

CANADIAN CUSTOMS AND TRADE LAW DEVELOPMENTS

Update 2005
Emerging Trends for Decision Makers

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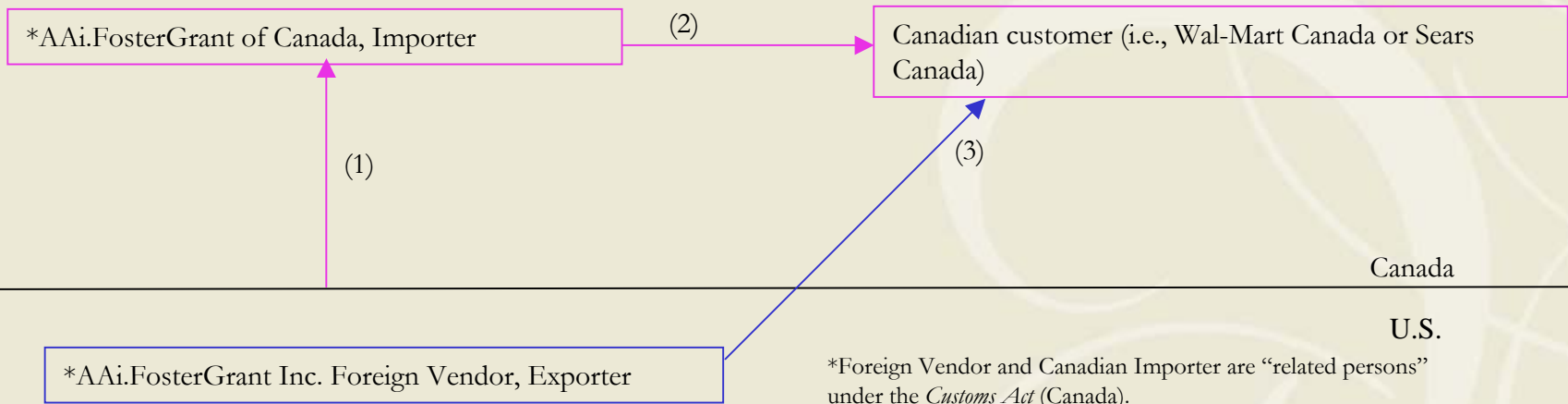
November 30th, 2005



A. Customs Valuation - "Purchaser in Canada"

1. *AAi.FosterGrant of Canada Co. v. CCRA*

(Federal Court of Appeal, July 14, 2004)



- (1) Importer declares Value for Duty (VFD) under the Transaction Value Method (TVM) using a "sale for export" of sunglasses from the Foreign Vendor to the related Importer.
- (2) Importer alleges that it re-sells goods on its own account to arm's length Canadian retailers.
- (3) CCRA (now Canada Border Services Agency or CBSA) alleges that Importer is a "selling agent" and looks through the Importer to determine the VFD under the TVM based on a "sale for export" from the Foreign Vendor directly to the arm's length Canadian customer.

A. Customs Valuation - "Purchaser in Canada"

1. *AAi.FosterGrant of Canada Co. v. CCRA (cont'd)*

- The CBSA is still considering its policy response to this decision.
- The CBSA appears to be heading in the right direction with proposed amendments to its Memorandum D13-1-3: *Customs Valuation Purchaser in Canada Regulations* to interpret "carries on business" in a manner consistent with the jurisprudence.

