Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2019-027

Coalision Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, November 18, 2021

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IN THE MATTER OF an appeal heard on November 24, 2020, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 19, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

COALISION INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Georges Bujold

Georges Bujold
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 24, 2020
Tribunal Panel:	Georges Bujold, Presiding Member
Tribunal Secretariat Staff:	Sarah Perlman, Counsel Jessye Kilburn, Counsel Geneviève Bruneau, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representative**
Coalision Inc.	Jean-Marc Clément
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Luc Vaillancourt David Di Sante

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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed by Coalision Inc. (Coalision) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made by the President of the Canada Border Services Agency (CBSA) on March 19, 2019, under subsection 60(4) of the *Act*.

[2] The goods in issue are women's casual and sports garments imported between 2013 and 2016.[2]

[3] The issue before the Tribunal is whether payments made by Coalision to garment manufacturers for the acquisition of excess fabric should be included in the value for duty of the goods in issue.

[4] The CBSA argues that these payments are part of the "price paid or payable" for the goods in issue as defined in subsection 45(1) of the *Act* and were therefore properly included in the value for duty of these goods under the relevant legislative provisions. Coalision maintains, however, that the payments were not made "in respect of the goods" and therefore do not meet the definition of "price paid or payable". As such, according to Coalision, these payments cannot be taken into account when determining the transaction value of the goods in issue and should therefore not be included in their value for duty.

PROCEDURAL HISTORY

[5] On March 22, 2016, the CBSA notified Coalision that it had been selected for a trade compliance verification with respect to the value for duty of the goods in issue imported in 2015.

[6] On April 5, 2017, the CBSA forwarded the Trade Compliance Verification Final Report to Coalision, indicating that payments made to garment manufacturers by Coalision for the acquisition of excess fabric should have been added to the payments made to acquire the goods in issue for purposes of determining the value for duty of those goods. At the request of the CBSA, Coalision subsequently made corrections for the years 2013 to 2016 in accordance with subsection 32.2(2) of the *Act*.

[7] On July 26 and August 4, 2017, the CBSA issued notices of re-determination pursuant to subsection 59(2) of the *Act*.

[8] On October 19, 2017, Coalision filed a request for further re-determination pursuant to subsection 60(1) of the *Act*. On March 19, 2019, the CBSA issued its decision under

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2 Coalision states in its brief that the issue in this appeal is not limited to these imports but in fact applies to all its imports since 2013, as well as all future imports. Pursuant to subsection 67(1) of the *Act*, an appeal may only be filed with the Tribunal in respect of a decision of the President of the CBSA made pursuant to sections 60 and 61. The Tribunal's decision in this case therefore applies only to imports covered by the decision of the President that is being appealed by Coalision. It will be for the President to decide whether the value for duty of subsequent imports of garments by Coalision should also be the subject of re-determination. Should that occur, Coalision will be entitled to avail itself of the recourse mechanism provided by the *Act*, which could result in a ruling by the President pursuant to section 60 or 61.

subsection 60(4), confirming that the payments made for the acquisition of excess fabric should be included in the value for duty of the goods in issue.

[9] On June 24, 2019, Coalision requested an extension of time to file an appeal with the Tribunal under subsection 67.1(1) of the *Act*, given that the deadline for filing its appeal, June 17, 2019, had already passed. The Tribunal granted this request on September 18, 2019, and deemed the appeal to have been filed that same day.

[10] On November 19, 2019, Coalision filed its brief with the Tribunal.

[11] On December 20, 2019, the CBSA asked the Tribunal to direct Coalision to produce certain documents and to clarify certain submissions found in the appellant's brief.[3] That same day, Coalision opposed the CBSA's request, arguing that the relevant documents were already in the CBSA's possession and that the appellant's brief adequately explained its position. On December 24, 2019, the CBSA filed its reply, stating that it was only in possession of certain accounting documents and that the information in the appellant's brief was insufficient to allow a response to Coalision's arguments.

[12] In its January 7, 2020, order, the Tribunal denied the CBSA's request, but asked Coalision to confirm that the accounting entries for the years 2013, 2014, and 2016 reflected those for 2015 that were already in the CBSA's possession.

[13] On January 9, 2020, Coalision confirmed that the disputed payments made for the acquisition of excess fabric had always been treated the same way for accounting purposes, i.e. as payments made for the acquisition of an asset that was distinct from the garment asset.[4]

[14] On January 30, 2020, the CBSA filed its brief with the Tribunal.

[15] On March 17, 2020, as a result of the COVID-19 pandemic, the Tribunal cancelled the hearing scheduled for April 14, 2020.

[16] On June 25, 2020, the Tribunal informed the parties that, because of the situation with the COVID-19 pandemic, all in-person hearings had been cancelled and would be rescheduled at a future date. At the same time, the Tribunal informed the parties that appeals could be heard by file hearing or via teleconference or videoconference, depending on the resources available and any other factors that the Tribunal might deem relevant. The Tribunal therefore asked the parties to share their views on the type of hearing desired in this appeal.

[17] On June 29, 2020, the CBSA indicated that a file hearing for the appeal would be fair and efficient in this case. The CBSA stated, however, that if Coalision wished to file new evidence, or if the Tribunal decided to hold an in-person hearing, the CBSA intended to call a witness. The CBSA also requested permission to file additional submissions in light of the Tribunal's decision in *Casa Cubana*.[5]

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3 The documents requested by the CBSA included accounting records related to the purchase of excess fabric for the years 2013, 2014, and 2016, as well as the purchase agreements between Coalision and its suppliers in effect from 2013 to 2016.

4 Exhibit AP-2019-027-11 at 1; Exhibit AP-2019-027-12 at 163.

5 *Casa Cubana (Spike Marks Inv.) v. President of the Canada Border Services Agency* (19 February 2020), AP-2018-065 (CITT) [*Casa Cubana*].

[18] On July 10, 2020, Coalision indicated that it could be satisfied by an appeal hearing based on the documents on the record (a file hearing) in this case, given the confidential nature of the documents. Coalision also requested permission to file a statement by its witness made under oath in order to corroborate certain claims made in its brief. Coalision further indicated that it did not object to the CBSA's request to file additional submissions with respect to *Casa Cubana* but asked that it be given the same opportunity and be permitted to provide, in writing, the comments that it would have made at the hearing with respect to the French version of the World Trade Organization (WTO) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), as indicated in its brief.

