Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-008

Jockey Canada Company

v.

President of the Canada Border Services Agency

Decision issued
Thursday, December 20, 2012

Reasons issued
Friday, January 4, 2013

Canada

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IN THE MATTER OF an appeal heard on December 7, 8 and 9, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 12 decisions of the President of the Canada Border Services Agency, dated February 17, 2011, with respect to a request for re-determinations pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

JOCKEY CANADA COMPANY **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	December 7, 8 and 9, 2011
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Georges Bujold
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Julie Lescom
Registrar Support Officer:	Haley Raynor

PARTICIPANTS:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Jockey Canada Company (JCC) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made on February 17, 2011, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), concerning the value for duty of certain articles of apparel, consisting primarily of various styles of men's and women's underwear, imported by JCC between March 15, 2005, and December 31, 2008 (the goods in issue).

2. The central issue in this appeal is whether the value for duty of the goods in issue was properly re-determined by the CBSA as a result of a verification that it conducted in accordance with the relevant provisions of the *Act*, or should rather be the value for duty that was declared by JCC at the time of importation, as claimed by JCC.

3. In the event that the Tribunal finds that the value for duty of the goods in issue declared by JCC was incorrect, as determined by the CBSA, JCC requested that the Tribunal address two alternative issues, namely, (1) whether JCC had "reason to believe" before March 2009 that the value for duty that it declared in respect of the goods in issue was incorrect[2] and (2) whether the Tribunal should order that no additional customs duties or taxes be levied on the subset of the goods in issue that was imported over a 19-month period during which the verification was suspended because of admitted inaction on the part of the CBSA.

PROCEDURAL HISTORY AND RELEVANT DECISIONS OF THE CBSA

4. On April 18, 2005, the CBSA informed JCC that it would conduct a verification audit in order to determine whether the value for duty declared by JCC in respect of the goods in issue had been properly calculated in accordance with the requirements of the *Act*. The CBSA indicated that five import transactions would serve as a representative sample for the purposes of its initial verification and requested that JCC provide supporting documentation for these transactions, including purchase orders, commercial invoices and proof of payment.[3]

5. On May 18, 2005, a representative of JCC's parent company, Jockey International, Inc. (JII), provided a reply to the CBSA's initial letter on JCC's behalf.[4]

6. On March 2, 2006, further to its review of JII's reply, the CBSA informed it that an additional sample of 26 import transactions that occurred in 2005 had been selected for an on-site verification in Kenosha, Wisconsin, where JII maintains JCC's books and records. The CBSA indicated that its auditors could proceed with this on-site verification during the week of May 15, 2006. In this letter, the CBSA also requested that additional documents and information be provided concerning the relevant transactions.[5]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. In the decisions appealed from, the CBSA indicated that its position was that JCC had "reason to believe" that the value for duty declared in respect of the goods in issue was incorrect since January 1, 2005. Tribunal Exhibits AP-2011-008-01A (protected) and AP-2011-008-01B.
3. Tribunal Exhibit AP-2011-008-03B, tab A.
4. *Ibid*., tab B. Only the cover letter, without the actual responses to the questions asked by the CBSA and the enclosures, was filed with the Tribunal.
5. *Ibid.*, tab C.

7. From May 15 to 19, 2006, a team of CBSA's officials conducted an on-site verification of the value for duty in respect of the goods in issue at JII's head office. During that period, they reviewed JCC's books and records, including its general ledger, banking records and tax returns. They also interviewed various members of JII's personnel.

8. On June 13, 2006, noting that information necessary to complete the review remained outstanding, the CBSA requested additional information and documents.[6] JII provided a response on JCC's behalf on July 27, 2006.[7]

9. On January 9, 2007, the CBSA again requested additional information and documents, some of which had been previously requested but had yet to be fully provided, according to the CBSA.[8] JII provided additional explanations and documentation to the CBSA on February 26, 2007.[9]

10. Some 20 months later, by way of a letter dated October 20, 2008, the CBSA provided JII with the results of its verification and findings, including its valuation audit report concerning JCC's 2005 import transactions.[10] In this letter, the CBSA concluded that JCC's value for duty declarations in respect of goods that it imported from Asia, Honduras, Costa Rica and Jamaica in 2005 were incorrect. The CBSA further concluded that JCC had "reason to believe" that this was the case since 2005.

11. The CBSA also instructed JCC to self-correct its value for duty declarations in respect of all imports from the above-noted sources for fiscal years 2005, 2006, 2007 and 2008. JII was also informed that this "instruction letter" was considered a National Customs Ruling, which is binding on JCC unless rescinded in writing by the CBSA.[11]

12. In its ruling, the CBSA concluded that the value for duty of the goods made in Honduras, Costa Rica and Jamaica imported by JCC (the Caribbean goods) would be appraised on the basis of their transaction value in accordance with the conditions set out in section 48 of the *Act*, since it found that JCC purchased these goods from JII in a sale for export to Canada pursuant to an intercompany agreement. At the time of importation, JCC had declared, instead, that the value for duty of the Caribbean goods was their computed value appraised in accordance with section 52.

13. With respect to the goods made in Asia imported by JCC (the Asian goods), the CBSA similarly concluded that the transaction value method of valuation was applicable. In fact, at the time of importation, JCC had used this method for the purposes of determining the value for duty of the Asian goods. However, the CBSA found that the sale for export to Canada was a sale between JII and JCC, pursuant to an intercompany agreement, and not a sale between various unrelated Asian vendors and JCC, as had been declared by JCC when it accounted for the goods.

14. On November 21, 2008, JCC requested that the CBSA rescind its October 20, 2008, customs ruling. JCC claimed that the manner in which the verification was conducted, the length of time that it took and the way it concluded were unfair and not in accordance with the CBSA's practice and standards. Among other things, JCC asserted that it is only when it received the October 20, 2008, instruction letter that it was given "reason to believe" that the value for duty that it declared in respect of the goods in issue was

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6. *Ibid.*, tab F.
7. *Ibid.*, tab G. Only the cover letter, without the enclosures, was filed with the Tribunal.
8. *Ibid.*, tab J.
9. *Ibid.*, tab K. Again, only the cover letter, without the enclosures, was filed with the Tribunal.
10. *Ibid.*, tabs P and Q.
11. *Ibid.*, tab P at 270.

incorrect. JCC also submitted that the requirement that it self-correct all entries since January 1, 2005, was not legally possible under the *Act*. JCC further submitted that there were factual errors and omissions in the instruction letter and the valuation audit report. For these reasons, JCC claimed that it should, at most, only be required to correct its value for duty declarations on a go-forward basis, as of October 20, 2008.[12]

15. On March 3, 2009, the CBSA responded to JCC's request and advised that the October 20, 2008, ruling would not be rescinded, as it had been found to have been correct. In its letter, the CBSA acknowledged that there was a 19-month period of inactivity during the verification (between March 2007 and September 2008) and, for this reason, stated that it was prepared to waive all interests owed by JCC for that period of time.[13]

16. The CBSA also explained its reassessment policy after a post-release verification. Among other things, it indicated that its decision to require JCC to self-correct its value for duty declarations in respect of the goods in issue during the period of the audit (2005) and the subsequent years (2006 to 2008) was *not* made on the basis of its finding that JCC had "reason to believe" that its declarations were incorrect in 2005. In this regard, it stated the following: "Even if it had been determined that JCC did not have 'reason to believe' that its value for duty declarations were incorrect throughout this time period, it would have been required to correct for the fiscal period prior to the review period, the review period, and all subsequent importations . . . ."[14] According to the CBSA, this reassessment policy is consistent with the provisions of the *Act*. Finally, the CBSA reiterated its instructions that JCC self-correct its value for duty declarations in respect of the goods in issue and in accordance with a defined schedule.

17. On March 12, 2009, the CBSA issued two decisions in the form of Detailed Adjustment Statements (DAS), one in respect of the Caribbean goods and the other in respect of the Asian goods, pursuant to subsection 59(1) of the *Act*, in order to re-determine the value for duty of the goods imported by JCC from Asia, Honduras, Costa Rica and Jamaica for the period from March 15 to March 31, 2005.[15] These decisions were made on the basis of the October 20, 2008, ruling as they include an express reference to the CBSA's file number for this ruling. As a result, the value for duty of the goods imported from the above-noted sources during this period was substantially increased compared to the value that had been declared by JCC at the time of importation.

18. On March 31, 2009, in accordance with the schedule set out in the CBSA's March 3, 2009, letter, JCC filed corrections, pursuant to subsection 32.2(2) of the *Act*, to its value for duty declarations in respect of both the Caribbean goods and the Asian goods to cover its imports during the balance of the verification review period, that is, the period between April 1 and December 31, 2005.[16]

19. On April 2, 2009, JCC filed an application for judicial review with the Federal Court requesting that the CBSA's March 3, 2009, decision be quashed, particularly in respect of the finding that it had "reason to believe", in 2005, that its method of valuation was incorrect.

20. Between April and July 2009, JCC filed additional corrections to its value for duty declarations to cover its imports of the Caribbean goods and the Asian goods during the years 2006 through 2008, in

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12. *Ibid.*, tab R.
13. *Ibid.*, tab S.
14. *Ibid.*, tab S at 298.
15. Tribunal Exhibit AP-2011-008-07A, tab G.
16. *Ibid.*, tab H.

accordance with the schedule set out in the CBSA's March 3, 2009, letter.[17] Pursuant to subsection 32.2(3) of the *Act*, all of the corrections made by JCC to its value for duty declarations were treated as if they were re-determinations under paragraph 59(1)(*a*).

21. JCC subsequently made 12 requests to the CBSA for a further re-determination of these re-determinations pursuant to subsection 60(1) of the *Act*. The exact date of each of these requests is unknown since they have not been filed with the Tribunal, but there is no evidence that would suggest that they were not made within the time limits prescribed by the *Act*. According to the CBSA, these requests were filed between June and November 2009.[18]

22. On April 13, 2010, the Federal Court dismissed JCC's application for judicial review, concluding that it did not have jurisdiction to hear the matter.[19]

23. On January 26, 2011, the CBSA issued its preliminary decision concerning JCC's requests for a further re-determination of the value for duty of the goods in issue. The CBSA informed JCC that all its requests would be denied and provided it with the reasons for this decision.[20]

24. With respect to the Caribbean goods, the CBSA found that a sale for export occurred between JII (the vendor) and JCC (the purchaser in Canada) pursuant to an intercompany agreement at a transfer price of Canadian wholesale price less 35 percent. According to the CBSA, this sale between related parties established the price paid or payable for the Caribbean goods in accordance with the transaction value method of valuation under section 48 of the *Act*. Thus, the CBSA indicated that the use of the computed value method for the appraisal of the value for duty of the Caribbean goods was inappropriate, as there was a transaction value and that, under the *Act*, subsidiary methods of valuation can only be used to the extent that the transaction value method is not applicable. The CBSA did not accept JCC's argument that the Caribbean goods were purchased from related offshore companies located in Honduras, Costa Rica and Jamaica and not from JII.

25. With respect to the Asian goods, the CBSA found that the transaction value method of valuation under section 48 of the *Act* was also applicable, since there was a sale for export to Canada between JII and JCC. The CBSA dismissed JCC's claim that it purchased the Asian goods from various Asian vendors that are not related to it. According to the CBSA, an examination of the substance of the transactions revealed that the relevant sale for export occurred between JCC and JII in view of the following facts: (1) there was no record of invoices from the unrelated Asian suppliers or of their corresponding values in JCC's general ledger and accounting records; (2) Asian vendors were paid by JII from JII's bank account; (3) JII, in turn, sold the goods to JCC at an intercompany transfer price of Canadian wholesale price less 35 percent pursuant to an intercompany agreement and transfer price study; (4) JCC purchased all imported goods from JII at this agreed-upon transfer price, as evidenced by the entries on JCC's general ledger; and (5) there was no other price paid recorded in JCC's accounting records. Essentially, the CBSA determined that, at the time of importation, JCC erroneously declared JII's purchase price and not the price that it paid for the Asian goods upon their resale by JII.

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17. Other than JCC's correction covering the period from January 1 to June 30, 2006, these additional corrections were not filed with the Tribunal. However, it is beyond dispute that JCC complied with the October 20, 2008, ruling and the March 3, 2009, instruction letter.
18. Tribunal Exhibit AP-2011-008-07D at 11.
19. *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 396 (CanLII) [*Jockey*]. Tribunal Exhibit AP-2011-008-03D, tab 2.
20. Tribunal Exhibit AP-2011-008-03A, tab X.

26. With respect to the issue of when JCC had "reason to believe" that its value for duty declarations in respect of the goods in issue were incorrect, the CBSA found that JCC had "reason to believe" that this was the case as of January 1, 2005, due to evident and transparent legislative provisions outlined in a CBSA policy document, namely, Memorandum D11-6-6. Finally, the CBSA indicated that there was no legislative provision contemplating the waiver of lawfully payable customs duties under subsection 32.2(2) of the *Act*.

27. On February 17, 2011, the CBSA issued 12 decisions in respect of JCC's requests, pursuant to subsection 60(4) of the *Act*. In its final decisions, the CBSA confirmed its preliminary finding concerning the value for duty of the goods in issue and its finding that JCC had "reason to believe", since January 1, 2005, that the value for duty declared at the time of importation was incorrect.[21]

28. On May 16, 2011, JCC appealed the CBSA's final decisions to the Tribunal pursuant to subsection 67(1) of the *Act*.

29. The Tribunal held a public hearing in Ottawa, Ontario, on December 7, 8 and 9, 2011.

30. Mr. Steven Tolensky, JCC's President, Ms. Merle Haarbauer, Import Supervisor, JII, and Ms. Anne Arbas, Vice-President, Controller & Global Tax, JII, appeared as witnesses on JCC's behalf. Mr. Byron Fitzgerald, Manager – Litigation, CBSA, and Mr. Gavin Hales, Senior Economist, Canada Revenue Agency, testified on the CBSA's behalf.

31. Mr. Hales was qualified by the Tribunal as an expert in the area of transfer pricing from a taxation perspective. After having considered the submissions from the parties on this issue at the hearing, the Tribunal, applying the test set out in *R. v. Mohan*,[22] concluded that Mr. Hales had sufficient education and experience to be qualified as an expert in the area proposed by the CBSA. Moreover, the Tribunal concluded that the mere fact that Mr. Hales was employed by another Canadian government agency was not sufficient to prevent him from giving expert evidence on behalf of the CBSA on the basis of bias or a lack of independence.[23]

IMPORT TRANSACTIONS IN ISSUE

32. As previously noted, this appeal concerns the value for duty of various articles of apparel made in Asia and in the Caribbean region that were imported by JCC between 2005 and 2008. The Asian goods were made by companies that are not related to JCC whereas the Caribbean goods were made by related entities, that is, other JII affiliates located in Honduras, Jamaica and Costa Rica.

33. There is a disagreement between the parties as to key legal and factual issues regarding the import transactions at issue. The disputed issues include the determination of the transaction which constituted a sale for export to Canada, the identification of the vendor who sold the goods in issue to JCC and the price actually paid by JCC as the purchaser of the goods. The Tribunal will address those disputed issues in its analysis of the questions raised in this appeal below.

34. Before turning to the disputed issues, it is necessary to summarize the sequence of events leading to the importation of the goods in issue.

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21. Tribunal Exhibit AP-2011-008-01. These decisions indicate that the detailed rationale for the CBSA's conclusions was provided in the January 26, 2011, preliminary decision.
22. [1994] 2 SCR 9.
23. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 282-88.

