Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2020-028

G-III Apparel Canada ULC

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, August 22, 2022

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IN THE MATTER OF an appeal heard on December 7 and 8, 2021, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision dated November 24, 2020, made by the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

G-III APPAREL CANADA ULC **Appellant**

AND

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

DECISION

The appeal is allowed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Place of Hearing:	Via videoconference
Dates of Hearing:	December 7 and 8, 2021
Tribunal Panel:	Cheryl Beckett, Presiding Member
Tribunal Secretariat Staff:	Michael Carfagnini, Counsel Kirsten Goodwin, Counsel Morgan Oda, Registrar Officer Stephanie Blondeau, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
G-III Apparel Canada ULC	Darrel H. Pearson Jessica Horwitz Quentin Vander Schueren Kathleen (Kailing) Wang Andrei Mesesan

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Craig Collins-Williams Julie Chung

WITNESSES:

Michael Brady Senior Vice President G-III Apparel Canada ULC	Dean Lashley Vice President of Finance and Operations G-III Apparel Canada ULC
Selina Wong Senior Officer Trade Compliance President of the Canada Border Services Agency	Simon St-Pierre Analyst, International Tax Division, International and Large Business Directorate Canada Revenue Agency

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STATEMENT OF REASONS

INTRODUCTION

[1] This appeal was filed by G-III Apparel Canada ULC (G-III Canada), pursuant to subsection 67(1) of the *Customs Act* (the Act),[1] from a decision made on November 24, 2020, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the Act.

[2] This appeal concerns the value for duty of goods imported between February 1, 2014, and January 31, 2018 (Review Period). The imported goods are clothing, handbags and accessories under various brand names.

[3] The main issue is whether, for the purposes of determining the value for duty based on the transaction value method under section 48 of the Act, the sale for export was from:

(i) the foreign suppliers to G-III Canada as a purchaser in Canada (as argued by G-III Canada); or

(ii) G-III Leather Fashions Inc. (G-III Leather), G-III Canada's United States (U.S.)-based corporate parent, to Canadian retailer customers via G-III Canada acting as agent for G-III Leather or, in the alternative, G-III Leather to G-III Canada (as argued by the CBSA).

[4] For the reasons below, the Canadian International Trade Tribunal concludes that the sale for export was from the foreign suppliers to G-III Canada as a purchaser in Canada. The appeal is therefore allowed.

PROCEDURAL HISTORY

[5] The CBSA conducted a trade compliance verification of the value for duty of goods imported between February 1, 2014, and January 31, 2015. The CBSA issued its final report on October 27, 2017.[2] The CBSA determined that, regarding goods other than those under the Kensie brand name,[3] under the transaction value method: (1) the relevant "sales for export" to Canada were sales transactions between G-III Leather and Canadian retailer customers, who individually qualified as "purchasers in Canada" pursuant to subsection 48(1) of the Act. Corrections to the value for duty declarations were required under section 32.2, and the CBSA issued detailed adjustment statements under subsection 59(2) on February 20, 2018, and March 29, 2018.[4]

[6] G-III Canada requested a re-determination by the President on May 18, 2018.

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1 R.S.C., 1985, c. 1 (2nd Supp.).

2 Trade Compliance Verification Final Report (27 October 2017); see Exhibit AP-2020-028-05 at 97–104.

3 The parties agree that goods imported under the Kensie brand name are not at issue in this appeal. Exhibit AP-2020-028-05 at para. 12; Exhibit AP-2020-028-07 at para. 23.

4 Exhibit AP-2020-028-05.A (protected) at 109–145.

[7] The CBSA denied G-III Canada's request for re-determination pursuant to subsection 60(4) of the Act in a decision letter dated November 24, 2020, and in detailed adjustment statements issued on November 25, 2020.[5]

[8] On February 12, 2021, G-III Canada filed its notice of appeal (NOA) with the Tribunal.

[9] On August 3, 2021, the CBSA filed an Acknowledgement and Undertaking of Proposed Expert Witness form together with a confidential expert report, both completed by a Canada Revenue Agency (CRA) employee, Simon St-Pierre.

[10] On August 5, 2021, the CBSA filed a Declaration and Undertaking – Expert form, executed by Simon St-Pierre. That same day, G-III Canada wrote to the Tribunal objecting to the alleged disclosure of the confidential record to the proposed expert witness and a second individual employed by the CRA.[6] G-III Canada argued that the Tribunal should not accept the evidence of Simon St-Pierre based on this alleged procedural defect and on the basis that his employment with the federal government, and specifically the CRA, would undermine his independence and impartiality as an expert witness.

[11] On August 9, 2021, the CBSA responded to G-III Canada's allegations by claiming that G-III Canada consented to the disclosure of confidential information in its NOA, and the objection to the proposed expert witness was incorrect and premature.[7]

[12] On August 11, 2021, the Tribunal removed the expert report from the public record, directed the CBSA to ensure that the two CRA employees had no further access to the confidential record, and required the CBSA to provide certificates of destruction of confidential information in accordance with that direction,[8] which the CBSA subsequently filed.

[13] On August 18, 2021, to facilitate the resolution of issues regarding disclosure of the confidential record, the Tribunal postponed the hearing scheduled for September 1, 2021.[9]

[14] On August 24, 2021, the Tribunal informed the parties of its decision that G-III Canada had been deprived of its right, under subrule 16(4) of the *Canadian International Trade Tribunal Rules* (Rules),[10] to object to the disclosure of confidential information to an expert witness.[11] In the same letter, the Tribunal maintained its postponement of the hearing and indicated steps to be taken by the parties in accordance with rule 16 and the Tribunal's *Confidentiality Guidelines* (Guidelines).[12]

[15] On August 26, 2021, the CBSA filed an Acknowledgement and Undertaking of Proposed Expert Witness form and a Declaration and Undertaking – Expert form, signed by Simon St-Pierre.[13] On August 31, 2021, G-III Canada objected to the proposed expert accessing the confidential record

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5 *Ibid.* at 76–95, 147–160.
6 Exhibit AP-2020-028-14.
7 Exhibit AP-2020-028-19.
8 Exhibit AP-2020-028-21.
9 Exhibit AP-2020-028-31.
10 SOR/91-499.
11 Exhibit AP-2020-028-33.
12 Online: <www.citt-tcce.gc.ca/en/resource-types/confidentiality-guidelines.html>.
13 Exhibit AP-2020-028-36.

and asked the Tribunal to take various steps regarding prior and future disclosure of confidential information.[14] The CBSA responded to G-III Canada's arguments on September 2, 2021.[15]

[16] On October 14, 2021, the Tribunal held a video pre-hearing conference to address matters regarding whether it would qualify Simon St-Pierre as an expert witness and, if qualified as such, whether he should have access to the confidential record.[16] On October 22, 2021, the Tribunal qualified Simon St-Pierre as an expert witness and disclosed to him portions of the confidential record.[17]

[17] The Tribunal held a videoconference hearing on December 7 and 8, 2021. G-III Canada called the following witnesses to testify: Michael Brady and Dean Lashley. The CBSA called Selina Wong to testify, as well as Simon St-Pierre as an expert witness.

PRELIMINARY MATTER

Expert witness

[18] In July 2021, an issue arose regarding the CBSA's proposed expert witness, Simon St-Pierre. The parties agree that the CBSA disclosed the Tribunal's entire confidential record to Simon St-Pierre at that time, prior to him seeking access to it in his Executed Declaration and Undertaking – Expert form, filed with the Tribunal on August 5, 2021. The parties also agree that a second CRA employee, Govindaray Nayak, had access to confidential information in the Tribunal's record before the disclosure to Simon St-Pierre. However, during the pre-hearing conference, the CBSA confirmed that it did not disclose the Tribunal's confidential record to Govindaray Nayak.[18] Rather, Govindaray Nayak received information that the CBSA held pursuant to its verification process.[19]

[19] G-III Canada submitted that it did not agree to the CBSA's disclosure of confidential information to Simon St-Pierre and Govindaray Nayak, which means the disclosure was contrary to the Rules and the Guidelines. Specifically, G-III Canada argues that it did not consent to the disclosure by checking the box in the NOA advising the Tribunal that "government officials involved in the appeal may be granted access to" confidential information filed by G-III Canada in the appeal proceedings. G-III Canada also argued that subparagraph 107(4)(b)(i) of the Act does not authorize the disclosure;[20] once information obtained by the CBSA through its verification process is entered in the Tribunal's record, section 107 does not authorize the CBSA to share that information in relation to Tribunal proceedings.

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14 Exhibit AP-2020-028-37.

15 Exhibit AP-2020-028-39.

16 Exhibit AP-2020-028-40; Exhibit AP-2020-028-46.

17 Exhibit AP-2020-028-46. The Tribunal's reasons for this decision are discussed in the "Preliminary Matter" section below.

18 *Transcript of Public Pre-hearing Conference* at 42–43.

19 *Transcript of Public Pre-hearing Conference* at 42–43, 52; Exhibit AP-2020-028-19 at 2–3.

20 Subparagraph 107(4)(b)(i) states, in relevant part, that "An official may provide, allow to be provided or provide access to customs information if the information . . . **(b)** will be used solely in or to prepare for any legal proceedings relating to the administration or enforcement of . . . this Act . . . before **(i)** a court of record, including a court of record in a jurisdiction outside Canada . . . ". Subsection 107(1) states, in relevant part, that "***official*** means a person who **(a)** is or was employed in the service of Her Majesty in right of Canada . . . ".

[20] The CBSA argued that the disclosure is authorized under the NOA because, as CRA employees, Simon St-Pierre and Govindaray Nayak are government officials who were involved in this appeal from the time that the CBSA consulted with them and they each executed a Declaration, Undertaking and Acknowledgement – Limited Disclosure form and filed it with the Tribunal. The CBSA further argued that disclosure of the confidential record to Simon St-Pierre, and confidential information to Govindaray Nayak, is authorized by subparagraph 107(4)(b)(i) of the Act.

[21] The Tribunal acknowledges the parties' concern about the scope of disclosure authorized by the consent given in the NOA. The Tribunal is considering options for clarifying the language in the NOA, separate from these proceedings. The Tribunal also acknowledges G-III Canada's request for a ruling on whether Simon St-Pierre and Govindaray Nayak are "government officials involved in this appeal" within the meaning of the NOA. In the circumstances of this appeal, however, it is not necessary for the Tribunal to make such a ruling.

[22] Regarding Simon St-Pierre, the Tribunal directed the parties to follow the process set out in rule 16 of the Rules, together with the Guidelines, in respect of experts and their access to confidential information in the Tribunal's record.[21] The parties complied. Regarding Govindaray Nayak, the CBSA did not disclose the Tribunal's confidential record to him. Rather, Govindaray Nayak reviewed customs information obtained and held by the CBSA as part of its value for duty verification process. In the Tribunal's view, when such information is entered in the Tribunal's record, it is only that version of the information as filed or submitted that is governed by the Rules and Guidelines; the CBSA did not disclose the version of the confidential customs information in the Tribunal's record to Govindaray Nayak.

[23] As communicated to the parties following the pre-hearing conference, the Tribunal decided to qualify Simon St-Pierre as an expert in the following areas:

- how the CRA interprets and uses information reported on the T106 tax form titled Information Return of Non-Arms Length Transactions with Non-Residents (T106) and the consequences of reporting this information under the *Income Tax Act*,[22] including G-III Canada's T106 filings; and

- the principles governing transfer pricing transactions including tax implications in Canada arising from transfer pricing transactions and other international transactions between taxpayers not dealing at arm's length.

[24] The Tribunal also decided to disclose select parts of the confidential record to Simon St-Pierre. The Tribunal's reasons for these decisions follow below.