[19] On July 13, 2020, the CBSA stated that it preferred an in-person hearing given Coalision's request to file new testimonial evidence. The CBSA likewise stated that it did not object to Coalision's request to file additional submissions with respect to *Casa Cubana* and the French version of the WTO text but requested permission to respond.

[20] On July 14, 2020, Coalision responded that in the context of a file hearing, it was reasonable for it to file a statement made under oath containing those assertions that could not be made orally and that, if necessary, the Tribunal could question the signatory of that document, Mr. Nicolas Beetz, about his statement over the telephone. Coalision further proposed to file an agreed statement of undisputed facts.

[21] On July 16, 2020, the Tribunal indicated that it intended to conduct a hearing by way of written submissions and that the parties could file submissions regarding *Casa Cubana*, as well as any witness statements and agreed statements of undisputed facts.

[22] On August 5, 2020, Coalision filed its additional representations and a statement from Mr. Beetz, Chief Operating Officer for Coalision.

[23] On August 18, 2020, the CBSA pointed out that Coalision had recently made an assignment of its assets and that a trustee in bankruptcy had been appointed. The CBSA requested that the Tribunal stay the appeal and that the trustee inform the Tribunal of his intentions with regard to the rest of the hearing of the appeal. The next day, Coalision responded that no confirmation was necessary in the circumstances.

[24] On August 20, 2020, the Tribunal asked Coalision's counsel to confirm that he was acting under the instructions of the duly authorized officer at Coalision or the trustee in bankruptcy. That same day, Coalision's trustee in bankruptcy sent a letter to the Tribunal confirming that Coalision still wished to proceed with its action before the Tribunal and that the counsel of record had not changed.

[25] On August 25, 2020, the Tribunal acknowledged receipt of the trustee's letter and therefore declined to stay the case as requested by the CBSA. The CBSA provided submissions in response that same day. It further provided a complete copy of the Trade Compliance Verification Final Report and noted that it had sent its comments to Coalision on August 4, 2020, with respect to the agreed statement of undisputed facts, but that it had received no response from Coalision on that subject.

[26] On September 8, 2020, Coalision filed its comments in reply to the CBSA's submissions.

[27] On September 23, 2020, the Tribunal notified the parties that on November 24, 2020, it would proceed with the file hearing, without the presence of the parties.

[28] On March 2, 2021, the Tribunal directed Coalision to file its vendor guide[6] and asked the parties to clarify certain evidence.

[29] On March 9, 2021, Coalision and the CBSA provided their answers to the Tribunal's questions. Coalision also provided its vendor guide, as requested. The CBSA, however, argued that it would be prejudicial to admit new evidence or additional submissions at this stage.[7] On March 16, 2021, the parties filed their replies to the additional submissions.

[30] On June 24, 2021, the Tribunal asked the parties to provide submissions on the Federal Court of Appeal's decision in *Skechers FCA*.[8] The Tribunal also asked the parties to provide submissions on issues relating to the transaction value approach and whether the amounts to be paid for excess fabric were determinable.

[31] On June 30, 2021, the CBSA provided submissions in response to the Tribunal's questions. At the same time, the CBSA requested an extension of time to file its reply to Coalision's submissions.

[32] On July 2, 2021, Coalision stated that it did not believe the questions posed by the Tribunal were material to the case, but it did respond to them.

[33] On July 6, 2021, the Tribunal acknowledged receipt of the parties' submissions as to their positions and granted them an extension of time to file their responses.

[34] On July 19, 2021, Coalision filed its response to the CBSA's submissions. The CBSA indicated that it did not intend to make any additional representations. The Tribunal therefore closed the record that same day.

LEGISLATIVE FRAMEWORK

[35] The Act sets out various methods for appraising the value for duty; subsection 47(1) stipulates that the transaction value must be the first consideration and provides as follows:

> 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.

[36] Pursuant to subsection 48(1), "the value for duty of goods is the transaction value of the goods if . . . the price paid or payable for the goods can be determined" and if certain conditions exist."[9] Pursuant to subsection 48(4), "[t]he transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5)."[10]

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6 Exhibit AP-2019-027-03A (protected); Exhibit AP-2019-027-036.

7 The Tribunal subsequently decided that it would not be prejudicial to admit this relevant document into evidence, given that the CBSA would have the opportunity to file submissions as to its contents. In any event, the Tribunal ultimately gave little weight to this documentary evidence in its analysis.

8 *Skechers USA Canada Inc. v. Canada (Border Services Agency)*, 2015 FCA 58 (CanLII) [*Skechers FCA*].

9 These conditions are not at issue in this case.

10 These adjustments are not at issue in this case.

[37] Pursuant to subsection 45(1) of the *Act*, "the price paid or payable" is defined as follows in the context of sections 46 and 55:

> [I]n respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor;

POSITIONS OF THE PARTIES

[38] The parties appear to agree that Coalision had agreements with the manufacturers of the goods in issue whereby the quantities and prices of the garments purchased by Coalision were predetermined and the manufacturers were responsible for sourcing the necessary fabric.[11]

[39] The parties also agree that there are two reasons manufacturers are sometimes left with excess fabric: either Coalision's garment orders are lower than expected, or fabric suppliers require the purchase of a minimum quantity that exceeds Coalision's needs.[12]

[40] As to the legislative framework, the parties maintain and the Tribunal agrees that, in this case, the applicable method for appraising the value for duty of the goods is the transaction value method.[13]

[41] The parties further agree that there is only one issue in dispute, namely, whether the payments for the acquisition of excess fabric were made "in respect of the goods" within the definition of "price paid or payable" in subsection 45(1) of the *Act*.

[42] The parties note that there are five criteria for payments to be properly included in the "price paid or payable" under subsection 45(1) of the *Act*. These payments must be (1) made or to be made; (2) by the purchaser; (3) directly or indirectly; (4) to or for the benefit of the vendor; and (5) in respect of the goods (in French, "*en paiement des marchandises*", sometimes translated in French case law as "*relatifs aux marchandises*").[14]

[43] The parties agree that of these five criteria, only the fifth is at issue in this case.

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11 See Exhibit AP-2019-027-12A (protected) at 141.

12 *Ibid.* at 142.