A. Customs Valuation - Purchaser in Canada"

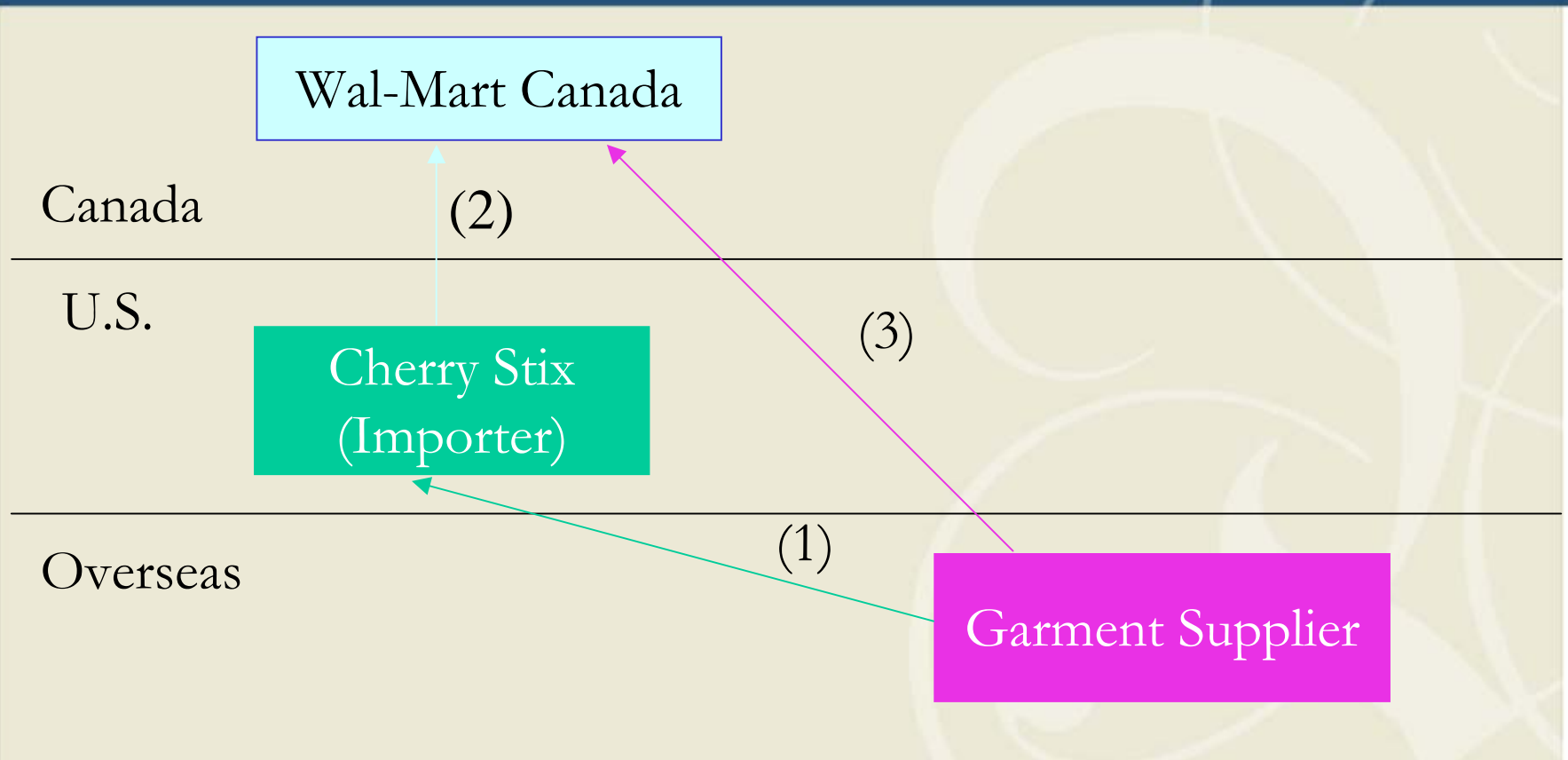
1. *AAi.FosterGrant of Canada Co. v. CCRA (cont'd)*

- Under the proposed revisions by the CBSA to existing paragraphs 10 to 13 of Memorandum D13-1-3, which contains the CBSA's policy on "carries on business", a person will be a "purchaser in Canada" if it:
 - (1) has a "permanent establishment" in Canada;
 - (2) has employees in Canada;
 - (3) files Canadian income tax returns; and
 - (4) buys and sells goods on its own account for profit.

A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA*

(Appeal No. 2004-09, Canadian International Trade Tribunal (CITT), October 6, 2005)



A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA (cont'd)*

- (1) Cherry Stix Non-Resident Importer declares VFD under the TVM using a "sale for export" of garments from the Overseas Supplier to Cherry Stix.
- (2) CBSA alleges that the VFD should be determined under the TVM based on a "sale for export" from Cherry Stix to Wal-Mart Canada. CBSA re-determines VFD and assesses GST and duties on the increased VFD. CITT agrees.
- (3) Direct "export" of the goods from the Overseas Supplier to Wal-Mart Canada with Cherry Stix acting as Importer.

A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA (cont'd)*

- A non-resident of Canada not carrying on business in Canada and without a permanent establishment in Canada, such as Cherry Stix, can be a "purchaser in Canada" in a "sale for export" of goods to Canada for the purpose of the TVM if:
 - Cherry Stix enters into its agreement to sell goods to a resident in Canada (Wal-Mart Canada) after purchasing the goods from the Overseas Supplier.

