CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 14, 1999

Appeal No. AP-98-100

IN THE MATTER OF an appeal heard on June 29, 1999, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF two decisions of the Deputy Minister of National Revenue dated November 25, 1998, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

BRUNSWICK INTERNATIONAL (CANADA) LIMITED **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part (Member Close dissenting).

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-98-100

BRUNSWICK INTERNATIONAL (CANADA) LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from two decisions of the Deputy Minister of National Revenue made under section 63 of the *Customs Act* relating to the value for duty of certain bowling and billiard equipment imported into Canada by the appellant. The importations at issue involve three types of goods: bowling capital equipment, bowling small goods and billiard goods. At issue in this appeal is whether the value for duty of these goods should be based on the price at which the appellant allegedly purchases the goods from Brunswick Bowling & Billiards Corporation (BB&B), as claimed by the appellant, or whether the value for duty of the goods should be based on the price at which BB&B allegedly sells the goods to the Canadian end user, as determined by the respondent.

HELD: The appeal is allowed in part. In respect of the value for duty of the bowling capital equipment, the Tribunal is of the view that the value for duty of these goods should be based on the transaction value between the appellant and BB&B. The appellant and BB&B are distinct legal entities, and the appellant is not the agent of BB&B. There is a sale between BB&B and the appellant and a sale between the appellant and the Canadian end user. The sale between BB&B and the appellant is a sale for export to Canada, and the appellant, having a permanent establishment in Canada, is a "purchaser in Canada". Finally, there was an ascertained price paid or payable at the time that the goods were sold by BB&B to the appellant for export to Canada. Therefore, the value for duty of the bowling capital equipment should be based on the transaction value between the appellant and BB&B.

The dissenting member is of the view that, in respect of the bowling capital equipment, there was no sale between the appellant and BB&B according to subsection 48(1) of the *Customs Act*. Given the degree of control that BB&B had over the sales to the Canadian end user and the transaction price of the goods paid by the appellant, the appellant did not participate in two independent sales (one between BB&B and the appellant and one between the appellant and the Canadian end user), but rather assisted with a single sale between BB&B and the Canadian end user. Therefore, the value for duty of the bowling capital equipment should be based on the value of the sale written into the sales contract with the end user and not on the transaction value between BB&B and appellant.

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During the hearing, the appellant stated that it would not be addressing the issue of the value for duty of the bowling small goods and billiard goods. As the appellant failed to produce evidence, which establishes a *prima facie* basis upon which to question the correctness of the respondent's determination in respect of these goods, the Tribunal determines that the appeal in respect of these goods is dismissed.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 29, 1999
Date of Decision:	December 14, 1999
Tribunal Members:	Arthur B. Trudeau, Presiding Member Patricia M. Close, Member Peter F. Thalheimer, Member
Counsel for the Tribunal:	Tamra Alexander
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Kenneth H. Sorensen, Brenda C. Swick-Martin and Trina Fraser, for the appellant Elizabeth Richards, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-98-100

BRUNSWICK INTERNATIONAL (CANADA) LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
PATRICIA M. CLOSE, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under section 67 of the *Customs Act*[1] from two decisions of the Deputy Minister of National Revenue, dated November 25, 1998, made under section 63 of the *Act* relating to the value for duty of certain bowling and billiard equipment imported into Canada by the appellant. The importations at issue involve three types of goods: bowing capital equipment, bowling small goods and billiard goods. At issue in this appeal is whether the value for duty of these goods should be based on the price at which the appellant allegedly purchases the goods from Brunswick Bowling & Billiards Corporation (BB&B), a Delaware corporation located in Muskegon, Michigan, and Bristol, Wisconsin, as claimed by the appellant, or whether the value for duty of the goods should be based on the price at which BB&B allegedly sells the goods to the Canadian end user, as determined by the respondent. The relevant provisions of the *Act* are as follows:

> 47. (1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.
>
> 48. (1) . . . the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined and if . . .
>
> (*d*) the purchaser and the vendor of the goods are not related to each other at the time the goods are sold for export or, where the purchaser and the vendor are related to each other at that time,
>
> (i) their relationship did not influence the price paid or payable for the goods . . .
>
> (4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

The *Valuation for Duty Regulations*[2] define a "purchaser in Canada" 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

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter the *Act*].
2. S.O.R./86-792 [hereinafter *Regulations*].

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> (*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,
>
> (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.

Section 2 of the *Regulations* defines, as follows, both "permanent establishment" and "resident" for the purposes of the above definition:

> "permanent establishment", in respect of a person, means 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.
>
> "resident" means
>
> (*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.

EVIDENCE

Messrs. Kenneth Lindgren, C.P.A., Manager - Tax, Brunswick Corporation, Pat Haggerty, District Manager - Canada, Brunswick International (Canada) Limited, and Pat Mitchell, President, Expert Fishing Co. (Expert Fishing), gave evidence on the appellant's behalf. Mr. Lindgren explained that Brunswick Corporation is a publicly traded company on the New York Stock Exchange that owns a number of companies which manufacture and sell recreational equipment, such as fishing, bowling, billiard and fitness equipment. Mr. Lindgren stated that Brunswick Corporation wholly owns BB&B and Brunswick International Limited. He stated that Brunswick International Limited wholly owns the appellant. According to the 1997 Intercompany Pricing Report Update of the Brunswick Indoor Recreation Group of the Brunswick Corporation (the 1997 Pricing Report) discussed by Mr. Lindgren, both BB&B and the appellant form part of the Brunswick Indoor Recreation Group, through which Brunswick Corporation and its related corporations co-ordinate product sales throughout the world. BB&B sources Brunswick billiard and bowling products either by manufacturing the products or by purchasing them from other vendors. The appellant purchases Brunswick billiard and bowling products from BB&B for sale to customers in Canada.