13 See the interpretative note to paragraph 1(b) of the Customs Valuation Agreement, which states that transaction value is not acceptable for customs purposes if the sale or price is subject to conditions or consideration for which a value cannot be determined with respect to the goods being valued. See also *Skechers FCA* at paras. 51–52 and 70–71, where the Federal Court of Appeal states that one of the conditions for the inclusion of amounts in the transaction value of imported goods is that the amounts be determinable at the time of importation. In light of the responses provided by the parties to the questions sent to them on June 24, 2021, regarding the applicability of this method of appraisal in this case, the Tribunal is satisfied that the evidence on the record indicates that transaction value is the method applicable to both Coalision's position and that of the CBSA. Indeed, the evidence on the record suggests that both the value of the garments and the value of the excess fabric were determinable in this case before the goods in issue were even imported: see Exhibit AP-2019-027-03A (protected) at 17–21. The Tribunal also notes that Coalision did not dispute this evidence. Accordingly, the Tribunal finds that this condition for applying the transaction value method is met in this case.

14 See for example *Skechers USA Canada Inc. v. President of the Canada Border Services Agency* (13 December 2013), AP-2012-073 (CITT) [*Skechers*] at para. 62; *Double J Fashion Group Inc. v. President of the Canada Border Services Agency* (27 May 2014), AP-2013-017 (CITT) [*Double J*] at para. 18.

[44] Coalision argues that combining the price paid for excess fabric with the price agreed upon to acquire the garments has the effect of perverting the true transaction value of the garments by substituting a price that was not agreed upon by the parties and is not actually the price paid for those goods. Coalision further argues that the price of the fabric was separate and independent from the price paid for the garments, that the sale of the garments was not conditional on the acquisition of the excess fabric, and that the price of the garments was agreed upon in advance and was not subject to change based on the amount of fabric ultimately found to be excess.[15] Coalision argues that in paying the invoices for the goods in issue, it was fully discharging its obligation to pay for those goods.

[45] According to Coalision, the excess fabric was not required to manufacture the imported garments and was accounted for as an asset. It argues that it voluntarily chose to acquire the fabric on its own account because the fabric might subsequently be required to manufacture additional garments. Coalision could also hold the excess fabric in inventory for a period of time before selling it, destroying it, or repatriating it to Canada.

[46] According to the CBSA, the payments in question were made "in respect of the goods" as there is a sufficient link between the payments and the imported garments. The CBSA argues that the excess fabric was necessary for the manufacture of the imported garments, that the sale of the garments was conditional on the purchase of the excess fabric, and that the excess fabric was accounted for as an expense and not an asset.

TRIBUNAL'S ANALYSIS

[47] As stated by the Tribunal in *Skechers*, only payments made by a purchaser to or for the benefit of a vendor for imported goods are included in the price of the goods.[16]

[48] The Tribunal further recognized that the meaning of the phrase "in respect of the goods" (in French "*en paiement des marchandises*" or "*relatifs aux marchandises*") in subsection 45(1) of the *Act* is quite broad.[17] However, it noted that it is not without bounds. The Tribunal interpreted the phrase to mean that the payment must not be a general payment unaffected by the specific goods being imported, and concluded that its meaning is not so broad as to include charges for some value that is "over and above the purchase value of the goods themselves".[18]

[49] In determining whether a payment is "in respect of the goods", the test set out by the Tribunal in *Skechers* and affirmed by the Federal Court of Appeal provides that "the central question is whether a sufficient link exists between the payment and the goods".[19] The issue to be determined is therefore heavily dependent on the factual circumstances.[20] For example, in making this

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15 See Exhibit AP-2019-027-26A at 13. In other words, Coalision maintains that even if there had been an excess of material, the agreed upon price of the goods in issue would not have changed.

16 *Skechers* at para. 60; *Simms Sigal & Co. Ltd. v. The Commissioner of the Canada Customs and Revenue Agency* (27 May 2003), AP-2001-016 (CITT) at 5 [*Simms Sigal*].

17 *Skechers* at para. 61, affirmed in *Skechers FCA* at para. 61; *Simms Sigal* at 5; see also *R. v. Nowegijick*, [1983] 1 SCR 29 (C.S.C.).

18 *Skechers* at para. 62; see *Chaps Ralph Lauren, a division of 131384 Canada Inc. and Modes Alto-Regal, Inc. v. The Deputy Minister of National Revenue v. GFT Mode Canada Inc.* (22 December 1997), AP-94-212 and AP-94-213 (CITT) at 14; *Simms Sigal* at 6.

19 *Skechers* at para. 62, affirmed in *Skechers FCA* at para. 69.

20 In *Skechers FCA*, the Federal Court of Appeal indicated the following at para. 45: "Determining whether a particular payment meets the legal standard for the statutory phrase 'in respect of' is a question of mixed fact and law, heavily dependent on the factual circumstances."

determination, the Tribunal has considered relevant whether the payments were necessary for the manufacture of the goods or whether the purchase of the imported goods was conditional on payment of the sums in question.[21]

[50] The parties also provided comments on the Tribunal's decision in *Casa Cubana*, the reasons for which were issued on March 10, 2020, while this case was pending. At issue in *Casa Cubana* was whether certain payments made to "intermediaries" in connection with the importation of Cuban cigars must be included in the value for duty of those goods. The appeal involved the adjustment referred to in subparagraph 48(5)(a)(i) of the *Act*, which provides that the price paid or payable shall be adjusted by adding the amounts equal to commissions and brokerage in respect of the goods incurred by the purchaser, other than fees paid to the agent representing the purchaser abroad in respect of the sale.[22]

[51] In *Casa Cubana*, the Tribunal stated that "the commissions and brokerage" in respect of the goods incurred by the purchaser "must have a sufficient nexus with what is paid directly or indirectly, to or for the benefit of the vendor, for the goods acquired".[23] In that case, the Tribunal was of the opinion that subsections 47(1), 48(4) and 48(5) of the *Act* do not include all expenses incurred by the purchaser to acquire the goods simply because they are vaguely associated with the transaction in question. The Tribunal further stated, "In this respect, in considering the nexus between the payment and the price of the goods, it is recalled that, in a normal commercial context, the price will generally reflect three considerations: the vendor's cost of production or acquisition, its administrative overhead and marketing expenses, and a profit margin".[24]

[52] The Tribunal therefore concluded that pursuant to subparagraph 48(5)(a)(i) of the *Act*, the payments that must be added to the price paid or payable are commissions and brokerage in respect of the goods that have a "sufficiently close connection" with the goods.[25]

[53] As stated above, the Tribunal agrees with Coalision that the concept of "in respect of the goods" has its limits. Coalision further argues that the concept of "sufficient link" is overly broad, favouring instead the concept of "sufficiently close connection" established in *Casa Cubana*. The CBSA suggests, on the contrary, that in that particular case the Tribunal interpreted the term "in respect of the goods" as well as the definition of "price paid or payable" too narrowly, contrary to the case law.