S. 2.1(c)(ii) of the *Valuation for Duty Regulations*.

A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA (cont'd)*

- CITT found that Cherry Stix entered into a verbal agreement to sell the apparel to Wal-Mart Canada before purchasing the apparel from its Overseas Suppliers based on discussions between Cherry Stix's sales associates and Wal-Mart buyers.

A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA (cont'd)*

- How significant a precedent is the CITT's decision in *Cherry Stix*?
 - 1) *Cherry Stix* has a 90-day period within which to appeal to the Federal Court of Appeal, which expires the first week of January.
 - 2) Unique set of unhelpful facts for *Cherry Stix*. At the time of production, the Overseas Supplier attached Wal-Mart trademark labels, Wal-Mart's unique CA number and the Wal-Mart retail price tag to the goods. Credibility problems with *Cherry Stix*'s principal witness on material facts.
 - 3) CITT weak on the law on meaning of "agreement to sell". Could a general supply agreement, in the absence of all the binding material terms of a sale contract, be an "agreement to sell"?
 - 4) *Mattel Canada Inc. v. Canada* (Supreme Court of Canada, June 2001) and *AAi.FosterGrant of Canada v. CCRA*, both VFD cases, hold the CITT to the strictest standard of legal correctness on judicial review.

A. Customs Valuation - "Purchaser in Canada"

2. *Cherry Stix Ltd. v. CBSA (cont'd)*

- Were the CBSA and CITT correct in applying the TVM or should they have resorted to an alternative method to determine VFD?
- Was Wal-Mart Canada a "purchaser in Canada" in a "sale for export" from Cherry Stix?
- In *Mattel Canada*, the Supreme Court said that "the relevant sale for export is that sale by which title to the goods passes to the importer."¹ On that basis, the "sale for export" was between the Overseas Supplier and Cherry Stix, even if Cherry Stix were not a "purchaser in Canada".
- An alternative method to determine the VFD would have probably more closely approximated Cherry Stix's declared VFD.

¹ *Canada v. Mattel Canada Inc.*, 2001 SCC 36, at paragraph 45.

B. Safeguards

There are two kinds of safeguard investigations:

1. Global; and
2. Only against exporters/producers from the People's Republic of China (as part of China's terms of accession to the WTO in 2001).
 - No injurious dumping or subsidies required.
 - Sufficient increase in imports to cause injury to the domestic industry (a “safety valve”).

B. Safeguards

1. Global Safeguards

Inquiry into the Importation of Bicycles and Finished Painted Bicycle Frames – CITT Final Report and Recommendations Released in September 2005.

- The CITT Report recommends decreasing annual rates of safeguard duties of 30% in the first year, 25% in the second year, and 20% in the third year, for the three successive years of their imposition on certain kinds of imported bicycles. The Cabinet has not made a decision whether to implement the recommendations, and there is no indication as to when it might do so.
- The CITT Report and recommendations to Cabinet are not binding on the Canadian government. There does not appear to be any statutory requirement that the government take any decision within any specified time period. Is there a common law duty for the Cabinet to act or take a decision (including not to implement any safeguard remedies) within a reasonable time period?

B. Safeguards

1. Global Safeguards (cont'd)

- There are generally three types of measures considered to remedy any injury found in a global safeguard inquiry:²
 - (1) Tariff duties or surtaxes, irrespective of import volumes;
 - (2) Tariff-rate quotas (TRQs) which impose different tariff duty rates below and above certain import volume thresholds (with the duty rate increased above the quota threshold); or
 - (3) Quotas, which establish an upper limit on the absolute volume of imports that can enter the market within a given period of time.

² Paragraph 224 of the Report on the *Global Safeguard Inquiry into the Importation of Bicycles and Finished Painted Bicycle Frames into Canada*, GS-2004-01 and GS-2004-02 (September 2005).

B. Safeguards

2. Chinese Safeguards

Market Disruption Inquiry into Barbecues Originating in the People's Republic of China, Safeguard Inquiry No. CS-2005-001 – CITT Final Report and Recommendations released in October 2005³.

- Rapid increase of imports of barbecues from China are an important cause of “market disruption” and material injury to domestic manufacturers of barbecues.
- The types of remedies considered should generally be the same as those three considered in a global safeguard inquiry [paragraph 143 of *Barbecues*].
- Recommends to Cabinet imposing a 3-year 15% safeguard duty. Cabinet has not made any decision to date.

³ On November 19, 2004, CBSA terminated anti-dumping and countervailing duties investigations into imports of barbecues from China when it found “insignificant” levels of dumping and subsidies (Statement of Reasons released on December 3, 2004).