Mr. Lindgren explained that the appellant was incorporated in Canada on September 2, 1971, and is registered to carry on business in various provinces in Canada. Mr. Lindgren indicated that the appellant has a main sales office in Mississauga, Ontario, with administrative personnel and an inventory control person, as well as three other sales offices located throughout Canada. He testified that the appellant also has financial operations located in Mississauga, which are operated by its treasurer and assistant secretary. Mr. Lindgren stated that the appellant's sales force solicits sales of bowling capital equipment from Canadian customers. In respect of these sales, Mr. Lindgren stated that BB&B performs accounting and credit check functions for the appellant. Mr. Lindgren stated that the appellant pays BB&B for those services and that separate accounting and financial records are maintained by BB&B for the appellant. He also stated that the appellant designs its own advertisements and advertises in Canada. Mr. Lindgren was unable to confirm whether BB&B approves the advertisements, but was able to confirm that Brunswick Corporation does not approve the advertisements.

Mr. Lindgren testified that the appellant issued T-4s to approximately 40 employees during the years audited by the respondent. He stated that none of the appellant's employees are also employed by Brunswick Corporation or BB&B. Mr. Lindgren testified that the appellant maintains medical, dental and pension plans for its employees and files Canadian tax returns. Mr. Lindgren stated that the appellant has two bank accounts in Canada, one for its general operations and an interest account for payroll. Mr. Lindgren testified that the Canadian employees are paid from the appellant's Canadian payroll account. In cross-examination, Mr. Lindgren acknowledged that employees' cheques are issued from Tulsa, Oklahoma, and Muskegon.

Mr. Lindgren indicated that the appellant has two Canadian directors and one US director and that its board meetings are held in Canada. Mr. Lindgren stated that the appellant owns property in Dauphin, Manitoba, on which a warehouse is located. He indicated that the appellant maintains inventory in the warehouse and has contracted out the running of the warehouse to Expert Fishing. Mr. Lindgren testified that the appellant has taken, in its own name, legal action in Canada in order to collect bad debts.

Mr. Lindgren described the sequence of a sale of bowling capital equipment and the role played by the appellant and BB&B. Mr. Lindgren explained that BB&B is required by US tax law to establish a transfer price for the bowling capital equipment sold by BB&B to the appellant that is comparable to an arm's length price. Brunswick Corporation's pricing study has established cost plus 18 percent as the arm's length price for US tax purposes. Mr. Lindgren testified that, other than in respect of discontinued products or where there is excess inventory, the appellant always obtains bowling capital equipment from BB&B at cost plus 18 percent. Mr. Lindgren stated that BB&B never sells directly to end users in Canada.

Mr. Lindgren explained that the appellant has a sales force in Canada that solicits sales of bowling capital equipment. The appellant's sales force contacts the potential customer, negotiates the price and the terms of the sales contract and accepts the order, subject to a credit check that is performed by BB&B for the appellant. The salesperson enters into a contract with the customer on behalf of the appellant and receives a deposit from the customer. The deposit is in the appellant's name and is deposited in the appellant's Canadian lock box. The salesperson then fills out a sales summary which lists the equipment and specifications that the customer wants, and this summary is provided to BB&B. Mr. Lindgren stated that the appellant does not purchase goods from BB&B until the appellant has a customer because the goods are custom orders and too costly to inventory.

Mr. Lindgren explained that BB&B ships the goods directly to the appellant's customer. BB&B issues an invoice to the appellant for the goods, and an invoice in the appellant's name is issued to the customer. The customer pays the invoice by cheque made out to the appellant, which is deposited in the appellant's lock box in Canada. Mr. Lindgren testified that the goods are shipped from BB&B FOB shipping point, at which time title and risk pass to the appellant. Mr. Lindgren stated that, although BB&B and the appellant have a common carrier agreement through Brunswick Corporation, the appellant pays the carrier directly. Mr. Lindgren testified that, if a deal between the appellant and its customer falls through, the appellant is responsible for paying for the goods. Mr. Lindgren testified that the appellant is responsible for all warranty costs relating to the sales.

Mr. Lindgren testified that the appellant's financial records support his testimony, in that they evidence: (1) the sale between BB&B and the appellant and between the appellant and the Canadian customer; (2) inventory levels at the Manitoba warehouse; (3) the appellant's payments for services provided by its affiliates and carrier services; (4) employment levels; (5) pension and benefit programs; and (6) warranty payments. Mr. Lindgren testified that the appellant is a separate profit centre from BB&B and

Brunswick Corporation and that profits from the appellant's operations are reinvested in Canada. He also testified that the appellant has the authority to purchase supplies as needed, but acknowledged that it is preferred that it purchase through Brunswick Corporation in order to obtain the best value for the money.

Both in his examination in chief and in cross-examination, Mr. Lindgren was questioned on the content of the contracts between the appellant and its Canadian customers. In particular, he was asked why, if the contracts are between the appellant and its Canadian customers, provisions relating to payment, the training of staff and warranties refer to BB&B's facilities in Michigan. Mr. Lindgren explained that the appellant copied BB&B contracts and mistakenly carried over these references. Similarly, Mr. Lindgren testified that the "Representative Agreement" tendered into evidence, which purports to be between BB&B and a Canadian distributor, was between the appellant and the Canadian distributor. Mr. Lindgren testified that, despite the terms of the agreement, it is the appellant and not BB&B that owns the inventory, pays for the shipping of all materials, bills and collects retail moneys and provides credit to the Canadian distributor. Mr. Lindgren also testified that the apparent letter of acceptance by BB&B to a Canadian customer tendered into evidence was, in fact, a public relations letter that is only issued 20 to 25 percent of the time, sometimes even after the goods are installed.

In cross-examination, Mr. Lindgren acknowledged that, in most cases, the appellant pays BB&B for the goods after the appellant has been paid by the customer. Mr. Lindgren also stated that statements in the appellant's tax returns, which suggest that the appellant did not pay management salaries or directors' fees, are incorrect.

Mr. Haggerty testified that he has the authority to enter into contracts on behalf of the appellant. He stated that he negotiates the product mix and selling price for bowling capital equipment with the customer on behalf of the appellant. Mr. Haggerty testified that, although he uses BB&B contract forms, he has full authority to amend the terms as required. Mr. Haggerty stated that he does not report daily to BB&B on his negotiations or selling activities. Mr. Haggerty testified that, even where a customer has signed a contract that has BB&B's name on it in error, the customer knows that it is dealing with the appellant. Mr. Haggerty stated that the paperwork was secondary.