35. The evidence indicates that JCC is an importer and distributor of Jockey-branded apparel and clothing accessories in Canada. JCC was incorporated in 1996 as a wholly owned subsidiary of JII, in order to market and distribute such trademarked garments in Canada.

36. In the typical structure of all transactions involved in the present case, it is understood that JCC forecasts its requirements for given marketing periods and then sends these forecasts to JII.[24]

37. With respect to the Asian goods, JII then submits purchase orders to various Asian suppliers in order to fulfil JCC's requirements. JII also purchases goods from these same suppliers for its own account.

38. The orders for JCC's goods destined to the Canadian market indicate Canadian-specific style numbers, which are different than the style numbers of the goods destined for sale in the United States that are purchased by JII for its own account, even though they may originate from the same suppliers.[25]

39. The Asian suppliers subsequently produce the goods, prepare them for shipment and deliver them to a port for direct shipment to Canada. When the goods are ready for shipment, the Asian suppliers issue an invoice to JCC and provide JII with a copy.[26]

40. The Asian goods are then shipped directly to Canada, typically to Vancouver, British Columbia, from where they are transported via rail for delivery to JCC's warehouse, which is located in London, Ontario. JCC is the importer of record and pays any applicable duties and taxes.

41. JCC bears the risk of losses and damages to the Asian goods during their shipment. In this regard, according to the evidence, JCC is responsible for the goods as soon as they are loaded onto a vessel at an Asian port and pays to insure them while they are in transit to Canada.[27]

42. The payment of invoices issued by Asian suppliers is made by JII. JII then periodically draws lump sum monies from JCC's bank account, which do not necessarily correspond to accounted invoices from the Asian suppliers, but it is represented that, through these transfers, JCC ultimately pays for the Asian goods.[28] It appears that JII has authority over JCC's bank account to make such transfers.

43. The value for duty declared by JCC for its imports of Asian goods is the price set out in each invoice issued by the Asian suppliers.

44. In JCC's accounting books and records, however, its purchases of Asian goods are not entered at this value. They are rather entered at a sales price, which is contemplated in a sales and distribution agreement (the Sales & Distribution Agreement) between JII and JCC.[29]

45. Pursuant to subsection 5(b) of the Sales & Distribution Agreement, the price for goods sold by JII to JCC "shall be in United States Dollars at wholesale price less twenty-five percent (25%)". This provision

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24. Tribunal Exhibit AP-2011-008-03A, tab D.
25. *Ibid.* at para. 35.
26. *Ibid.*
27. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 100-104, 108-9.
28. Tribunal Exhibit AP-2011-008-03A at para. 38. The Tribunal notes that the parties disagree on the actual sums of money that are actually drawn by JII and, as will be discussed below, whether they match the prices set out in the invoices issued by the Asian suppliers that are paid by JII.
29. *Ibid.* at para. 40. In its brief, JCC refers to this price as the "JII Sales Price", that is, the price for goods sold by JII to JCC. *Ibid.* at paras. 13, 18.

was subsequently amended to read "wholesale price less a customary discount based on discounts provided by [JII] to other distributors on market factors".[30] Thus, in JCC's books and records, all purchases of Asian goods were entered at the intercompany transfer price between JII and JCC that was in effect during the relevant period. It appears that at some point in time this transfer price was amended in order to represent JCC's Canadian wholesale price less 35 percent (in US dollars).[31]

46. At the hearing, JCC argued that the intercompany transfer price provided for in the Sales & Distribution Agreement, as amended, was in fact *JII's wholesale cost* less 35 percent. The witnesses who testified on behalf of JCC also stated that, in their view, the sales price contemplated in the Sales & Distribution Agreement referred to *JII's wholesale cost*. However, this explanation is not credible since, in JCC's books and records, all purchases were entered at the price of Canadian wholesale price less 35 percent.

47. Given JCC's acknowledgement that all of its purchases were entered in its books and records at the sales price which is contemplated in the Sales & Distribution Agreement, regardless of the country of origin of the goods, the Tribunal finds that, during the relevant period, this intercompany sales price was, in fact, JCC's wholesale price in Canada less 35 percent. For example, for underwear that JCC would sell in Canada for the equivalent of US$10.00, it would pay JII the price of US$6.50. In the Tribunal's opinion, this is a reasonable interpretation of the relevant provision of the Sales & Distribution Agreement.

48. The process used by JCC for purchasing the Caribbean goods is very similar. These goods are manufactured by three companies that are subsidiaries of JII, namely, Jockey de Honduras, S.A. (Jockey Honduras), Jockey International (Jamaica) Ltd. (Jockey Jamaica) and Confecciones Jinete, S.A. (Jockey Costa Rica). These companies perform the cutting and sewing operations. Usually, fabric is shipped from the United States to the facilities of these companies where the assembly of the finished goods is performed.[32]

49. The typical structure for those transactions is also similar. JCC sends a forecast of its requirements to JII and, in turn, JII sends a work order to one of the above-noted companies which assemble the Caribbean goods. The Caribbean goods are then shipped to Canada either in bond through Miami, Florida, or directly to a Canadian port. JCC is the importer of record for the Caribbean goods.[33]

50. Commercial invoices for the Caribbean goods are issued to JCC. However, the entries recorded in JCC's books and records do not reflect the amounts invoiced by the Caribbean plants. In JCC's books and records, all purchases of Caribbean goods are rather entered at the same value as the one already indicated for Asian goods, that is, at the intercompany transfer price for the sale of goods between JII and JCC that is provided for in the Sales & Distribution Agreement (i.e. Canadian wholesale price less 35 percent during the relevant period).[34]

51. The value for duty declared by JCC for its imports of Caribbean goods was an estimate by JCC of their computed value, which is based on the standard cost of the Caribbean goods, including profit.

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30. *Ibid.* at para. 13.
31. Tribunal Exhibit AP-2011-008-03B, tab J at 249, tab K at 254.
32. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 140-41.
33. Tribunal Exhibit AP-2011-008-03A at para. 43.
34. *Ibid.* at para. 46.

According to JCC, the invoices from the Caribbean suppliers actually set out a computed value of the Caribbean goods, which was declared to the CBSA at the time of importation.[35]

52. The payment for the Caribbean goods is settled through the debiting and crediting of intercompany accounts. While there is no evidence of direct payments from JCC to any of the Caribbean suppliers for these goods, it appears that the above-mentioned withdrawals from JCC's bank account periodically made by JII also cover the payment for the Caribbean goods.[36] These withdrawals do not represent specific amounts in relation to specific invoices, but again, are said to be lump sum money transfers by JII, and to the benefit of JII, from JCC's bank account.

LAW

53. Under the *Act*, in order to impose customs duties on imported goods, a value must first be attributed to the goods. Section 46 of the *Act* specifies that the value for duty must be determined in accordance with sections 47 to 55.

54. Section 47 of the *Act* provides 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.

(2) Where the value for duty of goods is not appraised in accordance with subsection (1), it shall be appraised on the basis of the first of the following values, considered in the order set out herein, that can be determined in respect of the goods and that can, under sections 49 to 52, be the basis on which the value for duty of the goods is appraised:

(*a*) the transaction value of identical goods that meets the requirements set out in section 49;
(*b*) the transaction value of similar goods that meets the requirements set out in section 50;
(*c*) the deductive value of the goods; and
(*d*) the computed value of the goods.

(3) Notwithstanding subsection (2), on the written request of the importer of any goods being appraised made prior to the commencement of the appraisal of those goods, the order of consideration of the values referred to in paragraphs (2)(*c*) and (*d*) shall be reversed.

47. (1) La valeur en douane des marchandises est déterminée d'après leur valeur transactionnelle dans les conditions prévues à l'article 48.

(2) Lorsque la valeur en douane des marchandises n'est pas déterminée par application du paragraphe (1), elle l'est d'après les valeurs suivantes qui peuvent constituer la base de l'appréciation par l'application des articles 49 à 52, prises dans l'ordre où elles s'appliquent :

a) la valeur transactionnelle de marchandises identiques répondant aux exigences visées à l'article 49;
b) la valeur transactionnelle de marchandises semblables répondant aux exigences visées à l'article 50;
c) la valeur de référence des marchandises;
d) la valeur reconstituée des marchandises.

(3) Par dérogation au paragraphe (2), à la demande écrite de l'importateur des marchandises à apprécier présentée avant le début de l'appréciation, l'ordre d'applicabilité des valeurs visées aux alinéas (2)*c*) et *d*) est inversé.

55. Section 48 of the *Act* provides as follows:

48. (1) Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price

48. (1) Sous réserve des paragraphes (6) et (7), la valeur en douane des marchandises est leur valeur transactionnelle si elles sont vendues pour exportation au Canada à un acheteur au Canada,

35. *Ibid.* at paras. 43-44. Tribunal Exhibit AP-2011-008-03C, tabs P, Q and R.
36. Tribunal Exhibit AP-2011-008-07E at 860-66.

paid or payable for the goods can be determined and if	si le prix payé ou à payer est déterminable et si les conditions suivantes sont réunies :
. . .	[...]
(*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, or (ii) the importer of the goods demonstrates that the transaction value of the goods meets the requirement set out in subsection (3).	*d*) l'acheteur et le vendeur ne sont pas liés au moment de la vente des marchandises pour exportation ou, s'ils le sont : (i) ou bien le lien qui les unit n'a pas influé sur le prix payé ou à payer, (ii) ou bien l'importateur démontre que la valeur transactionnelle des marchandises à apprécier répond aux exigences visées au paragraphe (3).
. . .	[...]
(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).	(4) Dans le cas d'une vente de marchandises pour exportation au Canada, la valeur transactionnelle est le prix payé ou à payer, ajusté conformément au paragraphe (5).
(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted	(5) Dans le cas d'une vente de marchandises pour exportation au Canada, le prix payé ou à payer est ajusté :
. . .	[...]
(*c*) by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported.	*c*) compte non tenu des remises ou réductions du prix payé ou à payer effectuées après l'importation des marchandises.

56. In summary, section 47 of the *Act* provides that the primary basis for determining the value for duty is the "transaction value" of the imported goods. Subsection 48(1) confirms that this is the starting point for valuation under the *Act*; it is clear that the value for duty *must* be appraised on the basis of this method of valuation, subject to the conditions set out in section 48.

57. It is only to the extent that the value for duty of imported goods cannot be appraised on the basis of their transaction value that any subsidiary bases of appraisal can be considered. Whenever recourse to another method of valuation is necessary, the order of priority stipulated in subsection 47(2) of the *Act* must be followed, subject, however, to an importer's right to choose between deductive value and computed value under certain conditions.

58. Section 48 of the *Act* sets out the conditions for the appraisal of the value for duty of imported goods on the basis of the transaction value method of valuation. This method focuses mainly on the value which a vendor and a purchaser attach to goods in an export transaction. It corresponds to the "price paid or payable" for the goods, that is, the selling price in an export transaction when it can be determined.[37] In certain cases, this price may be adjusted upwards or downwards to account for certain charges. If the vendor and the purchaser are related persons, the transaction value is acceptable only if it is established that the relationship between the parties to the transaction did not influence the price.

59. The principal issue in this appeal concerns the appraisal of the value for duty of the goods in issue. In order to determine whether the value for duty of the goods in issue was correctly determined by the

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37. Pursuant to section 45 of the *Act*, the term "price paid or payable" means "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor."

CBSA in the decisions appealed from, the Tribunal will have to apply these provisions in light of the facts surrounding the import transactions in issue and the evidence before it.

60. Moreover, in view of the alternative claims made by JCC, other aspects of the scheme of the *Act* relating to the determination and collection of import duties, most notably the extent of an importer's duty to self-correct its value for duty declarations, the power of the CBSA to re-determine the value for duty of imported goods on the basis of a verification audit and the time period for which the CBSA is entitled to require an importer to pay additional customs duties on the basis of its findings at the conclusion of a verification are also relevant in this appeal.

61. Those elements of the statutory scheme will be examined in detail, if and where appropriate, as part of the Tribunal's analysis.

ANALYSIS

62. JCC's primary position in this appeal is that the value for duty that it declared for both the Asian goods and the Caribbean goods was at all times the proper value appraised in accordance with the relevant provisions of the *Act*.

63. In the alternative, should the Tribunal find that the value for duty declared by JCC in respect of some or all the goods in issue was incorrect, JCC submitted that it had no "reason to believe" that its declarations were incorrect until March 2009.

64. In the further alternative, JCC requested that the Tribunal rule that no duties or taxes should be paid because of the 19-month period during which the verification review was inactive due to the unfairness and financial prejudice caused to JCC as a result of this delay.

65. The Tribunal will begin by examining whether, as claimed by JCC, the CBSA erroneously re-determined the value for duty of the Asian goods. It will then review the merits of the CBSA's decision concerning the value for duty of the Caribbean goods. Finally, if necessary, the Tribunal will address JCC's alternative arguments.

Preliminary Issue: Burden of Proof

66. In order to dispose of this appeal, the Tribunal must be mindful of the requirements of section 152 of the *Act*, which govern the allocation of the burden of proof in any proceeding under the *Act* relating to the importation or exportation of goods. Clearly, this appeal is a proceeding under the *Act* relating to the importation of goods.

67. Subsection 152(1) of the *Act* provides that the burden of proving the importation of goods lies on the Crown and, therefore, on the CBSA. In this appeal, it is common ground between the parties that the goods in issue were imported. The undisputed evidence plainly establishes this fact. Thus, there is no doubt that the CBSA has discharged itself of this burden.

68. Subsection 152(3) of the *Act* provides that the burden of proof in any question relating, *inter alia*, to the payment of duties on any goods or the compliance with any of the provisions of the *Act* lies on the party to the proceedings other than the Crown. That the appellant has the burden of proving that it has satisfied the

requirements of the *Act* in appeals pursuant to section 67 has recently been re-affirmed by the Federal Court of Appeal.[38]

69. In *Miner*, the Court indicated that an appellant will fail to meet his onus if the evidence is "indeterminate" on a statutory requirement.[39] Similarly, in *Les Produits Laitiers Advidia Inc. v. Commissioner of the Canada Customs and Revenue Agency and Dairy Farmers of Canada*,[40] the Tribunal stated that "[t]he party on which the burden of proof rests will fail if, when all the evidence is produced, the mind of the trier of fact is in a state of real doubt as to the effect of the evidence."

70. Therefore, JCC bears the burden of proving that its value for duty declarations in respect of the goods in issue complied with the relevant provisions of the *Act* or, conversely, that the value for duty of the goods in issue was not determined in accordance with the provisions of the *Act* by the CBSA.

71. For this reason, the crux of the issue in this appeal is whether JCC has discharged its burden of proving that its own appraisal of the value for duty of the goods in issue complied with sections 47 to 55 of the *Act*. The Tribunal will thus examine whether JCC has provided sufficient evidence to meet its onus of proving that the value for duty that it declared for both the Asian goods and the Caribbean goods was at all times the correct value in view of the requirements of the *Act*.

Value for Duty of the Asian Goods

72. The parties agree that the value for duty of the Asian goods should be appraised on the basis of their transaction value in accordance with section 48 of the *Act*. The heart of the dispute lies in the parties' conflicting views on the application of the conditions set out in subsection 48(1) to the facts of this appeal. In particular, the parties disagree on which sale constituted a sale for export to Canada and on the price paid or payable by JCC for the Asian goods. In order to dispose of this issue, it is necessary to review the parties' respective position and the evidence on which they rely.