[54] The Tribunal recalls that in *Skechers FCA,* the Federal Court of Appeal stated that the term "in respect of" ("*en paiement des marchandises*" or "*relatifs aux marchandises*" in French) is broad in scope. In this regard, the Court indicated that the Tribunal was justified in relying on the Supreme

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21 In *Skechers*, the Tribunal found that the payments in question—research, design and development costs for footwear styles—were necessary for the production of the imported footwear and that there was a sufficient link between those payments and the goods in issue. These payments were therefore made "in respect of the goods" even though some of the payments were for footwear that was not imported into Canada. See also *Mexx Canada Inc. v. The Deputy Minister of National Revenue* (16 February 1995), AP-94-035, AP-94-042 and AP-94-165 (CITT) [*Mexx*]; *Double J*; *Simms Sigal*.

22 *Casa Cubana* at paras. 2, 15.

23 *Ibid.* at para. 50.

24 *Ibid.* at para. 54.

25 *Ibid.* at para. 57.

Court of Canada's decision in *Nowegijick v. The Queen*[26] to support the proposition that the phrase should be interpreted broadly. The Tribunal is of the view that, in this case, in order to determine whether the payments were "in respect of the goods" within the definition of "price paid or payable" in subsection 45(1) of the *Act*, it must follow the interpretation of the Federal Court of Appeal in *Skechers FCA* and apply the "sufficient link" test.

[55] Moreover, the Tribunal is not persuaded that the "sufficient link" test for the purposes of the definition of "price paid or payable" in subsection 45(1) of the *Act* was set aside in *Casa Cubana*. As mentioned above, this test is explicitly mentioned in that decision. Furthermore, there is no reference in *Casa Cubana*, and therefore no express challenge to, the Tribunal's interpretation of the test in *Skechers*, which was confirmed by the Federal Court of Appeal. In the Tribunal's view, this implies that the phrase "sufficiently close connection" may be simply another way of expressing the "sufficient link" test, without actually limiting its scope.[27] In any event, to the extent that *Casa Cubana* could be interpreted as calling into question the application of the "sufficient link" test, the Tribunal is not bound by such an interpretation and, for the reasons noted above, defers rather to the interpretation of the applicable legal test endorsed by the Federal Court of Appeal in *Skechers FCA*. The Tribunal considers this interpretation to be authoritative for purposes of this appeal.[28]

The payments for excess fabric were made "in respect of the goods"

[56] The burden is on Coalision to prove that the payments in question are not made "in respect of the goods".[29] In other words, Coalision must prove that there is not a "sufficient link" between these payments and the goods in issue, contrary to the CBSA's finding in the decision under appeal. Furthermore, in *Miner*, the Federal Court of Appeal stated that the appellant will fail to meet the burden of proof if the evidence is "indeterminate" as to the requirements of the *Act*.[30]

[57] Coalision distinguishes *Skechers* from this appeal, arguing that the excess fabric was of no use in the actual manufacturing of the garments, unlike the prototypes and samples in *Skechers*, without which the imported footwear could not have existed. Coalision further argues that the research and development costs in *Skechers* are not goods and cannot have their own price paid under section 45 of the *Act*, unlike the excess fabric.

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26 [1983] 1 SCR 29. In that case, which dealt with the interpretation of a provision of the *Indian Act*, the Supreme Court stated that the phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. In light of this precedent and the Federal Court of Appeal's observations in *Skechers FCA*, the Tribunal concludes that it would not be appropriate to narrow the legal test dictated by the phrase "in respect of the goods" in the *Act* and interpret it as requiring demonstration of a "close" link between payments and the imported goods.

27 In light of the fact that *Skechers FCA*, the Federal Court of Appeal's most recent decision on the meaning of "in respect of the goods", is not even mentioned in *Casa Cubana*, the Tribunal cannot conclude that a clear intention to circumscribe or limit the "sufficient link" test is evident from its decision in *Casa Cubana*.

28 This rather broad interpretation of the applicable legal test is the one essentially adopted by the Tribunal in other appeals, namely *Mexx*, *Double J* and *Simms Sigal*.

29 Subsection 152(3) of the *Act*. See also *Skechers FCA* at para. 43. The Federal Court of Appeal noted that the Tribunal properly stated on this issue that the importer is required to prove that the payments in question *are not* in respect of the goods. Similarly, in this case, if Coalision succeeds in introducing sufficient evidence to demonstrate this point, it will necessarily establish that the CBSA is incorrect in its assertion that the payments in question are effectively payments in respect of the goods.

30 *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) [*Miner*]; see also *Jockey Canada Company v. President of the Canada Border Services Agency* (20 December 2012), AP-2011-008 (CITT) [*Jockey*] at paras. 68–71.

[58] Coalision maintains that the manufacturers do not require that the fabric be purchased, and that the sale of the garments was therefore not conditional on the acquisition of the fabric. Coalision argues that it wanted to acquire the fabric because it might subsequently be required to produce additional quantities of garments. In purchasing the excess fabric, Coalision explains that it wanted to ensure the availability and proximity of the fabric.[31] Coalision further argues that the manufacturers could have obtained the exact amount of fabric that was needed to produce the garments ordered.

[59] Coalision further submits that, depending on its needs, it can use, sell, destroy or import the excess fabric into Canada. Coalision states that when fabric is repatriated to Canada, its value for duty is calculated based on its own price paid or payable.

[60] Coalision also argues that if it does not purchase the excess fabric, the manufacturer can use it to make other garments, sell it to a third party, or absorb its cost.

[61] The CBSA argues that the excess fabric was necessary for the manufacture of the garments because neither Coalision nor the manufacturers could have known whether they would end up with too much fabric once the garments had been manufactured. According to the CBSA, the manufacturers could not have produced the imported garments without purchasing the fabric ultimately found to be excess.