Mr. Haggerty testified that the sales summary constitutes the appellant's order to BB&B. He stated that, while the credit check is being done by BB&B, he continues to work with the customer to facilitate financing. He also continues to work with the customer to ensure that pre-installation requirements are fulfilled, and he discusses after-sales service with the customer. Mr. Haggerty testified that the appellant also conducts training for its customers in Canada.

Mr. Haggerty explained to the Tribunal that he consults with BB&B during negotiations of a contract where the goods required are not part of BB&B's usual product line of 6,000 stock keeping units. In such a case, he would send an exception request to BB&B to ascertain the cost plus 18 percent in order to establish his margins. Mr. Haggerty confirmed the testimony of Mr. Lindgren as to the sales process for bowling capital equipment and the appellant's responsibility for warranty costs.

In cross-examination, Mr. Haggerty was questioned on a number of documents in which it appeared that BB&B was amending the appellant's order. Mr. Haggerty testified that BB&B was ensuring that the proper goods were ordered to complete the bowling system. He stated that ensuring that the customer received the right product was in the interest of both corporations.

Mr. Mitchell testified that the appellant owns the warehouse in Manitoba and that it is the appellant that pays Expert Fishing to manage the warehouse.[3] Mr. Mitchell stated that he was instructed by the appellant to place stickers on the goods in the warehouse that state that the goods are the property of the appellant.

ARGUMENT

During the hearing, counsel for the appellant stated that the appellant would not be addressing the issue of the value for duty of bowling small goods or billiard goods. Counsel addressed only the value for duty of bowling capital equipment in argument.

Counsel for the appellant stated that the criteria for using the transaction value between the appellant and BB&B to determine the value for duty of the bowling capital equipment are:

(a) there must be a sale between the appellant and BB&B;

(b) that sale must be "for export to Canada";

(c) the appellant must be a "purchaser in Canada"; and

(d) there must be an ascertained price paid or payable by the appellant to BB&B when the goods are sold for export.

Counsel for the appellant submitted that there was a sale between the appellant and BB&B, as no agency relationship exists between the companies. Counsel stated that the fact that the two companies are related does not preclude the use of the transaction value method nor is it determinative of whether there is a sale between the companies.[4] Counsel submitted the following, *inter alia*, as evidence of the sale between BB&B and the appellant and the sale between the appellant and its Canadian customer: (1) the appellant's employees solicit sales from Canadian customers and negotiate the terms of the contract; (2) the appellant enters into the contract with the Canadian customer subject only to the credit check performed by BB&B; (3) the reason that the contract is sent to BB&B is so that the credit check can be performed; (4) the sales summary, which is prepared by the appellant's sales employee, serves as the appellant's offer to purchase goods from BB&B; (5) the appellant's employees continue to consult with the Canadian customer while the credit check is being performed; (6) BB&B ships the goods once the credit check is approved, and the act of shipping the goods is BB&B's acceptance of the appellant's offer to purchase; (7) the goods are shipped directly to the Canadian customer; (8) BB&B invoices the appellant for the goods; (9) the appellant's books show an account payable to BB&B and BB&B's books show an account receivable from the appellant; (10) the Canadian customer is sent an invoice in the appellant's name, instructing the customer to pay the appellant; (11) payment for the goods is made by the appellant to BB&B by wire transfer; and (12) the Canadian customer pays the appellant, and the funds are deposited in its Canadian bank account. Counsel submitted that the facts in this case are very similar to those in *Moda Imports*[5] in which the Tribunal found that there was a sale between the parent and its subsidiary.

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3. When presented with evidence of a 1994 contract for the management of the warehouse between Expert Fishing and Zebco (a division of Brunswick Corporation located in Tulsa), Mr. Lindgren explained that the 1994 contract was mocked up and never executed. Mr. Lindgren stated that the 1994 contract was not in effect in 1996 and that it is the appellant that pays Expert Fishing to manage the warehouse.
4. For this proposition, counsel for the appellant relied on *Moda Imports* v. *D.M.N.R.* (3 September 1997), AP-95-296 (C.I.T.T.) [hereinafter *Moda Imports*].
5. *Ibid.*

In addressing the sales contracts with the appellant's Canadian customers and other documents which either specified BB&B as the seller or referred to BB&B's premises in respect of certain terms, counsel for the appellant submitted that the documents should be interpreted in the "most commercially reasonable" manner.[6] Counsel stated that the testimony of the appellant's witnesses, to the effect that these documents were US documents used by the appellant without proper amendment, resolves any inconsistencies that may stem from these documents. Counsel also noted that, in five of the six contracts on the record, the appellant is specifically identified as the seller of the bowling capital equipment to the Canadian customer. Counsel submitted that the evidence reveals that the true nature of the commercial transaction was that there was a sale between BB&B and the appellant and between the appellant and the Canadian customer.

Counsel for the appellant submitted that the sale between BB&B and the appellant is a sale for export to Canada, as the goods are shipped by BB&B from the United States directly to the appellant's customer in Canada. Counsel submitted that the sale between the appellant and the Canadian customer is a domestic sale.

Counsel for the appellant submitted that the appellant is a "purchaser in Canada". Counsel submitted that the appellant is a "resident", as that term is defined in the *Regulations Amending the Valuation for Duty Regulations*.[7] Counsel stated that a "resident" is a corporation that carries on business in Canada and of which the management and control is in Canada. Counsel submitted that the appellant carries on business in Canada, in that, *inter alia*, it enters into sales, owns a warehouse, maintains inventory, employs personnel, has bank accounts, pays taxes and maintains employee benefit and pension plans in Canada. Counsel submitted that management and control of the appellant is in Canada, in that, *inter alia*, Mr. Haggerty is responsible for the day-to-day operations of the appellant and Mr. Bob Culver, who is located in Mississauga, invests the appellant's profits in Canada without the need for US authority.

In the alternative, counsel for the appellant submitted that, if the appellant is not a resident, it has a permanent establishment in Canada. Counsel stated that there are two requirements to have a permanent establishment in Canada: (1) there must be a fixed place of business in Canada; and (2) business must be carried on through this fixed place of business. Counsel submitted that the appellant had several fixed places of business, including the warehouse in Manitoba and four offices throughout Canada, out of which the appellant's sales employees sold bowling capital equipment during the audit period. For the reasons set out above in respect of the criteria required to establish that the appellant is a resident, counsel submitted that the appellant carries on business through its fixed places of business. Therefore, counsel submitted that the appellant is a "purchaser in Canada".