[25] To determine whether to qualify Simon St-Pierre as an expert witness, the Tribunal first considered whether he had special knowledge arising from his education and experience regarding the matters on which he would provide evidence.[23] The CBSA sought Simon St-Pierre's testimony on transfer pricing and CRA tax documentation. Simon St-Pierre's curriculum vitae establishes that

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21 Exhibit AP-2020-028-33.

22 R.S.C., 1985, c. 1 (5th Supp.).

23 The Tribunal has previously qualified witnesses as experts on the basis of their education and experience. See, for example, *Withings Inc. v. President of the Canada Border Services Agency* (8 November 2021), AP-2020-003 (CITT) at para. 15.

he has professional and academic designations, as well as considerable professional experience, regarding those matters. G-III Canada did not dispute that Simon St-Pierre is an expert in such matters.[24] The Tribunal concluded that Simon St-Pierre has the requisite knowledge and experience regarding matters on which he would provide evidence and is therefore an expert in those matters.

[26] G-III Canada argued that Simon St-Pierre was disqualified *ab initio*, so the Tribunal assessed whether Simon St-Pierre would be able to provide fair, objective and non-partisan assistance.[25] The Tribunal first considered Simon St-Pierre's undertaking to carry out his duty to the Tribunal to give fair, objective and impartial evidence and that his opinion would be impartial, independent and unbiased.[26] Simon St-Pierre affirmed his undertaking in the pre-hearing conference.[27] The Tribunal found Simon St-Pierre forthright and credible; his responses to questions from counsel and the Presiding Member were detailed, consistent and in no way evasive. The Tribunal concluded that Simon St-Pierre was willing and had the capacity to comply with the terms of his undertaking.

[27] The Tribunal also considered G-III Canada's challenge to Simon St-Pierre's independence and impartiality on the basis of Simon St-Pierre's alleged involvement in formulating the CBSA's arguments; status as a "party" to the appeal; and inability to provide objective, unbiased assistance to the Tribunal because, as an employee of the CRA, he was adverse in interest to G-III Canada from an income tax perspective. G-III Canada argued that these factors precluded Simon St-Pierre's participation as an expert witness.

[28] In the pre-hearing conference, Simon St-Pierre testified that he did not work on developing arguments in support of the CBSA's position in this appeal.[28] He testified that his involvement was limited to answering five precise questions for the purpose of preparing an expert report.[29] Nothing before the Tribunal established that he worked on developing arguments to support the CBSA's position in this appeal. Rather, Simon St-Pierre worked on answering questions as a means of providing his views in an expert report. The Tribunal concluded that Simon St-Pierre was not involved in formulating the CBSA's arguments and case brief.

[29] The CBSA acknowledged that it incorrectly filed Form I – Notice of Participation (Party) for Simon St-Pierre.[30] In the pre-hearing conference, the CBSA stated that Simon St-Pierre "was not and

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24 *Transcript of Public Pre-Hearing Conference* at 5.

25 In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*] at para. 2, the Court states that "Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so." See also *Rallysport Direct LLC v. 2424508 Ontario Ltd.*, 2020 FC 794 at para. 17; *Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (23 December 2010), PR-2010-049, PR-2010-050, PR-2010-056, PR-2010-057 (CITT), and PR-2010-058 (CITT) at paras. 65, 68; *Hudson's Bay Company v. President of the Canada Border Services Agency* (21 March 2014), AP-2012-067 (CITT) at paras. 26–28.

26 Acknowledgement and Undertaking of Proposed Expert Witness executed by Simon St-Pierre on August 25, 2021.

27 *Transcript of Public Pre-Hearing Conference* at 20–23. In *White Burgess* at para. 47, the Court states that, in the absence of a challenge to an expert's independence and impartiality, an "expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met."

28 *Transcript of Public Pre-Hearing Conference* at 18.

29 *Transcript of Public Pre-Hearing Conference* at 20.

30 Exhibit AP-2020-028-19 at 2.

never was a party to these proceedings".[31] The Tribunal accepted the CBSA's submissions on this issue because Simon St-Pierre did not have standing to participate in this appeal as a "party".[32]

[30] Regarding G-III Canada's position that as a CRA employee Simon St-Pierre could not provide objective and unbiased testimony, the Tribunal recalled that a person's employment relationship with the party proposing him as an expert witness does not automatically mean he cannot be qualified as an expert.[33] This proposition extends to a federal government employee proposed as an expert witness by a federal government entity.[34] Indeed, the Tribunal has previously qualified CRA and other federal government employees as expert witnesses.[35] G-III Canada argued that the CRA as a taxing agency is adverse in interest to G-III Canada and that Simon St-Pierre as a CRA employee in the International Tax Division could, at some time in the future, be called upon to investigate G-III Canada's transfer pricing methodology as part of an audit or verification and, in this respect, he would be adverse in interest. Simon St-Pierre advised the Tribunal that he had no intent or plan to take part in any future audits of G-III Canada.[36] The Tribunal did not find that the CRA was adverse in interest to G-III Canada simply due to its mandate and accepted Simon St-Pierre's testimony and undertaking that he will remain impartial, not use the confidential information for any other person, and has no intent to participate in an audit of G-III Canada. Based on the above, the Tribunal concluded that Simon St-Pierre's CRA employment did not bar his qualification as an expert witness.

[31] The Tribunal also considered G-III Canada's view that Simon St-Pierre's testimony would be neither relevant nor necessary and that the Tribunal should balance the limited benefits of his testimony against the risks of undue consumption of time, prejudice to G-III Canada, complication, confusion, inappropriate deferral to an expert and distraction from the core matters at issue. However, G-III Canada implicitly,[37] and the CBSA expressly,[38] recognized that relevance and necessity are matters of whether Simon St-Pierre's evidence is admissible. The Tribunal noted that relevance, necessity and balancing the potential risks and benefits of evidence are normally considered in deciding whether to admit evidence.[39] The Tribunal concluded that those matters would properly be addressed in assessing the admissibility of, and ultimately the weight given to, Simon St-Pierre's evidence (which was not in the record at the time of the pre-hearing conference) rather than in assessing whether he could be qualified as an expert witness.[40]

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31 *Transcript of Public Pre-Hearing Conference* at 45.

32 Rule 2 of the Rules provides that "***party*** means . . . **(c)** in the case of an appeal, the appellant, the respondent or an intervener . . . ".

33 *White Burgess* at para. 49.

34 *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2021 FC 130 at para. 26.

35 See, for example, *Jockey Canada Company v. President of the Canada Border Services Agency* (20 December 2012), AP-2011-008 (CITT); *N. Valente v. President of the Canada Border Services Agency* (19 November 2020), AP-2019-037 (CITT).

36 *Transcript of Public Pre-Hearing Conference* at 17.

37 *Transcript of Public Pre-Hearing Conference* at 8, 14, citing *C. Keay Investments Ltd. S/N Ocean Trailer Rentals v. President of the Canada Border Services Agency* (15 May 2018), AP-2017-031 (CITT).

38 *Transcript of Public Pre-Hearing Conference* at 6.

39 See, for example, *White Burgess* at paras. 23–24.

40 *White Burgess* at paras. 46–48.

[32] Therefore, for the reasons above, the Tribunal concluded that Simon St-Pierre was not disqualified, *ab initio*, from being an expert witness and it decided to qualify Simon St-Pierre as such.

[33] Finally, in deciding whether to disclose confidential information to Simon St-Pierre, the Tribunal first considered section 45 of the *Canadian International Trade Tribunal Act* (CITT Act),[41] together with rule 16 of the Rules. The former permits the Tribunal to disclose confidential information in its record to an expert in a proceeding;[42] the latter prescribes a condition precedent to such disclosure.[43] The Tribunal concluded that the requirements in those provisions were met. There was no dispute that Simon St-Pierre was acting under the control or direction of the CBSA's counsel. Moreover, by executing the Tribunal's Declaration and Undertaking – Expert (Expert Undertaking),[44] Simon St-Pierre undertook to use any confidential information disclosed to him only in this appeal; not to divulge such information to anyone other than an authorized person; not to reproduce or copy such information without the Tribunal's authorization; and to protect such information in accordance with the conditions set out in the Expert Undertaking. Nothing before the Tribunal established that Simon St-Pierre would violate his Expert Undertaking.

[34] The Tribunal then considered G-III Canada's request that "confidential disclosure be fully denied." G-III Canada argued that income taxation and transfer pricing were not central issues in the appeal and, in any event, Simon St-Pierre could explain the relevant concepts without referencing confidential information. G-III Canada also argued that disclosing confidential financial information to a CRA tax auditor would have adverse effects on G-III Canada. In response, the CBSA argued that non-disclosure would interfere with its ability to fully respond to G-III Canada's arguments because Simon St-Pierre needed access to the confidential record to provide his opinion on the matters at issue. The CBSA also argued that Simon St-Pierre would not use confidential information for any purpose other than this appeal and, in any event, G-III Canada had not established any risk that would arise from disclosure, because the CRA is neither a third-party competitor nor adverse in interest to G-III Canada.

[35] In the Tribunal's view, CRA tax forms and transfer pricing matters tend to raise complicated issues. The Tribunal concluded that it would benefit from an expert's opinion to better understand how (if at all) these issues apply in this case. The CBSA is entitled to make its case as it sees fit and

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41 R.S.C., 1985, c. 47 (4th Supp.).

42 Subsection 45(3) provides that confidential information " . . . that has been provided to the Tribunal in any proceedings before the Tribunal may be disclosed by the Tribunal to . . . an expert, acting under the control or direction of that counsel, for use, notwithstanding any other Act or law, by that . . . expert only in those proceedings, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by . . . the expert to any person in any manner that is calculated or likely to make it available to **(a)** any party to the proceedings or other proceedings, including a party who is represented by that counsel or on whose behalf the expert is acting; or **(b)** any business competitor or rival of any person to whose business or affairs the information relates."

43 Subrule 16(3) requires an expert seeking access to confidential information under subsection 45(3) of the CITT Act to give the Tribunal "a declaration and undertaking on the relevant Tribunal form in respect of the use, disclosure, reproduction, protection and storage of the confidential information in the record of a proceeding, as well as in respect of that expert's disposal of the confidential information at the close of the proceeding . . . ".

44 The Form V—Expert Undertaking, as modified to fit the circumstances of this proceeding and executed by Simon St-Pierre on August 25, 2021, is attached as Appendix I.

provided a reasonable rationale as to how the tax forms and the expert's evidence could assist the Tribunal. In the Tribunal's view, the potential benefits outweighed any risks.

[36] For the reasons above, the Tribunal decided to disclose confidential information in the Tribunal's record to the expert witness, Simon St-Pierre.[45] The parties agreed that any disclosure should be limited to specific documents referenced in his initial expert report.[46] The Tribunal therefore limited disclosure to those documents.

LEGAL FRAMEWORK

[37] Pursuant to section 44 of the Act, a value must be attributed to goods imported to Canada to determine the applicable import duties. Section 46 specifies that the value for duty of imported goods is determined in accordance with sections 47 to 55.

[38] The Act sets out various methods of valuation for determining the value for duty. Subsection 47(1) sets out that the primary basis of appraisal is the transaction value. The subsection reads 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.

[39] A key condition of subsection 48(1) is that the goods are sold for export to Canada to a purchaser in Canada:

> **48 (1)** Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined . . .

[40] It is only to the extent that the value for duty of imported goods cannot be appraised on the basis of their transaction value that any subsidiary bases of appraisal, as outlined in sections 49 to 53 of the Act, can be considered.

Purchaser in Canada

[41] For the purposes of subsection 48(1) of the Act, the term "purchaser in Canada" is set out in section 2.1 of the *Value for Duty Regulations* (Regulations).[47] The relevant part of the provision reads as follows:

> **2.1** For the purposes of subsection 45(1) of the Act, ***purchaser in Canada*** means
>
> **(a)** a resident;
>
> **(b)** a person who is *not a resident* but who has a *permanent establishment in Canada*; or
>
> **(c)** a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,

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45 Exhibit AP-2020-028-46.
46 Exhibit AP-2020-028-37 at 3; *Transcript of Public Pre-Hearing Conference* at 34, 43.
47 SOR/86-792.