[62] Relying on the Tribunal's decisions in *Mexx,*[32] *Double J*[33] and *Simms Sigal,*[34] the CBSA further submits that there is a sufficient link between the purchase of the garments and the purchase of the excess fabric to conclude that one was conditional on the other. The CBSA notes that in its request for re-determination under subsection 60(1) of the *Act*, Coalision states:

> Coalision agrees at the outset with its garment manufacturers that it will purchase any excess materials from them. The manufacturers therefore do not factor these excess materials into their manufacturing costs and consequently, set the unit prices agreed upon with Coalision for each style of garment without taking into account the value of these excess materials.[35]
>
> [Translation]

[63] The CBSA further points out that the debit notes for the excess fabric refer to the garments in issue.[36] According to the CBSA, this supports the conclusion that the payments in question were made to compensate the manufacturer for expenses incurred in the production of the goods in issue.

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31 Exhibit AP-2019-027-26A at 13.

32 The Tribunal found in that case that the payments for the acquisition of the excess fabric were made "in respect of the goods" because the appellant had agreed, as a condition of purchasing the imported garments, to compensate the manufacturer for the loss incurred in relation to the excess fabric.

33 In *Double J*, the Tribunal found that payments to the supplier for distribution fees in connection with the importation of separately invoiced garments, which amounted to a percentage of the price of those garments, were "inextricably linked" because the contract combined the obligation to acquire garments with the obligation to pay for services.

34 In *Simms Sigal*, the Tribunal determined that payments for the exclusive right to distribute goods manufactured by Anne Klein were not made in respect of the goods, in part because the price of the goods was set separately from the cost of the services.

35 Exhibit AP-2019-027-12A (protected) at 142.

36 *Ibid.* at 165–170.

[64] Coalision distinguishes this appeal from the decisions cited by the CBSA. It argues that this case involves two separate transactions—the purchase of garments and the purchase of excess fabric—and that, unlike in *Mexx*,[37] its manufacturers do not retroactively revise garment prices.

[65] Coalision also distinguishes this appeal from *Double J*, arguing that the sale of excess fabric was not the subject of a contract and did not affect the price of the garments. According to Coalision, the prices for the garments were "based on market supply and demand and other factors relating to competition in the garment industry"[38] [translation], whereas the price of the fabric was already agreed upon by the parties prior to and independent of the purchase of the excess fabric.

[66] As for its statement that it "agrees at the outset with its garment manufacturers that it will purchase any excess materials from them" [translation], Coalision argues that this was not accurate and should not be taken as an admission on its part, especially since the statement was made in error by its counsel.[39]

[67] As noted above, the burden of proof is on Coalision. Having considered the submissions and the evidence on the record, the Tribunal is of the view that Coalision has not met its burden in this case.

[68] Contrary to what Coalision seems to suggest, for payments for excess fabric to be included in the transaction value of the goods in issue, it is not absolutely necessary that the sale of the garments be contractually conditional on the purchase of that fabric. Indeed, while the Tribunal's case law supports the view that payments made or to be made as a condition of the sale of the imported goods should be included in the price paid or payable for those goods,[40] this fact is relevant, but not determinative in itself. In short, its demonstration is not absolutely necessary to establishing a sufficient link between the payments and the specific goods imported.

[69] Subsections 45(1), 47(1), 48(4) and 48(5) of the *Act* provide that the purpose of these subsections is to determine the *actual price* paid or payable for the imported goods. The determination of the actual price paid or payable to or for the benefit of the vendor implies that it is necessary to include in the value for duty all payments that are sufficiently linked to the production, price, or value of the goods, whether or not it is established that such payments are a formal condition of sale.

[70] In this case, the Tribunal is of the view that there is conflicting evidence as to whether the payments in question were made as a condition of the sale of the garments, and it is not persuaded one way or the other as to the question of the conditions attached to the sale of the garments. In the absence of a written contract clearly setting out the terms for the sale of the garments or the excess fabric by the manufacturers to Coalision, it is difficult for the Tribunal to make a definitive determination as to whether the payments for the excess fabric were formally required by the manufacturers as a condition of the sale of the goods in issue.

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37 *Mexx* at 11.

38 Exhibit AP-2019-027-03A (protected) at 6; Exhibit AP-2019-027-26A at 13.

39 Exhibit AP-2019-027-26A at 3, 13.

40 See, for example, *Mexx* and *Double J*. The interpretative note on the issue of price paid or payable in the Customs Valuation Agreement also provides that this price includes, in particular, all payments made or to be made, as a condition of the sale of the imported goods, by the buyer to the seller.

[71] The Tribunal need not make this determination, however, because, as in *Skechers*, it is satisfied that the payments in question were necessary for the manufacture or production of the goods in issue. In the Tribunal's view, the manufacturers could not have made the garments and sold them to Coalision without first purchasing, for that purpose and on behalf of Coalision, quantities of fabric that could result in an excess. In this regard, Coalision acknowledged that it told the manufacturers what materials to use and from which suppliers to purchase them. Coalision also admitted that in some cases these suppliers required manufacturers to purchase minimum quantities of fabric. It is therefore clear from the evidence that the cost of the excess fabric was an expense incurred by the manufacturers in the production of the goods in issue, which was then offset by Coalision when it purchased these unused materials.

[72] On this point, Coalision does not dispute that its intention to purchase the excess fabric was real and generally known to suppliers. The Tribunal concludes that these facts explain why the manufacturers did not take the excess fabric into account in determining the unit price of the garments. They knew that they would eventually be compensated by Coalision for these production costs, which are clearly closely linked to the manufacture of the goods in issue. Moreover, it would appear that their expectations in this regard were invariably met. Accordingly, it is difficult for the Tribunal to see how it could exclude from the actual or true price paid for the goods in issue the amount paid by Coalision to the vendors for the acquisition of this fabric.

[73] In light of the foregoing, the Tribunal cannot accept Coalision's argument that the excess fabric was of no use in the actual production of the garments, unlike the prototypes and samples in *Skechers*. On the contrary, in the Tribunal's view, the situation in this case is generally similar. Just as the costs of researching, designing and developing the styles of footwear, including those not imported into Canada, were necessary for the manufacture of the imported footwear in *Skechers*, had it not been for the purchase of all of the fabric, including the fabric that was ultimately found to be excess, the manufacturers would not have been able to manufacture the imported garments.[41] As the CBSA notes, the excess fabric, while not incorporated into the imported garments, was necessary to the manufacturing process. The manufacturers had to have enough fabric to make the garments ordered by Coalision.[42]

[74] The Tribunal is therefore satisfied that the purchase of the excess fabric by Coalision was necessary for the manufacture of the garments, and that there is a sufficient link between that fabric and the goods in issue. The payments in question cannot therefore be said to be general payments unaffected by the specific goods being imported by Coalision. The following evidence further supports this conclusion.