Finally, counsel for the appellant submitted that there was an ascertained price payable by the appellant to BB&B when the goods were sold for export to Canada and that the price was evidenced on the invoices prepared by BB&B prior to the shipment of the goods. Counsel stated that the price payable was known to both BB&B and the appellant prior to export as being BB&B's cost plus 18 percent. For these reasons, counsel submitted that the transaction value to be used in the sale for export of the bowling capital equipment to a purchaser in Canada is the transaction price between the appellant and BB&B.

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6. For this proposition, counsel for the appellant relied on *Oceanic Exploration* v. *Denison Mines* (13 December 1996), B322/94 (O.C.J.).
7. S.O.R./97-443.

Counsel for the respondent submitted that, as the appellant did not call evidence at the hearing with respect to the bowling small goods and billiard goods, the appeal in respect of the value for duty of those goods should be dismissed.

Counsel for the respondent agreed with the four criteria set out by counsel for the appellant as being necessary to determine whether the transaction value is the value for duty of the goods. Counsel submitted that there is no sale between the appellant and BB&B, as the appellant acts as BB&B's agent. Counsel submitted that evidence of the agency relationship can be found, in that, *inter alia*: (1) Brunswick Corporation prepared the contract forms used by the appellant; (2) in some of the contracts, BB&B was listed as the vendor, and all the contracts referred to BB&B's premises; (3) documentary evidence suggests that BB&B accepted the contracts with the Canadian customer; (4) the appellant must file exception requests with BB&B before committing to provide goods which are not in BB&B's product lists; (5) the appellant does not attempt to obtain bowling capital equipment from any manufacturer other than BB&B; (6) other documentation used by the appellant refers only to BB&B; (7) goods are only ordered by the appellant after a Canadian customer has been secured; (8) BB&B reviews the contracts for the appellant; and (9) the appellant submits product trouble reports to BB&B requesting replacement or repair. Counsel submitted that the appellant's position that there are multiple errors in the documentary evidence tendered is not tenable and that little or no weight should be given to the testimony of the witnesses for the appellant.

Counsel for the respondent submitted that, in addition to clear documentary evidence, there is additional evidence of the agency relationship, in that, *inter alia*: (1) all accounting records and invoices are prepared and maintained by BB&B; (2) BB&B issues all cheques; (3) office supplies are to be purchased from BB&B; (4) BB&B employees have considerable involvement in post-contract service; (5) there is no negotiation of the BB&B price; (6) goods are shipped directly from BB&B to the Canadian purchaser; (7) the appellant maintains no inventory; (8) freight and insurance contracts are negotiated by Brunswick Corporation; and (9) BB&B employees perform warranty services on the goods in Canada. Therefore, counsel submitted that the appellant is the agent of BB&B and that no sale occurs between them. As there is no sale between BB&B and the appellant, counsel submitted that the sale for export to a purchaser in Canada must be the sale between BB&B and the Canadian customer.

If it is determined that a sale took place between the appellant and BB&B, counsel for the respondent submitted that the appellant is not a "purchaser in Canada" within the meaning of the *Regulations*. Counsel submitted that, for the reasons set out above, BB&B maintains control over the operation and management of the appellant; therefore, the appellant is not a "resident". Further, as the solicitation of sales is controlled by a US company, counsel submitted that the appellant does not operate a fixed place of business through which a business is carried on in Canada. Therefore, the appellant does not have a "permanent establishment" in Canada. For the forgoing reasons, counsel submitted that the appellant is not a purchaser in Canada

DECISION

Sections 47 and 48 of the *Act* provide that the value for duty of goods is to be the transaction value 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. As noted above, a "purchaser in Canada" is defined in the *Regulations* as, *inter alia*, a resident or a person who is not a resident but who has a permanent establishment in Canada. In respect of corporations, "resident" is defined in the *Regulations* as "a corporation that carries on business in Canada and of which the management and control is in Canada". The *Regulations* define a "permanent

establishment" as "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". Memorandum D13-1-3[8] sets out the respondent's policy guidelines with respect to the definition of a "purchaser in Canada". Memorandum D13-4-2[9] sets out the respondent's policy guidelines with respect to the interpretation of the phrase "sold for export to Canada".

The appellant did not address the issue of the value for duty of bowling small goods or billiard goods during the hearing. As the appellant failed to produce evidence that establishes a *prima facie* basis upon which to question the correctness of the respondent's determination in respect of these goods, the appeal in respect of these goods is dismissed.

In respect of the value for duty of the bowling capital equipment, the appellant and the respondent disagreed on two issues: (1) whether there was a sale between the appellant and BB&B; and (2) whether the appellant is a "purchaser in Canada". The Tribunal accepts the position of the appellant and the respondent that, in order to use the transaction value between BB&B and the appellant as the basis for the value for duty of the bowling capital equipment, the following criteria must be met:

(a) there must be a sale between the appellant and BB&B;

(b) that sale must be "for export to Canada";

(c) the appellant must be a "purchaser in Canada"; and

(d) there must be an ascertained price paid or payable by the appellant to BB&B when the goods are sold for export to Canada.

The Tribunal will address each of these criteria in turn.

Is there a sale?

The Tribunal's review of relevant jurisprudence reveals that the elements of a sale are threefold:

(a) there must be two parties, standing in relation of buyer and seller to one another;

(b) both parties must agree to the same proposition; and

(c) there must be a passage of title and consideration.[10]

In order for there to be two parties, standing in relation of buyer and seller to one another, there must be two separate legal entities involved in the transaction. It is a cornerstone of Canadian corporate law that corporations, even where one is a wholly owned subsidiary of the other or where they are both wholly owned subsidiaries of the same parent corporation, are distinct legal entities.[11] Thus, generally, there can be a sale between a corporation and its parent, subsidiary or sister corporation. However, the presumption of separate legal identity can be rebutted in exceptional circumstances. Where the corporate structure was established as a sham, where one corporation is completely dependent on the other or is its puppet, or where a subsidiary is

8. Department of National Revenue, *Customs Valuation: Purchaser in Canada Regulations (Customs Act, Section 48)* (11 December 1998).
9. Department of National Revenue, Customs and Excise, *Customs Valuation: Sold for Export to Canada (Customs Act, Section 48)* (21 August 1989).
10. For example, see *Joe Ng Engineering* v. *Gerling Global General Insurance* (24 December 1997), SR-96-CU-112421 (Ont. Ct. Gen. Div.), 37 O.R. (3d) 359.
11. *Salomon* v. *Salomon*, [1897] A.C. 22.

