CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, April 20, 1990

Appeal No. 3069

IN THE MATTER OF an application heard January 16, 1990, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C. 1970, c. E-13;

AND IN THE MATTER OF a Notice of Decision of the Minister of National Revenue dated June 29, 1988, with respect to a notice of objection filed pursuant to section 51.15 of the *Excise Tax Act.*

BETWEEN

WILLIAM NEILSON LTD./LTÉE **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. It is the finding of the Tribunal that the steps taken by William Neilson Ltd./Ltée to transfer the property in the goods at issue, ordered by its customers before July 1, 1985, and January 1, 1986, and delivered after those dates, fell short of the requirements in law, and thus the sales of those goods are liable to federal sales tax at the increased rates.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

John C. Coleman
John C. Coleman
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 3069

WILLIAM NEILSON LTD./LTÉE **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Ontario Sale of Goods Act - Determination of sales tax - Unascertained goods -Whether the property in confectionery products passed to the appellant's customers before the effective dates for an increase in federal sales tax - Whether inventory segregated in bulk from the remainder of inventory is "ascertained" within the meaning of the Sale of Goods Act.

DECISION: *The appeal is dismissed. It is the finding of the Tribunal that the steps taken by William Neilson Ltd./Ltée to pass the property in the goods at issue, ordered by its customers before July 1, 1985, and January 1, 1986, and delivered after those dates, fell short of the requirements in law, and thus the sales of those goods are liable to federal sales tax at the increased rates.*

Place of Hearing: *Ottawa, Ontario*
Dates of Hearing: *January 16 and 17, 1990*
Date of Decision: *April 20, 1990*

Tribunal Members: *Arthur B. Trudeau, Presiding Member*
John C. Coleman, Member
Sidney A. Fraleigh, Member

Clerk of the Tribunal: *Janet Rumball*

Appearances: *Michael E. Barrack and Brian Pel, for the appellant*
Michael Ciavaglia, for the respondent

Cases Cited: *Inglis v. James Richardson & Sons Limited (1913), 29 O.L.R. 229; United States v. Amalgamated Sugar Co. (1934), 72 F. (2d) 755 (Circuit Court of Appeals, Tenth Circuit); Standish Pipe Line Co. et al. v. Oklahoma County Excise Board (1943), 141 P. 2d 281 (Supreme Court of Oklahoma); Healey v. Howlett & Sons, [1917] 1 K.B. 337; Karlshamns Oljefabriker v. Eastport Navigation [The Elafi], [1982] 1 All E.R. 208.*

Statutes Cited: *Excise Tax Act, R.S.C. 1970, c. E-13, subs. 27(1); Sale of Goods Act, R.S.O. 1980, c. 462, ss. 17, 18, 19 and 21.*

Other References Cited: *P.S. Atiyah, The Sale of Goods, 7th Edition, Pitman Publishing Limited, London, 1982, reprinted 1985-86; Report on Sale of Goods, Ontario Law Reform Commission, Vols. I-III, 1979, Ministry of the Attorney General; The Uniform Sale of Goods Act, Institute of Law Research and Reform, Edmonton, Alberta, 1982.*

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Appeal No. 3069

WILLIAM NEILSON LTD./LTÉE **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
JOHN C. COLEMAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

SUMMARY

In this appeal, under section 51.19 of the *Excise Tax Act*, William Neilson Ltd./Ltée (Neilson) asks that a decision of the Minister of National Revenue be set aside. The Minister assessed Neilson $1,215,897.26 for unpaid federal sales tax, penalties and interest on candy bars and other such confectionary products which, under the May 23, 1985, federal Budget, became subject to sales tax of 10 percent as of July 1, 1985, and 11 percent as of January 1, 1986. The Minister's assessment related to goods ordered by Neilson's customers between May 23 and July 1, 1985, but not shipped until after July 1, 1985, and to goods ordered before January 1, 1986, but not shipped until after that date.