> **(i)** for consumption, use or enjoyment by the person in Canada, but not for sale, or
>
> **(ii)** for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.
>
> [Emphasis added]

[42] The term "resident" is defined in section 2 of the Regulations as follows:

> **(a)** an individual who ordinarily resides in Canada;
>
> **(b)** a corporation that **carries on business** in Canada and of which the **management and control** is in Canada; and
>
> **(c)** a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada. (*résident*)
>
> [Bold added for emphasis]

[43] The term "permanent establishment" is defined in section 2 of the Regulations as follows:

> . . . a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the **person carries on business**. (*établissement stable*)
>
> [Bold added for emphasis]

ANALYSIS

Overview

[44] This appeal raises two key issues with respect to the applicability of the transaction value basis of appraisal under subsection 48(1) of the Act:

(i) whether the relevant sale for export was the transaction between the foreign suppliers and G-III Canada or the transaction between G-III Leather and the Canadian retailers (or between G-III Leather and G-III Canada); and

(ii) insofar as the relevant sale for export was between the foreign suppliers and G-III Canada, whether G-III Canada qualifies as a "purchaser in Canada" pursuant to paragraph 2.1(b) of the Regulations in respect of those transactions at issue.

[45] G-III Canada submitted that during the Review Period it purchased the goods in issue from foreign suppliers on its own account. These transactions qualify as "sales for export to Canada" under subsection 48(1) of the Act because they were conditioned on the transportation of the goods directly from the foreign source country to Canada and because G-III Canada obtained title through those transactions and held title at the time of importation. G-III Canada was a "purchaser in Canada" in these transactions because it had a permanent establishment in Canada as defined in paragraph 2.1(b) of the Regulations. Therefore, the appropriate basis of appraisal is the transaction value method, based on the price paid or payable by G-III Canada to the foreign suppliers.

[46] The CBSA argued that G-III Canada had no role in the passage of title of the goods and did not make payment for the goods when they were exported to Canada. G-III Leather advertised the goods and maintained a showroom in New York. Canadian retailers placed orders with G-III Leather, which initiated production with foreign suppliers with which it had the primary relationship. G-III Leather made payments to the foreign suppliers based on these orders. G-III Leather, or its corporate parent, owned the trademarks and designs of the goods or was the primary licensee in respect of trademarks and designs licensed from third parties. Based on these factors, the CBSA argued that the relevant transaction was between G-III Leather and the Canadian retailers as the "purchasers in Canada".[48]

[47] For the reasons below, the Tribunal finds that the CBSA erroneously identified the sale for export to Canada as being the transaction between G-III Leather and the Canadian retailers based on its view that G-III Canada did not stand in a relationship of buyer and seller with the foreign suppliers and that G-III Canada did not qualify as a purchaser in Canada. Based on the totality of the evidence and the submissions of the parties, the Tribunal finds that the sale for export to Canada was between the foreign suppliers and G-III Canada.

[48] With respect to the issue of whether G-III Canada qualified as a purchaser in Canada pursuant to paragraph 2.1(b) of the Regulations, G-III Canada argued that it had satisfied the conditions for a "permanent establishment". G-III Canada submitted that it had a fixed place of business at the offices located in Richmond, British Columbia (the Premises). G-III Canada argued that it had conducted its business at the Premises through the activities of its employees and via intercompany service agreements (Buying Agency Agreement,[49] Design Services Agreement,[50] Trademark License Agreement,[51] and Management and Sales Services Agreement[52]) with G-III Leather.

[49] The CBSA argued that G-III Canada could not qualify as a purchaser in Canada. While G-III Canada has a fixed place of business, the CBSA submitted that it did not carry on business at the Premises in relationship to those goods in issue in this appeal. G-III Canada did carry on business with respect to the Kensie-branded goods, but the CBSA argued that the evidence indicated that G-III Canada only acted as agent for G-III Leather in relation to the sales of non-Kensie-branded goods.

[50] For the reasons outlined below, the Tribunal agrees with G-III Canada and finds that it met the conditions of a permanent establishment and therefore qualified as a purchaser in Canada. Accordingly, the transaction value method was applicable based on the price paid or payable by G-III Canada to the foreign suppliers.

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48 The CBSA also argues that G-III Leather took title to the goods in issue by taking possession of the shipping documents and bills of lading from the shipping company, as well as invoices from the foreign suppliers. The parties disagreed over both the extent and implications of this allegation, which are addressed further below.

49 Exhibit AP-2020-028-05.A (protected) at 1448–1458.

50 *Ibid.* at 1460–1468.

51 *Ibid.* at 1470–1477.

52 *Ibid.* at 1435–1446.

Corporate structure and business operations of the G-III Group

[51] In order to determine the transaction value in this case, it is first essential to understand the corporate structure of G-III Canada and related companies, as well as how this group manages its business through the use of various corporate entities incorporated in multiple jurisdictions.

[52] G-III Apparel Group, Ltd. (G-III Apparel) is a U.S. company publicly traded on the NASDAQ that operates globally through multiple international subsidiaries (G-III Apparel together with its subsidiaries are defined as the G-III Group). G-III Apparel is not an operating company; it is a holding company which is the parent company of the G-III Group and holds substantially all the third-party licences.[53]

[53] The G-III Group sells apparel and related products under various brand names, either owned by it or licensed from third parties, on a wholesale basis to retailers and through its own stores. The G-III Group sells products under corporate-owned brands such as Andrew Marc, Donna Karan, DKNY, Vilebrequin and Kensie and third-party licensed brands such as Calvin Klein, Tommy Hilfiger, and Karl Lagerfeld.[54] Third-party licences and corporate-owned licences are sublicensed to all of the subsidiaries and affiliates of the G-III Group either directly or through an intercompany licence agreement.[55] In the case of G-III Canada, the Trademark License Agreement between G-III Leather and G-III Canada sublicenses the trademarks from G-III Leather to G-III Canada.

[54] The North American business of the G-III Group is operated primarily by G-III Leather, a U.S. corporation based in New York City.[56] G-III Leather serves as the corporate head office for the entire G-III Group, providing corporate services to all of its subsidiaries, including G-III Canada.[57] Prior to 2011, G-III Leather carried on business in the U.S. and Canada, selling products directly to Canadian retail customers.[58]

[55] In 2011, the G-III Group expanded its product line by exclusively licensing the Canadian-owned Kensie brand of apparel and goods.[59] To facilitate this expansion, G-III Leather incorporated a wholly owned subsidiary, G-III Canada, in British Columbia. G-III Canada became the successor employer to the former Kensie employees and co-founders of the Kensie brand, leased head office space in Richmond, British Columbia, for the employees and continued the business previously operated by the co-founders of the Kensie brand.[60] From the date of acquisition and continuing throughout the Review Period, G-III Leather decided that, as the employees of G-III Canada already had relationships with foreign suppliers to produce the Kensie-branded goods, the company should continue this practice and not centralize the procurement function with the head office in the U.S. However, with respect to the business systems, G-III Leather required that G-III Canada begin to use the global corporate systems, including its enterprise resource planning (ERP) system (known as the ACS system), its financial accounting system (known as the JD Edwards system) and its warehousing system (known as the PKMS system). All these systems were centrally managed by G-III Leather. The use by G-III Canada of the corporate-wide business systems

53 *Transcript of Public Hearing* at 12, 14.
54 *Transcript of Public Hearing* at 11; Exhibit AP-2020-028-05 at 120.
55 *Transcript of Public Hearing* at 14.
56 *Transcript of Public Hearing* at 14.
57 *Transcript of Public Hearing* at 15.
58 *Transcript of Public Hearing* at 19.
59 *Transcript of Public Hearing* at 19, 114.
60 *Transcript of Public Hearing* at 19–20.

facilitated the overall management and control of G-III Canada by G-III Leather by providing data consistency, cost efficiencies and internal control purposes. As noted by Michael Brady, this is not an unusual practice in multinational corporations.[61]

[56] After 2011, G-III Leather continued to sell products into the U.S. market. Although G-III Leather also made some nominal sales to Canadian customers during the Review Period, the sales were limited to instances where G-III Canada could not fulfill replenishment or reorders and for liquidation opportunities with Canadian retail customers. These specific transactions are not in dispute in this case.[62]

[57] G-III Canada submitted that, during the Review Period, it employed between 15 and 39 Canadian resident employees in its Richmond office, consisting of managers as well as some Kensie division team members, and several employees responsible for G-III Canada's day-to-day business in respect of sales and purchases of all G-III brands.[63] In addition, G-III Canada assumed the operation of four DKNY retail stores in Canada following the amalgamation of Donna Karen International (Canada) Inc. and G-III Canada at the end of 2017.[64] At the hearing, Dean Lashley confirmed that the majority of G-III Canada's operations were for the Canadian market and related to purchases and sales of apparel, footwear, and accessories to wholesale customers, including Hudson's Bay, Nordstrom and Winners.[65]

[58] Both parties agreed that G-III Canada is not a resident of Canada, as defined under the Regulations, because its management and control are located outside of Canada. Upon incorporation of G-III Canada in 2011, the directors and officers of G-III Canada were also directors and officers of G-III Leather, G-III Apparel and elsewhere in the G-III Group, with the exception of Eric Karls who held the position of President of G-III Canada. Eric Karls was a co-founder of the Kensie brand and was employed by G-III Canada to oversee the Canadian operations.[66] During the Review Period, this continued to be the case until Eric Karls resigned in 2017.[67]

[59] As the business of the G-III Group is centred on licensing relationships and the payment of royalties to licensors, its business systems have been structured to facilitate the calculation and payment of these royalties as well as to comply with specific terms set out in each of its licence

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61 *Transcript of Public Hearing* at 78–79.

62 *Transcript of Public Hearing* at 15.

63 Including: Eric Karls, President, responsible for overall G-III Canada operations until his departure in 2017; Dean Lashley, Vice President, Finance and Operations; Della Wong, Controller in charge of day-to-day finance and accounting functions; and Jamie Acevado, Supply Chain Coordinator. *Transcript of Public Hearing* at 8–9, 17–19.

64 *Transcript of Public Hearing* at 10; Exhibit AP-2020-028-05 at 114.

65 *Transcript of Public Hearing* at 10.

66 The directors of G-III Canada upon incorporation were and, the record indicates, remain: Morris Goldfarb, also Chief Executive Officer of G-III Canada; Wayne Miller, Vice President of G-III Canada; and Neal Nackman, Vice President of Finance of G-III Canada until 2020. The record indicates that all three served as directors and/or officers elsewhere in the G-III Group during the Review Period. Michael Brady was named Corporate Controller of G-III Canada upon its incorporation, has served as its Vice President of Finance (reporting to Neal Nackman) since 2020 and is a named officer in several other G-III Group entities. The only exception is Eric Karls, who was a founder of the Kensie brand and became President of G-III Canada shortly after the acquisition in 2017 but was never a director of the company. *Transcript of Public Hearing* at 7, 128–130, 161; Exhibit AP-2020-028-05 at 112; Exhibit AP-2020-028-07 at 113, 117, 120, 129, 148, 157, 222, 514–515, 569, 607.

67 *Transcript of Public Hearing* at 161–162; Exhibit AP-2020-028-05 at 118.

agreements. Witnesses for G-III Canada testified that the business of the G-III Group is organized into divisions, with each division focusing on a specific product category within a specific licensed brand. A division is not a legal structure but rather a distinct business unit which permits the G-III Group to track revenue and expenses and resulting profit and loss along specific business lines. Each division has a dedicated staff to handle the design, sourcing, procurement and sales for that specific brand and product category, a requirement which is often a condition under the licence agreement. The setup is intended to ensure product consistency, quality and image for the respective brands and, from an accounting perspective, to track profitability of different product lines and facilitate record keeping for royalty purposes.[68] This organizational model is a fundamental feature of the G-III Group's business operations and is one of the business rationales for centralized management of certain functions within this business.