[75] First, as the CBSA notes, the debit notes sent to Coalision by the manufacturers of the imported garments with respect to the excess fabric appear to refer to the imported garments to which the fabric relates. Indeed, the manufacturers identify the payments for this fabric as a "surcharge" associated with the imported garment styles.[43] They also use phrases such as "overbooked fabric

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41 In this sense, the actual price of the goods in issue should reflect the total costs of production passed on to the purchaser by the vendors, which in this case included the acquisition by the vendors of the fabric ultimately found to be excess. The payments in question were therefore associated with one of the components of the price of the goods in a normal commercial context, i.e., a context in which the purchaser pays the vendor a price that reflects the usual components of a selling price, including the vendor's actual costs.

42 The Tribunal also notes that the evidence does not establish that it would have been possible for the garment manufacturers to obtain the exact quantity of fabric required to produce and sell the goods in issue to Coalision.

43 Exhibit AP-2019-027-03A (protected) at 21, 33; Exhibit AP-2019-027-12A (protected) at 165–170.

cost", which are indicative of a clear nexus between these debit notes and the payments subsequently made by Coalision to cover them and the garments destined for importation that had previously been manufactured on Coalision's behalf.

[76] Second, although Coalision stated more than once that it had no obligation to purchase the excess fabric, the Tribunal finds that the evidence does not support this claim. The Tribunal does not find credible Coalision's claims or evidence to the effect that it was purchasing the excess fabric on its own account, without regard to the fact that it was to be used to make the garments that Coalision would subsequently import, and that this purchase decision was a separate transaction from that related to the production and importation of those garments.

[77] Furthermore, Mr. Beetz's statement under oath indicates that when there is excess fabric, Coalision must inform the supplier of its intention to purchase it and must agree with the supplier on the price and other terms of acquisition.[44] Coalision did not file any correspondence or other documents to support this statement, however. The absence of documents to support this statement means that the Tribunal cannot lend it much probative value. Rather, the entries on the manufacturers' debit notes suggest that the manufacturers automatically invoiced Coalision for any excess fabric in the normal course of their business relationship.

[78] The Tribunal is therefore of the view that the evidence points to an implied agreement between Coalision and the manufacturers whereby the latter would obtain the estimated amount of fabric required to manufacture the garments ordered by Coalision and would be reimbursed by Coalision if any of that fabric was not used.[45] Coalision itself indicated that there were generally two reasons why manufacturers were left with excess fabric: either Coalision revised its sales forecasts downward, or Coalision's chosen fabric suppliers required the purchase of a minimum quantity of fabric.[46] It is difficult for the Tribunal to accept, without evidence to the contrary, that a manufacturer would agree to absorb the cost of excess fabric, particularly if the excess fabric appears to be the direct result of Coalision's choice and instructions as to the materials to be acquired to manufacture the garments.

[79] In light of the foregoing, the Tribunal finds, on a balance of probabilities, that the manufacturers did not factor the price of the excess fabric into the selling price of the garments because Coalision guaranteed, at least tacitly, to compensate them and actually did so in practice. In reality, therefore, Coalision was paying more than the invoice amount for the imported garments.

[80] Whether or not this represents a "condition of sale", the Tribunal is of the view that, ultimately, the payments for the excess fabric were made in respect of the goods in issue.

[81] In the Tribunal's view, Coalision's argument that there are two separate transactions is an artificial distinction. For example, the Tribunal stated in *Skechers* that the timing of the payments is

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44 Exhibit AP-2019-027-26A at 3, 13.

45 See for example Exhibit AP-2019-027-12A (protected) at 141–142; Exhibit AP-2019-027-26A at 13–14. The Tribunal notes, among other things, Coalision's statement that it agreed at the outset with the garment manufacturers that it would purchase the excess fabric from them. While Coalision wishes to set aside this statement, the Tribunal is of the view that its explanation for doing so is not persuasive. As the CBSA points out, this statement was made on October 19, 2017, in the context of Coalision's request for further re-determination, and almost three years passed before Coalision attempted to withdraw it, despite the fact that by then, the matter had been before the Tribunal for approximately one year.

46 Exhibit AP-2019-027-12A (protected) at 141–142.

not in itself determinative, as the "price paid or payable" includes all payments "made or to be made".[47] The Tribunal is of the view that in this case it does not matter whether the amounts are billed on two separate invoices; where a payment is necessary for the manufacture of the garments and is paid to the vendor, it must be included in the "price paid or payable". Indeed, there is nothing in the *Act* that indicates that the price is limited to what is billed on a single invoice. Rather, the circumstances of each case must be examined to determine whether a sufficient link can be made between the payment and the goods in issue.

[82] In short, to the extent that the evidence, on a balance of probabilities, indicates that the purchase of excess fabric was necessary for the manufacture of the garments, the existence of a "sufficient link" is demonstrated here.

The hypothetical situations raised by Coalision are not relevant

[83] Coalision raises in defence what it alleges to be certain absurdities that would stem from treating excess fabric as part of the "price paid or payable" for imported garments.

[84] The Tribunal is not persuaded by the argument that Coalision sometimes sells off excess fabric, which could reduce the "price paid or payable" for the goods in issue following importation. First, there is evidence on a balance of probabilities that Coalision is not generally in the business of selling fabric, but rather garments. Moreover, the only evidence provided by Coalision that supports such a situation is from 2018, outside the period of the imports in question.[48] Moreover, the CBSA auditor found no evidence of resale or subsequent use of the excess fabric in Coalision's account statements.[49]

[85] The Tribunal is also not persuaded by Coalision's argument that it can repatriate excess fabric to Canada, which could lead to double counting of that fabric. While Coalision offered an example of such repatriation, it once again involved a later period—2017—and that situation appears to be an exception.[50] Like the CBSA, the Tribunal is of the view that the documents produced do not establish that this imported fabric was actually excess material resulting from the production of the goods in issue imported between 2013 and 2016.

[86] As the CBSA points out, the value for duty of the goods in issue is determined based on the "price paid or payable" for the goods, and not on mere assumptions. In the absence of contemporaneous supporting evidence, the Tribunal is of the view that the preceding arguments from Coalision are not actually relevant and are certainly unpersuasive. Furthermore, as noted by the

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47 *Skechers* at para. 87, affirmed in *Skechers FCA* at paras. 29, 52.