"bound hand and foot to the parent company and must do just what the parent company says",[12] Canadian courts have "pierced the corporate veil" and found that the two corporations are but one entity.

The Tribunal is of the view that the appellant, BB&B and Brunswick Corporation are distinct legal entities. In reaching this conclusion, the Tribunal relied primarily on the following: (1) the day-to-day management of the appellant's operations is carried out by Mr. Haggerty, an employee of the appellant; (2) the appellant is free to negotiate the terms of sale with its customers; (3) the appellant employs and pays its own employees and maintains pension, medical and dental plans for those employees; (4) the appellant has its own premises in Canada; (5) although maintained by BB&B, the appellant has separate books and records; (6) the appellant maintains separate bank accounts in Canada; and (7) proceeds of the appellant's business are retained by the appellant and invested by its officers. Given these facts, the Tribunal is of the view that the exceptional circumstances required to rebut the presumption of separate legal identity do not exist in this case. The respondent has not suggested that the appellant was incorporated as part of a sham and, given that it has been incorporated since 1972, it does not appear to the Tribunal that such would be the case. Further, the evidence does not demonstrate that the appellant is completely dependent upon or "bound hand and foot" to BB&B or Brunswick Corporation.

The Tribunal notes that the corporations co-ordinated their efforts to a great extent. BB&B performed administrative and credit check services for the appellant, Brunswick Corporation arranged a carrier contract on the appellant's behalf, and BB&B worked with the appellant to ensure that the proper goods were ordered. These arrangements do not alter the Tribunal's view. The Tribunal is of the view that such arrangements between related companies, designed for the mutual advantage of each company, are to be expected and that they do not, of themselves, make the participating corporations a single entity.[13] The Tribunal is satisfied that the appellant maintains sufficient direction and control over its operations to make it more than a mere puppet of BB&B or Brunswick Corporation.

However, even though the appellant and BB&B are separate legal entities, there still may not be a sale between them if the appellant is acting as agent on behalf of BB&B, the principal. Therefore, the Tribunal must determine whether the appellant and BB&B are in an agency or a buyer/seller relationship. The agency relationship has been described by the Supreme Court of Canada as:

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [Emphasis in original.][14]

There was no evidence of an express contract of agency between BB&B and the appellant. In order to determine if there is an implied contract of agency between BB&B and the appellant, the Tribunal must consider the "effect in law of the way [the appellant and BB&B] have conducted themselves".[15] In considering whether an agency relationship exists, the courts have determined that this is a question of fact. In his treatise *The Law of Agency*, Fridman states:

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12. *Covert* v. *Minister of Finance (N.S.)*, [1980] 2 S.C.R. 774 at 793, citing *D.H.N. Food Distributors* v. *Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852.
13. *Canada (Attorney-General)* v. *Plotkins*, [1939] Ex.C.R. 1; and *Gerrard-Ovalstrapping* v. *M.N.R.* (26 September 1994), AP-93-289 (C.I.T.T.).
14. *R.* v. *Kelly*, [1992] 2 S.C.R. 170, citing with approval G.H.L. Fridman, *The Law of Agency*, 5th ed. (London: Butterworths, 1983) at 9.
15. G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 13.

> In all these situations [where the courts are attempting to determine whether there is a principal/agent or buyer/seller relationship], the problem must be resolved by a careful examination of the facts and, most importantly, the exact nature of the relationship arranged between the parties. In this respect courts pay considerable attention to the question whether one party, the alleged 'agent', is accountable for moneys received by him to the other party, the alleged 'principal'.[16]

The Tribunal has noted on many occasions that, while the courts have taken a variety of factors into account in order to answer the question of whether there is a principal/agent or buyer/seller relationship, including whether one party is accountable to the other for profits, the extent to which one party controls the other and the degree of risk assumed by the alleged agent, no one factor has been considered by the courts to be determinative of the issue of agency.[17]

The Tribunal is of the view that the appellant is not the agent of BB&B. In reaching this conclusion, the Tribunal relied primarily on the following: (1) the appellant's employees solicit sales from Canadian customers, negotiate the terms of the contract (including product mix and price) and engage in ongoing consultations with the customer throughout the delivery and installation process; (2) the invoice to the Canadian customer is in the appellant's name, and the appellant receives all payments from the Canadian customer; (3) the appellant takes title to the goods upon shipment and bears the risk of non-payment by the Canadian customer; (4) Canadian customers deal with the appellant in respect of warranty claims; and (5) the appellant is not accountable to BB&B for profits earned on the appellant's sales.

The Tribunal acknowledges the existence of certain facts that may support a finding of an agency relationship between the appellant and BB&B. In particular, the existence of (1) a contract which appears to be between BB&B and a Canadian customer, (2) contracts between the appellant and its Canadian customers, but which contain references to BB&B's facilities, (3) the alleged letter of acceptance from BB&B to a Canadian customer and (4) the "EXCEPTION Overhead Video Display/Scoreboard Structure Certification" in BB&B's name caused the Tribunal to question the relationship. The Tribunal finds it surprising that greater care was not exercised by the appellant with respect to the wording of its documents. Although the credibility of the appellant's witnesses was put into question by counsel for the respondent in her argument, the Tribunal accepts the explanation of the appellant's witnesses that the appellant has, in error, used standard BB&B contract forms and BB&B's certification form for the appellant's own purposes without properly amending the terms. The Tribunal also notes that the "acceptance" letter in question was sent out after the goods to which it related had been installed at the Canadian customer's premises and, therefore, it did not, in any way, serve as an acceptance of the Canadian customer's contract.