[60] The CBSA took issue with how the G-III Group structured its Canadian operations and alleged that the only legitimate sales that G-III Canada made to Canadian retail customers during the Review Period are products related to the Kensie-branded sales. The CBSA's primary position was that all other brands sold by the G-III Group to Canadian retailers continued to be sold by G-III Leather, with G-III Canada solely acting as an agent. Accordingly, the CBSA argued that the appropriate transaction value for duty purposes was the purchase price paid by the Canadian retail customers, and not the price paid to foreign suppliers. In the alternative, the CBSA argued that the relevant sale for export to Canada was between G-III Leather and G-III Canada.

Kensie-branded goods

[61] Goods sold under the Kensie brand are not at issue in this appeal. Both parties agreed that the appropriate transaction value for sales of Kensie-branded goods imported into Canada is the price paid by G-III Canada to its foreign suppliers. The parties also agreed that, for the purposes of Kensie-branded goods, G-III Canada was a purchaser in Canada because it was a non-resident corporate entity with a permanent establishment in Canada under paragraph 2.1(b) of the Regulations.[69] Specifically, the CBSA recognized that G-III Canada had a fixed place of business at the head office in Richmond *through which* G-III Canada carried on the business of designing, manufacturing, and selling the Kensie-branded goods; and had employees in Richmond who were directly involved in the brand design and procurement from foreign suppliers.[70]

[62] It should be noted that the sales rooms for the Kensie-branded products are located in New York at the same location as all other G-III Group-branded products. Canadian buyers for the Kensie-branded products are expected to travel to New York to review samples at the marketing headquarters for G-III Leather, which consists of 20 floors of products—each floor primarily dedicated to an individual brand.[71] Individual salespeople responsible for each brand are employed by G-III Leather and operate out of the New York or other U.S. offices of the G-III Group.[72]

[63] Notably, Kensie sales personnel were located in New York prior to the brand's acquisition by the G-III Group, after which they were hired by G-III Leather to continue providing sales functions

68 *Transcript of Public Hearing* at 23–25.
69 *Transcript of Public Hearing* at 326–327.
70 *Transcript of Public Hearing* at 12–13.
71 *Transcript of Public Hearing* at 22, 26–28.
72 *Transcript of Public Hearing* at 13, 29–30.

for the brand in that location.[73] In this respect, the sales process for Kensie-branded goods is identical to the sales process of the non-Kensie-branded goods, and no G-III Canada employees, whether a resident in Canada or not, carried out sales functions for any goods.[74] Basically, Canadian customers would place orders with the relevant division team (whether such team was in Canada or the U.S.), who would then enter the order into the G-III Group's ERP system, ACS.[75] G-III Canada contracted for these sales services performed by G-III Leather pursuant to the terms and conditions set out in the Management and Sales Services Agreement executed between G-III Canada and G-III Leather.

Non-Kensie-branded goods

[64] The dispute in this case revolves around the appropriate value for duty of non-Kensie-branded goods. Following the approach set out by the Tribunal in *Delta Galil USA Inc. v. President of the Canada Border Services Agency*,[76] the Tribunal's analysis will first determine what is the relevant sale for export to Canada of the goods in issue for the purpose of subsection 48(1) of the Act. The Tribunal found the following in that case:

> . . . The first task of the CBSA in determining whether the transaction value method is available, is to properly identify the sale for export. This requires determination of the person who purchased the goods in a sales transaction and had title to the goods *on importation*. Once the importer has been determined, the next question is whether that importer qualifies as a "purchaser in Canada". If the importer does not qualify as a "purchaser in Canada", then the value of duty cannot be determined using the transaction value pursuant to subsection 48(1).[77]
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> [Emphasis in original]

[65] G-III Canada argued that it had purchased non-Kensie-branded goods from foreign suppliers as a principal, via G-III Leather as its buying agent, and that it held title to the goods at the time of importation. The CBSA argued that the sale for export to Canada was between G-III Leather as seller and the Canadian retailers as the purchaser(s) in Canada. In the alternative, the CBSA submitted that the sale for export to Canada was between G-III Leather and G-III Canada.

[66] The CBSA is correct that the procurement process for all non-Kensie-branded goods is performed in the U.S. by employees of G-III Leather. This is a different process than what exists for the Kensie-branded goods. G-III Canada submitted that the G-III Group has developed a central global purchase and accounting (procurement) system for use by its affiliates, including G-III Canada.[78] This system was developed prior to the incorporation of G-III Canada in 2011. After the acquisition of the Kensie licence and right to produce the Kensie-branded goods, G-III Canada continued to operate the procurement function for the Kensie-branded goods from the British Columbia office, because this business had an existing procurement system set up in British

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73 *Transcript of Public Hearing* at 22.
74 *Transcript of Public Hearing* at 26.
75 Michael Brady elsewhere referred to ACS as an ERP system.
76 (5 March 2021), AP-2020-002 (CITT) [*Delta Galil*].
77 *Delta Galil* at para. 31.
78 Exhibit AP-2020-028-05 at paras. 20–22.

Columbia and employees residing in Canada had the contacts and relationships with the foreign suppliers used by the Kensie brand.[79]

[67] For all other brands, the procurement employees resided in the U.S. and coordinated orders on behalf of the various G-III Group affiliates, including G-III Canada for non-Kensie brands.[80] Witnesses for G-III Canada testified that this outsourcing of the procurement function from G-III Canada to G-III Leather existed from 2011 onward but was only formalized and detailed in the inter-company service agreements between G-III Leather and G-III Canada, which were signed in March 2019, with a retroactive effective date of November 1, 2011.[81]

[68] In the Tribunal's view, the fact that no written agreement existed during the Review Period documenting the inter-company services arrangements is not a fundamental defect in G-III Canada's argument. The Tribunal is satisfied that the agreements signed in March 2019 do in fact accurately describe the relationship that existed in practice between the two affiliated companies and accepts the agreements at face value. As outlined in further detail below, documentary evidence from the Review Period supports and is consistent with this finding.

Sale for export to Canada

[69] In determining the transaction constituting the "sale for export" pursuant to section 48 of the Act, the Tribunal has previously referred to *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,[82] where the Supreme Court of Canada highlighted the passing of title as a key indicator. The Court stated as follows:

> For the purposes of valuation under s. 48 of the *Customs Act*, *the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada*. The importer may be the intermediary or the ultimate purchaser, depending on which party actually imports the goods into the country. For the purposes of determining whether a sale is for export, the residency of the purchaser or of the party transporting the goods is not material.[83]
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> [Emphasis added]

[70] Both parties cited *Brunswick International (Canada) Limited v. the Deputy Minister of National Revenue*,[84] where the Tribunal set out three criteria for determining whether a sale has taken place, namely that: (1) there must be two parties, standing in relation of buyer and seller to one another; (2) both parties must agree to the same proposition; and (3) there must be a passage of title and consideration.

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79 *Transcript of Public Hearing* at 20–21.

80 *Transcript of Public Hearing* at 85.

81 *Transcript of Public Hearing* at 77–78, 86; Exhibit AP-2020-028-05 at 130, 132, 134, 136; Exhibit AP-2020-028-05.A (protected) at 1435–1477.

82 2001 SCC 36, [2001] 2 SCR 100 [*Mattel*].

83 *Mattel* at para. 45.

84 (14 December 1999) AP-98-100 (CITT) [*Brunswick*]. The *Mattel* decision was issued following *Brunswick* but did not consider the issue of agency, which is therefore discussed below primarily in the context of *Brunswick* and preceding cases.

Procurement and sale process

[71] For the Tribunal to properly identify the sale for export, it must consider the relevant facts surrounding the importation of the goods in issue during the relevant period.

[72] The Tribunal heard persuasive testimony, consistent with the Intercompany Management and Sales Agreement, that G-III Canada contracted the services of G-III Leather to provide management, sales and marketing services,[85] which included the services of sales employees, and the use of the G-III Leather showroom for all brands.[86] These service arrangements also provided for the provision by G-III Leather of management and corporate services such as finance, human resources, legal, and information technology (IT) services.[87]

[73] The record indicates that, during the Review Period, G-III Canada received procurement services from G-III Leather for non-Kensie-branded goods. These services provided by G-III Leather included receiving orders from Canadian customers, aggregating those sales orders to estimate future replenishment needs, and then placing orders with the foreign suppliers on behalf of G-III Canada for goods to be shipped directly to G-III Canada's warehouse in Ontario.[88]

[74] Michael Brady testified, and the documentary evidence indicates, that all purchase orders placed by G-III Leather with the foreign suppliers were sent from the centralized procurement office indicating that G-III Canada was the purchaser as outlined in the Buying Agency Agreement.[89] The evidence indicates that all subsequent documentation from the foreign suppliers was created in the name of G-III Canada, including invoices, waybills, and tracking documents.[90] These documents indicate that G-III Canada was the purchaser and held title to the goods upon shipment.

[75] The documentation from the foreign suppliers, even though it was in the name of G-III Canada, was not sent directly to G-III Canada. Instead, it was delivered back to the centralized procurement office at G-III Leather who arranged payment of the invoice. One might assume that G-III Leather, acting as agent and providing financial services to G-III Canada, would make payments to the foreign suppliers from the G-III Canada bank accounts. This did not occur for all invoices.

[76] In fact, G-III Leather paid for a significant number of invoices (i.e. those other than for goods sold under the Kensie and Calvin Klein brands) out of its own bank accounts.[91] The CBSA submitted this fact as evidence that there was not in fact any purchase by G-III Canada, despite the names of the parties being set out in the written documentation, and argues that G-III Leather was in fact the purchaser in the sale for export.

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85 Michael Brady testified that advertising for licensed brands is almost exclusively conducted by the licensor or retailers, for which service the G-III Group pays royalties. DKNY and proprietary brands are marketed directly by G-III Leather. *Transcript of Public Hearing* at 137–138.

86 *Transcript of Public Hearing* at 27–28, 137, 180, 190.

87 *Transcript of Public Hearing* at 51–52, 60–61, 76–77.

88 *Transcript of Public Hearing* at 29–30, 50.

89 *Transcript of Public Hearing* at 85–86, 143; Exhibit AP-2020-028-05.A (protected) at 224–226, 450–453, 479–482, 513–516, 1499.

90 *Transcript of Public Hearing* at 37–38, 93–94, 96–97, 99; Exhibit AP-2020-028-05.A (protected) at 210–532.

91 *Transcript of Public Hearing* at 66–67, 94.

[77] In the Tribunal's view, G-III Canada provided a credible explanation as to why this discrepancy appears in the financial records of G-III Leather and G-III Canada. At the hearing, Michael Brady explained that G-III Leather's logistics and accounting systems in place during the Review Period had limited functionality to record payments from subsidiaries and that the way they had set up their accounts (with each brand and category having its own code) made it impractical to create an entire duplicate set of codes for G-III Canada so that the sale could be properly accounted for in the business records. When G-III Canada was incorporated, G-III Leather had created two new company codes: one for Kensie-branded goods sold in Canada (KV), and one for Calvin Klein Canada (CZ), because those two divisions together represented the majority of Canadian sales. It was therefore worth the effort to create two new codes, which Michael Brady framed as a compromise with G-III Leather's IT department. Sales under the KV and CZ codes could be recorded directly to G-III Canada, meaning that payables and receivables were recorded directly to G-III Canada's general ledger, allowing payments to vendors to be made directly from G-III Canada's bank accounts.[92]

[78] The Tribunal notes that the non-Kensie-branded sales which related to the CZ code followed the exact same accounting procedures as the Kensie-branded goods, which the CBSA has determined to be properly to the account of G-III Canada as purchaser. The same accounting process was deployed in terms of ordering, sales recording, recording the payable and recording the purchase. It was all recorded directly on G-III Canada's accounting books. However, while the CBSA did not find an issue with how the accounting procedures worked for the Kensie-branded goods, it did find an issue with the Calvin Klein-branded goods.