Positions of Parties

73. JCC submitted that the conditions set out in subsection 48(1) of the *Act* for the appraisal of the value for duty on the basis of the transaction value method of valuation are met. According to JCC, the Asian goods were sold for export by each Asian supplier as vendor/exporter from a country in Asia. JCC is a purchaser in Canada. The price paid or payable for the goods is determinable, as it is set out in the arm's length invoices issued by Asian suppliers that are paid by JCC via JII. Finally, the Asian suppliers are not related to JCC.

74. JCC's arguments focused on the existence of a sale for export between Asian suppliers and JCC. It submitted that it is well established that the relevant sale for export is the sale by which title passes to the importer, who is the party who has title when the goods are transported to Canada. Applying this legal test to the facts surrounding the transactions for the importation of the Asian goods, JCC submitted that the following established that the relevant sale for export was a sale between each Asian supplier and itself:

- there are distinct purchase orders sent by JII to Asian suppliers for JCC's purchases of Asian goods that are of styles unique to Canada;[41]

38. *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) [*Miner*].
39. *Ibid.* at paras 20-21.
40. (8 March 2005), AP-2003-040 (CITT) at 3.
41. Tribunal Exhibit AP-2011-008-03C, tabs G-1, H-1, I-1 and J-1.

- the invoices from the Asian suppliers indicate that they are to JCC, or for JCC's account, not JII's;[42]
- JCC obtains title directly from each Asian supplier at the time of shipment and bears all risk of loss and damage after title transfers;[43]
- JCC pays each of the Asian supplier's invoice through JII, which was done prior to April 2006 occasionally via a letter of credit set up for JCC,[44] or, more usually and exclusively after April 2006, by JII paying the invoice on behalf of JCC and then obtaining reimbursement of the payments from the funds in JCC's bank account; and
- the Asian goods are shipped directly to Canada, JCC having title to the goods from the port of export to their entry in Canada.

75. JCC further submitted that there is no evidence to support the CBSA's position that the sale for export is from JII to JCC. It argued that JII never obtained title to the Asian goods and, hence, could not have sold to JCC goods that it did not own.

76. JCC argued that, contrary to what is stated in the CBSA's decisions, the Sales & Distribution Agreement was only meant to govern the sale of goods originating in the United States by JII to JCC. According to JCC, it was not intended to apply to the purchases of Asian goods by JCC.

77. As for the fact that, in its accounting books and records, it is JII's sales price, contemplated in the Sales & Distribution Agreement, that is used to value its purchases of Asian goods (i.e. JCC's cost for the Asian goods), JCC submitted that the CBSA failed to appreciate that its books and records were for internal purposes and focused on income tax compliance.

78. In this regard, JCC submitted that, regardless of the price actually paid for the goods or their source, all of its purchases were recorded at the same value in its books and records pursuant to an accounting convention for determining the cost of all goods that it purchases. It added that the price contemplated in the Sales & Distribution Agreement was never intended to be used as a transfer price for customs value purposes, but only as the standard value assigned to all goods in its inventory, which is used mainly for income tax obligation purposes. As such, JCC submitted that the Canadian wholesale price less 35 percent did not reflect the actual purchase price paid by JCC for the Asian goods. JCC claims that the actual price paid, which is set in the invoices from the Asian suppliers, was, however, used to create profit and loss statements used by JCC to monitor its financial performance.[45]

79. JCC also explained that the sales price contemplated in the Sales & Distribution Agreement was not intended to be a definitive price because it is subject to transfer pricing obligations under Canadian and U.S. income tax laws.[46] In order to comply with these obligations, JCC noted that it typically makes year-end

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42. *Ibid.*, tabs G-2, H-2, I-2 and J-2.
43. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 99-101, 104, 108-9.
44. Tribunal Exhibit AP-2011-008-03C, tabs G-5, G-6, H-5 and H-6.
45. An example of such profit and loss statements was filed by JCC. *Ibid.*, tab O.
46. Transfer pricing issues arise in transactions between related parties involving the sale of goods across international borders since the sales price in such transactions may diverge considerably from market prices that would prevail in transactions between parties that deal at arm's length. This is a cause of concern for taxation authorities around the world since it can potentially lead to the under-taxation of the income of multinational corporations or their affiliates located in different countries. For this reason, taxation authorities, including the Canada Revenue Agency, verify that the transfer prices in respect of transactions between related parties reflect the prices that would have prevailed had the parties not been related. This principle is known as the arm's length principle. Tribunal Exhibit AP-2011-008-11A at paras. 10-35.

adjustments to the cost of goods sold recorded in its accounting books and records in accordance with a recognized method for establishing a transfer price that is acceptable from a taxation perspective for its purchases of goods from a related party.

80. Applying this method, known as the Transactional Net Margin Method (TNMM),[47] JCC's operating profit every year must be within a certain percentage range of its total sales. In order to achieve the appropriate level of profit for income tax purposes, in its accounting books and records, the cost of all goods acquired by JCC for resale is entered at the same standard value, that is, the sales price contemplated in the Sales & Distribution Agreement. If the profit earned by JCC in a given year falls within the acceptable range of comparable company profit level established through the TNMM, there is no need to adjust the cost of goods sold entered in its books and records. If, however, the profit earned was too high or too low in any year (i.e. outside the range of acceptable percentages of its total sales), JCC will adjust the cost that it assigned to the goods that it purchased for resale up or down, so that the profit that it declares to the Canada Revenue Agency falls within the acceptable profit margin range established through the TNMM.

81. On that basis, JCC submitted at the hearing that the Canadian wholesale price less 35 percent entered in its books and records cannot be used as the transaction value of the Asian goods under section 48 of the *Act* because it is a transfer price for income tax purposes, not customs purposes, and that there can be differences between the value of goods for customs purposes and transfer prices for income tax purposes.

82. In any event, JCC further submitted that because the price contemplated in the Sales & Distribution Agreement does not represent a final price, it is not usable as the transaction value of the Asian goods. According to JCC, section 48 of the *Act* requires that the price paid or payable for the goods be determined at the time of entry, that is, when the goods are sold for export. Since the Canadian wholesale price less 35 percent is typically adjusted or changed at the end of the year for tax reasons, JCC submitted that it does not reflect a price paid or payable for the goods that is determinable at the time of entry.

83. For its part, the CBSA submitted that JCC did not meet its burden of establishing that the Asian goods were sold to JCC by the Asian suppliers and that the price that JCC actually paid for the Asian goods is the price that is set out in the invoices issued by the Asian suppliers. The CBSA added that the evidence indicates that JCC purchased the Asian goods from JII pursuant to the Sales & Distribution Agreement and at the price contemplated therein (i.e. JCC's Canadian wholesale price less 35 percent).

84. In this regard, the CBSA submitted that, pursuant to the Sales & Distribution Agreement, JCC agreed to purchase "goods" from JII. The CBSA observed that the term "goods" is defined in the agreement to encompass the sale of goods that have been made for JII by third parties, including suppliers located in Asia.[48] It also referred to the evidence given by Mr. Tolensky, who confirmed that, on its face, the Sales & Distribution Agreement does not indicate that its application is limited to the sale by JII of goods that are manufactured in the United States.[49] The CBSA argued that there is no basis in law, through testimony or other extrinsic evidence, to read in the text of the agreement words that are not there.

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47. The TNMM is one of five methods recommended by the Organisation for Economic Co-operation and Development (OECD) for establishing that a transfer price between related parties satisfies the arm's length principle. *Ibid.* at paras. 41-49. Transfer pricing studies performed by accounting firms recommended that JCC use the TNMM for the purpose of establishing that it complies with its transfer pricing obligations under relevant income tax laws and regulations. Tribunal Exhibit AP-2011-008-03C, tab 3.
48. *Ibid.*, tab 1 at 365-67.
49. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 51-53.

85. The CBSA further submitted that JCC's case rests on the erroneous claim that, for the purposes of customs valuation, the Tribunal should ignore the contents of JCC's accounting books and records and accept that they do not reflect commercial reality.

86. The CBSA argued that, as a matter of law, JCC was required, for six years, to keep all records relating to, among other things, the "costs and value of the commercial goods" and the "payment for the commercial goods" that it imported.[50] In this connection, it submitted that nowhere in JCC's books and records is there evidence that JCC purchased the Asian goods from various Asian suppliers or that JCC paid the price set out in the invoices issued by the Asian suppliers for the Asian goods.

87. To the contrary, the CBSA submitted that the verification of JCC's books and records performed by the CBSA officers revealed that all transactions for the importation of the Asian goods were entered in JCC's records as a sale by JII at the purchase price of Canadian wholesale price less 35 percent.

88. Moreover, the CBSA argued that JCC's submissions leave the incorrect impression that JII pays the invoices issued by the Asian suppliers on JCC's behalf and then simply withdraws that same amount from JCC's bank account as reimbursement. In fact, the CBSA argued that its audit revealed that, while it is true that JII withdraws money from JCC's bank account for the payment of the goods, the amounts it withdraws reflects JCC's purchasing of the Asian goods at Canadian wholesale price less 35 percent, not the amounts invoiced by and paid to Asian suppliers, which represents a significant mark-up over the price set out in the invoices issued by these suppliers.

89. In summary, the CBSA submitted that the evidence establishes that the actual sale for export is between JII as the vendor and JCC as the purchaser of these Asian goods. It argued that what actually occurred was that JII purchased the goods from the Asian suppliers at the price set out in the invoices and then resold them to JCC at a different (and almost invariably higher) price, that is, the price contemplated in the Sales & Distribution Agreement (JCC's wholesale price in Canada less 35 percent) in all cases. According to the CBSA, that such were the terms of the transactions for the importation of the Asian goods can be traced through JCC's records, bank account, income statement and corporate tax return for the year 2005.[51]

90. The CBSA submitted that there are no records which would suggest that JCC actually purchased the Asian goods from the Asian suppliers or that it paid, either directly or indirectly, these suppliers the amounts referenced in their invoices. As a result, the CBSA argued that these amounts cannot constitute the basis for valuation for the Asian goods under section 48 of the *Act*.

91. Since, in the CBSA's view, the relevant sale for export is a sale between JII and JCC at a price which can be determined (i.e. Canadian wholesale price less 35 percent), it correctly determined the value for duty of the Asian goods on the basis of the transaction value method of valuation in the decisions appealed from.

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50. Section 40 of the *Act* and *Imported Goods Records Regulations*, S.O.R. 86-1011.
51. The evidence filed by the CBSA to support its conclusion is summarized in Tribunal Exhibit AP-2011-008-07E at Appendix A, which includes specific references to excerpts of JCC's internal records that were filed as confidential exhibits in this appeal. At the hearing, Mr. Fitzgerald provided *viva voce* evidence concerning the fact that the actual payments made by JCC to JII did not reflect the amounts referenced in the invoices put forward by JCC in support of its position in this appeal. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 394-402; *Transcript of In Camera Hearing*, Vol. 2, 8 December 2011, at 31-53.

92. With respect to the fact that JII and JCC are related persons, the CBSA submitted that their relationship did not influence that price paid or payable for the goods and that the requirements of subparagraph 48(1)(*d*)(i) are thus satisfied. In this regard, it submitted that it typically accepts, as the transaction value of goods sold between related parties, a price paid or payable which is derived from a transfer pricing method that maintains the arm's length principle. The CBSA observed that the establishment of an intercompany transfer price based on the wholesale price less a percentage was very common and that, in this case, the wholesale price less 35 percent was derived from the application of the TNMM, which is one of the methods recommended by the OECD for establishing a transfer price that complies with the arm's length principle.

Tribunal's Assessment

93. Subsection 48(1) of the *Act* establishes the following three conditions that must be met before the transaction value can be used to appraise the value for duty:

- there must be a *sale for export*;
- there must be a *purchaser in Canada*; and
- the price paid or payable must be ascertainable.[52]

94. In addition, to the extent that the vendor and purchaser of the goods are related parties, paragraph 48(1)(*d*) provides that the transaction value can only be used if their relationship did not influence the price paid or payable for the goods. In this appeal, it is beyond dispute that JCC's importation of the Asian Goods involved a sale for export to a purchaser in Canada, namely, JCC. However, the question is whether the Asian goods were sold for export to JCC by unrelated Asian suppliers or by its parent, JII.

95. In *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, the Supreme Court of Canada held that, "[f]or the purposes of valuation under s. 48 of the *Customs Act*, the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada."[53] Thus, the Tribunal must determine whether, as argued by JCC, there is sufficient evidence to establish that title to the Asian goods passed directly from the Asian suppliers to JCC prior to their importation into Canada.

96. After a careful review of the totality of the evidence before it, the Tribunal finds that JCC failed to establish that it purchased the Asian goods from the Asian suppliers and, in particular, that the price that it actually paid or that was payable by it for the Asian goods is the price set out in the invoices issued by the Asian suppliers. In the Tribunal's opinion, the preponderant evidence rather indicates that the sale for export is a sale between JII as the vendor and JCC as the purchaser.

– Sales & Distribution Agreement

97. Since 1996, JII and JCC are parties to a Sales & Distribution Agreement pursuant to which JII agreed to sell, and JCC agreed to purchase, "goods" that are broadly defined to include the Asian goods.

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52. *The Pampered Chef, Canada Corporation v. President of the Canada Border Services Agency* (13 February 2008), AP-2006-048 (CITT); *Ferragamo U.S.A. Inc. v. President of the Canada Border Services Agency* (2 March 2007), AP-2005-053 (CITT).
53. [2001] 2 SCR 100 [*Mattel*] at para. 45.

98. Contrary to JCC's argument, this agreement is not merely a *distribution* agreement. As was noted by Mandamin J. in *Jockey Canada Company Limited v. Canada (Public Safety and Emergency Preparedness)*, "[t]his *Sales Agreement* provides that JII would sell JCC garments bearing the Jockey Marks *manufactured by and for JII*, U.S.A. for which JCC would pay JII a specified price" [emphasis added].[54]

99. On its face, thus, the scope of the Sales & Distribution Agreement encompasses the sale of goods that have been made for JII by third-party suppliers, irrespective of their country of origin, to JCC.

100. There is no clause which limits the scope of this agreement to goods manufactured by or for JII in the United States. Indeed, in *Jockey*, Mandamin J. further noted the following: "At some time prior to 2005, JCC also began importing goods *from JII* that were manufactured in Asia" [emphasis added].[55]

101. Despite the clear and unambiguous terms of the Sales & Distribution Agreement, JCC relied on the *viva voce* evidence given by Mr. Tolensky at the hearing to argue that it should not apply to the sale of goods made in Asia. Mr. Tolensky testified that at the time the Sales & Distribution Agreement was drafted, the intention between the parties was that it was only meant to apply to goods manufactured in the United States; this is not specifically mentioned in the said agreement.

102. In essence, JCC is asking the Tribunal to read words, namely, the words "goods manufactured by and for JII *in the United States*", into the text of the agreement. According to JCC, this is logical since goods originating in the United States were the main type of goods purchased by JCC in 1996.[56]

103. However, when a transaction has been reduced to writing through an agreement between two parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document. This is especially the case when the transaction at issue is between two sophisticated corporations.

104. Indeed, a review of the authorities pertaining to the admissibility of extrinsic evidence in the context of the interpretation of a contractual document indicates that, failing a finding of ambiguity in the document under consideration, it is not open to a court to consider extrinsic evidence and that, even where there is ambiguity, evidence only of a party's subjective intention is not admissible.[57]

105. In this appeal, the Tribunal finds that there is no ambiguity in the Sales & Distribution Agreement entered into between JII and JCC. It is clear that the parties' intention was to make the agreement applicable to the sale of goods manufactured by third parties for JII to JCC, irrespective of the geographical origin of these goods. Therefore, Mr. Tolensky's evidence that the parties actually intended something different at the time of the drafting and execution of the agreement is not admissible. The most important tool in order to ascertain the parties' intention at the time of the contract is present in the language of the agreement itself.