48 See Exhibit AP-2019-027-03A (protected) at 27.

49 Exhibit AP-2019-027-01 at 7; Exhibit AP-2019-027-12A (protected) at 45. In addition, the decision under appeal states, " . . . [I]t is determined that the payments by *Coalision Inc.* to manufacturers/vendors for the acquisition of excess materials **that are not reused for subsequent production** are made *in respect of the goods* in issue and are to be added to the price paid or payable in accordance with the definition found in subsection 45(1) of the *Customs Act*" [italics in original, bold added, translation]. This suggests that only payments for fabric that is not reused are to be included in the value for duty of the goods in issue.

50 Exhibit AP-2019-027-01 at 7–8; Exhibit AP-2019-027-03A (protected) at 28; Exhibit AP-2019-027-26A at 14. In particular, Mr. Beetz acknowledges that it was not Coalision's practice to repatriate the fabric. On balance, while it is possible that this repatriation was related to the goods in issue, this is not apparent from the evidence submitted by Coalision.

CBSA, should such situations arise, Coalision could seek relief from the CBSA, such as a reduction in the value for duty, in accordance with the *Act*.

The accounting evidence is inconclusive

[87] The Tribunal has established that it may consider books and records for customs valuation purposes, given that " . . . the information set out in [the appellant's] books and records and reported to the Canada Revenue Agency reflects its real costs and the actual price that it paid . . . ."[51] The Tribunal may therefore consider the accounting treatment of the payments in question to the extent that it reflects the "commercial reality" of the transaction.[52]

[88] The Tribunal's decision in this case does not rely on the accounting evidence. The parties disagree on the accounting treatment of the payments in question and, in particular, whether the payments were treated as an asset or an expense.

[89] The CBSA contends that Coalision accounted for the payments as expenses, and it notes that in the 2015 verification,[53] the CBSA auditor found no mention of the excess fabric among the assets listed in Coalision's financial statements. Rather, the auditor found that the payments made for the excess fabric were accounted for as "cost of goods sold" [translation], which according to the CBSA would confirm that the excess fabric has no intrinsic value independent of the imported goods.[54] Coalision, on the other hand, argues that "the payments for the fabric are treated by the appellant as an expense for the acquisition of tangible goods, an acquisition that is accounted for in the asset accounts as inventory held abroad"[55] [translation].

[90] The Tribunal notes, however, that the evidence, in particular the CBSA auditor's report—which in the Tribunal's view has not been discredited by the evidence or Coalision's submissions — tends to show that the payments for the excess fabric are accounted for in the cost of goods sold, again indicating a link between the payments for the excess fabric and the imported garments sold by Coalision in the course of the operation of its business.

The *Charley Originals* decision is not applicable

[91] *Charley Originals*[56] partially involved payments for excess fabric, which according to the evidence had been purchased to create garment samples and was therefore not trimmings. The Tribunal found that the amounts paid for unused fabric did not fall under the terms of clause 48(5)(a)(iii)(C) of the *Act*, which requires that materials consumed in the production of the imported goods be included in the price paid or payable for the goods, given that the fabric was not

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51 *Jockey* at paras. 160–164.

52 *Ibid.* at para. 160.

53 Although the CBSA verification only applies to 2015, Coalision confirmed that it has always treated the payments in question in the same manner from an accounting perspective; Exhibit AP-2019-027-11 at 1.

54 Exhibit AP-2019-027-12A (protected) at 12, 44–45, 59–62, 65, 82–88; Exhibit AP-2019-027-33B (protected) at 60–61.

55 Exhibit AP-2019-027-06 at 1; Exhibit AP-2019-027-12A (protected) at 143. See also Exhibit AP-2019-027-26A at 14.

56 *Charley Originals Ltd, Division of Algo Group Inc. and Mr. Jump Inc, Division of Algo Group Inc. v. The Deputy Minister of National Revenue* (29 April 1997) AP-95-261, AP-95-263 (CITT) [*Charley Originals*], affirmed in *Deputy Canada (Minister of National Revenue) v. Charley Originals Ltd.* 2000 CanLII 15307 (FCA) [*Charley Originals FCA*].

consumed in the production of the imported goods or incorporated into the imported garments. The Tribunal also noted that the unused fabric was resold by the manufacturers, and that the appellants were then credited with the amounts received from these sales.

[92] The Federal Court of Appeal concluded that this decision was well founded, adding that the payments for the excess fabric were not made "to or for the benefit of the vendor" and therefore should not be included in the price paid or payable under subsection 45(1) of the *Act*. According to the Federal Court of Appeal, "to include the cost of the unused fabric in the price of the subject goods would ignore the effect of subparagraph 48(5)(a)(ii) where Parliament has specifically addressed the treatment of materials supplied by the purchaser for use in the production of goods for export".[57]

[93] Coalision argues that *Charley Originals* is relevant to this appeal, despite the fact that it involves the fourth criterion of the definition of price paid or payable ("to or for the benefit of the vendor"), rather than the fifth ("in respect of the goods"), as in this case. According to Coalision, the Federal Court of Appeal excluded the cost of unused fabric from section 45 of the *Act* in the context of that decision.

[94] The CBSA argues that *Charley Originals FCA* does not apply to this appeal because it deals with the scope of the phrase "to or for the benefit of the vendor" and not "in respect of the goods". The CBSA relies on *Skechers FCA*, in which the Federal Court of Appeal distinguished *Skechers* from *Charley Originals FCA* because the latter dealt with the applicability of the assists provision (i.e. goods and services 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) under subparagraph 48(5)(a)(iii) and the interpretation of the term "benefit" in the definition of "price paid or payable". The Court concluded that the appellant could not rely on *Charley Originals FCA* to argue that the payments in question were not "in respect of the goods".[58]

[95] The Tribunal agrees with the Federal Court of Appeal in *Skechers FCA* and is of the view that *Charley Originals FCA* is not applicable to this case for the same reasons.

> There is no inconsistency or ambiguity between the English and French versions of the phrase "in respect of the goods"

[96] Coalision argues that the case law on the definition of "price paid or payable" was prepared, argued and drafted in English, and that it is quite possible that only the English version was considered by the parties and the courts that decided the disputes on this issue.

[97] It notes that the English version uses the expression "in respect of" twice in the same sentence, which seems odd given that it translates two different expressions: "*en cas de*" (sale) and "*en paiement*" (of the goods). Coalision finds the French version to be more precise in that the expression "*en cas de vente*" indicates that for a price to exist, there must first be a sale. Furthermore, the expression "en paiement des marchandises" indicates that the payments must be used to pay the agreed price. For Coalision, therefore, this is a matter of defining the "price" "*en cas de vente*" (i.e. in the context of a sale).