Neilson, in agreement with its customers, took various measures to have the property in the advance order goods pass to its customers before the July 1, 1985, and January 1, 1986, tax increase dates. Neilson's accounting and warehouse system was adjusted to ensure that there was enough inventory on hand to meet the advance orders and that goods were not shipped immediately, as would be usual, but that invoices were promptly sent to customers, stamped as follows: "Although shipment has been delayed, title in the above goods has passed to you on this date." Neilson employees also marked with yellow tape sections of inventory in the warehouse destined for filling the special orders. However, the goods for each individual order were not separated and identified and were not shipped and paid for until after July 1, 1985, or January 1, 1986. Neilson did not raise its prices to reflect the increased tax on these special orders, believing them not to be affected.

Neilson argues that it was entitled to arrange its affairs to reduce its tax liability and that it took all feasible measures to identify those goods which related to the special orders. It also demonstrated a common intention with its customers to have the property in the goods pass before the two dates when sales tax became applicable or increased.

The Tribunal finds that while Neilson was entitled to organize its affairs to minimize the amount of tax payable, it was unsuccessful in doing this. The Ontario *Sale of Goods Act*, which governs the rights and obligations of the parties in respect to property matters, states, in section 17, that in a contract for the sale of unascertained goods, property does not pass to the buyer until the goods are ascertained. In a case where there are multiple contracts of sale for portions of an undivided bulk of goods, this means that property does not pass until the goods are physically separated and identified in some manner as specific goods belonging to a particular customer.

The provision in subsection 18(1) that property "is transferred to the buyer at such time as the parties to the contract intend it to be transferred" applies only to goods which are already specific or ascertained. In this case, the goods for each of the special orders were not so ascertained until they were separated from other such goods in the warehouse and placed on pallets in preparation for delivery. As this did not occur until after July 1, 1985, or January 1, 1986, the property in the goods did not pass to the buyers until after those dates.

The Tribunal notes that draft legislation proposed in Ontario and Alberta in the form of a *Uniform Sale of Goods Act*, while eliminating the distinction between specific and unascertained goods, would still require goods to be "identified to the contract" before title could pass.

The Tribunal finds that the steps taken by Neilson to pass the property in the goods specially ordered before the sales tax changes of July 1, 1985, and January 1, 1986, fell short of the requirements of the Ontario *Sale of Goods Act*. The appeal is dismissed.

THE LEGISLATION

For the purpose of this appeal, the relevant statutory provisions are as follows:

Excise Tax Act,[1]

> *27.(1) There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods*
>
> *(a) produced or manufactured in Canada*
>
> *(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,*

1. R.S.C. 1970, c. E-13.

Sale of Goods Act[2]

17. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained.

18.(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

...

Rule 5. (i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.

(ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he shall be deemed to have unconditionally appropriated the goods to the contract.

...

21. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not...

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2. R.S.O. 1980, c. 462.

THE FACTS

This is an appeal pursuant to section 51.19 of the *Excise Tax Act* (the Act) by Neilson to set aside the decision of the Minister of National Revenue, No. 70202 AE, dated June 29, 1988. The decision assessed $1,215,897.26 for unpaid federal sales tax, including penalties and interest calculated to June 29, 1988. At the hearing of the appeal, the parties submitted an agreed statement of facts which set out the following information:

By Notice of Assessment No. TOR 6792, dated June 10, 1987, the respondent assessed the appellant, *inter alia*, the following amounts of tax:

(a) Sales Invoices dated June 1985 of confectionery products which are taxable - $933,166.75; and

(b) Adjustment for tax rate change - error in cutoff - goods shipped Jan./86 invoiced Dec./85 - tax calculated at 10% should be 11% - $14,014.00.

In addition to the amounts of tax assessed, interest and penalty in respect of these two items amounted to approximately $177,695.37.

By Notice of Objection dated July 2, 1987, Neilson objected to the assessment stating that the sales giving rise to the alleged tax liability of $933,166.75 did in fact take place prior to July 1, 1985, and the sales giving rise to the alleged tax liability of $14,014.00 did in fact take place prior to January 1, 1986.