106. In any event, the Tribunal finds that Mr. Tolensky's evidence on this issue was not persuasive. In this regard, his statement that the Sales & Distribution Agreement only governs the sale by JII of goods originating in the United States was not corroborated by any of the employees of JII who testified at the hearing. These employees had very little knowledge concerning the agreement and could not provide evidence as to JII's intention when it entered into this agreement.

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54. 2010 FC 396 (CanLII) [*Jockey*] at para. 6.
55. *Ibid.* at para. 7.
56. *Transcript of Public Hearing*, Vol. 3, 9 December 2011, at 489-91; *Ibid.*, Vol. 1, 7 December 2011, at 22-23, 51-53.
57. *Canada v. General Motors of Canada Ltd.*, 2008 FCA 142 (CanLII) and other cases therein referred to.

107. Ms. Haarbauer stated that, while she was not familiar with the Sales & Distribution Agreement, her understanding was that, pursuant to this agreement, JII agreed to sell Jockey-branded goods to JCC.[58] She did not testify that the agreement only applied to the sales of goods originating in the United States.

108. As for Ms. Arbas, she testified that she did not have input into the text of the agreement, other than suggesting what the transfer price should be.[59] In sum, those witnesses could not provide evidence in support of the claim that the agreement only contemplates the sale of goods that are made by and for JII in the United States. For this reason, at best, Mr. Tolensky's evidence regarding the scope of the Sales & Distribution Agreement merely reflects his view or interpretation, not necessarily JII's.

109. Moreover, other statements made by Mr. Tolensky in his testimony cast doubt on the reliability of his evidence concerning the scope and significance of the Sales & Distribution Agreement. For example, he was "not sure" that the Sales & Distribution Agreement was a legally binding contract between JII and JCC, despite the fact that he executed the agreement on behalf of JCC and of the inclusion of clear provisions to that effect in the actual text of the agreement.[60]

110. Mr. Tolensky also stated that certain provisions of the agreement did not apply between related parties, while others could be enforced by JII.[61] He conceded that numerous clauses of the agreement, other than the provision governing the sale of goods by JII to JCC, applied to goods manufactured outside of the United States, including the Asian goods, distributed by JCC.[62]

111. In the Tribunal's opinion, one cannot pick and choose clauses that are legally binding and disregard others when convenient to do so. For this reason, JCC's ultimate argument to the effect that the inconsistencies in Mr. Tolensky's evidence can be explained by the fact that the Sale & Distribution Agreement was essentially a boilerplate document, which JII had put in place with numerous distributors around the world, and that the parties never intended to strictly adhere to its terms because they are related is not compelling.

112. In fact, there is a definition of the term "goods" set out in subsection 1(b) of the Sales & Distribution Agreement which, as previously indicated, covers the Asian goods and, for that matter, any goods bearing the Jockey trademark made by and for JII. This definition applies throughout the agreement and there is no legal basis for concluding that certain provisions of the agreement apply only to a subset of those goods (i.e. goods made in the United States) while others may apply to all goods manufactured by and for JII, irrespective of their origin.

113. The context provided by the other provisions of the agreement which use the term "goods" and which, admittedly, apply to the Asian goods provides further support for the Tribunal's conclusion that section 5 of the Sales & Distribution Agreement, which governs the sale by JII to JCC of "goods" as defined in subsection 1(b), contemplates the sale of goods manufactured for JII in Asia.

114. In addition, it warrants emphasizing that the evidence indicates that, since 1996, there have been at least three amendments to the Sales & Distribution Agreement. Had the parties actually intended to make section 5 only applicable to the sale of goods manufactured by and for JII in the United States, they could

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58. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 153-54, 156-57.
59. *Ibid.* at 193-94.
60. *Ibid.* at 56-57.
61. *Ibid.* at 45-49.
62. *Ibid.* at 52-53.

have modified this provision to that effect through these amendments. The fact that they did not suggests that they never intended to limit the scope of section 5 to the sale of goods made in the United States.

115. The amendments that were made also demonstrate that, while JII and JCC are related parties, they deemed it necessary to formalize, in writing, certain revisions to their rights and obligations under the Sales & Distribution Agreement. This suggests that, contrary to Mr. Tolensky's view, JII and JCC are well aware that all the terms of the agreement are legally binding and that formal amendments are required to modify or render inapplicable any provision of the agreement.

116. For these reasons, the Tribunal agrees with the CBSA that the Asian goods were sold by JII to JCC pursuant to the Sales & Distribution Agreement.

– Insufficient Evidence That the Title to the Asian Goods Passed Directly From Asian Suppliers to JCC

117. JCC's argument that title to the Asian goods passed directly from the Asian suppliers to JCC prior to their importation into Canada is inconsistent with the terms of the Sales & Distribution Agreement. The agreement does not provide that JCC has the right to purchase goods bearing the Jockey trademark from third-party suppliers. Rather, as discussed above, the Sales & Distribution Agreement contemplates that the goods to be sold to JCC and to be subsequently distributed in Canada as Jockey-branded goods are goods to be manufactured by and for JII.

118. In other words, the Sales & Distribution Agreement provides that JII may acquire goods manufactured for it by third-party suppliers and subsequently resell those goods as vendor and owner of the Jockey trademark. There is no evidence that JCC has the right to have Jockey-branded goods manufactured for it by third-party manufacturers.

119. At any rate, for the Tribunal to accept JCC's argument that title to the Asian goods passed directly to it from Asian suppliers, cogent evidence that JCC entered into agreements of purchase and sale with these suppliers and paid the price set out in their invoices was required. As argued by the CBSA, without the payment of an agreed-upon price by the purchaser to the vendor, there is no sale.[63]

120. There is insufficient evidence that JCC entered into contracts for the purchase of the Asian goods with Asian suppliers and actually paid their invoices.

121. The purchase orders for Asian goods were sent by JII and are JII's purchase orders, as is made clear by the inscription "Issued by Jockey International, Inc." that appears on the documents. The purchase orders do not indicate that JCC is the purchaser of the goods, but merely that the goods are to be delivered to its premises in London, Ontario. This is evidenced by the caption "Ship to" that appears on each purchase order. Thus, the purchase orders merely establish that JCC is identified as the consignee and not as the purchaser of the Asian goods.

122. All of the other information on the purchase orders is consistent with the view that they set forth the terms and conditions of transactions between JII and various Asian vendors. For example, there is a reference to the "Jockey Contractor Manual" and to the fact that "Jockey will not accept seconds". The references to "Jockey" in this context must be taken to mean JII, not JCC, especially given that the purchase orders are signed by a representative of JII.[64] For this reason, the Tribunal is unable to accept JCC's

63. Tribunal Exhibit AP-2011-008-07D at 802.
64. Tribunal Exhibit AP-2011-008-03C, tabs G-1, H-1, I-1 and J-1.

argument that the purchase orders are JCC's purchase orders or documents that set out the terms and conditions of transactions between JCC and Asian vendors.

123. Accordingly, the Tribunal is not convinced that the purchase orders were merely channeled through JII for the sake of administrative convenience. The evidence rather indicates that JII purchased the Asian goods, paid for them and, consequently, briefly assumed the responsibility that a purchaser would normally assume before reselling them to JCC.

124. JCC did not file compelling evidence indicating that JII simply passed on the cost of the Asian goods to JCC and that JCC actually paid the amounts invoiced by the Asian supplier for the goods. This is fatal to the position that JII simply ordered the Asian goods on behalf of JCC as part of services provided under an agreement pursuant to which JCC appointed JII to perform certain administrative functions (the Management Agreement).[65]

125. In this regard, while it is true that invoices from the Asian suppliers were sent to JCC, which suggests that JCC was the purchaser, the preponderant evidence indicates that JII, not JCC, paid these invoices in almost, if not all, cases. JCC did not produce a cogent paper trail originating from the Asian invoices to amounts ultimately withdrawn by JII from JCC's account, which could convince the Tribunal otherwise.

126. The only evidence indicating that JCC might have paid Asian suppliers directly in some cases relates to two transactions that occurred in 2005 and 2006 for which JCC allegedly paid the amount of the invoice via a letter of credit that was established for it by JII.[66] Other than these, all transfers from JCC to JII bear little if no relation to actual amounts paid by JII for the benefit of JCC (i.e. invoices) but, rather, are represented as lump sum amount transfers when money was available. If anything, this represents poor accounting practices and even poorer traceability.

127. The Tribunal finds that the evidence concerning two transactions is insufficient to establish that JCC paid the Asian suppliers.

128. Ms. Haarbauer testified that the account number appearing on the payment notice from the bank which issued the letter of credit was one of JCC's bank accounts.[67] On that basis, JCC argued that this document constituted evidence that it paid for Asian goods using money coming out of one of its bank accounts. However, another statement from the same bank indicates that it was a different account that was debited by it for the relevant charge. This "charge advice" was sent by the bank to JII and refers to a different account number, which may belong to JII.[68]

129. Ms. Haarbauer also testified that these accounts held in a U.S. bank were managed by JII.[69] Thus, from this evidence, it is not clear that the money used for the payment of the goods sold in these two transactions actually came out of one of JCC's bank accounts and, in the event that it did, who had dominion over that account.

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65. *Ibid.*, tab 2. In fact, nowhere in the Management Agreement is JII appointed as a buying agent on behalf of JCC or granted with the express and unconditional authority to bind JCC vis-à-vis third parties.
66. *Ibid.*, tabs G-5, G-6, H-4 and H-5.
67. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 105; Tribunal Exhibit AP-2011-008-03C at 515.
68. *Ibid.* at 516.
69. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 181-82.

130. The Tribunal also notes that, while the CBSA requested that JCC provide the proof of payment for the relevant transactions and a list of its bank accounts, records and statements for the 2005 fiscal year, these banking records, or similar documents, were not provided to the CBSA during the course of the verification.[70] The fact that some evidence of this sort is relied upon for the first time in this appeal undermines its probative value, since the CBSA never had an opportunity to verify them. The Tribunal also notes that no cogent evidence was adduced as to which accounts were used for which invoices. Besides, no documentation was supplied as to who managed such accounts and who the principal holder of these accounts actually was. The Tribunal was not either given clear explanations as to who supplied letters of credit for JCC, who guaranteed these letters of credit and from what account. The evidence was dusted with many different financial vehicles, but very little explanation was given to link these instruments to JCC's actual accountability.

131. For these reasons, the tribunal cannot give a lot of weight to these banking statements.

132. In any event, Ms. Haarbauer stated that up to 2006, only "a small amount" of Asian goods were paid by way of a letter of credit.[71] Given that the Asian goods were imported between 2005 and 2008 and that, by JCC's own admission, letters of credit were no longer used to pay the suppliers after April 2006, the Tribunal must conclude that, for the vast majority of cases, this evidence, which was filed to purportedly demonstrate that JCC paid the Asian suppliers directly, has no probative value.

133. After 2006, it is beyond dispute that the payment of the invoices issued by the Asian suppliers was made electronically by JII, not JCC. For these so-called "open account" transactions, there is no evidence that JCC ever paid the Asian suppliers directly.

134. In fact, the documentary evidence filed by JCC concerning these transactions and discussed by JCC's witnesses at the hearing does not include any proof of payment of the invoices by JCC. Thus, JCC tendered no evidence as to the amounts that it allegedly paid for the Asian goods or the timing of any such payments for the transactions that it depicted as "open account" purchases.

135. While Ms. Haarbauer testified that her belief was that JII wired the funds to the Asian suppliers on JCC's behalf, she could not give evidence in support of JCC's position that it subsequently reimbursed these funds to JII and, in this way, ultimately paid the amounts invoiced by the Asian suppliers. Concerning the money that JII periodically withdrew from JCC's bank account to allegedly cover the cost of the Asian goods, she stated that she would not normally see the records for these withdrawals and that, to her knowledge, they were never for a specific invoice amount since they covered both the cost of finished goods and the cost of other services provided by JII. During her cross-examination, she stated that she was not aware that JCC had "proof of payment from Jockey Canada to Jockey U.S." and acknowledged that she could not give evidence with respect to that matter.[72]

136. Similarly, Mr. Tolensky testified that he did not know the exact amounts that were withdrawn from JCC's bank account and could not give evidence on the issue of whether they matched the amounts that appear on the invoices from the Asian suppliers for the Asian goods. His evidence was that other fees owed by JCC to JII were included in the withdrawal made by JII from JCC's bank account. He also testified that

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70. *Transcript of In Camera Hearing*, Vol. 3, 9 December 2011, at 70-71.
71. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 164.
72. *Ibid.* at 136, 164-66, 179-80.

he was unable to answer any questions relating specifically to the payment by JCC of the goods that it purchases.[73]

137. There is no information in JCC's books and records that would indicate that JCC, at any time, owed money to any Asian suppliers or that it paid the Asian suppliers the amounts set out in their invoices. The only accounts payable for finished goods in JCC's books and records are payable to JII and they do not reflect the amount of the relevant invoices from the suppliers.

138. In addition, there is uncontested evidence that JII, not JCC, paid the invoices issued by the Asian suppliers with its own funds.[74] JCC also acknowledged that JII received a copy of the invoices, even if, on their face, they indicate that they are for JCC's account.

139. The Tribunal further notes that there is no evidence that JCC had any obligation towards the Asian suppliers with respect to the payment of the invoices issued by these manufacturers and that the latter expected payments from JCC. In these circumstances, that the Asian suppliers did not issue a separate invoice to JII and that JII did not re-invoice JCC for the Asian goods are not, in themselves, facts that can persuade the Tribunal that JII did not take title to the goods prior to such title being transferred to JCC.

140. In the Tribunal's opinion, given the lack of evidence that JCC actually paid, either directly or indirectly, the Asian suppliers the price that is set out in their invoices, one cannot reasonably conclude that those invoices reflect the terms of transactions between each Asian supplier, as the vendor, and JCC, as the purchaser.

141. With respect to JCC's argument that the facts that (1) JCC bore all the risks of loss and damage to the Asian goods immediately after they crossed the rail of the vessel at the port of shipment in Asia, (2) paid freight, insurance and duties in respect of the Asian goods and (3) had title to the Asian goods at the time they were transported into Canada indicated that it obtained title directly from each Asian supplier at the time of shipment, the Tribunal finds that those facts are equally insufficient to demonstrate the existence of a contract for the sale of goods between the Asian suppliers and JCC, considering the specific facts of the present case.

142. In *Mattel*, the goods in issue were made by third-party manufacturers located in Hong Kong, they were shipped directly from those manufacturers to the Canadian corporation part of the Mattel group of companies, Mattel Canada Inc. (Mattel Canada), and Mattel Canada insured the imported goods. The goods were at Mattel Canada's risks from the time of shipment. Notwithstanding these facts, the Supreme Court of Canada found that Mattel Canada's American parent company (Mattel Inc.) took title to the goods before title was transferred to Mattel Canada.

143. Similarly in this appeal, the facts relied upon by JCC are not determinative of the existence of a sale between the Asian supplier and JCC. What is rather determinative is the fact that there is insufficient evidence that JCC purchased the Asian goods directly from the Asian suppliers for the price that is indicated on the suppliers' invoices and that there is evidence that title to the Asian goods was transferred to JCC's American parent company, JII, before the goods were actually resold to JCC.