C. Export Controls

Export Control List (ECL) pursuant to the *Export and Import Permits Act* (EIPA).

- The ECL includes eight groups:
- **Group 1:** Dual Use List
- **Group 2:** Munitions List
- **Group 3:** Nuclear Non-proliferation List
- **Group 4:** Nuclear-Related Dual Use List
- **Group 5:** Miscellaneous Goods (U.S. origin goods, roe herring, cedar shakes and shingles, logs, softwood lumber)
- **Group 6:** Missile Technology Control Regime List
- **Group 7:** Chemical and Biological Weapons Non-Proliferation List
- **Group 8:** Chemicals for the Production of Illicit Drugs

C. Export Controls

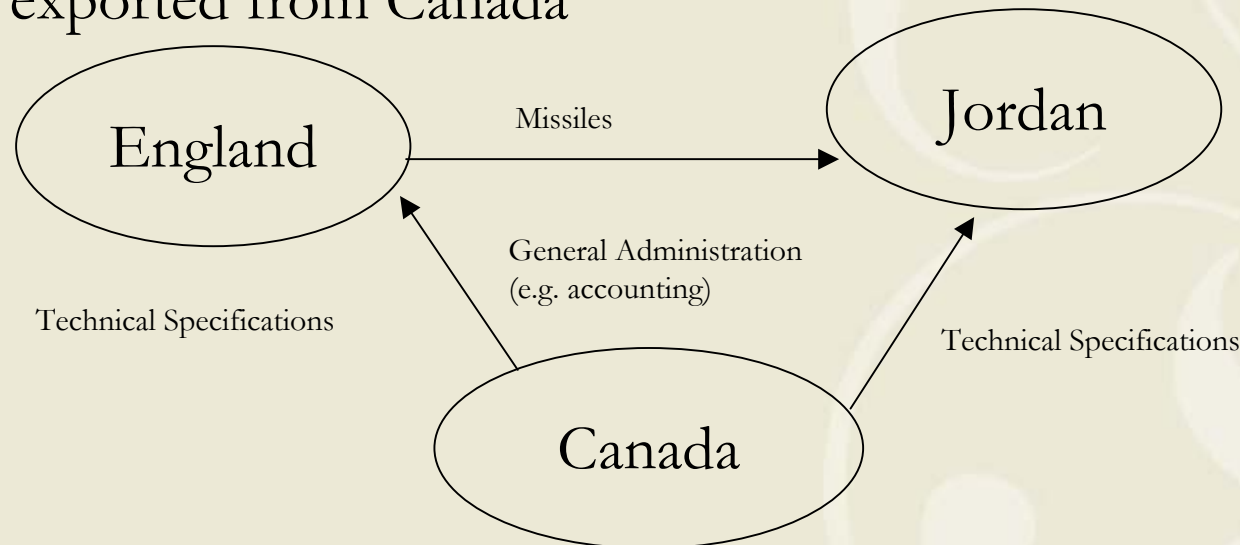
Export of Technology

- Export of “technology” related to a controlled product requires an export permit
- For military goods, for example, “technology” means specific information which is required for the development, production or use of a controlled product, and not generally available “in the public domain”
- Very broad definition - most technical specifications and data will fall under the definition
- Generally the only way of exporting relevant technology without a permit would be if the data was “in the public domain“, which is a very narrow exception

C. Export Controls

Case Study

- Export permits can be required even if no goods are exported from Canada



C. Export Controls

Applying for a Permit

- Certain controlled goods require an Individual Permit for export
- Certain goods may only require reference to a General Permit, which is not specific to an individual exporter and allows for the pre-authorized export of goods in specified conditions (e.g. most U.S. origin exports to third countries)

C. Export Controls

Applying for a Permit (cont'd)

- Individual permits can take 10 days to several months depending on the good and the destination
- Alternatively, non-binding opinions can be sought from the Department of International Trade Canada to determine if a permit is required (2-6 weeks for a response)
- Certainty versus timing and release of sensitive data

C. Export Controls

Violations

- Both corporations and their officers are potentially liable for prosecution and penalties for contravention of the EIPA or its regulations
- Investigators from CBSA and the Royal Canadian Mounted Police enforce the EIPA
- Where offences are suspected, customs officers may detain or seize goods; as well, ascertained forfeiture action may be taken. Investigations may lead to charges, prosecutions, fines and/or incarceration
- Officers and directors can be liable for an indeterminate fine (at the discretion of the court) and up to 10 years in prison

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