The Tribunal also notes that the appellant maintained no inventory of the bowling capital equipment and would place an order with BB&B only after securing a Canadian customer. In the circumstances, where bowling capital equipment is custom ordered and too large to inventory, the Tribunal does not find that this practice supports a finding that the appellant is the agent of BB&B. Further, the Tribunal is not convinced that, in the circumstances of this case, the co-ordination of efforts between the appellant and BB&B in the areas of administrative services, credit checks and product consultations suggests that the appellant is the agent of BB&B. As noted above, this degree of co-ordination is to be expected between related companies.

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16. *Ibid.* at 29.
17. For example, see *Moda Imports*, *supra* note 4; and *Jewelway International Canada* v. *D.M.N.R.* (26 March 1996), AP-94-359 and AP-94-360 (C.I.T.T.).

The Tribunal, having concluded that the appellant and BB&B are two parties that can stand in relation of buyer and seller to one another, must now consider the last two elements of a sale. It is the Tribunal's view that the appellant's sales summary constitutes its offer to purchase to BB&B and that, when BB&B ships the bowling capital equipment listed in the sales summary, the shipment constitutes BB&B's acceptance of the appellant's offer. Both parties agree to the transaction. Further, upon shipment of the goods FOB shipping point, title and risk passes to the appellant. BB&B then invoices the appellant, and the appellant pays BB&B by wire transfer. Therefore, the Tribunal finds that, as both parties agree to the terms of the transaction and there is a passage of title and consideration, there is a sale between the appellant and BB&B.

Given that the Tribunal has determined that there is a sale between the appellant and BB&B, there is no sale between BB&B and the Canadian customer which can form the basis of the value for duty. However, in order for the transaction value between the appellant and BB&B to form the basis of the value for duty of the bowling capital equipment, three additional criteria must be met.

Is the sale "for export to Canada"?

In order to use the transaction value between BB&B and the appellant as the basis for the value for duty of the bowling capital equipment, the sale between BB&B and the appellant must be a sale for export to Canada. With respect to this issue, the Tribunal notes that the documentary evidence provided and the testimony of the witnesses all contemplate that the bowling capital equipment were for export from Michigan to Canada. The appellant took legal title to the goods from BB&B when the goods were in Michigan. The goods were then exported directly from Michigan to Canada. Prior to the goods being imported into Canada, they did not enter the commerce of any other country, and title to the goods was not transferred to any other person. In other words, no event or person interrupted the export of the goods from Michigan to Canada. On the basis of the foregoing, the Tribunal finds that the bowling capital equipment was sold for export to Canada.

Is the appellant a "purchaser in Canada"?

The third element required in order to use the transaction value between BB&B and the appellant as the basis for the value for duty of the bowling capital equipment is that the appellant must be a "purchaser in Canada". As noted above, a "purchaser in Canada" is defined in the *Regulations* as, *inter alia*, a resident or a person who is not a resident but who has a permanent establishment in Canada. The *Regulations* define a "permanent establishment" as "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".

It is the Tribunal's view that the appellant has a permanent establishment in Canada. The appellant has a number of fixed places of business in Canada, including its warehouse, main sales office in Mississauga and three other sales offices located throughout Canada. The appellant also carries on business in Canada from those locations. The Tribunal relied primarily on the following in reaching this conclusion: (1) the appellant's employees solicit customers for orders in Canada; (2) the appellant's employees have the authority to negotiate the terms of sale of the bowling capital equipment without seeking confirmation from BB&B and to enter into contracts on behalf of the appellant; (3) invoice are issued in the appellant's name, and all payments by the Canadian customers are received by the appellant in its Canadian bank accounts; (4) the Canadian customers deal with the appellant in respect of warranty claims; and (5) the appellant files Canadian income tax returns.

Given the Tribunal's view that the appellant has a permanent establishment in Canada, it is not necessary for the Tribunal to consider whether the appellant is or is not a resident. In either event, the appellant would be a purchaser in Canada as defined in the *Regulations.*

Was the price paid or payable ascertained when the goods were sold for export to Canada?

The fourth element required in order to use the transaction value between BB&B and the appellant as the basis for the value for duty of the bowling capital equipment is that there must be an ascertained price paid or payable by the appellant to BB&B when the goods were sold for export to Canada. As title to the bowling capital equipment passes to the appellant when it is shipped, it is the Tribunal's view that this is the point at which the sale for export to Canada occurs. Therefore, it is at this point that the price paid or payable must be ascertained. BB&B's invoices to the appellant clearly set out the price payable by the appellant to BB&B. The evidence and testimony before the Tribunal also verify that this price is known by both the appellant and BB&B to be BB&B's cost plus 18 percent. Therefore, it is the Tribunal's view that there was an ascertained price paid or payable by the appellant to BB&B when the goods were sold for export to Canada.

CONCLUSION

Given that the Tribunal has found that (1) there is a sale of bowling capital equipment between the appellant and BB&B, (2) this sale is a sale for export to Canada, (3) the appellant is a purchaser in Canada and (4) there is an ascertained price paid or payable by the appellant to BB&B when the bowling capital equipment is sold for export to Canada, the Tribunal is of the view that the value for duty of the bowling capital equipment is the transaction value between the appellant and BB&B. Consequently, the appeal in respect of the value for duty of the bowling capital equipment is allowed. In all other respects, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

DISSENTING OPINION OF MEMBER CLOSE

I concur with my colleagues that the first issue in this appeal is whether or not there was a sale of bowling capital equipment between the appellant and BB&B upon which the value for duty could be calculated according to subsection 48(1) of the *Act*. I agree with my colleagues that, in order for there to be such a sale, the appellant and BB&B must be separate legal entities in a buyer/seller and not a principal/agent relationship. I also agree with my colleagues that the appellant and BB&B are separate legal entities because they are both legally and separately incorporated entities. Although I found some of the other evidence relied upon by my colleagues on this issue ambiguous at best,[18] I would not go as far as to say that the exceptional circumstances required to rebut the presumption of separate legal entity have been met.