144. JCC also filed a profit and loss statement document in order to purportedly establish that the actual price that it paid for the Asian goods was the invoice cost, plus freight and duty.[75] The Tribunal is however

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73. *Ibid.* at 66, 87-88.
74. Tribunal Exhibit AP-2011-008-07B, tab Q at 408-29; *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 127-29.

unable to conclude from this document that the price actually paid by JCC for the Asian goods is the amount of each commercial invoice, plus freight and duty. Indeed, this document is a consolidated profit and loss statement generated by JII. Moreover, this profit and loss statement does not provide specific information on the purchases of Asian goods or on the cost of such goods for JCC.

145. From this evidence, the Tribunal is unable to determine the actual price paid by JCC for the Asian goods. As argued by the CBSA, a consolidated profit and loss statement found in JII's books and records, which may reflect the parent company's landed cost, for a profitability analysis of sales to Canadian customers through its Canadian subsidiary does not necessarily have any bearing on what JCC actually paid for the goods. In addition, the Tribunal notes that there is evidence that this profit and loss statement actually reflects JII's, not JCC's, costs of goods sold.[76]

146. The Tribunal further notes that Mr. Fitzgerald testified that this document was not provided to the CBSA at the time of the verification. The Tribunal considers that this affects the weight that should be given to this document in this appeal since, during the audit, the CBSA requested on multiple occasions that JCC provide proof that it paid the amounts set out in the invoices from the Asian suppliers to acquire the Asian goods; this document only became known to the CBSA through the appeal process. The fact that the document was not provided earlier undermines JCC's claims that it reflects the actual purchase price paid by JCC for the Asian goods.

147. Accordingly, the Tribunal is unable to conclude, on the basis of the evidence tendered by JCC, that there were actual contracts for the purchase of the Asian goods between JCC and various suppliers located in Asia and that JCC took title to the goods directly from these suppliers. Simply put, JCC failed to discharge its burden of establishing the existence of a sale for export from the Asian suppliers to JCC. On balance, the evidence supports the CBSA's position that there were two sale contracts, the first between JII and the Asian suppliers, and the second between JII and JCC.

– Evidence That JII Took Title to the Asian Goods and Resold Them to JCC

148. JCC submitted that there is no evidence on the record that would indicate that, at any time, JII took title to the Asian goods; the Tribunal disagrees.

149. In fact, the evidence filed by the CBSA in this appeal is consistent with the view that JII took a proprietary interest in the Asian goods and then sold them to JCC. This evidence thus supports the Tribunal's conclusion that the sale for export was a sale from JII to JCC.

150. In this regard, Mr. Fitzgerald gave undisputed evidence that JCC was charged by JII an amount equivalent to the Canadian wholesale price less 35 percent for the Asian goods and that there are no records or documentation in JCC's internal corporate books that would suggest that JCC paid, either directly or indirectly, suppliers located in Asia the amounts referenced in the invoices filed by JCC in this appeal. In fact, there is no evidence that the amount paid for these goods is anything but the Canadian wholesale price less 35 percent.

151. Mr. Fitzgerald explained that a company can only have one set of accounting books and can only record import transactions at the value paid for the imported goods. Every single transaction that the CBSA

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75. Tribunal Exhibit AP-2011-008-03C at 578.
76. Tribunal Exhibit AP-2011-008-07E at 857; *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 405-7.

verified, including transactions for the acquisition of the Asian goods, was recorded by JCC at the cost of Canadian wholesale price less 35 percent, as an account payable to JII.

152. On the basis of the evidence provided by Mr. Fitzgerald, the Tribunal finds that the role played by JII was not that of a facilitator or intermediary, which was simply buying the Asian goods on JCC's behalf and further passing their cost on to JCC. Rather, Mr. Fitzgerald's evidence, which stems from a thorough analysis of JCC's books and records, along with the limited information from JII's books and records that the latter agreed to disclose during the verification, strongly suggests that JII purchased the Asian goods on its own account and resold them to JCC.[77]

153. On the basis of this evidence, as was argued by the CBSA, the Tribunal finds the following:

- JII maintains a general ledger and monthly journal entries of all of its sales to JCC. The monthly journal entries list all the goods purchased by JCC in a given month, including the Asian goods.
- The price charged to JCC for all the goods that it purchased set out in these records is the Canadian wholesale price less 35 percent.
- The monthly journal entries, which, in essence, amount to a monthly billing from JII to JCC, also indicate JII's standard cost to land these goods in North America, a cost which includes the price that JII paid to the Asian suppliers for the Asian goods.
- With very few exceptions, JII's standard cost was below the price which it charged JCC for the goods.[78]
- At the hearing, Ms. Arbas confirmed that it is through these monthly journal entries that JII records the cost of sales on JCC's books on a monthly basis and that the entries reflect the Canadian wholesale price less 35 percent charged to JCC. She also testified that, on this document, the column entitled "U.S. Standard Cost" represents what JII paid for the Asian goods and the other columns entitled "Canada Cost" and "Canada Whls less 35%" represent the amount that was periodically withdrawn from JCC's bank account during a given year.[79] The Tribunal notes that this evidence is consistent with the CBSA's position that JII purchased the Asian goods from the Asian suppliers at a given price and subsequently transferred the goods to JCC at a different and, almost invariably, significantly marked-up price.
- All the amounts in the monthly billings for all JCC's purchases at the Canadian wholesale price less 35 percent are totalled and rolled into JCC's general ledgers for inventory and intercompany account payables. This means that JCC valued its inventory at the Canadian wholesale price less 35 percent and recorded a payable to JII reflecting that price.[80]
- JCC paid JII the Canadian wholesale price less 35 percent for all of the goods that it imported, including the Asian goods. On balance, the Tribunal is persuaded by the CBSA's evidence that JCC's banking records indicate that it made periodic payments to JII to discharge the price payable

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77. *Ibid.* at 394-402; *Transcript of In Camera Hearing*, Vol. 2, 8 December 2011, at 31-63.
78. Tribunal Exhibit AP-2011-008-07C. Examples of purchases of Asian goods by JCC can be found at page 498.
79. *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 210, 216-19.
80. Tribunal Exhibit AP-2011-008-07B at 463-64; Tribunal Exhibit AP-2011-008-07B at 455; *Transcript of In Camera Hearing*, Vol. 2, 8 December 2011, at 34-36, 46-53.

to JII, which is recorded in its intercompany account payables ledger, not some other price, such as the price which is set out in the invoices from the Asian suppliers.[81]

- The cost of goods sold that JCC used in preparing its year-end financial statements was based on the purchase of Asian goods from JII at the price of Canadian wholesale price less 35 percent. There is evidence that, for fiscal year 2005, JCC then adjusted its total cost of sales figure, which includes the cost of Asian goods, to comply with its transfer pricing obligations under the *Income Tax Act*; the amount of this adjustment has no relation to the actual amount paid by JII for the invoice for the Asian goods, but rather traces its origin to intercompany accounting/fiscal practices.
- Despite this adjustment, the fact remains that it is the purchase price of Canadian wholesale price less 35 percent which is embedded in JCC's cost of goods sold which was reported to the Canada Revenue Agency for purposes of calculating JCC's net revenue figure.[82] In other words, the cost of goods sold reported by JCC to the Canada Revenue Agency for the purposes of determining its tax liability was based on purchases of goods from JII at the Canadian wholesale price less 35 percent.

154. In the Tribunal's opinion, the mere fact that the cost of Asian goods was subject to a transfer pricing adjustment for income tax purposes provides compelling evidence that the Asian goods were sold by JII to JCC.

155. Indeed, income tax transfer pricing refers to the determination of the prices at which services, tangible or intangible property may be traded across international borders *between related parties*. Under the *Income Tax Act*, the Canada Revenue Agency requires that, for tax purposes, the terms and conditions agreed to between related parties in their commercial relations be those that one would have expected had the parties been dealing with each other at arm's length.[83] There is no such transfer pricing issue that arises in transactions between unrelated parties.

156. Thus, had the Asian goods been purchased by JCC from unrelated third-party manufacturers located in Asia, as is claimed by JCC, there would have been no need, and no legal basis, to adjust the cost of these goods (i.e. their transfer price) for income tax purposes. However, through the application of the TNMM, one of the recognized methods for establishing an acceptable transfer price, at the end of each relevant fiscal year, JCC adjusted, up or down, for income tax reasons, the cost that it assigned to all the goods that it purchased from abroad for resale, including the Asian goods. In this way, the profit that it declared to the Canada Revenue Agency fell within a profit margin range that was deemed acceptable (i.e. consistent with the arm's length principle).

157. At the hearing, Mr. Hales explained that a transfer pricing adjustment for income tax purposes to a single cost of goods sold figure implied that all the transactions reported were between related parties. His expert evidence was that companies will not normally include in their transfer pricing adjustments of the cost of goods sold reported in their income tax return an adjustment to the costs for goods acquired from non-related parties. The reason is that transactions between unrelated parties do not give rise to transfer pricing issues.[84]

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81. Tribunal Exhibit AP-2011-008-07D at 820; *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 393-99; *Transcript of In Camera Hearing*, Vol. 2, 8 December 2011, at 45-58; *ibid.*, Vol. 3, 9 December 2011, at 89-91.
82. Tribunal Exhibit AP-2011-008-07B at 191, 211; *Transcript of Public Hearing*, Vol. 1, 7 December 2011, at 240-42; *Transcript of In Camera Hearing*, Vol. 1, 7 December 2011, at 17-18.
83. Tribunal Exhibit AP-2011-008-11A, Expert Report of Gavin Hales.
84. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 297-304.

158. On the basis of the evidence, the Tribunal finds that, for income tax purposes, JCC treated its purchases of Asian goods as purchases of tangible property from a related party. The Tribunal agrees with the CBSA's argument that the only way to make sense of JCC's corporate behaviour and income tax filings is to conclude that the Asian goods were indeed sold to it by a related party, namely, JII.[85]

159. If, as argued by JCC, JII's sales price (i.e. Canadian wholesale price less 35 percent) was used as a factor to determine the income tax transfer pricing obligations of JCC and JII, then JII must be the vendor of the Asian goods. Simply put, there would have been no transfer pricing obligations for JCC and JII to comply with if the Asian goods had been sold to JCC by unrelated suppliers.

160. The Tribunal also notes a peculiar submission by JCC to the effect that, by and large, its accounting books and records should somehow be disregarded for customs valuation purposes because they are internal documents of a privately held corporation that focus on compliance with income tax obligations. The Tribunal finds that this argument has no merit. In order accept it, the Tribunal would have to conclude that JCC's books and records do not reflect commercial reality. This is not credible.

161. The fact that the Canadian wholesale price less 35 percent is reported throughout JCC's books and records as the purchase price for the Asian goods must mean that this amount was nothing less than the actual cost of those goods for JCC.

162. In this regard, Mr. Hales testified that, before companies make adjustments to their cost of goods sold to comply with their transfer pricing obligations under the relevant tax laws, they are not valuing their costs through the use of a notional price. He stated that the starting point of the analysis is the examination of the actual prices that were paid and of the actual financial flows between the related parties.[86] This suggests that, even if it may be used primarily for income tax purposes, the information in JCC's books and records is useful and relevant to determine the price paid or payable for the Asian goods in accordance with section 48 of the *Act*.

163. As was convincingly argued by the CBSA, to conclude otherwise would mean that JCC filed incorrect tax returns. It would mean that, in the case of the Asian goods, its actual cost of goods sold was significantly lower than the value that it declared to the Canada Revenue Agency; this would amount to erroneous declarations. The Tribunal finds that a more credible and reasonable conclusion is that the information set out in JCC's books and records and reported to the Canada Revenue Agency reflects its real costs and the actual price that it paid to its parent for the Asian goods.

164. In summary, there is ample evidence in JCC's books and records to support a finding that it took title to the goods from JII and not from third-party manufacturers located in Asia.

– The Price Paid or Payable for the Asian Goods Is Ascertainable

165. The Tribunal finds that that not only does the foregoing evidence establish that there was a sale for export between JII and JCC (the purchaser in Canada), but it also demonstrates that the price actually paid or that was payable by JCC when the Asian goods were sold for export was, in all cases, set at the Canadian wholesale price less 35 percent. Therefore, pursuant to subsection 48(1) of the *Act*, the price paid by JCC for the Asian goods is determinable.

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85. *Ibid.*, Vol. 3, 9 December 2011, at 551-54.
86. *Ibid.*, Vol. 2, 8 December 2011, at 323-24.

166. JCC raised three arguments against the use of the Canadian wholesale price less 35 percent as the price paid or payable for the Asian goods, that is, as their transaction value under subsection 48(1) of the *Act*.

167. First, it argued that the Canadian wholesale price less 35 percent entered in its books and records cannot be used as the transaction value of the Asian goods under section 48 of the *Act* because it is a transfer price established for income tax purposes, not customs purposes.

168. Contrary to JCC's argument, there is nothing in the *Act* which precludes a transfer price established for income tax purposes from constituting the transaction value of the goods for customs purposes. While it is true that a transfer price, which is acceptable for income tax purposes, will not necessarily be suitable for customs purposes and that, as such, the CBSA is not obliged to accept a transfer price reported to the Canada Revenue Agency as the transaction value of the goods, the evidence indicates that, for goods imported from a related party, the CBSA will generally accept a price paid or payable which is derived from one of the transfer pricing methods set out in the OECD guidelines, as is the case in this appeal.[87]

169. In fact, Mr. Fitzgerald stated that, as a rule, the CBSA will use the transfer price, which is set for income tax purposes, as the starting point for determining the price paid or payable for the goods, that is, the transaction value of the imported goods. On the basis of this value, it will then make the adjustments, either additions or deductions, that are required by section 48 of the *Act* and that are relevant in the circumstances.[88] Even if this may result in some differences in the values for customs and income tax purposes, in no way does it imply that a transfer price established for income tax purposes is not acceptable for customs purposes.

170. Second, JCC argued that this price is based on a deductive method and therefore cannot form the basis of a transaction value under subsection 48(1) of the *Act*. However, JCC has not provided any authorities that would suggest that the price paid or payable for the goods under subsection 48(1) cannot be based on a deductive method. On that basis, the Tribunal is unable to conclude that the provisions of the *Act* preclude a price that can be determined on the basis of a deductive method from constituting the transaction value of the imported goods. The relevant condition of subsection 48(1) is simply whether the price paid or payable "can be determined". As long as all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor can be determined, as is the case in the present appeal, the Tribunal finds that this condition is met.

171. Third, JCC referred to the decision of the Federal Court of Appeal in *Deputy, Canada (Minister of National Revenue), Customs and Excise v. Toyota Canada Inc.*[89] and argued that subsection 48(4) of the *Act* requires that the price paid or payable for the imported goods be capable of determination when the goods are brought to Canada, that is, at the time of entry or when the goods are imported.

172. On that basis, it submitted that since the Canadian wholesale price less 35 percent is subject to a transfer pricing adjustment for income tax purposes at the end of each year and therefore subject to change, it cannot represent a final price or one which is capable of being determined when the Asian goods are sold for export to Canada.

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87. Tribunal Exhibit AP-2011-008-07D at 623-24, 636.
88. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 419-20.
89. 1999 CanLII 8189 (FCA) [*Toyota*].

173. In the Tribunal's opinion, JCC incorrectly interprets the decision of the Federal Court of Appeal in *Toyota* to mean that, to the extent that a transfer price for the goods sold for export is subject to revisions or subject to the possibility of change post-importation, then the price paid or payable for the imported goods can no longer be determined at the time of importation; this is not so.