Neilson is a corporation that, at the relevant time, pursuant to an agreement with George Weston Limited, managed the confectionery, dairy and ice cream business of George Weston Limited.

Pursuant to the May 23, 1985, federal Budget (the Budget), the federal tax exemption for candy/confectionery was repealed, effective July 1, 1985, and the rate of federal sales tax was increased from 10 to 11 percent, effective January 1, 1986. As a result, commencing July 1, 1985, federal sales tax was imposed on sales of candies/confectionery by Neilson at the rate of 10 percent of the sales price, and, on January 1, 1986, this rate was increased to 11 percent.

Neilson, as manager, began accounting for federal sales tax for sales made after June 30, 1985, as required by the Act at the rate of 10 percent of its sales price and for sales made after December 31, 1985, at the rate of 11 percent of its sales price.

To avoid the imposition of the federal sales tax on and after July 1, 1985, due to the loss of the exemption announced in the Budget, many of Neilson's customers placed orders prior to July 1, 1985, in anticipation of the announced tax.

Inventory levels were projected for the month of June 1985 and all sales branches were instructed by Neilson's Sales Administration Manager that sales could not exceed the projected inventory levels for the month. Neilson also used its perpetual inventory system to ensure that there was enough inventory on hand to meet accepted orders.

All of the orders placed before July 1, 1985, were aggregated. Sufficient inventory to fill these orders was segregated in a portion of Neilson's warehouse. This total inventory was identified by placing yellow tape around the entire segregated stock. While the inventory was segregated in bulk no further identification of the inventory was carried out. Specifically, individual cases of product were not identified as relating to individual customers or contracts.

All orders in question were received and recorded in Neilson's accounting system prior to July 1, 1985. Invoices for all orders in question were prepared prior to July 1, 1985. The creation of such invoices ensured that the Neilson accounting system recognized the orders as invoiced. However, segregated product was not actually shipped until after July 1, 1985.

Most invoices were stamped as follows:

Although shipment has been delayed, title in the above goods has passed to you on this date.

The remaining terms on the invoices were identical to those employed by Neilson in the normal course of its business.

After Neilson's customers were invoiced, Neilson held the inventory until the customers requested shipment of their inventory. No payment was required until the customers accepted delivery of the inventory. There was no change in the responsibility for payment for delivery.

In the belief that federal sales tax was not payable on sales to customers prior to July 1, 1985, Neilson did not increase its prices for such sales. Neilson did increase its prices to account for federal sales tax on sales made on and after July 1, 1985.

To avoid the increase in federal sales tax payable on sales after December 31, 1985, Neilson and its customers followed a similar procedure for goods purchased by such customers prior to January 1, 1986. In the belief that the sales would be subject to tax at the 10 percent rate applicable to sales made prior to January 1, 1986, Neilson did not increase its prices for such sales. Neilson did increase its prices to account for the federal sales tax rate increase on sales made on and after January 1, 1986.

The following additional information was provided during the hearing.

Representatives of two of Neilson's major customers gave evidence as to the arrangements that were made with Neilson following the Budget announcement. Mr. Stevens, who was general manager of ITWAL at that time, stated that his company entered into negotiations with all its chocolate bar suppliers in order to purchase the greatest quantity of bars before the tax was imposed. He stated that the tax increase was regarded in the industry as a price increase, and that the period before the imposition of the tax was therefore regarded as a one-time buying opportunity. Neilson agreed to store candy bars ordered by ITWAL prior to the July 1 tax date as ITWAL did not have sufficient storage facilities for the quantity of chocolate bars it wanted to purchase. It was the understanding of ITWAL that, although possession of the chocolate bars

would not be taken until after July 1, 1985, title to the goods would pass to ITWAL before that date. It was also arranged that Neilson's insurance would cover the segregated product while it was being stored in Neilson's warehouse. In the normal course, stated Mr. Stevens, risk would change at the point of delivery, which was at the time the product was loaded onto ITWAL's trucks.