[79] With regard to all other goods imported into Canada (other than KV- and CZ-coded goods), management opted to deploy a workaround that satisfied its business purposes, to which G-III Canada and G-III Leather refer as a "reclassification" process.

[80] Under the reclassification process as explained by Michael Brady, G-III Leather recorded orders on a day-by-day basis made with foreign suppliers and destined for Canadian customers on G-III Leather's own general ledger. Sales to Canadian customers were identified by invoice, so that both revenues and costs associated with each sale were identified. A reclassification exercise was then undertaken prior to the companies' fiscal year end in February to reconcile all amounts owing between these two companies. At that time, a journal entry was then made to remove the revenues and costs related to these sales from G-III Leather's ledger and record them to G-III Canada's ledger.

[81] The ultimate journal entry at the end of the fiscal year consolidated all payments due and owing between the two companies, not only related to the calculation of operational revenues and expenses but also included the service fees that were owed by G-III Canada to G-III Leather due to the various services performed by G-III Leather under the Buying Agency Agreement, Design Services Agreement, Trademark License Agreement, and Management and Sales Services Agreement.[93] At the end of each fiscal year, the G-III Group was then able to accurately report the financial position of G-III Leather and G-III Canada.[94]

[82] The Tribunal finds this explanation convoluted but credible and understandable due to the business system limitations facing G-III Canada at the time. Michael Brady acknowledged that the

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92 *Transcript of Public Hearing* at 63–66, 89.
93 Exhibit AP-2020-028-05.A (protected) at 2172–2175.
94 *Transcript of Public Hearing* at 67–70, 159–160.

system deployed was a workaround and that the G-III Group has, since the Review Period, implemented a different business system to avoid this complex reclassification process.[95]

G-III Canada held title to the goods on importation

[83] In order for G-III Leather to have been the seller in a sale for export to Canada, it would have had to take title of the goods from the foreign suppliers at some point. The evidence before the Tribunal makes it clear that at no time did G-III Leather take title to the goods in issue. Following the framework set out in *Mattel*, the Tribunal finds that G-III Canada held title to the goods at the time of importation. The CBSA's argument that G-III Leather was the seller in the sale for export to Canada must fail, as passage of title is a requirement for there to be a sale under the *Brunswick* factors.

[84] G-III Canada cited two cases applying *Mattel*. In *Cherry Stix Ltd. v. President of the Canada Border Services Agency*, the Tribunal considered the terms of the contract of sale and conduct of the parties in determining the sale for export.[96] In *The Pampered Chef, Canada Corporation v. President of the Canada Border Services Agency*, the Tribunal considered whether the purchaser had responsibility for customs charges and the risk of damage, loss, non-delivery, returns, warranties and product liability during transit of the goods to Canada as evidence of the transfer of title.[97] More recently, in *Delta Galil*, the Tribunal found that identifying the sale for export "requires determination of the person who purchased the goods in a sales transaction and had title to the goods *on importation*" (emphasis in original).[98]

[85] Unlike in *Cherry Stix*, there was no master vendor agreement or written terms and conditions in place between any G-III Group entities and the foreign suppliers.[99] In the Tribunal's view, this means that, in the circumstances of the present appeal, documents relating to specific transactions provide the strongest indication of the parties' intentions as to who held title to the goods at the time they were transported into Canada. As noted above, all documentation from the foreign suppliers was created in the name of G-III Canada, including invoices, waybills and tracking documents.

[86] Considering the factors outlined in *Pampered Chef*, the evidence indicates that G-III Canada bore the risk of excess inventory, which could be realized in the event of returns or cancelled orders from customers, or if demand forecasts (which as outlined above informed purchasing decisions) proved inaccurate. Such excess inventory was recorded in G-III Canada's balance sheet, and G-III Canada absorbed the associated write-downs in value when that inventory became aged. Dean Lashley testified that the value of such aged merchandise reached into the millions of dollars during the Review Period.[100]

[87] The evidence also indicates that G-III Canada had the responsibility for clearing the goods in issue through Canadian customs. Dean Lashley testified that foreign suppliers would forward shipping details to the G-III Group's logistics provider, OOCL, which would forward it to the central logistics team in New York, who in turn would notify G-III Canada's customs broker. This broker, Omnitrans, was responsible for tracking the goods in transit and taking care of customs clearance in

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95 *Transcript of Public Hearing* at 65.
96 (10 May 2010), AP-2008-028 (CITT) [*Cherry Stix*] at paras. 38, 46.
97 (13 February 2008), AP-2006-048 (CITT) [*Pampered Chef*] at para. 36.
98 *Delta Galil* at para. 31.
99 *Transcript of Public Hearing* at 29, 37.
100 *Transcript of Public Hearing* at 30–31; see also Exhibit AP-2020-028-05.A (protected) at 2217–2218.

Canada.[101] Omnitrans reported the importations to the CBSA, after which G-III Canada paid Omnitrans for duties and taxes. The two companies executed a Custom Brokers Service Agreement and Power of Attorney for Omnitrans to act on behalf of G-III Canada, and Omnitrans issued invoices to G-III Canada, which it paid directly to Omnitrans and recorded in its accounting record.[102]

[88] G-III Canada witnesses testified that all goods were shipped from foreign suppliers on a Free on Board (FOB) basis, meaning delivery occurs when goods are placed on the cargo vessel at the foreign port of origin.[103] At the hearing, Dean Lashley read from several protected exhibits containing sample purchase orders placed with foreign suppliers, which stipulated shipping terms as "FOB Point Haiphong Vietnam", and testified that this was the standard format for G-III Canada's purchase orders to foreign suppliers.[104]

[89] Dean Lashley testified that, once imported, goods were delivered to a warehouse in Vaughan, Ontario, operated by SDR Distribution Services (SDR). Here, the goods were received into G-III Canada's inventory, and individual orders were allocated, picked, packed and shipped to Canadian customers.[105] Invoices to Canadian customers were automatically issued by G-III Leather's PKMS system when dispatched from the warehouse for delivery.

[90] The delivery point where Canadian customers took possession of the goods was stipulated on these invoices, with most specifying "FOB ship point", meaning customers received orders at the SDR warehouse. However, some specified FCA or "Free Carrier", which Dean Lashley testified had a similar meaning to FOB. Dean Lashley testified that the use of the terms FOB and FCA on invoices issued to Canadian customers was not the same as their meaning as assigned under the International Chamber of Commerce's Incoterms but were simply shorthand meaning point of delivery as specified, which was always in Canada.[106]

[91] Dean Lashley testified that Canadian employees coordinated with the warehouse to process returns by Canadian customers, ensure credit refunds and update inventory.[107] However, G-III Leather managed the relationship with SDR as part of the management services provided to G-III Canada, and this relationship predated the Kensie acquisition and incorporation of G-III Canada. G-III Canada paid for invoices from SDR for these services for goods coded CZ and KV through the Review Period, but invoices for the other goods were sent to G-III Leather, on whose account they were erroneously registered and paid for. Dean Lashley stated that this error was corrected when G-III Leather created new company codes for all brands sold by G-III Canada in late 2017 and that G-III Canada paid for roughly half the total billings from SDR before that point.[108] The Tribunal

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101 *Transcript of Public Hearing* at 32–33

102 *Transcript of Public Hearing* at 47–49, 93, 96; Exhibit AP-2020-028-05.A (protected) at 1818–1819, 2196–2209, 2211.

103 *Transcript of Public Hearing* at 33. G-III Canada submitted a copy of the relevant rules (Incoterms 2010) published by the International Chamber of Commers; Exhibit AP-2020-028-05 at 191–197.

104 *Transcript of Public Hearing* at 34, 36; Exhibit AP-2020-028-05.A (protected) at 281. See also Exhibit AP-2020-028-05.A (protected) at 310, 347, 381, 415, 450, 479, 513.

105 *Transcript of Public Hearing* at 50.

106 Dean Lashley also testified that, for certain customers, G-III Canada itself shipped the goods directly to the customer's warehouse. *Transcript of Public Hearing* at 52–55; Exhibit AP-2020-028-05.A (protected) at 535–1381.

107 *Transcript of Public Hearing* at 19.

108 *Transcript of Public Hearing* at 155–158.

understands this to mean that the remaining amounts of payments to SDR were paid by G-III Leather and never reclassified to (i.e. reimbursed by) G-III Canada. The Tribunal finds this evidence to be ambiguous at best, as it appears that roughly half the warehousing costs were paid by G-III Canada and half were not.

[92] The Tribunal considers the issue of which party coordinated with and paid SDR, while not irrelevant, to be much less indicative of whom held title to the goods upon importation than the relationship with Omnitrans (which was responsible for both customs clearance and inland freight).[109] The CBSA made reference to bills of lading for goods transported from the SDR warehouse to a customer in Ontario which referenced "third party freight charges billed" to "GIII" at a U.S. address, which Michael Brady confirmed is a third-party warehouse leased by G-III Leather.[110]

[93] Michael Brady's testimony was also somewhat ambiguous in this regard. At times he stated that inland freight to customers would be serviced by Omnitrans and billed to G-III Canada. Other times, he stated that inland freight could be a cost incurred as part of the services provided by G-III Leather and recovered from G-III Canada during the reclassification process.[111] However the evidence as a whole indicates that inland carriage from the SDR warehouse by customers was generally provided either: (1) through Omnitrans, which was paid directly by G-III Canada; or (2) by other carriers and billed to G-III Leather, for which it was reimbursed by G-III Canada through the reclassification process (though not always, as indicated with regard to payments to SDR described above).

[94] In any case, the issue of who paid for inland carriage *from* the warehouse is much less indicative of who held title to the goods at the time of importation than the issue of who was responsible for them when they actually entered Canada. All the evidence indicates that the relevant entities in this regard were Omnitrans, as the customs broker, and G-III Canada as the party which engaged and paid Omnitrans.

[95] Regarding transit risk, Dean Lashley testified that G-III Canada generally bore the risk of loss for the goods from the time they were loaded onto the vessel at the foreign port of origin.[112] As noted by the CBSA, marine and cargo insurance policies on the goods in issue (outside Canada) were issued to, and paid for by, G-III Leather and not G-III Canada. However, the cost of these policies relating to the insured goods imported into Canada was charged to G-III Canada during the reclassification process, and G-III Canada was added to the policy as a covered party during the Review Period.[113]

[96] At the hearing, Michael Brady acknowledged that G-III Leather did not charge G-III Canada for coverage of Kensie- or Calvin Klein-branded goods (i.e. those under codes KV and CZ). Michael Brady described this cost as a "nominal" amount, although elsewhere he described Calvin Klein as

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109 *Transcript of Public Hearing* at 32–33, 143.

110 *Transcript of Public Hearing* at 144–145.

111 *Transcript of Public Hearing* at 143, 160. Omnitrans was not the named carrier on any of the bills of lading submitted by the CBSA.

112 *Transcript of Public Hearing* at 36–37.

113 *Transcript of Public Hearing* at 45–47; Exhibit AP-2020-028-05.A (protected) at 1821. It is also not clear that G-III Canada could not be considered an assured party even under the original policy; see Exhibit AP-2020-028-05.A (protected) at 1824.

representing a "substantial majority" of the sales within Canada.[114] It is not necessary for the Tribunal to determine here what proportion of transit risk a party must bear to be considered the purchaser in a sale for export. The evidence clearly indicates that G-III Canada bore the risk for a significant portion of the goods in issue while they were in transit, i.e. goods other than those coded CZ.[115] In any event, the CBSA did not have any concern that the insurance coverage for Kensie-branded goods was not being borne by G-III Canada, as it was able to determine that, despite this issue, G-III Canada could qualify as a "purchaser in Canada".