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57 *Charley Originals FCA* at para. 17.

58 *Skechers FCA* at para. 47.

[98] Coalision argues that it is the contract for the sale of the goods that determines the price, not the presence of a sufficient link with other payments. The concept of "sufficient link" is therefore a departure from the objective test of contractual agreement between vendor and purchaser, which Coalision argues is the basis of Article VII of the Agreement on Customs Valuation, particularly transaction value.[59] Coalision further argues that, under Article VII, customs valuation cannot be based on "arbitrary or fictitious" values, which come into play when searching for a "sufficient link" with other payments.[60]

[99] The CBSA submits that the terms "payments . . . in respect of the goods" and "*versements . . . en paiement des marchandises*" in the definition of "price paid or payable" have a common meaning and are in no way inconsistent or ambiguous.[61] The CBSA notes that in *Skechers* FCA, the Federal Court of Appeal used the term "*relatif aux marchandises*" when referring to the French version of the test, which suggests a common meaning with the English version.[62]

[100] The CBSA also argues that the Tribunal's decisions are published in both languages,[63] and that neither version is legally superior to the other. Therefore, according to the CBSA, the Tribunal is bound by previous case law, regardless of the language in which it was originally written.

[101] The Tribunal is of the view that the English and French versions of the definition of "price paid or payable" have the same meaning.

[102] According to the principles of bilingual statutory interpretation, differences between two official enactments of the same provision are usually reconciled by identifying their shared meaning. The same applies where one version is ambiguous and the other is clear and unequivocal.[64] Furthermore, where one version has a broader meaning than the other, the more restricted or limited meaning is favoured.[65]

[103] That said, according to Ruth Sullivan and the Supreme Court, "linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme".[66]

[104] The Tribunal is of the view that Coalision is committing that very error in this case. The fact that the definition of "price paid or payable" is being raised for the first time in French by a party before the Tribunal does not elevate the issue of bilingual interpretation above all other

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59 Article VII, paragraph 1(1) states: "The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation . . . ".

60 The introductory text of Article VII recognizes the need for a "fair, uniform and neutral system for the Customs valuation of goods that eliminates the use of arbitrary or fictitious Customs values".

61 See *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48 at para. 53.

62 *Skechers FCA* at para. 7.

63 *Official Languages Act*, R. S.C. 1985, c. 31 (4th Supp.).

64 See for example *Unitool Inv. v. President of the Canada Border Services Agency*, (4 December 2014), AP-2013-060 (CITT) at para. 62, citing *R. v. Daoust*, [2004] 1 SCR 217, 2004 SCC 6 (CanLII) [*Daoust*] at para. 26, citing Professor Côté in his book *The Interpretation of Legislation in Canada* (3rd ed., 2000) at 324; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339, 2009 SCC 12 (CanLII) [*Khosa*] at para. 39.

65 *Daoust* at para. 26.

66 *Khosa* at para. 39.

considerations. It appears that Coalision is attempting to demonstrate a distinction between the two versions that does not exist.

[105] First, the phrase "*en cas de vente de marchandises*" does not deviate from the English "in respect of the sale of goods". In either case, the context established for calculating the "price paid or payable" is that of the sale of the goods. Similarly, the phrase "en paiement des marchandises" is equivalent to "payments . . . in respect of the goods". The Tribunal thus sees no inconsistency or ambiguity that would require further examination of the French and English versions.

[106] Coalision extrapolates from its interpretation of the French definition of "price paid or payable" that only payments made pursuant to a contract can be included. This is incorrect. If Parliament or the WTO had wanted to restrict the meaning of the *Act* and Article VII of the Customs Valuation Agreement to the interpretation offered by Coalision, they could have done so. The Tribunal is of the view that the terms used have a broader meaning and allow certain payments, other than the price of the goods, to be included in the value for duty to the extent that they have a sufficient link to the goods.

The interpretative note regarding Article 1 of the Customs Valuation Agreement is not relevant

[107] Coalision argues that the interpretative note to Article 1 of the Customs Valuation Agreement supports its position because it excludes from the price paid or payable "activities undertaken by the buyer on the buyer's own account". The note states:

> 1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.
>
> 2. *Activities undertaken by the buyer on the buyer's own account*, other than those for which an adjustment is provided for in Article 8, *are not considered to be an indirect payment to the seller*, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.[67]
>
> [Emphasis added]

[108] According to Coalision, this note should take precedence and thus override any consideration of a "sufficient link" with respect to payments made by a purchaser on the purchaser's "own account". As noted above, Coalision argues that it is procuring the excess fabric "for its own account", i.e. to ensure the availability and proximity of the fabric in the event that Coalision wishes to produce additional garments.

[109] The CBSA points out that paragraph 2 of the interpretative note to Article 1 limits the scope of an "indirect payment to the seller" and is therefore not relevant to the issue of whether a payment is "in respect of the goods". The CBSA further argues that this paragraph is not applicable because payments for excess fabric are made directly by Coalision to the manufacturers. In addition, the CBSA argues that the examples of fees covered by the interpretative note to Article 1 of the Customs

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67 Exhibit AP-2019-027-12A (protected) at 190.

Valuation Agreement that are provided in Comment 16.1 are not comparable to the payments in this case.[68]

[110] The Tribunal is of the view that the interpretative note to Article 1 is not relevant to this case. The issue here is a direct payment to the manufacturer for the purchase of fabric to manufacture the garments: payments for excess fabric exist only because the fabric must be purchased in order to manufacture the garments, and any such payment is therefore a direct payment to the seller that should be added to the "price paid or payable". The evidence therefore shows that Coalision was not purchasing excess fabric on its own account but was in fact compensating garment manufacturers directly for excess fabric from the production of the garments. Given that these payments were therefore not "on its own account", paragraph 2 of the interpretative note to Article 1 is not applicable.

CONCLUSION

[111] The payments for the excess fabric were made "in respect of the goods" under the definition of "price paid or payable" in subsection 45(1) of the *Act* and therefore must be included in the value for duty of the goods in issue.

DECISION

[112] The appeal is dismissed.

Georges Bujold

Georges Bujold
Presiding Member

[68] Exhibit AP-2019-027-12 at 243. CBSA notes, for example, that Comment 16.1 lists as examples costs incurred by the purchaser's experts, as well as costs related to an advertising campaign for the imported goods.