Mr. McCloy, then the Ontario Regional Manager of Hudson Bay Wholesale, entered into similar arrangements with Neilson on behalf of Hudson Bay. As the company could not physically store the product ordered, it was to remain in Neilson's warehouse until delivery could be arranged, on the understanding that title to the goods would nevertheless pass to Hudson's Bay before the tax imposition date.

Mr. Luxbacher was the manager of warehouse operations at the Georgetown, Ontario, warehouse during this period, and he was called by the respondent to give evidence as to the events which transpired leading up to July 1, 1985, and the procedures put in place to implement the segregation scheme. Mr. Luxbacher testified that under Neilson's normal accounting procedure, once an order has been taken and inputted into the computer system, a document is generated which serves, *inter alia*, as a bill of lading and the warehouse "pick slip." It sets out the variety and quantity of product ordered by a particular customer, which the staff then "pick" from the inventory on hand and load onto pallets ready for delivery.

Mr. Simpson was responsible for managing inventory at the Georgetown warehouse at the relevant time in 1985. He stated that the warehouse measured 150,000 sq. ft. or approximately the size of two football fields. Individual bars were packed in boxes, which in turn were packed in cases. Cases were then piled onto pallet loads in uniform amounts and stored. Mr. Simpson stated that it was not feasible, given space limitations in the warehouse, to physically segregate each individual order. If customer orders for Crispy Crunch candy bars totalled 15,000 boxes and Crispy Crunch was stored in rows of 7,500 boxes, the staff would mark off two rows of the product by placing yellow tape around them. Thus, the inventory required for the advance orders was not physically separated from the rest of the stock.

Mr. Luxbacher stated that while segregation of goods was done on a daily basis during this period, activity in the warehouse around the segregation scheme began to escalate severely just prior to the July 1 cutoff date. On June 28, a Friday, the company's computer system failed, necessitating that staff come into the warehouse on the weekend to continue generating shipping documents as they were entered at the order entry department. As a result, a certain amount of customer orders placed before July 1 was not able to be segregated until after July 1. While Mr. Luxbacher estimated this to involve roughly 150 to 200 shipping documents, he stated that the volume of product involved was relatively small compared to the volume of product segregated prior to July 1, 1985.

No evidence was presented relating to the period preceding the tax increase which became effective on January 1, 1986.

THE ISSUES

The general taxing provision of the Act, subsection 27(1), provides that the tax imposed on the sale price of goods is payable by the producer or manufacturer when the goods are delivered, or at the time when the property in the goods passes, whichever is the earlier. There is no dispute that the goods in question were delivered after the dates when the sales tax increases became effective. The issue is therefore whether the property in the confectionery products sold by Neilson passed to its customers before or after the July 1, 1985, and January 1, 1986, effective dates for the increase in federal sales tax.

It is the central argument of the appellant that the intention of the parties as to the time when property in the goods is to pass is paramount in law under the *Sale of Goods Act,*[3] and that Neilson's did everything that it could practicably do under the circumstances to further the understanding with its customers that property pass prior to July 1, 1985. Section 18 of the Ontario *Sale of Goods Act* states that "the property in them [specific or ascertained goods] is transferred to the buyer at such time as the parties to the contract intend it to be transferred." Thus, argues the appellant, the respondent cannot impose upon the parties, contrary to their intentions, another time for the passage of property.

As authority for the principle that the intention of the parties is paramount, the appellant cites the case of *Inglis v. James Richardson & Sons Limited*.[4] The plaintiff, in that case, entered into a contract of sale with the defendant and paid for 4,000 bushels of wheat which was then transported to an elevator and stored with 20,000 bushels of wheat belonging to the defendant. The plaintiff had only taken delivery of 1,000 bushels of the wheat when a fire occurred which damaged all the wheat in the elevator. At issue was whether the property in the 3,000 bushels of wheat not delivered had passed to the plaintiff. Justice Hodgins of the Ontario Court of Appeal concluded, on page 240:

> *Intention is the test finally applied as determining the passing of the property, and there is authority for the position that, when everything has been done that, having regard to the situation of the parties and the position of the goods in question, could be done, on the one hand to part with the dominion over the goods and on the other to accept the right to demand the goods from a third party in lieu of actual present delivery, the intention to pass the property will be presumed.*
>
> *Benjamin, in his 5th edition, p. 312, says: "Nothing prevents the parties from agreeing ... that the property shall pass in a thing which remains in the seller's possession, and is not ready for delivery, as an unfinished ship ... as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel." But an examination of such cases ... leads one readily to accept the statement (Benjamin, p. 338) that it is impossible to deduce a consistent doctrine as to when the property passes, from the reported cases in England, on the sale of part of a larger bulk, which, he says, are in hopeless conflict.*

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3. Supra, footnote 2.
4. (1913), 29 O.L.R. 229.

The court then stated, at page 244, "... it is reasonable to hold that, under all the circumstances, the property had passed to the appellant before the fire."

The appellant states that the Inglis case is also support for the proposition that the segregation of goods in bulk without specific identification of goods as applicable to individual customers is sufficient to allow property in the goods to pass. Thus, once the goods were in existence and were physically in the warehouse and available to go to the various contracts, the property passed when the parties intended it to pass.

Two American cases, *United States v. Amalgamated Sugar Co.*[5] and *Standish Pipe Line Co. et al. v. Oklahoma County Excise Board,*[6] are also cited by the appellant for the proposition that title to an unseparated part of a larger quantity of fungible property passes under a valid contract of sale without separation or segregation if that is the intention of the parties. The court in Amalgamated Sugar Co. found that individual purchasers of bags of beet sugar were owners of respective interests and tenants in common in the bulk of the bags of sugar sold.

Counsel for the appellant claim that there is nothing in the *Sale of Goods Act* which prevents Neilson's customers from being tenants in common in the bulk of confectionery products segregated in Neilson's warehouse, and that the customers as a group could have the intention to pass the property. Thus, when the quantity of confectionery products sufficient to meet the orders placed were separated from the rest of Neilson's stock, the goods became ascertained in bulk enabling the property in them to pass to Neilson's customers.

The respondent claims that the goods in issue were unascertained goods within the meaning of section 17 of the Ontario *Sale of Goods Act.* Therefore, the property in them did not pass to the buyers before July 1, 1985, as it is clearly stated in that section that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained. On this point, the respondent cites an excerpt from the seventh edition of Atiyah's book, The Sale of Goods,[7] at pages 235 and 236:

> *It is clear that Sect. 16 [section 17 in Ontario] must be the starting point in considering the passing of property in a sale of unascertained goods. The section lays down the fundamental rule that the property cannot pass until the goods are ascertained, and this clearly takes precedence over the intention of the parties. Indeed, Sect. 17 [section 18 in Ontario], which deals with the intention of the parties, only operates in a sale of 'specific or ascertained' goods. There is thus no provision covering the passing of property in goods which are still unascertained for the good reason that the Act clearly does not contemplate this as a legal possibility at all. No matter what the parties may have intended, property cannot pass until the goods are ascertained.*

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5. (1934), 72 F. (2d) 755 (Circuit Court of Appeals, Tenth Circuit).
6. (1943), 141 P. 2d 281 (Supreme Court of Oklahoma).
7. P.S. Atiyah, The Sale of Goods, 7th Edition, Pitman Publishing Limited, London, 1982, reprinted 1985-86.

The respondent further states that in order for the goods to become ascertained they must be unconditionally appropriated to the contract as per section 19, rule 5(i) of the Ontario *Sale of Goods Act.* When a portion of a bulk is sold, unconditional appropriation does not take place until a portion is irrevocably selected from the bulk and allocated to the particular contract. Pursuant to rule 5(ii) of the Ontario *Sale of Goods Act,* this normally occurs when the goods are delivered to the purchaser.