Like my colleagues, it is my view that the fact that the appellant and BB&B are separate legal entities does not imply that transactions between them are sales. As the Tribunal has previously stated: "separate legal entities can be treated as integral elements of one commercial enterprise in determining at what point a sale has occurred".[19]

Unlike my colleagues, however, it is my view that BB&B and the appellant were not in a buyer/seller relationship, but acted together to sell bowling capital equipment to end users in Canada. The point of sale for export, therefore, was not between BB&B and the appellant, but between BB&B and the Canadian end user of the bowling capital equipment. It is my view that the inter-company transfer price between BB&B and the appellant is not a sale as envisioned by subsection 48(1) of the *Act*, but merely a bookkeeping entry between two related corporations. As such, the transfer price between them is not the appropriate basis for the value for duty of the sale for export to Canada, rather it is the price contained in the sales contract for the bowling capital equipment with the end user. My reasons are as follows.

First, I do not find convincing several of the factors primarily relied upon by my colleagues as to why the appellant is not an agent. It is my view that some agents solicit sales, negotiate contract prices and engage in ongoing consultations with customers. I also differ with my colleagues' interpretation of some of the evidence cited in support of their finding of a buyer/seller relationship and wish to note some other evidence in coming to my conclusion.

As to the importance of the invoice issued in the appellant's name to the end user, this invoice is issued by BB&B.[20] A similar invoice is also issued by BB&B in the appellant's name when the Canadian

18. For instance, it is not clear that the appellant runs its day-to-day operations in a manner that one normally thinks of as "management". Although Mr. Haggerty (with the suspicious title, for a Canadian-managed company, of District Manager – Canada) claims to control the budget and expenses, he has to send invoices to Michigan to order pencils. Nor is there even a petty cash (*Transcript of Public Hearing*, 29 June 1999, at 94). There may well be several sales employees of the appellant, but the 40 T-4 slips presented in evidence were almost all for contract carpenters hired to install the bowling alleys (*Transcript of Public Hearing*, 29 June 1999, at 85). The cheques to the employees were signed in Michigan and Oklahoma (*Transcript of Public Hearing*, 29 June 1999, at 94). The appellant had its own premises in Mississauga, but, with the downsizing in 1996, it appears to have moved into another Brunswick subsidiary office (*Transcript of Public Hearing*, 29 June 1999, at 138 and 279). The appellant does not keep any records or books. They are all kept by BB&B (*Transcript of Public Hearing*, June 29, 1999, at 65). The appellant's bank account is discussed below.
19. *Geo. Cluthé Manufacturing* v. *M.N.R.* (5 June 1989), Appeal No. 3031 (C.I.T.T.) at 6.
20. *Transcript of Public Hearing*, 29 June 1999, at 130-32.

end user calls an 800 number to order small bowling goods directly from BB&B.[21] There has been no involvement by the appellant in this latter transaction, yet invoices in the appellant's name are still issued by BB&B to both the appellant and the end user in the appellant's name. In my mind, this invoicing, in cases where the only contact has been between BB&B and the end user, disqualifies the invoices for the sales of bowling capital equipment as an indication of a sale by the appellant.

As to the testimony that the appellant is paid by the Canadian end user, this appears to be somewhat at odds with the payment terms of the sales contracts. All the sales contracts with the end user, whether in the name of BB&B or later modified to define the appellant as the seller, have under "price and payment terms" the address of BB&B. These contracts state the following: "All payments shall be made, without offset, to Brunswick at 525 West Laketon Avenue, Muskegon 49443 or at such other place as Brunswick may direct".[22] In practice, that other place may well be the appellant's lock box, which, although part of the appellant's bank account, is not accessible to the appellant's employees. Employees of BB&B, however, appear to be able to issue cheques from the account.[23]

The witnesses, in explaining this and other discrepancies in and between the written evidence and their testimony, referred to mistakes or sloppy paperwork. The documents containing these alleged "mistakes" or described as "sloppy paperwork" included all six of the contracts provided as evidence,[24] the appellant's income tax forms,[25] the description of the appellant's organization provided for the purpose of the audit[26] and the 1997 Pricing Report.[27] While there may, at times, be differences between the commercial realities of doing business and the formal contracts upon which that business is based,[28] I find it hard, in this case, to believe that the written documents, especially the sales contracts that were being used to negotiate with the end user, are not the better indicator of the realities of the sales of Brunswick bowling capital equipment to Canada. In my view, there were just too many alleged "mistakes" in too many of the documents filed by the appellant for the *vive voce* evidence to completely override the written evidence.

As to the testimony that the appellant takes title to the goods upon shipment, this was based upon invoices containing a provision that there is an FOB shipping point in Muskegon.[29] However, these same invoices erroneously indicate that the goods were being shipped to the appellant. The goods were in fact shipped directly to the Canadian end user.[30] Other testimony as to title also contradicted other formal clauses and handwritten notes on a contract presented in the evidence.[31]

As far as risk is concerned, it appears to me that, if there is any risk to the appellant, it is not independent from the risk to BB&B. The sales contracts with the purchaser, although signed by the

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21. *Transcript of Public Hearing*, 29 June 1999, at 273.
22. Exhibit A-2, Tab 6 at 109 and Tab 7 at 171; and Exhibit B-2, Tab 17 at 104 and Tab 18 at 123. The page added to Tab 16 of Exhibit B-1 (protected) submitted at the hearing has slightly modified wording.
23. *Transcript of Public Hearing*, 29 June 1999, at 94.
24. *Transcript of Public Hearing*, 29 June 1999, at 167 and 226-28.
25. *Transcript of Public Hearing*, 29 June 1999, at 153-54
26. *Transcript of Public Hearing*, 29 June 1999, at 83-85.
27. *Transcript of Public Hearing*, 29 June 1999, at 95-96.
28. *Mattel Canada* v. *Canada* (13 January 1999), A-291-97 (F.C.A.).
29. *Transcript of Public Hearing*, 29 June 1999, at 50; and Exhibit A-2, Tab 6 at 114.
30. *Transcript of Public Hearing*, 29 June 1999, at 124.
31. *Transcript of Public Hearing*, 29 June 1999, at 106; and Exhibit B-1, Tab 8 (made public by letter from counsel for the appellant on June 28, 1999).

appellant, are, at least as far as the written contracts state, not binding until approved by BB&B. The contracts state: "Neither this Order nor any amendment hereof shall be binding upon Brunswick [defined in some contracts as the appellant, in others as BB&B] until either it has been accepted in writing by a duly authorized representative of Brunswick at its offices in Muskegon, Michigan or Lake Forest, Illinois, or the Equipment has been shipped".[32]

Furthermore, it is Brunswick Corporation that insures the goods in transit and to whom the insurance company would make out a cheque in case of loss. The fact that Brunswick Corporation passes on the insurance credit to the appellant appears to be nothing more than bookkeeping.