[97] In the Tribunal's view, the fact that this risk exposure may not have applied to all, or even most, of the goods in issue is not sufficient to outweigh the other evidence outlined above that G-III Canada held title to the goods at the time of importation. Furthermore, as noted above, CZ-coded goods were recorded directly on G-III Canada's ledger, and G-III Canada paid directly for these goods.[116] As such, much of the CBSA's other arguments, regarding who stood in the position of the buyer and seller in the sale for export based on the source of payments, are arguably less applicable to the CZ-coded goods than the other goods in issue.

[98] The CBSA argued that, because G-III Leather received the bills of lading during the shipping process, it could have potentially taken possession of the goods by endorsing negotiable bills of lading in its possession, despite G-III Canada being named as consignee on all such documents.[117] It argued that this potential is an indication of title, though not conclusive in its own right. The Tribunal does not find this argument persuasive.

[99] At the hearing, Michael Brady testified that none of the sample bills of lading provided during the trade verification were negotiable and that G-III Leather did not, and was not authorized to, endorse any bills of lading even if they had been negotiable.[118] The Tribunal notes that the example/sample bills of lading cited at the hearing, and in the respondent's brief, are actually non-negotiable copies[119] and do not support the CBSA's argument that the "majority" of bills of lading in this case were negotiable.[120]

[100] Taken together, the evidence indicates that title to the goods in issue passed to G-III Canada at the foreign port of origin and passed to the Canadian customers only after the goods arrived in Canada (either at the SDR warehouse or at a customer's warehouse if G-III Canada delivered the goods there). As such, the Tribunal finds that G-III Canada held title to the goods at the time of importation.

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114 *Transcript of Public Hearing* at 47, 65. Kensie-branded goods are not at issue in this appeal.

115 It is unclear whether Michael Brady's description of a "substantial" majority of Canadian sales included Kensie-branded goods as well as Calvin Klein-branded goods, which would reduce the proportion of goods *in issue* for which insurance costs were not charged back to G-III Canada during reclassification; see *Transcript of Public Hearing* at 89.

116 *Transcript of Public Hearing* at 97–98.

117 Exhibit AP-2020-028-55.A (protected) at 26; Exhibit AP-2020-028-05.A (protected) at 231, 264, 290, 320, 359, 396, 437, 463, 494, 524–525.

118 *Transcript of Public Hearing* at 40–45.

119 Exhibit AP-2020-028-07.A (protected) at 260; Exhibit AP-2020-028-05.A (protected) at 231, 264.

120 *Transcript of In Camera Hearing* at 57; Exhibit AP-2020-028-07 at para. 74, footnote 109.

[101] Furthermore, as G-III Leather never took title to the goods, it cannot have been the vendor in a sale for export to Canada. The Tribunal therefore finds that the relevant sale for export to Canada was not between G-III Leather and G-III Canada, as argued in the alternative by the CBSA.

G-III Leather acted as the buying agent for G-III Canada

[102] The CBSA took the position that there was no *bona fide* principal-agent relationship between G-III Leather and G-III Canada, because the latter had no choice of foreign suppliers and did not control the price paid for goods, the terms of sale to Canadian retailers or the amount it paid for services, and because G-III Leather placed the orders with, and often paid, foreign suppliers. The Tribunal is not persuaded by this argument.

[103] The Tribunal has consistently found that no one factor is determinative of the issue of agency.[121] In this case, the evidence indicates that the Buying Agency Agreement, the Design Services Agreement, the Trademark License Agreement and the Sales and Management Agreement executed in 2019 between G-III Canada and G-III Leather are reflective of the arrangements between the companies during the Review Period.[122] The Tribunal found the witnesses for G-III Canada to be both knowledgeable and credible in this regard.[123] The evidence shows that G-III Leather was in a position to create obligations with third parties on behalf of G-III Canada.[124] For example, G-III Leather created obligations with foreign suppliers of CZ-coded goods and with Omnitrans in respect of all goods in issue, both of which G-III Canada paid directly. G-III Canada's satisfaction of those obligations by making payment for the goods confirms the nature of the relationship between it and G-III Leather. As outlined above, the Tribunal finds that G-III Leather at no time took title to the goods in issue.[125]

[104] Based on these findings, the Tribunal concludes that G-III Leather acted as the buying agent for G-III Canada with regard to the purchase of the goods in issue from the foreign suppliers.

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121 *Brunswick* at 10, citing *Moda Imports, Inc. v. the Deputy Minister of National Revenue* (3 September 1997), AP-95-296 (CITT) at 4; *Jewelway International Canada, Inc. and Jewelway International, Inc. v. the Deputy Minister of National Revenue* (26 March 1996), AP-94-359 and AP-94-360 (CITT) [*Jewelway*] at 12.

122 The Tribunal notes that the President's decision appears to accept that this agreement was effective as of November 2011, despite being signed in 2019. Exhibit AP-2020-028-05.A (protected) at 84.

123 See *Transcript of Public Hearing* at 85, 87–88, 90–98. This can be contrasted to *Clothes Line Apparel, Division of 2810221 Canada Inc. v. President of the Canada Border Services Agency* (14 July 2008), AP-2007-006 (CITT) at paras. 46–49. In that case, the Tribunal found that the terms of an expired "buying agreement" did not reflect the actual arrangements between the Canadian appellant and its foreign affiliate, looking carefully at the facts and nature of the relationship after finding that the appellant's witnesses did not appear knowledgeable regarding the legal structure of their day-to-day business relationship.

124 This is a key element of the principle of agency. See *Brunswick* at 9, citing *R. v Kelly*, [1992] 2 S.C.R. 170 at 183, 1992 CanLII 62 (SCC).

125 This is in direct contrast to the situation in *Jewelway*.

G-III Canada's tax forms do not demonstrate an inter-company sale of goods

[105] The CBSA also referred to T106 tax forms filed by G-III Canada with the CRA during the Review Period.[126] The CBSA argued that G-III Canada made inconsistent representations to the CRA through these forms, initially indicating that payments made to G-III Leather were for the purchase of goods from G-III Leather. This appears to contradict G-III Canada's assertions that G-III Leather was merely its buying agent, as opposed to G-III Leather being vendor of the goods (at least for goods other than those coded CZ, for which G-III Canada paid suppliers directly). It also appears to contradict G-III Canada's position that G-III Leather never took title to the goods.

[106] At the hearing, Michael Brady testified that these payments represent the value of purchases by G-III Leather on G-III Canada's behalf, as reconciled through the reclassification process, and were erroneously reported on the T106 forms as inter-company purchases from a non-resident affiliate. He testified that G-III Canada never filed amended T106 forms with the CRA correcting the error because the form is for information reporting purposes and has no direct impact on the amount of taxes owed.[127] Simon St-Pierre confirmed Michael Brady's understanding regarding the nature of the T106 form[128] but noted that misstatements can result in further questions from the CRA.[129]

[107] G-III Canada witnesses provided confidential testimony regarding how the G-III Group calculated the management fees owed by G-III Canada to G-III Leather.[130] In the public hearing, Michael Brady confirmed that this involved applying the Transactional Net Margin Method (TNMM),[131] a practice that the G-III Group has continued to employ since the Review Period. Michael Brady testified that this practice was and remains consistent with verbal advice received from Ernst & Young (EY) during the Review Period, although the transfer pricing studies prepared by EY for the G-III Group in 2019 led G-III Canada to break out the management fees to provide a separate charge for design fees and buying agency fees.[132] Dean Lashley testified that this was for income tax purposes but that an income tax audit of G-III Canada by the CRA for fiscal years 2015 to 2017 identified no problems with its transfer pricing methodology.[133] The Tribunal notes that, in both its brief and at the hearing, G-III Canada conceded that fees for the design services provided by G-III Leather to G-III Canada should have been included in the price paid or payable for the goods in issue pursuant to clause 48(5)(a)(iii)(D) of the Act.[134]

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126 The T106 form is an annual information return used to report non-arm's length transactions between the reporting person and non-residents. Under the *Income Tax Act*, a "reporting person" is a person who, at any time in the year, was a resident of Canada, or at any time was a non-resident and carried on a business (other than a business carried on as a member of a partnership) in Canada; R.S.C., 1985, c. 1 (5th Supp.), ss. 233.1(1). See *Transcript of Public Hearing* at 207; Exhibit AP-2020-028-49 at 4.

127 *Transcript of Public Hearing* at 105–106.

128 *Transcript of Public Hearing* at 211.

129 *Transcript of Public Hearing* at 212–217; Exhibit AP-2020-028-49 at 4–5.

130 *Transcript of In Camera Hearing* at 5–6, 20–21, 33–34.

131 In his Expert Witness Report, Simon St-Pierre explained that the TNMM is a transfer pricing method that is a potentially appropriate way of determining arm's length prices between non-arm's length parties under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations [OECD Guidelines]. Exhibit AP-2020-028-49 at 8.

132 *Transcript of Public Hearing* at 82–84, 160.

133 *Transcript of Public Hearing* at 83–84.

134 *Transcript of Public Hearing* at 81, 304; Exhibit AP-2020-028-05 at para. 79.

[108] Simon St-Pierre confirmed his understanding that G-III Canada used the TNMM to determine the management fees payable from G-III Canada to G-III Leather during the Review Period.[135] Simon St-Pierre gave his opinion that the TNMM would be a normal method for pricing the purchase of goods but had not, in his experience, seen it used for pricing management fees.[136] Simon St-Pierre stated his view that the TNMM would not be an appropriate way to price management fees. However, he acknowledged that it was theoretically available and that the OECD Guidelines envision using the method that is most appropriate.[137] Although Simon St-Pierre gave his opinion that use of the TNMM in this case was unusual and that reimbursement for the purchase of goods by G-III Canada should be reported on the T106 form, he testified that he did not have enough information to opine on whether the G-III Group's inter-company reclassifications more broadly would need to be included on a T106 form.[138]

[109] The CBSA argued that the difference between G-III Canada's statements to the CRA that its payments to G-III Leather were for the cost of imported goods and its statement to the CBSA that the payments were for services provided by G-III Leather is similar to the facts in *Jockey Canada Company v. President of the Canada Border Services Agency*,[139] where the Tribunal accepted T106 slips as evidence of the inter-company purchase of goods, indicating that the relevant import transactions all "transited through" the Canadian importer Jockey Canada Company/JCC's foreign parent, Jockey International, Inc. (JII). In that case, the Tribunal considered that finding payments by JCC to its foreign parent were for services "would imply that . . . JCC would have filed an incorrect tax return, which the Tribunal considers doubtful . . . [A] more reasonable inference can be drawn from this evidence, which is that JCC, in fact, purchased the Caribbean goods from JII."[140]

[110] The Tribunal does not find the analysis in *Jockey Canada* to be applicable in the present appeal. In *Jockey Canada,* the Tribunal found the tax filing to be relevant in the absence of any other indication that the appellant had filed an incorrect tax return (i.e. the Tribunal chose not to make an inference based on an unsupported assumption that the return had been filed incorrectly). In the present appeal, G-III Canada freely admits that it filed an erroneous T106 tax form. Furthermore, in *Jockey Canada*, the Tribunal found that title had passed to the foreign parent, who then resold the goods to the Canadian distributor. That finding relied heavily on the existence of purchase orders to foreign suppliers made in the name of the parent, naming the Canadian distributor only as consignee, as well as a lack of evidence that the Canadian distributor ultimately reimbursed the parent.[141] As already discussed, the Tribunal finds that the preponderance of evidence in this case indicates that title passed directly from foreign suppliers to G-III Canada.

[111] The evidence indicates that the ultimate funds flowing between G-III Leather and G-III Canada are not a simple exercise of profit from sales of the goods in issue being attributed to G-III Canada. Rather, the reclassification process is subject to complex transfer pricing formulas that incorporate not only the cost of acquiring the goods in issue and the subsequent sale of those goods

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135 *Transcript of In Camera Hearing* at 88–90.