The respondent maintains that while unascertained goods may be unconditionally appropriated to the contract before delivery takes place where goods sufficient to fulfil the contract are separated, packed and addressed for delivery to the purchaser, such segregation did not occur in this case at any time prior to preparation for actual delivery and, in any event, not prior to July 1, 1985, and January 1, 1986. In this regard, counsel for the respondent cites the case of *Healey v. Howlett & Sons*[8] where the court states, at page 343:

> *The result of those authorities is abundantly clear and is that the goods become the property of the consignee and are at his risk so soon as they are marked off by some distinct act as his, and not the seller's, and are delivered to the carrier as the agent to complete delivery to the purchaser. But in the present instance out of 190 boxes a portion were to belong to the defendants, a London firm, and none had been marked off. I am not aware that in any similar case it has been held that because all the parcels were meant to be divided between three separate purchasers in London there was an appropriation of them all to the risk of the purchasers when it was impossible to say at whose risk any one of the boxes could be.*

In the alternative, states the respondent, if the goods in issue are properly viewed as specific or ascertained, the real intent of the parties with respect to the transfer of property must be determined having regard to the "terms of the contract, the conduct of the parties and the circumstances of the case" as per section 18 of the *Sale of Goods Act*. The respondent asserts that it is a principle of tax law that a taxpayer's intention should not be determined solely by statements of intention, but regard must also be paid to the objective facts of the case.

The respondent claims that the only purpose of the appellant's plan to pass the property in the goods before the tax increase dates was to avoid the payment of federal sales tax. In other respects, such as the assumption of risk and the terms of delivery and payment, the contracts of sale between Neilson and its customers remained the same. Thus, argues the respondent, the real intent of the parties was not to change the nature of the contract of sale but to avoid paying federal sales tax.

DECISION

It is well settled law that a taxpayer is free to organize his affairs so as to minimize the amount of tax payable. The question is not whether it may be done, but whether it has been done

8. [1917] 1 K.B. 337.

successfully. It is apparent to the Tribunal that Neilson and its customers had a common intention to effect a 'sale' of advance orders of confectionery products and thus to transfer the property in those goods before July 1, 1985, with the express purpose of avoiding the payment of federal sales tax. The issue here is whether that was accomplished.

In order to manifest that intention, Neilson's accounting procedure was adjusted so that the computer system generated invoices which were sent to Neilson's customers prior to delivery of the goods. The invoices stated that property in the goods described therein passed to the customer on the date of receipt of the invoice. This triggered the perpetual inventory system to account for the advance orders as sold and removed from inventory. In addition, Neilson received confirmation from its insurance brokers that its insurance coverage would protect the product being stored in its warehouse although it was the property of Neilson's customers.

The Tribunal is also satisfied that quantities of product sufficient to meet the orders placed before July 1, 1985, were existing and segregated in bulk in the warehouse. While it was not shown that any of the goods set aside for future delivery was identified as going to a particular customer, the total amounts of each of the product lines necessary to fill the advance orders was marked with yellow tape which differentiated it from the rest of the inventory. In summary, the Tribunal finds that there is ample evidence of the intention of Neilson and its customers to transfer the property in the goods at issue before the tax imposition date. However, the issue of intention is not the end of the matter.

In Ontario, the *Sale of Goods Act* provides rules for determining when the property in goods shall pass. Section 17 of that Act provides that in the case of a contract for the sale of unascertained goods, "no property in the goods is transferred to the buyer until the goods are ascertained." In the case of "specific or ascertained goods," section 18 provides that "the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." The question of intention, then, does not become relevant until it has been determined that the goods are specific or ascertained. Thus the prior question to be addressed is whether the inventory designated for the advance customer orders, which was segregated in bulk from the rest of Neilson's inventory, was "ascertained" within the meaning of the *Sale of Goods Act.*

The Ontario *Sale of Goods Act* does not provide a definition of "ascertainment" or "ascertained goods." However, the subject has been interpreted by the courts on a number of occasions. The concept of ascertainment is discussed at length in the case of *Karlshamns Oljefabriker v. Eastport Navigation [The Elafi]*,[9] which concerned a cargo of 22,000 tons of copra for which different purchasers held contracts of sale for portions of that cargo. The following excerpt is particularly relevant to the facts in this appeal:[10]

> *The section [section 16 - section 17 in Ontario] refers to 'a contract for the sale of unascertained goods' and says that the property shall not pass 'unless and until the goods are ascertained.' In their most natural sense the words 'the goods'*

9. [1982] 1 All E.R. 208.
10. Ibid. at page 214.