As to credit risk,[33] the appellant does not order the goods until it has a purchaser[34] and usually does not pay for the goods until it has been paid by the Canadian customer.[35] If the prior credit check is not properly carried out by BB&B, then the appellant's position is that it is BB&B's risk. This position was evident in the only instance on the record where a liability was incurred in a shipment of bowling capital equipment.[36]

The evidence on warranties is also not clear. The appellant may deal with the customer in respect of warranty claims, but the sales contracts state: "To obtain warranty service, Purchaser must submit written notice, describing the defect, to Brunswick at 525 W. Laketon Avenue, Muskegon, Michigan".[37] This is BB&B's address. While the 1997 Pricing Report states that the appellant pays for the warranty costs relating to its sales,[38] BB&B employees do service warranty repairs in Canada.[39]

The final point made by my colleagues is that the appellant is not accountable for profits earned on the sales to the end user. The appellant's profitability, however, is determined by the transfer price, which is not negotiated between BB&B and the appellant,[40] but handed down by corporate headquarters.[41] The discount schedule for the appellant is also "handed down".[42] It appears to me that, although the appellant is not accountable to BB&B for profits, determination of what its profits will be is fettered.

It is my view that control over the sales contracts with the Canadian end user resides with BB&B and not the appellant. Not only, as stated above, are the sales contracts not binding until accepted by BB&B but even the contract form is controlled by BB&B. The appellant uses contract forms drawn up and later amended, to include Canadian content, by Brunswick Corporation lawyers on behalf of BB&B.[43] The

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32. See, for instance, Exhibit A-2, Tab 7 at 175, para. 15.
33. Exhibit A-1, Vol. II, Tab 17 at 321 (made public by letter from counsel for the appellant on June 28, 1999). These financial statements of the appellant refer to a "bad debt reserve".
34. *Transcript of Public Hearing*, 29 June 1999, at 103.
35. *Transcript of Public Hearing*, 29 June 1999, at 147.
36. Exhibit B-1, Tab 14 at 303 (made public by letter from counsel for the appellant on June 28, 1999); and *Transcript of Public Hearing*, 29 June 1999, at 267.
37. For instance, see Exhibit A-2, Tab 6 at 103.
38. Exhibit A-2, Tab 5 at 65.
39. *Transcript of Public Hearing*, 29 June 1999, at 178 .
40. *Transcript of Public Hearing*, 29 June 1999, at 100.
41. This transfer price would not, in my view, meet the criteria of subparagraph 48(1)(*d*)(i) of the *Act*, and evidence at Exhibit A-1, Vol. I, Tab 5 at 86 (protected), in particular at note 7, would likely also show that the transfer price does not meet the criteria of subsection 48(3).
42. *Transcript of Public Hearing*, 29 June 19999, at 269.
43. *Transcript of Public Hearing*, 29 June 1999, at 216-17.

appellant, in negotiating the price to be paid and in determining the equipment to be ordered, only changed the terms of those contracts that were out of date.[44] Once the sales contract are signed, they are sent down in their entirety to BB&B.[45]

It is my view that the technical aspects of the sale are also controlled by BB&B. Approval of the order, or any changes to it, resides with contract management and not with the appellant. Each contract has a corporate contract manager in Muskegon who ensures that the salesperson who signs the contract is actually ordering the right products.[46] The order cannot be booked until corporate headquarters reviews it and is satisfied that it is proper.[47] Further, the appellant is directed not to quote or complete any contract containing any exceptional items until an exception request has been approved up front by contract management.[48] As stated by Mr. Haggerty, the contract manager in Muskegon is the one "that is responsible for each [contract] as it flows through the system from the time that [the appellant] sends the order down to BB&B until it flows out".[49]

The contracts were signed by the Area Sales Manager (in most cases, Mr. Haggerty), regardless of whether the contracts were in BB&B's name, on the appellant's letterhead, but otherwise unchanged from the BB&B contracts, or partially altered in the appellant's name. This, and the fact that the inconsistent references to BB&B and the appellant in all the contracts did not seem to bother the customers[50] nor corporate headquarters,[51] are, in my opinion, evidence that the customers and the officers of Brunswick Corporation are fully aware that they are dealing with one business transaction: the sale of bowling capital equipment between BB&B, through the appellant, to the Canadian end user.

Because of these factors, it is my opinion that the sales contracts reflect the fact that control over the conditions of sale was retained in corporate hands in Muskegon or Lake Forest and are evidence of the fact that BB&B and the appellant are one and the same as far as the sales contracts were concerned. As Mr. Haggerty stated: "There is a lot of relationship built up through [the appellant] and BB&B, and with that I would think that we are both looking after what is in the best interests of each other, which in turn looks after the best interests of our corporation, our shareholders throughout the world".[52] While this degree of co-ordination may be expected between related companies, in my view, it makes it very difficult to also conclude, given the evidence stated above, that the appellant was not merely acting on behalf of BB&B to sell its products into Canada.

44. *Transcript of Public Hearing*, 29 June 1999, at 201; and Exhibit B-2, Tab 17 at 106-107.
45. *Transcript of Public Hearing*, 29 June 1999, at 128.
46. *Transcript of Public Hearing*, 29 June 1999, at 253.
47. *Transcript of Public Hearing*, 29 June 1999, at 238-41.
48. *Transcript of Public Hearing*, 29 June 1999, at 206 and 254-55.
49. *Transcript of Public Hearing*, 29 June 1999, at 253.
50. *Transcript of Public Hearing*, 29 June 1999, at 203.
51. *Transcript of Public Hearing*, 29 June 1999, at 120.
52. *Transcript of Public Hearing*, 29 June 1999, at 234.

The above facts combined are sufficient for me to conclude that the relationship between BB&B and the appellant cannot be characterized as that of a purchaser and seller. Therefore, it is my view that a sale for the purposes of subsection 48(1) of the *Act* did not occur between the appellant and BB&B, but did occur between BB&B and the Canadian end user.

Patricia M. Close

Patricia M. Close
Member