174. In *Toyota*, the importer, Toyota Canada Inc. (TCI), had declared provisional prices as the price paid or payable for the vehicles that it imported. TCI negotiated the actual final purchase price of the vehicles after their importation into Canada, as much as two months after their importation in certain cases. To reflect the adjustment to the provisional prices that resulted from the negotiation of the final prices, TCI requested re-appraisals of the transaction value of the imported vehicles. Where TCI requested reductions in the transaction value to reflect a downward adjustment to the price paid or payable which had been originally declared, the Deputy Minister of National Revenue chose to disregard those downward adjustments for the purposes of determining the transaction value, in accordance with paragraph 48(5)(*c*) of the *Act*.

175. The Tribunal allowed TCI's appeal. In the Tribunal's view, the final negotiated selling prices reflected the actual price paid or payable by TCI for the vehicles under section 48 of the *Act*.

176. While the Federal Court of Appeal allowed the Deputy Minister's appeal and set aside the Tribunal's decision, in doing so, it did not rule that the transaction value method of valuation was no longer applicable in view of the fact that the importer negotiated the actual final purchase price of the imported vehicles after their importation.

177. In allowing TCI's appeal, the Federal Court of Appeal mentioned that the Tribunal had failed to consider the time requirements embodied in section 48 of the *Act*. Thus, the Court referred the matter back to the Tribunal to determine whether the pricing provisions in the agreement between TCI and the exporter allowed for the determination of the price paid or payable for the goods at the time of importation.

178. In re-hearing the appeal under subsection 68(2) of the *Act*, the Tribunal did not, however, examine the merits of the question of whether TCI's pricing method allowed for the determination of the price paid or payable for the vehicles at the time of importation. This was because the parties advised the Tribunal that they had agreed to a resolution of the appeal. They requested that the Tribunal issue a decision reflecting their agreement that stated that the appeal brought by TCI should be dismissed and the decisions of the Deputy Minister of National Revenue upheld. On consent of the parties, the Tribunal therefore dismissed the appeal.[90]

179. This means that neither the Federal Court of Appeal nor the Tribunal found that section 48 of the *Act* was inapplicable on the facts that were at issue in *Toyota*.

180. Consequently, the decision in *Toyota* does not support the view that, to the extent that the purchase price for the imported goods might change after their importation, the value for duty of those imported goods can no longer be their transaction value and must be appraised on the basis of an alternative valuation method, as prescribed by subsection 47(2) of the *Act*.

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90. *Toyota Canada Inc. v. The Deputy Minister of National Revenue* (12 September 2000), AP-99-043 (CITT). In dismissing the appeal, the Tribunal upheld the Deputy Minister's decision to disregard any rebates or price decreases after the importation of the vehicles into Canada, thereby adopting the provisional prices as establishing their transaction value.

181. Even when the actual final purchase price is not known until after the importation, the Federal Court of Appeal did not rule out the possibility that the price paid or payable for the imported goods might still be ascertainable at the time of importation of the goods.

182. In any event, the Tribunal finds that the facts in this appeal are distinguishable from those in *Toyota*. In that case, the parties to the export sale had, arguably, not reached an agreement on the final price of the imported vehicles when they were sold for export to Canada.

183. In contrast with the present appeal, the evidence here indicates that JII and JCC agreed on a price for the Asian goods (i.e. Canadian wholesale price less 35 percent) in advance of their importation. This transfer pricing formula, which provides for possible post-importation price adjustments, was also clearly established prior to the importation of the goods. JII and JCC did not negotiate or otherwise renegotiate the actual purchase price of the Asian goods after their importation into Canada. The purchase price of Canadian wholesale price less 35 percent did not represent a notional or provisional price.

184. On that basis, the Tribunal finds that the pricing provision of the Sales & Distribution Agreement between JII and JCC allowed for the determination of the price paid or payable for the Asian goods at the time of importation. Moreover, as discussed above, the evidence indicates that JCC was always charged by, and actually paid to, JII the Canadian wholesale price less 35 percent for the Asian goods. Thus, it cannot be said that the price paid or payable by JCC for the Asian goods was not capable of determination when the goods were imported.

185. For these reasons, on the facts of this appeal, in accordance with the principles articulated by the Federal Court of Appeal in *Toyota*, the Tribunal finds that the pricing provisions in the agreement between JII and JCC allowed for the determination of the price paid or payable for the goods at the time of importation.

186. The Tribunal further notes that, contrary to JCC's argument, the mere fact that there were post-importation adjustments to this agreed-upon transfer price does not mean that the price paid or payable for the Asian goods was not ascertainable at the time of importation. Irrespective of the occurrence of such adjustments, the fact remains that, when the Asian goods were sold for export (i.e. at the time of importation), the price paid or payable for these goods was always JCC's Canadian wholesale price less 35 percent.

187. As a matter of law, the *Act* contemplates that a price paid or payable for imported goods which is determinable at the time of entry may change after the goods are imported without having the effect of rendering section 48 inapplicable. In other words, the mere fact that the price paid or payable for the goods may change after their importation does not necessarily mean that the price paid or payable is not ascertainable at the time of importation. This is made clear by paragraph 48(5)(*c*), which provides that the price paid or payable shall be adjusted "by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported."

188. By virtue of this provision, the price paid or payable for goods when they are sold for export under subsection 48(4) of the *Act* is not necessarily the actual final price that is ultimately paid by an importer. In other words, if the price paid or payable for the goods when they are sold for export is modified after the goods are imported, a relevant question is whether the price paid or payable (i.e. the transaction value of the goods) should be adjusted to reflect such price changes that occur post-importation.

189. On this issue, the Tribunal notes that the evidence indicates that the CBSA did not treat the year-end downward adjustments to the transfer price made by JCC in order to achieve its transfer pricing objectives for income tax purposes as rebates or decreases within the meaning of paragraph 48(5)(*c*) of the *Act*.

190. As a matter of fact, it took those adjustments into consideration in determining the transaction value of the goods in issue pursuant to section 48 of the *Act*. This resulted in deductions to the price paid or payable and, by implication, to the value for duty of the Asian goods, in certain cases. At the hearing, Mr. Fitzgerald explained that this decision was consistent with the CBSA's standard practice to allow this type of year-end adjustments, since they affect the value which a vendor and a purchaser attach to the imported goods.[91]

191. Typically, the CBSA allows importers to self-correct their value for duty declarations at the end of the fiscal year if, as a result of transfer pricing adjustments, they end up paying less for the imported goods that they purchased from a related party compared to the transfer price that they declared at the time of importation. Mr. Fitzgerald also stated that the CBSA expects importers to file self-corrections under section 32.2 of the *Act* if, as a result of transfer pricing adjustments, they end up paying more for the goods that they purchased from a related party than the amount that they declared at the time of importation.

192. The Tribunal finds that this practice is consistent with the requirements of section 48 of the *Act*. Indeed, downward price adjustments to the price paid or payable for imported goods that occur post-importation do not necessarily constitute rebates in the price paid or payable for the imported goods within the meaning of paragraph 48(5)(*c*) of the *Act*.[92]

193. On the basis of the foregoing, the Tribunal finds that, in the circumstances of this case, JCC's transfer pricing adjustments do not entail that the sales price of Canadian wholesale price less 35 percent did not constitute the price paid or payable for the Asian goods when they were sold for export or can no longer be used as the basis for establishing the transaction value of the goods pursuant to section 48 of the *Act*, as is claimed by JCC.

194. Accordingly, the Tribunal concludes that there is no legal or factual basis to interfere with the CBSA's decision to use the purchase price of Canadian wholesale price less 35 percent as representing the price paid or payable for the Asian goods when they were sold for export and to allow for relevant adjustments to be made to this transaction value in accordance with its policy to allow transfer pricing adjustments when they are made in accordance with an accepted transfer pricing methodology.

– The Relationship Between JII and JCC Did Not Influence the Price Paid or Payable for the Goods

195. Paragraph 48(1)(*d*) of the *Act* provides that, where the purchaser and vendor of the goods sold for export are related to each other, the transaction value method for appraising the value for duty of the imported goods cannot be used unless their relationship did not influence the price paid or payable for the goods. Given that JII and JCC are related persons within the meaning of subsection 45(3) of the *Act*, the value for duty of the Asian goods can be appraised on the basis of their transaction value only if the Tribunal is convinced that their relationship did not influence the price paid or payable for these goods.

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91. *Transcript of In Camera Hearing*, Vol. 3, 9 December 2011, at 109-13.
92. *Nordic Laboratories Inc. v. Deputy Minister of National Revenue*, (1996) 113 F.T.R. 168 (FCTD); *Quadra Chemicals Ltd. v. The Deputy Minister of National Revenue* (26 July 1994), AP-93-260 (CITT).

196. On this issue, the Tribunal notes that JCC did not make submissions or file evidence to persuade the Tribunal, should it be found that the Asian goods were sold to JCC by JII at the Canadian wholesale price less 35 percent, that the fact that JII and JCC are related parties influenced the price paid or payable for the Asian goods.

197. Put another way, JCC did not submit that, for this reason, the value for duty of the Asian goods cannot be appraised on the basis of their transaction value pursuant to section 48 of the *Act*. Thus, the CBSA's submissions that the relationship between JCC and JII did not influence the price that JCC paid JII for the goods in issue, including the Asian goods, were not rebutted.

198. The Tribunal further notes there is undisputed evidence that JCC purchased the Asian goods from JII at terms that were set to implement one of the methods for establishing a transfer price that complies with the arm's length principle recommended by the OECD, namely, the TNMM. This method is one of the recognized methods for determining a transfer price which could reasonably have been expected in similar circumstances had the vendor and the purchaser not been related.

199. There is also undisputed evidence that the transfer pricing methodology used by JII and JCC, which provides for the possibility of year-end adjustments to the transfer price in order to maintain JCC's profitability within an appropriate percentage range, was determined to be acceptable by the Canada Revenue Agency. This indicates that, from an income tax perspective, the transfer price in respect of all transactions between JII and JCC involving the sale of tangible property, including the sale of the Asian goods, was deemed to reflect the situation that would have prevailed had the parties not ben related.

200. As previously noted, the evidence also indicates that the CBSA will generally accept for customs valuation purposes, pursuant to section 48 of the *Act*, a price paid or payable which is derived from one of the methods recommended by the OECD, as is the case in this appeal. All those facts tend to demonstrate that the relationship between JII and JCC did not influence the price paid or payable for the goods.

201. In view of the foregoing, the Tribunal accepts the CBSA's arguments that the relationship between JII and JCC did not influence the price that JCC paid JII for the Asian goods and that the requirements of paragraph 48(1)(*d*) of the *Act* are satisfied.[93]

202. For all of the above reasons, the Tribunal finds that the CBSA correctly determined that the value for duty of the Asian goods can be appraised on the basis of the transaction value method of valuation. The Tribunal concludes that, in accordance with the conditions set out in section 48 of the *Act*, the Asian goods were (1) sold for export by JII to JCC, (2) at a price that was determinable, and (3) that the relationship between JII and JCC did not influence the price paid or payable for these goods. The Tribunal also concludes that the value for duty of the Asian goods was based on the purchase price of Canadian wholesale price less 35 percent originating in subsection 5(b) of the Sales & Distribution Agreement, as amended by the parties.

Value for Duty of the Caribbean Goods

203. In the case of the Caribbean goods, the proper method of valuation to be used is a contested issue.

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93. Tribunal Exhibit AP-2011-008-07E at 846-49.

Positions of Parties

204. JCC submitted that the conditions of section 48 of the *Act* are not met in regard to the transactions for the purchase of the Caribbean goods. It submitted that the transaction value method of valuation cannot be used because JCC purchased the Caribbean goods from related parties (i.e. Jockey Honduras, Jockey Jamaica and Jockey Costa Rica) and that this relationship influenced the price. It further submitted that the price paid or payable cannot be determined since these purchases are settled through debiting and crediting several intercompany accounts.

205. As a result, JCC argued that the value for duty of the Caribbean goods must be determined in accordance with another method provided for in the *Act*. In this regard, it submitted that the value for duty cannot be appraised using the first two subsidiary bases for appraisal set out in paragraphs 47(2)(*a*) and (*b*) of the *Act* as the conditions for the use of those methods are not met. According to JCC, the requirements of the computed value method referenced in paragraph 47(2)(*d*) and detailed in section 52 of the *Act* are met and data to verify the value for duty declared by JCC on the basis of this method was readily available.

206. JCC also submitted that it used the computed value of the Caribbean goods under section 52 of the *Act* instead of their deductive value under section 51, which it claimed was permitted by subsection 47(3) in the circumstances. Subsection 47(3) provides that, notwithstanding the requirement that the subsidiary bases of appraisal be considered in the order set out in subsection 47(2), ". . . on the written request of the importer of any goods being appraised made prior to the commencement of the appraisal of those goods, the order of consideration of the [deductive and computed value] shall be reversed." JCC claims that it made such a request prior to the appraisal of the value for duty of the Caribbean goods.

207. The CBSA submitted that the transaction value method of valuation is applicable to appraise the value for duty of the Caribbean goods. It submitted that JCC failed to establish that the Caribbean goods were actually sold to it for export by its sister companies located in Honduras, Jamaica and Costa Rica. It argued that the evidence clearly indicates that, like the Asian goods, the Caribbean goods were sold by JII to JCC at the purchase price of Canadian wholesale price less 35 percent.

208. The CBSA referred to the information recorded in JCC's accounting books and banking records, which again reveals that it paid JII the Canadian wholesale price less 35 percent for the Caribbean goods, and submitted that, in view of the records requirements of section 40 of the *Act*, this information must reflect the commercial reality of transactions to which JCC was a party. The CBSA argued that there is no evidence in JCC's internal documents which would suggest that JCC was actually purchasing the Caribbean goods from anyone other than JII.

209. For the same reasons as those that it invoked in respect of the transactions for the purchase of the Asian goods, the CBSA submitted that the relationship between JII and JCC did not influence the price paid or payable for the Caribbean goods. Therefore, since all the relevant conditions of section 48 of the *Act* are met, the CBSA maintains that it correctly determined the value for duty of the Caribbean goods on the basis of their transaction value. Given that the value for duty of the Caribbean goods can be appraised on the basis of the primary basis of appraisal, the CBSA submitted that there is no need to consider any of the subsidiary bases of appraisal, including the computed value of the Caribbean goods, in the circumstances of this appeal.

Tribunal's Assessment

210. In order to successfully appeal the CBSA's determinations concerning the value for duty of the Caribbean goods and persuade the Tribunal that the value for duty of these goods is their computed value in accordance with section 52 of the *Act*, JCC had the burden of proving that neither the transaction value method under section 48 nor any of the subsidiary bases of appraisal referenced in sections 49 to 51 is applicable. For the following reasons, the Tribunal finds that JCC failed to discharge this burden.

– Preponderant Evidence Is That JCC Purchased the Caribbean Goods From JII

211. JCC's position that the value for duty of the Caribbean goods cannot be appraised on the basis of their transaction value in accordance with section 48 of the *Act* is premised on the claim that these goods were sold for export by related persons, namely, other subsidiaries of JII located in the Caribbean region.

212. In JCC's view, its relationship with those JII affiliates influenced the purchase price. However, there is compelling evidence on the record which indicates that, in fact, like the Asian goods, the Caribbean goods were sold for export by JII to JCC at the agreed-upon transfer price of Canadian wholesale price less 35 percent.