136 *Transcript of Public Hearing* at 227, 234–236.

137 *Transcript of Public Hearing* at 227–228. This is generally confirmed by the OECD Guidelines submitted with Simon St-Pierre's Expert Witness Report; Exhibit AP-2020-028-49 at 113–116, 133.

138 *Transcript of Public Hearing* at 221; *Transcript of In Camera Hearing* at 94.

139 (20 December 2012), AP-2011-008 (CITT) [*Jockey Canada*] at 228–233.

140 *Jockey Canada* at para. 163.

141 *Jockey Canada* at para. 117–127. As discussed above, in the present appeal the Tribunal has seen much stronger documentary evidence that G-III Canada was the ultimate purchaser of the goods and accepts G-III Canada's evidence that the cost of acquiring them was recovered from G-III Canada through the reclassification process.

to Canadian customers but also the value of the services provided by G-III Leather to G-III Canada under the inter-company service agreements.

[112] Ultimately, the Tribunal accepts the position of G-III Canada that the T106 forms in question were prepared erroneously and do not reflect the nature of payments made by G-III Canada to G-III Leather through the reclassification process. The preponderance of evidence outlined above, including documentation relating to the procurement and sale process and the credible testimony of G-III Canada's witnesses, is in the Tribunal's view much more persuasive in this regard.

G-III Canada was the purchaser in the sale for export to Canada

[113] Considered together, the evidence indicates that title to the goods in issue passed to G-III Canada at the foreign port of origin and passed to the Canadian customers only after the goods arrived in Canada (either at the SDR warehouse or at the customers' warehouse if G-III Canada delivered the goods there). G-III Leather acted as the buying agent for G-III Canada but did not take possession of, or title to, the goods in the course of this process. As stated above, the Tribunal finds that G-III Canada held title to the goods at the time of importation.

[114] Applying *Mattel*, the Tribunal therefore also finds that G-III Canada was the purchaser in the relevant sale for export to Canada for purposes of section 48 of the Act.

Purchaser in Canada

[115] Having found that the sale for export was between the foreign suppliers and G-III Canada, the next question is whether G-III Canada qualifies as a "purchaser in Canada" under the Regulations.

[116] The Regulations set out three contexts pursuant to which an entity will be considered a "purchaser in Canada". The first instance, paragraph 2.1(a), requires the entity to be a "resident" of Canada as further defined in the Regulations. The parties agree that G-III Canada, a British Columbia corporation, is not a resident of Canada, as its management and control is in the U.S. The second and third instances, paragraphs 2.1(b) and (c), define the conditions under which a non-resident may be considered a "purchaser in Canada".

[117] A non-resident may be considered a "purchaser in Canada" where it meets the criteria in either paragraph 2.1(b), which requires the person to have a "permanent establishment" as defined in the Regulations, or subparagraph 2.1(c)(ii), which does not require a permanent establishment but rather requires that the goods be imported for the purposes of selling by the non-resident in Canada without a previous agreement to sell the goods to a resident in place.[142] For the reasons below, the Tribunal finds that G-III Canada qualifies as a purchaser in Canada on the basis of paragraph 2.1(b).

[118] For the purposes of a "permanent establishment", the Regulations require as a first condition that there must be in Canada "a fixed place of business of the person". This may include "a place of management, a branch, an office, a factory or a workshop". The second condition is that the person "carries on business" through the fixed place of business.

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142 Paragraph 2.1(c)(ii), which governs persons not purchasing goods for resale or personal use, is not applicable in this case.

[119] As the Tribunal noted in *Delta Galil*, there is no additional language in either the Act or the Regulations that elaborates on the concepts contained in the definition of a permanent establishment, i.e. "a fixed place of business . . . through which the person carries on business." The Federal Court of Appeal in *AAi. FosterGrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*[143] looked at established legal definitions in other contexts in its examination of the meaning of "carrying on business" under the Regulations, stating as follows:

> There is a significant body of jurisprudence on the meaning of the phrase "carrying on business" . . . There is nothing in the *Customs Act* or the *Value for Duty Regulations* that would suggest that the meaning of the phrase "carries on business" should be interpreted in a manner that is not consistent with these established legal definitions.[144]

Fixed place of business

[120] Section 2 of the Regulations provides that a permanent establishment means a fixed place of business "and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business." The evidence indicates that G-III Canada maintained an office with Canadian employees in Richmond, British Columbia, and paid Canadian income taxes throughout the Review Period.[145] Dean Lashley testified that G-III Canada was registered in Canada for all relevant federal and provincial sales tax purposes and that Canadian employees administered in Canada the remission of all such taxes to the CRA under that registration.[146]

[121] The CBSA has agreed that G-III Canada meets the definition of "purchaser in Canada" regarding Kensie-branded goods.[147] Its position is that that these goods were sold through the fixed place of business of G-III Canada because, essentially, the design and procurement functions occurred in Canada. In contrast, it argued that G-III Canada did not meet the definition of purchaser in Canada as it relates to the importation of the non-Kensie-branded goods.[148] However, as noted above, the management, marketing and sales functions relating even to Kensie-branded goods occur in the U.S. through G-III Leather. Under the intercompany agreements, almost all business functions are outsourced to this U.S. affiliate. G-III Canada maintains that the G-III Group is permitted to set up its Canadian business in a manner that makes economic sense to the organization and that there is no requirement that any specific percentage or aspect of the business functions must occur in Canada and occur "through" the fixed place of business.

[122] In the Tribunal's view, and as suggested by the parties' agreement that G-III Canada is a non-resident purchaser in Canada with regard to Kensie-branded goods, it is clear that G-III Canada had a fixed place of business in Canada throughout the Review Period. It had an established office with employees, at least some of whom performed functions in Canada concerning all goods in issue such as logistics, inventory and accounting. Where the parties disagree is whether G-III Canada was

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143 (14 July 2004), 2004 FCA 259 [*FosterGrant*].

144 *FosterGrant* at paras. 17, 18.

145 *Transcript of Public Hearing* at 17–19; Exhibit AP-2020-028-05.A (protected) at 1947, 1993, 2042, 2091, 2220, 2222.

146 *Transcript of Public Hearing* at 49–50, 56–57.

147 *Transcript of Public Hearing* at 326.

148 This also excludes the small number of sales made directly from G-III Leather to Canadian customers during the Review Period. *Transcript of Public Hearing* at 15–16.

carrying on the business of purchasing and selling *the goods in issue* through this fixed place of business.

Carries on business

[123] The Federal Court of Appeal in *FosterGrant*, in considering the extensive jurisprudence concerning the meaning of the phrase "carrying on business", opined that "it would seem to be axiomatic that a corporation that buys and sells goods on its own account for a profit is carrying on business."[149] The Court overturned a Tribunal decision that a Canadian wholly owned subsidiary of a U.S.-based corporation was not carrying on business because its affairs were subject to significant control by the parent corporation, despite the subsidiary buying and selling goods on its own account for profit. In this regard, the Court found the following:

> [19] . . . In essence, the CITT adopted the principle that a corporation is not carrying on business if its affairs are subject to significant *de facto* control by the parent corporation. There is no authority for that proposition, and in my view it is wrong in law. There is nothing in the *Customs Act* that requires or permits that approach.
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> [20] Counsel for the Commissioner argued that the approach taken by the CITT is justified because, given the general policy of the *Customs Act*, it is not right that a corporation should be treated as the "real purchaser" of goods if it cannot sell those goods without the approval of its foreign parent and does not "show some control" over its profits. I see no merit in that submission.

[124] The Court went on to state that to accept such a position would invite an error analogous to that described by the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*[150] in the context of the *Income Tax Act*. It states as follows:[151]

> [40] […] it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied [case references omitted].
>
> […]
>
> [43] […] This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention [case references omitted]. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

[125] The CBSA argued that, with regard to non-Kensie-branded goods, G-III Canada was not carrying on business as defined in *FosterGrant*, i.e. it did not buy and sell goods on its own account for a profit. The CBSA argued that G-III Canada was, at best, performing the services of an agent paid on a commission basis. This raises the question of what minimum threshold, if any, of work

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149 *FosterGrant* at para. 18.

150 [1999] 3 SCR 622, 1999 CanLII 647 (SCC) [*Shell Canada*].

151 *FosterGrant* at para. 20, citing *Shell Canada* at paras. 40, 42.

must be performed at a non-resident's fixed place of business in Canada in order for that non-resident to be considered to be carrying on business through that fixed place of business.

[126] As noted above, the evidence indicates that G-III Canada paid Canadian income taxes throughout the Review Period. However, as noted in *Delta Galil*, whether an importer pays income taxes in Canada relating to the goods in issue is not determinative of where it carries on business.[152] The Tribunal must consider the totality of the evidence on the record in this appeal in assessing whether G-III Canada carried on business through its fixed place of business. In this case, the payment by G-III Canada of Canadian income taxes on all sales to Canadian customers, which were invoiced from G-III Canada, supports the evidence of G-III Canada witnesses that the intent is for G-III Canada to be buying and selling goods on its own account for profit.

[127] The CBSA pointed to T106 tax forms that were filed by G-III Canada as evidence that there was in fact a sale of goods between G-III Leather and G-III Canada for the goods in issue. For reasons similar to its above finding regarding the issue of what was the sale for export to Canada, the Tribunal does not find this evidence compelling. The T106 tax forms are an informational form that a taxpayer provides to the CRA to provide additional information on its transfer pricing schemes. Simon St-Pierre testified that the forms are used by the CRA to flag any files that may benefit from an audit on transfer pricing issues. Witnesses from G-III Canada provided a credible explanation that the forms were incorrectly filled out due to a misunderstanding. The forms are complex and were originally completed by someone unfamiliar with Canadian tax requirements. The Tribunal accepts this explanation and does not put any weight on these forms to assist in its value for duty analysis.

[128] As the Tribunal found above, the facts of this case indicate that G-III Canada was buying the goods in issue via G-III Leather acting as its agent. G-III Canada took title to the goods at the foreign port of origin, held title to them at the time they were transported into Canada, and subsequently shipped them to Canadian customers. Where G-III Leather received the revenues from these sales to Canadian customers and paid certain costs in the procurement process resulting in ultimate delivery to those customers, these amounts were calculated and reconciled between the books of G-III Leather and G-III Canada during the annual reclassification process. The confidential testimony by Simon St-Pierre and witnesses for G-III Canada confirmed that these calculations were set up to allow for a consistent profit margin by G-III Canada.[153]

[129] The Tribunal accepts that these arrangements are accurately reflected in the intercompany agreements between G-III Canada and G-III Leather. The role of G-III Leather under the intercompany agreements did not displace G-III Canada as the purchaser of the goods from the foreign suppliers, the importer of the goods or the vendor of the goods to the Canadian retailers. The issue in this case appears to be that there was little involvement by employees *in* Canada to perform many of the business functions relating to the goods in issue. The Tribunal accepts that G-III Canada outsourced many business functions to its parent U.S. company. To determine whether a company is carrying on business in Canada at a certain fixed place of business, the Tribunal must understand the business model of the company and consider whether the rationale for outsourcing certain services is reasonable and the extent to which specific services are performed in Canada.

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152 Whether G-III Canada is liable to pay income taxes in Canada, and to what extent, is outside the scope of the Tribunal's jurisdiction. The Tribunal therefore cannot draw an adverse or positive inference based on the fact that G-III Canada reports its income for tax purposes in Canada. *Delta Galil* at para. 78.

153 *Transcript of In Camera Hearing* at 5–6, 20–21, 33, 42.

[130] The Tribunal finds no requirement in the Act to support the CBSA's theory that a non-resident with a fixed place of business in Canada must directly employ residents in Canada to perform specific business functions relating to the buying and selling of imported goods in order for them to be considered buyers and sellers. The Tribunal agrees with G-III Canada that there is simply no condition in the Act requiring that the individuals performing certain tasks must be physically located in Canada or that a specific function must occur in Canada for the corporate entity, G-III Canada, to be considered to be carrying on business through its fixed place of business.