> *would be read as referring to the goods which are the subject of the contract in question, so that one can say of them that 'these are the goods which refer to that contract.' ... But when one comes to deal with an unusual situation, such as exists here, it is in my view legitimate to look at the reasoning which underlies the legislation. This is quite plain. The passing of property is concerned with the creation of rights in rem, which the purchaser can assert not only against the vendor but against the world at large, and which he can alienate in such a way as to create similar rights in a transferee. Where there are multiple contracts of sale in the hands of different buyers, in relation to an undivided bulk, there are only two possible solutions. First, to hold that the buyers take as joint owners in undivided shares. English law has rejected this solution. The only alternative is to hold that the property does not pass until the goods are not only physically separated but separated in a way which enables an individual buyer to say that a particular portion has become his property under his contract of sale, for until then, ... no one can say which part of the whole quantity the seller has agreed to deliver.*

Since the introduction of the Sale of Goods Acts in England and Canada, the law has been clear on this point. Where there are multiple contracts of sale for portions of an undivided bulk, the property does not pass until the goods are not only physically separated, but identified in some manner as specific goods belonging to a particular customer. In the passage from the Inglis case cited by the appellant, Sutherland, J. remarked that "it is impossible to deduce a consistent doctrine as to when the property passes ... on the sale of part of a larger bulk...." That case was decided in 1913, and since the enactment of the *Sale of Goods Act* in Ontario in 1920, it can no longer be said there is no consistent doctrine.

This is not to say that there is not still a good deal of conflict or confusion surrounding some areas of sale of goods law. This fact, no doubt, prompted two comprehensive studies of this area of the law: in 1979, by the Ontario Law Reform Commission,[11] and in 1982, by the Alberta Institute of Law Research and Reform.[12] The result of these works was proposed draft legislation in the form of the *Uniform Sale of Goods Act.*[13]

It is interesting to note, however, that the draft legislation leaves relatively unchanged the current law regarding the transfer of property in the case of a contract of sale for unascertained goods. While the distinction between specific and unascertained goods would be eliminated, nevertheless, all goods would have to be "identified to the contract" before title could pass. Under the proposed rules, title to goods would pass when possession was vested in the buyer, and where a contrary intention was expressed, title could not pass, in any event, until the goods were identified to the contract.[14]

Section 7.1 of *The Uniform Sale of Goods Act* proposes that identification would occur, if

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11. Report on Sale of Goods, Volumes I-III, 1979, Ministry of the Attorney General.
12. Report No. 38, The Uniform Sale of Goods Act, 1982.
13. Adopted by the Uniform Law Conference of Canada in 1982.
14. The *Uniform Sale of Goods Act*, 1982, s. 6.1.

the contract was for the sale of future goods, when goods were "shipped, marked or otherwise designated by the seller as goods to which the contract refers." The Tribunal concurs in the view expressed in the Alberta study[15] that this is effectively the same as the present test of ascertainment.

The inventory which Neilson set aside to fill the advance customer orders was an undifferentiated bulk of confectionary products. It is admitted that no attempt was made to physically separate or identify individual cases of product as relating to individual customers. In the language of Justice Mustill in The Elafi, no individual buyer could say that a particular portion had become his property. In the result, the Tribunal finds that the steps taken by Neilson to pass the property in those goods to its customers clearly fell short of the requirements in law.

CONCLUSION

The appeal is dismissed. It is the finding of the Tribunal that the steps taken by Neilson to pass the property in the goods at issue, ordered by its customers before July 1, 1985, and January 1, 1986, and delivered after those dates, fell short of the requirements in law, and thus the sales of those goods are liable to federal sales tax at the increased rates.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

John C. Coleman
John C. Coleman
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

15. At pages 95-96.