213. Indeed, for the purposes of a value of duty appraisal, the transactions for the purchases of both the Asian goods and the Caribbean goods were identical in all material respects. There exists no agreement of purchase and sale between JCC and related suppliers located in Honduras, Jamaica or Costa Rica. In contrast, the Sales & Distribution Agreement between JII and JCC clearly provides that JII would sell JCC's garments bearing the Jockey trademark manufactured by and for JII, regardless of their country of origin, for which JCC would pay a specified price.

214. The Tribunal has already found that the evidence provided by JCC in order to convince the Tribunal that the Sales & Distribution Agreement only applies to goods originating in the United States sold by JII to JCC is both inadmissible and not particularly credible. In the Tribunal's opinion, on balance, the evidence before it indicates that the Caribbean goods were sold to JCC by JII pursuant to the terms of the Sales & Distribution Agreement.

215. In *Jockey*, Mandamin J. found that, as a matter of fact, "[a]t some time prior to 2000, JCC began purchasing goods *from JII* manufactured by its subsidiaries in Jamaica, Honduras and Costa Rica. *JCC paid JII* for these Caribbean goods . . ." [emphasis added].[94]

216. What is more, the information set out in the transfer pricing study conducted by an accounting firm to analyse the transactions between JII and JCC supports the conclusion that the structure of JII's operations and of the transactions for the importation of the Caribbean goods is such that these goods are assembled in the Caribbean region by JII subsidiaries, sold to JII and then resold by JII to JCC for distribution in Canada.[95] At the hearing, Ms. Arbas did not provide convincing evidence to the contrary.[96]

217. Fundamentally, there is no hard evidence that the title to the Caribbean goods passed directly from the Caribbean manufacturers to JCC. Most commercial invoices filed by JCC concerning transactions for

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94. *Jockey* at para. 7.
95. Tribunal Exhibit AP-2011-008-03C (protected) at 391-94.
96. *Transcript of In Camera Hearing*, Vol. 1, 7 December 2011, at 8-11.

the purchase of the Caribbean goods merely indicate that JCC is the consignee.[97] These are insufficient to persuade the Tribunal that the Caribbean goods were sold to JCC by the Caribbean manufacturers.

218. Besides, JCC did not file any evidence concerning the payment of those invoices. At the hearing, the issue of the payment chain concerning the transactions for the purchase of the Caribbean goods was not addressed by its witnesses. As was previously noted, without the proof of payment of an agreed-upon price by the purchaser to the vendor, the Tribunal cannot conclude to the existence of a purchase and sale agreement between JCC and offshore manufacturers.

219. As for JCC's arguments that it bore all the risks of losses and damages to the Caribbean goods during shipment and transit to Canada, that it held title to the goods from the port of export and that JII purchased the goods on its behalf as part of services provided under the Management Agreement, the Tribunal has already rejected these claims in addressing the value for duty of the Asian goods. The Tribunal's conclusion and underpinning reasoning in this respect apply equally to the transactions for the purchase of the Caribbean goods. Those allegations and related evidence are similarly insufficient to establish that JCC purchased the Caribbean goods directly from suppliers located in Honduras, Jamaica and Costa Rica.

220. For the reasons discussed above, the Tribunal is also of the view that the profit and loss statement filed by JCC to purportedly establish that the landed cost of the Caribbean goods for JCC was the computed value of the goods plus freight and duty is not sufficient to demonstrate the existence of a sale between JCC and the Caribbean manufacturers. This document does not provide specific information on the purchases of the Caribbean goods or on the cost of such goods for JCC.

221. In sum, JCC provided insufficient evidence to persuade the Tribunal that there were agreements for the purchase and sale of the Caribbean goods between JCC and the three subsidiaries of JII located in Jamaica, Honduras and Costa Rica, and that JCC took title to the goods directly from these suppliers.

222. On balance, the Tribunal finds that JCC did not substantiate its claim that the CBSA erred in concluding that a sale for export rather occurred between JII (the vendor) and JCC (the purchaser in Canada) pursuant to an intercompany agreement at a transfer price of Canadian wholesale price less 35 percent. On that basis, the Tribunal is unable to accept JCC's argument that it bought the Caribbean goods directly from related offshore suppliers.

223. Further, as he did for transactions involving the JCC's purchases of the Asian goods, Mr. Fitzgerald provided undisputed evidence that all transactions involving purchases of the Caribbean goods were entered in JCC's books and records as a sale from JII to JCC at the purchase price of Canadian wholesale price less 35 percent.[98] The evidence that Mr. Fitzgerald provided at the hearing as well as the documentary evidence in support of his statements are summarized in Appendix A to the CBSA's brief.[99]

224. On the basis of this evidence, the Tribunal's findings in paragraphs 152-153 above apply equally to JCC's purchases of the Caribbean goods.

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97. Tribunal Exhibit AP-2011-008-03C (protected), at 580, 583, 585. In some cases, JII, not JCC, is identified as either the purchaser or the consignee. At the hearing, Ms. Haarbauer stated that these were errors and that JII did not press this issue with the exporters. While nothing turns on this, the Tribunal finds it unusual that the documents filed by JCC to purportedly demonstrate that it purchased the Caribbean goods directly from its sister companies operating in the Caribbean region cast doubt on JCC's assertions in this regard.
98. *Transcript of In Camera Hearing*, Vol. 3, 9 December 2011, at 79-99.
99. Tribunal Exhibit AP-2011-008-07E (protected) at 862-66.

225. In summary:

- JII bills JCC on a monthly basis for all the goods purchased by JCC in a given month, including the Caribbean goods. As previously noted, JII maintains a general ledger and monthly journal entries for all of its sales to JCC. For each month, the first pages are the general ledger entries and the following pages are the supporting monthly billings from JII to JCC, which list all the goods purchased by JCC in the month, including the Caribbean goods.[100]
- The price charged to JCC for the Caribbean goods set out in JCC's accounting books, including in its general ledger and monthly journal entries, is the Canadian wholesale price less 35 percent.
- JCC valued its entire inventory, including its inventory of Caribbean goods, at the Canadian wholesale price less 35 percent and recorded a payable to JII reflecting that price. This is reflected in JCC's accounts for inventory and intercompany payables.
- JCC paid to JII the Canadian wholesale price less 35 percent for all of the goods that it imported, including the Caribbean goods, not some other price such as the price which is set out in the invoices from the Caribbean suppliers. On balance, the Tribunal is persuaded by Mr. Fitzgerald's evidence that JCC's banking records indicate that it made periodic payments to JII to discharge the price payable to JII, which is recorded in its intercompany account payables, not some other price such as the price which is set out in the invoices from the Caribbean suppliers.[101]
- The cost of goods sold that JCC used in preparing its year-end financial statements was based on the purchase of the Caribbean goods from JII at Canadian wholesale price less 35 percent. According to the evidence, for fiscal year 2005, JCC then adjusted its total cost of sales figure, which includes the cost of the Caribbean goods, to comply with its transfer pricing obligations under the *Income Tax Act*.
- Despite year-end transfer pricing adjustments, it is the purchase price of Canadian wholesale price less 35 percent for the Caribbean goods that is embedded in JCC's cost of goods sold figure that was reported to the Canada Revenue Agency for purposes of calculating JCC's net revenue figure.[102]

226. This evidence equally supports a finding that the title to the Caribbean goods was transferred to JII before these goods were resold to JCC. Moreover, it confirms that the Caribbean goods were sold by JII to JCC pursuant to the terms of the Sales & Distribution Agreement, as amended.

227. On average, there was a difference of 100 percent between the purported computed value of the Caribbean goods, the value which was declared by JCC at the time of importation, compared to the price charged by JII reported in JCC's books and records. As a result, as was the case for the Asian goods, JCC's value for duty declarations ascribed to the Caribbean goods a value which was significantly below the price

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100. Tribunal Exhibit AP-2011-008-07C (protected) at 657-65. In Appendix A to the CBSA's brief, a transaction involving shipments of goods from Honduras is explained. At the hearing, Mr. Fitzgerald provided *viva voce* evidence concerning the manner in which the terms of this transaction and other transactions involving the importation of the Caribbean goods were reported in JCC's books and records. *Transcript of In Camera Hearing*, Vol. 3, 9 December 2011, at 79-95. This undisputed evidence supports the statements made at paragraphs 83-84 of the CBSA's confidential brief (Tribunal Exhibit AP-2011-008-07E [protected]), according to which there is no records which would suggest that JCC purchased the Caribbean goods from Caribbean suppliers or paid these suppliers the amounts referenced in the invoices issued by those suppliers.
101. *Transcript of In Camera Hearing*, Vol. 3, 9 December 2011, at 90-99.
102. Tribunal Exhibit AP-2011-008-07B at 191, 211.

that its parent company charged for these goods and which, according to the preponderant evidence, was paid by JCC.

228. In the case of the Caribbean goods, JCC's income tax returns filed with the Canada Revenue Agency also provide compelling evidence that the parties to the relevant transactions were indeed JII and JCC, as opposed to JCC and the Caribbean suppliers.

229. The Canada Revenue Agency requires a taxpayer to report non-arm's length transactions with non-residents on a separate form called a "T106 Slip" for each non-resident from whom it purchased tangible property. Such reporting would therefore occur if JCC purchased the Caribbean goods directly from Jockey Honduras, Jockey Jamaica and Jockey Costa Rica; it would need to file a separate T106 Slip in respect of each of those related parties.

230. At the hearing, Mr. Hales explained that a separate T106 Slip is mandatory for each related party with which a taxpayer deals with, and his expert opinion was that, if JCC was independently purchasing goods from its three sister companies located in the Caribbean region, it would then be expected that JCC file a distinct T106 Slip for each of those related parties.[103]

231. However, the evidence indicates that for 2005, the year for which the CBSA verified its import transactions, JCC filed only one T106 Slip, and this form indicates that JCC purchased goods from only one related party, namely, JII.[104] There is no information on the record which would indicate that the situation was different in 2006, 2007 or 2008. This strongly suggests that, at least in 2005 and, in absence of evidence to the contrary, likely throughout the relevant period, JCC purchased tangible property from only one related party, that is, its parent company.

232. A thorough analysis of JCC's total 2005 transactions was in fact presented to the Tribunal at the hearing. Mr. Fitzgerald, in a very thorough and methodical way, explained how he managed to trace back JCC transactions for the purchase of Caribbean goods in JCC's books and records and determine the cost of those goods for this given period. Incidentally, the resulting number of this exercise is the one which is eventually embedded in JCC's income tax returns. Mr. Fitzgerald's evidence confirms that import transactions for JCC all transited through JII and that none of these occurred directly with the Caribbean suppliers.

233. To understand this evidence otherwise would imply that for at least 2005, JCC would have filed an incorrect tax return, which the Tribunal considers doubtful. Given the foregoing facts, a more reasonable inference can be drawn from this evidence, which is that JCC, in fact, purchased the Caribbean goods from JII.

234. Accordingly, the Tribunal finds that, as was the case for the Asian goods, the Caribbean goods were sold for export by JII to JCC at the transfer price of Canadian wholesale price less 35 percent.

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103. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 305-7.
104. Tribunal Exhibit AP-2011-008-07B (protected) at 216-17; *Transcript of In Camera Hearing*, Vol. 1, 7 December 2011, at 12-16.

– The Value for Duty of the Caribbean Goods Can Be Appraised on the Basis of the Transaction Value in Accordance With the Conditions Set Out in Section 48 of the *Act*

235. In view of the foregoing, the Tribunal finds that the CBSA correctly determined that the value for duty of the Caribbean goods can be appraised on the basis of the transaction value method of valuation, as all of the relevant conditions for the application of section 48 of the *Act* are met.

236. In this regard, on the basis of the previous analysis and evidence, the Tribunal has already concluded that, in accordance with the conditions set out in section 48 of the *Act*, the Caribbean goods were (1) sold for export by JII to JCC, and (2), at a price that was determinable (i.e. Canadian wholesale price less 35 percent).

237. JCC invoked the same arguments against the use of the purchase price of Canadian wholesale price less 35 percent as the price paid or payable for the Caribbean goods as the ones raised in the case of the Asian goods. The Tribunal has already dealt with these arguments and determined that they were not persuasive. For the reasons discussed above, the Tribunal therefore concludes that the price paid or payable for the Caribbean goods was determinable at the time of importation.

238. Turning to the issue of whether the fact that JII and JCC are related persons renders section 48 of the *Act* inapplicable to the appraisal of the value for duty of the Caribbean goods, the Tribunal has also already determined that the relationship between JII and JCC did not influence the price paid or payable for the Asian goods. In the Tribunal's opinion, this conclusion and underlying reasoning applies *mutatis mutandis* to the transactions between JII and JCC for the importation of the Caribbean goods.

239. There is no evidence on the record which could lead the Tribunal to reach a different conclusion in the case of the Caribbean goods. Again, it warrants emphasizing that the transfer price agreed upon by JII and JCC, which was accepted by the Canada Revenue Agency, is derived from a transfer pricing method which is recognized by the OECD as one that maintains the arm's length principle. Moreover, this methodology applied to all of JCC's purchases of tangible property from its parent company. These include both the Asian goods and the Caribbean goods.

240. Accordingly, as there is a transaction value which can be determined and satisfies the requirement of paragraph 48(1)(*d*) concerning export sales between related persons, in accordance with the requirements of sections 47 and 48 of the *Act*, the Tribunal concludes that the CBSA correctly appraised the value for duty of the Caribbean goods using the primary basis of appraisal set out in the *Act*. As a result, it is not legally appropriate to appraise the value for duty of the Caribbean goods on the basis of any of the subsidiary methods of valuation set out in the *Act*, including the computed value of the goods.

241. For this reason, the Tribunal is unable to accept JCC's argument that the requirements of the computed value method referenced in paragraph 47(2)(*d*) and detailed in section 52 of the *Act* are relevant or met in the case of the Caribbean goods.

242. While it is not necessary to dispose of the present appeal, the Tribunal deems it appropriate to note that, even if it had found that the transaction value method was not applicable, it is not convinced that the requirements of subsection 47(3) of the *Act*, which allow, in certain circumstances, an importer to appraise the value for duty of imported goods on the basis of the computed value of the imported goods before considering their deductive value in accordance with section 51, were met in this case.

243. Notwithstanding the cascading order set out in subsection 47(2) of the *Act*, subsection 47(3) allows importers the opportunity to proceed to valuation through the computed value method, by reversal of paragraphs 47(2)(*c*) and (*d*) if certain preliminary steps are taken. This involves the filing of a *written request* by the importer with regard to the goods being appraised, *prior to* the commencement of the appraisal.

244. In this regard, there is no documentary evidence which indicates that JCC made a written request to that effect prior to the commencement of the appraisal as to the reversal of the order of consideration of the values referred to in paragraphs 47(2)(*c*) (deductive value) and (*d*) (computed value).

245. Thus, even if JCC's argument that it could elect to use the computed value method of appraisal when the CBSA notified it that there would be a review of some kind of its value for duty declarations was found to be legally viable, the fact remains that there is no probative evidence that JCC ever requested to the CBSA, in writing, that the computed value method be used in preference to the deductive value method and that this request was made prior to the appraisal of the goods.

246. The Tribunal notes that, in the exchange of correspondence between the parties during the audit, there is information which indicates that the CBSA requested JCC to provide its written request to the CBSA, pursuant to subsection 47(3) of the *Act*, to switch the hierarchical order of the deductive and computed value valuation methods.[105] However, JCC did not file with the Tribunal its complete reply to the CBSA's correspondence in this respect. Only cover letters which make no reference to this issue are on the record.[106] Thus, there is no cogent evidence on the record which demonstrates that JCC ever made the written request referenced in subsection 47(3).