[131] The Tribunal has reviewed in detail the specific business model of the G-III Group and how this model applies to G-III Canada. Witnesses from G-III Canada have provided a reasonable rationale as to why certain business functions were outsourced to G-III Leather. The Tribunal now needs to analyze which specific activities did take place at the fixed place of business in Canada during the Review Period by Canadian employees residing in Canada. The facts of this case indicate that the following activities did occur in Canada and were performed by employees residing in Canada during the Review Period:

- Eric Karls, President of G-III Canada, was tasked with increasing sales of all licensed goods, not only the Kensie-branded goods. He also had signing authority for the G-III Canada bank accounts.[154]

- Dean Lashley, Vice President of Finance and Operations (formerly Director of Finance) of G-III Canada, supervised operations and accounting and performed various financial tasks connected to G-III Canada's sales of all G-III Group-branded goods, including the approval of journal entries for non-accounts receivable deposits and payment requests for monthly GST/HST returns. He also had signing authority for the G-III Canada bank accounts.[155]

- Della Wong, Controller of G-III Canada, managed G-III Canada's day-to-day finance and accounting functions for all brands. Her role included processing payroll and completing monthly bank account reconciliations; managing enrolment and administration of the G-III Canada Group Benefits Plan; completing local payment deposits and journal entries for various refunds and reimbursements from government and Canadian suppliers; preparing and filing the monthly GST/HST returns; and preparing and processing G-III Canada's corporate income tax instalment payments. In order to perform these functions, Della Wong had access to the JDE financial accounting system, the Chase banking system and bank reconciliations and the ERP System.[156]

- Jaime Acevedo, Supply Chain Coordinator of G-III Canada, communicated and coordinated with the SDR warehouse; processed product returns and ensured credit refunds were issued for all G-III Canada brands; transferred inventory, handled Canadian customer requests for samples and updated inventory records in the ERP system for goods returned by Canadian customers.[157]

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154 *Transcript of Public Hearing* at 17, 61.
155 *Transcript of Public Hearing* at 8–9, 118.
156 *Transcript of Public Hearing* at 18, 56–57, 61.
157 *Transcript of Public Hearing* at 18–19, 57.

- Canadian employees at the Richmond, British Columbia, office had the primary corporate relationship with Omnitrans, the customs broker, and were responsible for coordinating with Omnitrans.[158]

- The Canadian office is the primary place of contact for all Canadian customers relating to product returns.

- Canadian employees paid the foreign suppliers for CZ-coded goods, which were a significant proportion of the total goods in issue.

- G-III Canada's customers paid either by cheque to a Chase lockbox that was located in Canada or by wire directly to G-III Canada's operating account; occasionally, payment was mistakenly made to the wrong account at G-III Leather but the monies were immediately transferred into the correct account when this occurred.[159]

[132] While these specific functions do not encompass all operational and business functions relating to carrying on business in Canada, they do indicate a certain level of activity that was occurring in Canada during the Review Period, commensurate with the type of business being carried on. In this case, there existed a minimum threshold of management, financial, logistical and customer service functions that supported the position that G-III Canada was in fact carrying on business in Canada with regard to the goods in issue. The volume and type of activity necessary to qualify as carrying on business will naturally vary from case to case depending on the circumstances and the nature of the business being conducted. The Tribunal is satisfied that the threshold has been met in the case at hand.

[133] The Tribunal is here mindful of the above discussion by the Federal Court of Appeal in *FosterGrant* and the Supreme Court of Canada in *Shell Canada* that, "[w]here the provision at issue is clear and unambiguous, its terms must simply be applied", and that "[f]inding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act."[160] The Tribunal does not consider it appropriate to set a bright line test to determine what business functions must occur within Canada in order for a company to be found to be carrying on business through a fixed place of business. The concept of carrying on business does not warrant such an exercise but rather a review of all the facts of each particular case.

[134] With these principles in mind, and considering the totality of the evidence outlined above, the Tribunal concludes that: (1) G-III Canada was the purchaser in the sale for export to Canada; and (2) G-III Canada is a non-resident that carries on business through a fixed place of business, making that fixed place of business a permanent establishment in Canada within the meaning of section 2 and paragraph 2.1(b) of the Regulations.

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158 *Transcript of Public Hearing* at 48; Exhibit AP-2020-028-05.A (protected) at 1818.

159 *Transcript of Public Hearing* at 75–76.

160 In discussing the quoted Supreme Court of Canada statements from *Shell Canada*, the Federal Court of Appeal in *FosterGrant* stated explicitly that "[t]hese comments were made about the interpretation of the *Income Tax Act*, . . . but in my view they are appropriate for the *Customs Act* as well, which is equally complex." See *FosterGrant* at para. 21.

[135] The Tribunal finds that these facts satisfy the unambiguous language of subsection 48(1) of the Regulations.

G-III Leather was not the vendor to Canadian retail customers in a sale for export to Canada

[136] The CBSA argued, in the alternative, that G-III Canada was acting as an agent of G-III Leather in the import and sale of the goods in issue and that the finding should therefore ultimately be that G-III Leather acted as vendor in the sale for export and that the Canadian retailers were the purchasers in Canada. In the Tribunal's view, this argument must fail for two reasons.

G-III Canada did not act as the agent for G-III Leather

[137] The Tribunal does not find that G-III Canada was acting as the agent of G-III Leather. The CBSA's arguments in this regard largely turned on the various business functions performed by G-III Leather, namely the selection of foreign suppliers, placing orders with suppliers, making payments to suppliers, trademark ownership and product design.

[138] Regarding selecting, paying for, and placing orders with foreign suppliers, the Tribunal accepts that these services are provided for under the Buying Agency Agreement and Design Services Agreement executed between the parties.[161] That is, G-III Leather was authorized to perform these functions on behalf of G-III Canada as its buying agent. Despite being memorialized in a contract after the fact, the Tribunal found above that this relationship was reflected in the facts throughout the Review Period: G-III Leather was in a position to create obligations with third parties on behalf of G-III Canada, including with foreign suppliers of CZ-coded goods and with Omnitrans in respect of all goods in issue, both of which G-III Canada paid directly. Where G-III Leather paid suppliers directly, it was reimbursed and compensated by G-III Canada through the reclassification process.

[139] Regarding trademark ownership, the Tribunal accepts the confidential evidence and testimony of G-III Canada that it was a legitimate sub-licensee regarding both third-party and proprietary brands and that it had authority to distribute these brands in Canada. Notwithstanding that this arrangement was in some cases only apparently clarified with licensors during or after the Review Period, the evidence makes clear their acceptance that it was the case throughout the Review Period.[162]

[140] Regarding design fees, the Tribunal fails to see how the provision of design services reflect those of a principal in an agency relationship. The Tribunal accepts that design services were provided by G-III Leather to G-III Canada pursuant to the intercompany agreements, in this case the Design Services Agreement.[163]

[141] At the hearing, the CBSA suggested that the Tribunal should weigh most heavily the information provided to the CBSA through the verification process. The Tribunal acknowledges that not all the evidence informing the present analysis on the issue of agency was available to the CBSA

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161 Exhibit AP-2020-028-05.A (protected) at 1449.

162 *Transcript of Public Hearing* at 268; *Transcript of In Camera Hearing* at 6–7, 8–12; Exhibit AP-2020-028-05.A (protected) at 1480, 1584, 1588, 1630, 1637, 1731–1732, 1742.

163 The issue of whether the design services should be included in the value for duty of the goods in issue is addressed further below.

during the Review Period. That said, appeals before the Tribunal proceed *de novo* and are not limited to evidence and arguments considered by the CBSA.

[142] As mentioned in the analysis regarding the relevant sale for export to Canada, no one factor is determinative of the issue of agency. Considering the totality of evidence outlined above, the Tribunal finds that the facts in this case do not establish that G-III Canada acted as the agent of G-III Leather in the importation of the goods to Canada.

[143] Furthermore, even if the Tribunal found that G-III Canada acted as the agent of G-III Leather in relation to the importation of the goods in issue, this would still not support the CBSA's position that the Canadian retail customers were the purchasers in Canada for the purpose of section 48 of the Act for reasons outlined in the following section.

Canadian retail customers were not purchasers in the sale for export to Canada

[144] As stated in *Mattel*, for the purposes of valuation under section 48 of the Act, the relevant sale for export is the transaction by which title to the goods passes to the importer, and the importer is the party who has title to the goods at the time the goods are transported into Canada.

[145] For the CBSA to establish that the Canadian retail customers were the importer of the goods, it would therefore have to establish that the retailers held title to the goods at the time of importation. However, there is no evidence suggesting that Canadian retail customers held title to the goods in issue at the time that they were transported into Canada.

[146] As discussed above, the Tribunal finds that G-III Canada held title to the goods when they were imported. Accordingly, the Canadian retail customers were not the importers in a sale with G-III Leather as the vendor, as has been proposed by the CBSA in these proceedings.

[147] Having found that the sale for export to Canada was between the foreign suppliers and G-III Canada, the Tribunal nevertheless considers it useful to briefly discuss the implications of the CBSA's argument that G-III Leather held title to the goods upon importation. If that had been the Tribunal's finding, it would lead to one of two possible conclusions depending on the facts.

[148] The first possibility is that G-III Leather would be the purchaser in Canada, by virtue of having a permanent establishment in Canada, specifically a dependent agent (i.e. G-III Canada) carrying on business through a fixed place of business in Canada. This was the nature of the Tribunal's finding in *Delta Galil*.

[149] In the absence of such a finding, G-III Leather could not be considered a purchaser in Canada despite being the importer. In that case, the requirements of subsection 48(1) of the Act would not be met, because the goods would not have been sold for export to Canada to a purchaser in Canada. The transaction value method would therefore not be available, and another method contemplated in subsequent provisions of the Act would be necessary to determine the value for duty of the goods in issue.

[150] These hypothetical situations demonstrate that, even if the Tribunal were to accept the CBSA's argument that G-III Leather held title to the goods in issue, either via G-III Canada acting as its agent or for some other reason, this would still not support the CBSA's position that the value for

duty of the goods can be determined pursuant to subsection 48(1) of the Act based on the price paid by the Canadian retail customers.

Design fees

[151] As noted above, in both its brief and at the hearing, G-III Canada conceded that fees for the design services provided by G-III Leather to G-III Canada are dutiable under clause 48(5)(a)(iii)(D) of the Act.[164]

[152] The Tribunal accepts this admission as consistent with both the provisions of the Act and the Design Services Agreement executed between G-III Canada and G-III Leather. As such, the Tribunal finds that the price paid or payable in the sale of goods for export to Canada shall be adjusted to include such design fees.

DECISION

[153] Having reviewed all the evidence and jurisprudence and for the reasons above, the Tribunal finds that G-III Canada has a fixed place of business through which it carries on business satisfying the definition of a permanent establishment set out in section 2 of the Regulations.

[154] Accordingly, as a non-resident importer who has a permanent establishment in Canada, G-III Canada qualifies as a "purchaser in Canada" pursuant to paragraph 2.1(b) of the Regulations and, therefore, the transaction value pursuant to subsection 48(1) of the Act may be applied in determining the value for duty of the goods, based on the price paid or payable in the sales for export by the foreign suppliers to G-III Canada.

[155] Pursuant to clause 48(5)(a)(iii)(D) of the Act, the price paid or payable in the sale of goods for export to Canada shall be adjusted by adding amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to the value of design work provided by G-III Leather to G-III Canada relating to the goods in issue, as determined in the manner prescribed by the Regulations and apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles.

[156] The appeal is allowed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

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164 *Transcript of Public Hearing* at 81, 304; Exhibit AP-2020-028-05 at para. 79.