247. On the basis of the foregoing, the Tribunal concludes that JCC failed to establish that the conditions of section 48 of the *Act* are not met in regard to the transactions for the purchase of the Caribbean goods and that the value for duty of the Caribbean goods had to be appraised on the basis of the computed value of these goods.

Whether JCC Had "Reason to Believe" That Its Value for Duty Declarations Were Incorrect in 2005

248. JCC submitted in the alternative that it had no "reason to believe" in 2005 that its value for duty declarations on its imports of both the Asian goods and the Caribbean goods were incorrect as is stated by the CBSA in the decisions appealed from.

249. JCC submitted that the Tribunal has jurisdiction to address this "reason to believe" issue through the current appeal.

250. JCC's position is that it only had "reason to believe" that its value for duty declarations were incorrect once it received a final notification from an authorized CBSA officer that the CBSA had concluded that this was the case.

251. On the facts of this appeal, JCC argued that this did not occur until March 3, 2009 (when the CBSA confirmed that the October 20, 2008, ruling, which was made at the conclusion of the verification, would not be rescinded), or, at the earliest, on October 20, 2008, when the CBSA provided JII with the results of its verification and findings, including its valuation audit report, and instructed JCC to self-correct its value for duty declarations for fiscal years 2005, 2006, 2007 and 2008.

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105. Tribunal Exhibit AP-2011-008-03B at 229-30.
106. *Ibid*. at 232-35.

252. The CBSA submitted that nowhere in the substantive part of the October 20, 2008, ruling and instruction letter to JCC is reference made to the "reason to believe" issue. The CBSA argued that reference was made to this issue at the end of the letter to advise JCC that it was considering imposing an administrative monetary penalty as a result of JCC's failure to self-correct its value for duty declarations in 2005, given the auditors' finding that the entries recorded in JCC's books and records meant that JCC had "reason to believe" as early as 2005 that its value for duty declarations were incorrect.

253. The CBSA further submitted that whether or not JCC had "reason to believe", in 2005, that its value for duty declaration were incorrect has no bearing whatsoever on whether or not those valuations were correct.

254. It argued that its decision to require JCC to self-correct its value for duty declarations for the period between March 15, 2005, to December 31, 2008, which led to the issuance of decisions in the form of DASs pursuant to paragraph 59(1)(*a*) of the *Act* and, as a result of JCC's subsequent requests for a further re-determination to the CBSA under section 60, to the decisions appealed from, is not underpinned by its finding that JCC had such "reason to believe" in 2005. The CBSA submitted that its decision to require JCC to file corrections to its value for duty declarations from 2005 to 2008 is grounded on the substantive results of its verification.

255. In this regard, the CBSA noted that, pursuant to section 59 of the *Act*, it may re-determine the value for duty of any imported goods at any time within four years after the date on which the imported goods were accounted for on the basis of, among other things, a verification audit. For example, this means that on the basis of an audit completed on January 2, 2010, the CBSA could re-determine the value for duty of the goods imported into Canada in the four-year period from January 2, 2006, to January 1, 2010.

256. In addition, the CBSA argued that "reason to believe" only comes into play after it has been determined that a given declaration is incorrect and, while this issue may, in certain circumstances, be relevant in deciding how far back corrections must be made, in this case, the fact that the decisions appealed from state that JCC had "reason to believe" that its value for duty declarations were incorrect as early as 2005, did not determine the duration of the duty reassessment period in this case. The reason being that, pursuant to subsection 32.2(2) of the *Act*, the obligation of importers to make corrections to their declarations concerning the tariff classification, the value for duty or the origin of the imported goods ends four years after the imported goods have been accounted for.

257. The CBSA observed that, in this appeal, the fact that its final ruling including its instructions that JCC self-correct its value for duty declarations of the verification was only communicated to JCC in March 2009 meant that it could only require JCC to correct its value for duty declarations going back four years from March 2005 onwards.

258. It argued that this is precisely what it did, in full compliance with the relevant requirement of the *Act*. Consequently, the CBSA took the position that whether or not JCC had "reason to believe" in 2005 was irrelevant to the issue of whether it was required to self-correct its value for duty declarations going back to March 2005.

259. The CBSA further submitted that the "reason to believe" issue was relevant to determine whether a monetary penalty under section 109 of the *Act* should be imposed. The CBSA argued that, where a penalty is imposed under section 109 on the basis of an importer's failure to correct its declarations where it had "reason to believe" that such declarations were incorrect, the importer may seek a ministerial review of that penalty under section 129.

260. To the extent that the Minister of Public Safety and Emergency Preparedness upholds the "reason to believe" finding which underpinned the imposition of the penalty, the importer can then appeal that decision by way of an action to the Federal Court pursuant to section 135 of the *Act*. In these circumstances, the CBSA argued that it would be for the Federal Court, not the Tribunal, to decide when the importer had "reason to believe" that its declarations were incorrect.

261. After having considered the parties' submissions, the Tribunal finds that it is not necessary for it to determine when JCC had "reason to believe" that its value for duty declarations were incorrect in order to resolve this appeal. Thus, the Tribunal will not issue a finding on this question.

262. The Tribunal agrees with the CBSA that whether JCC had "reason to believe" in 2009 or 2005 has no bearing on the issue of whether the value for duty of the goods in issue was correctly re-determined by the CBSA, which is the substantive legal issue that the Tribunal has to address in this appeal pursuant to subsection 67(1) of the *Act*.

263. Moreover, for the following reasons, it is clear that JCC's obligation to self-correct its value for duty declarations from March 2005 to December 2008 was not based on the CBSA's statement in the decisions appealed from that JCC had "reason to believe" in 2005 that its declared value for duty was incorrect.

264. In this regard, it is useful to review the relevant provisions of the *Act*. In particular, it warrants noting that an importer of goods into Canada is required to report the importation pursuant to Part II of the *Act*. Section 32 requires the importer to account for the goods in the prescribed manner and pay the applicable duties.

265. The CBSA has the authority, under subsection 58(1) of the *Act*, to determine the value for duty of imported goods. However, if that determination is not made by the CBSA, the determination is deemed by subsection 58(2) to be as declared by the importer at the time the goods are accounted for under section 32. Thus, in the absence of an initial determination by the CBSA of the value for duty of imported goods, the importer's declaration in this respect is treated as the CBSA's determination.

266. This is what happened in this case. At the time of importation of the goods in issue, their value for duty was deemed to be determined by JCC's declarations pursuant to subsection 58(2) of the *Act*.

267. Pursuant to subsection 32.2(2) of the *Act*, an importer who has "reason to believe" that its declaration in respect of the value for duty of imported goods is incorrect *shall* submit a correction within a specified time and pay any resulting deficiency in the duties payable.

268. Subsection 32.2(3) of the *Act* provides that, for the purposes of the *Act*, such a correction is treated as if it were a re-determination by the CBSA under paragraph 59(1)(*a*). According to subsection 32.2(4), this legal obligation to make corrections expires four years after the goods are accounted for under section 32.

269. Thus, where an importer has "reason to believe" that the value for duty of goods accounted for on March 15, 2005, is incorrect, the obligation to make a correction ends on March 15, 2009; for goods accounted for in January 2006, it ends in January 2010; for goods accounted for in January 2007, it ends in January 2011, etc.

270. In addition, under sections 42, 42.01 and 42.1 of the *Act*, the CBSA can, post-importation, conduct audits and verifications of the declarations made by the importer at the time the goods were accounted for

under section 32. The CBSA's powers under section 42.01 include a verification of the value for duty in respect of imported goods. As a result of those audits and verifications, the CBSA can "re-determine" or "further re-determine" any of the variables in the calculation of the duties payable, including the value for duty of imported goods.

271. This power to "re-determine" or "further re-determine" is found in section 59 of the *Act*. Pursuant to paragraph 59(1)(*a*), the CBSA may notably re-determine the value for duty of any imported goods within four years after the date of the initial determination under section 58 on the basis of a verification of the value for duty conducted under section 42.01.

272. Consequently, where the value for duty of imported goods is deemed determined by an importer's declaration at the time the goods are accounted for pursuant to subsection 58(2) of the *Act*, for example on March 15, 2005, the findings of a CBSA's audit or verification can cause it to re-determine the value for duty of such goods within four years from March 15, 2005, that is, until March 15, 2009. Similarly, for goods accounted for in January 2006, the CBSA's power to re-determine their value for duty under subsection 59(1) expires in January 2010; for goods accounted for in January 2007, it expires in January 2011, etc.

273. In view of the foregoing, the value for duty declared by the importer at the time of importation may *later* change in two situations, namely, (1) the importer files a correction pursuant to subsection 32.2(2) of the *Act*, or (2) the CBSA re-determines the value for duty of imported goods pursuant to subsection 59(1). Both situations occurred in this case.

274. As previously noted in the Tribunal's summary of the relevant decisions of the CBSA, on March 12, 2009, the CBSA issued two DASs pursuant to paragraph 59(1)(*a*) of the *Act* to re-determine the value for duty of the goods in issue for the period from March 15 to March 31, 2005.

275. These decisions were issued within four years after the date of the initial deemed determination of the value for duty of the goods in issue and expressly refer to the CBSA's ruling as a result of the verification audit.

276. The Tribunal finds that whether or not JCC had "reason to believe" in 2005 that its value for duty declarations were incorrect in 2005 is irrelevant to these re-determinations pursuant to subsection 59(1) of the *Act*. As is provided for by the *Act*, the CBSA re-determined in March 2009 the value for duty of goods going back for years to March 2005 on the basis of the findings of its audit.

277. Subsequently, as required by the CBSA's March 3, 2009, ruling letter, JCC filed corrections pursuant to subsection 32.2(2) of the *Act* with the CBSA in order to modify the value for duty that it initially declared to cover the remainder of the audit period (from April to December 2005).

278. These corrections were filed on March 31, 2009, that is, within four years after these goods were accounted for (which had to occur between April and December 2005). Again, the CBSA caused JCC to make these corrections on the basis of the findings of the audit and not because JCC had "reason to believe", as early as 2005, that its value for duty declarations were incorrect.

279. The same conclusion applies to the additional corrections that were filed by JCC between April and July 2009 to adjust the value for duty of the goods in issue imported during the years 2006 to 2008, as the CBSA directed it to do in accordance with the instructions provided on March 3, 2009, that were themselves based on the findings of the audit.

280. All the corrections filed by JCC were made after the CBSA formally notified it that the value for duty that had been declared for both the Asian and the Caribbean goods had been found to have been incorrect as a result of the audit and filed within the four-year limitation period contemplated by subsection 32.2(4) of the *Act*.

281. In summary, even assuming that JCC only had "reason to believe", in March 2009, that the value for duty that it declared in respect of the goods in issue at the time of importation was incorrect, the CBSA was authorized to either re-determine the value for duty of the goods in issue or require JCC to self-correct its value for duty declarations, going back four years from March 3, 2009, that is to March 3, 2005. For this reason, irrespective of whether JCC had "reason to believe" that its value for duty declarations were incorrect at an earlier date, the CBSA's decision to either re-determine or to cause JCC to correct the value for duty of both the Asian goods and the Caribbean goods that it imported between March 15, 2005, and December 31, 2008, is consistent with the relevant provisions of the *Act*.

282. The Tribunal further notes that, at the hearing, Mr. Fitzgerald gave evidence concerning the CBSA's reassessment policy and administrative practices and explained that, in this case, JCC was only required to self-correct for the review period (2005) going forward, as is contemplated by the *Act*, as long as the corrections were within the four-year limitation period set out in both sections 32.2 and 59 of the *Act*.

283. Mr. Fitzgerald testified that the finding concerning the point in time when JCC had "reason to believe" that its value for duty declarations were incorrect did not underpin the CBSA's determination on the relevant review period. He also stated that the only reason why the "reason to believe" issue was addressed in the CBSA's decisions was to issue administrative monetary penalties to JCC.[107] This evidence provides support for the Tribunal's conclusion that the "reason to believe" issue is irrelevant to the issue of the correctness of the decisions issued by the CBSA concerning the proper value for duty of the goods in issue that are the subject of this appeal.

284. Therefore, the Tribunal finds that the additional duties that were owed by JCC and collected as a result of the revisions to the value for duty of the goods in issue stemmed from the findings of the CBSA audit and were not levied on the basis that JCC had "reason to believe", in 2005, that its value for duty declarations were incorrect.

285. With respect to the administrative monetary penalty imposed by the CBSA on June 23, 2009, on the basis of its finding that JCC had "reason to believe", in 2005, that its value for duty declarations were incorrect and its failure to file corrections with the CBSA within 90 days after having such "reason to believe",[108] the Tribunal finds that this issue is not before it.

286. The Tribunal further finds that the issue of whether the CBSA could impose an administrative monetary penalty to JCC in the circumstances is beyond its jurisdiction and is, ultimately, an issue that may be addressed by the Federal Court in an action pursuant to section 135 of the *Act*.

Whether Duties or Taxes Should Be Paid by JCC Because of the 19-month Period of Inactivity of the CBSA

287. In the further alternative, JCC submitted that fairness dictates that, at the very least, the Tribunal should order that no additional duties or tax be payable by JCC because of the 19-month period of admitted

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107. *Transcript of Public Hearing*, Vol. 2, 8 December 2011, at 387-91, 437-38, 458-60.
108. Tribunal Exhibit AP-2008-007-07A at 59-63.

inaction by the CBSA, which resulted in unreasonable delays before the verification was completed. According to JCC, this caused serious financial prejudice to JCC.

288. JCC submitted that such a decision would be within the Tribunal's power, under subsection 67(2) of the *Act*, to make an order as the nature of the matter may require.

289. The Tribunal notes that the evidence indicates that the CBSA decided that amounts owing in interests would be waived on any duties owed by JCC because of this 19-month period of inactivity on their part.

290. The Tribunal is unable to accept JCC's argument.

291. JCC has not provided any precedent in support of its position that the Tribunal has the authority under subsection 67(2) of the *Act* to order that duties that are owed in respect of imported goods pursuant to the relevant provisions of the *Act* not be paid or otherwise waived. The Tribunal notes that, at the hearing, JCC even acknowledged that this request ventured into new territory.

292. The Tribunal has previously explained that it is not a court of equity and must apply the law as it is and that the administrative action, or inaction, of the CBSA cannot change the law.[109]

293. In the circumstances of this appeal, the Tribunal has already determined that the value for duty of the goods in issue was properly re-determined by the CBSA as a result of a verification that it conducted in accordance with the relevant provisions of the *Act* and that, as a result, additional duties were owed by JCC and lawfully collected under the *Act*.

294. Accordingly, the Tribunal finds that there is no legal basis to make this particular order as requested by JCC.

CONCLUSION

295. For all of the foregoing reasons, the Tribunal concludes that the value for duty of the goods in issue declared by JCC was incorrect, as was determined by the CBSA. With respect to JCC's alternative claims, the Tribunal concludes that it is not necessary to determine exactly when JCC had "reason to believe" that its value for duty declarations were incorrect in order to resolve the issues raised in this appeal and that there is no legal basis to order that no additional customs duties or taxes be levied on the subset of the goods in issue that was imported over a 19-month period during which the verification was suspended because of admitted inaction on the part of the CBSA.

DECISION

296. The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

109. *Romain L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT); *Wayne Ericksen v. The Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT).