Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

InternationalTradeBrief

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In This Issue

In this issue, we are pleased to welcome Cyndee Todgham Cherniak who has joined the Lang Michener Toronto office as Counsel in the International Trade Law and the Business Law Groups. Cyndee is listed in the *Canadian Legal Lexpert Directory* as an up-and-coming international trade practitioner and commodity tax practitioner. She is listed as an up-and-coming international trade and WTO practitioner in Canada in *Chambers Global: The World's Leading Lawyers for Business* and is also listed in *The Legal Media Group Guide to the World's Leading International Trade Lawyers*.

We are also pleased to offer articles regarding:

- the thorny issue of "purchaser in Canada" in customs valuation;
- an introductory look at the Chinese trade remedies system;
- advantages of listing on the TSX and/or TSX-V compared with other stock exchanges (such as the NASDAQ, NYSE, HK Stock Exchange and AIM), for our international clients seeking public financing options; and
- recent announcements and news of interest to exporters and importers.

Purchaser in Canada Rules Are Complex When Selling to Mass Retailers

Cyndee Todgham Cherniak

On September 4, 2007 the appeal in *Cherry Stix Ltd.* v. *The President of the Canada Border Services Agency* (CBSA), 2007 FCA 274 (Court File Number A-607-05), was heard and the appeal was dismissed summarily from the bench. The Federal Court of Appeal was satisfied that the Canadian International Trade Tribunal ("CITT") had correctly determined that Cherry Stix Ltd. ("Cherry Stix") was not a purchaser in Canada.

The facts are very straight forward. Between September 1, 1999 and July 14, 2003, Cherry Stix imported women's and children's garments into Canada for sale to Wal-Mart. Cherry Stix was not a resident of Canada.

Cherry Stix entered into an agreement with Wal-Mart. The agreement referred to Wal-Mart as the "Purchaser" and Cherry Stix as the "Vendor." The agreement provided that the terms and conditions in it "do not create an obligation for [the] Purchaser to purchase merchandise or other goods." The agreement further incorporated by reference the terms and conditions in Wal-Mart's *Vendor Information Manual*.

Cherry Stix had samples of garments designed, produced and placed in its sales line. The Wal-Mart buyers would visit the Cherry Stix showroom to view the sample garments. In certain situations, Cherry Stix may have used sketches rather than prepared samples. After viewing the samples or sketches, the Wal-Mart buyers would provide Cherry Stix with a purchase order. One month prior to shipping the finished goods, Wal-Mart submitted to Cherry Stix a "master purchase order."

Cherry Stix arranged for a third party to manufacture the garments. The overseas supplier would deliver the finished goods to a consolidator and the finished goods would be loaded on a ship. The goods would be shipped to the Port of Vancouver. On the same day, the overseas suppliers would draw on Cherry Stix's line of credit or payment was otherwise made by Cherry Stix to the suppliers.

Up to seven days prior to shipment, Cherry Stix would send an allocation request form to Wal-Mart. At the time of shipment, Cherry Stix would issue an invoice to Wal-Mart for the finished goods.

The facts form a typical sales process between a supplier and a large Canadian retailer. The issue was whether Cherry Stix was a "purchaser in Canada," pursuant to subsection 2(1) of the *Valuation for Duty Regulations*, which provide that:

> For the purposes of subsection 45(1) of the Act, "purchaser in Canada" means:
>
> (a) a resident;
> (b) a person who is not a resident but has a permanent establishment in Canada; or
> (c) a person who is neither a resident nor has a permanent establishment in Canada, and who imports the goods for which the value for duty is being determined,
> (i) for consumption, use or enjoyment by the person in Canada, but not for sale, or (ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

The issue for the CITT was the timing of the purchase by Cherry Stix in order to determine if Cherry Stix had an agreement to sell the goods to a resident of Canada prior to importation. The CITT determined that pursuant to the agreement with Wal-Mart, Cherry Stix had an agreement to sell the goods to a resident prior to importation. In making this determination, the CITT considered the *United Nations Convention on Contracts* and the *Sale of Goods Act* (Canada).

As a result, the value for customs duty purposes was the price charged by Cherry Stix to Wal-Mart rather than the price charged by the overseas supplier to Cherry Stix.

The moral of this case is that the terms of contracts are very important. If you have any concerns about the application of Canada's purchaser in Canada rules to existing or proposed contracts, please contact a Canadian customs lawyer. The purchaser in Canada rules are complex and are evolving. Some of the important guiding information is not in the public domain.

If you would like to review a copy of the CITT Decision, please contact Cyndee Todgham Cherniak.

This article first appeared as a blog entry on the tradelawyersblog.com, posted by Cyndee Todgham Cherniak on October 16, 2007.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

Canadian Primer on China's Trade Remedy Trio: Anti-dumping, Anti-subsidy and Safeguards

Peter Jarosz

The following article is a primer on the Chinese system of ant-dumping, anti-subsidy and safeguard law for Canadian companies exporting to China from Canada, or from operations in other countries. Although all WTO member countries (which includes China as of 2001) base their trade remedy systems on the relevant WTO Agreements, their procedures can vary in significant ways as far as business users are concerned. Traders should be aware of China's trade remedies system as the country is becoming one of the largest importers in the world, with a significant domestic industry competing with imports in most markets.

Traders should be aware of China's trade remedies system as the country is becoming one of the largest importers in the world.

The following description relies on interviews, Chinese government written briefings (December 2006) and from the article entitled "Trade Remedy Law and Practice in China" by Professor Yongfu Gao.

China's trade remedies system is based upon the *Foreign Trade Law* amended April 6, 2004, by the National People's Congress ("NPC"), the legislature of the PRC and its highest organ of state power. The law provides the authority for regulations on anti-dumping, regulations on countervailing and the regulations on safeguard measures, promulgated November 2001 and amended following a decision of the State Council on March 31, 2004. There have been more than 20 distinct regulations under these three trade remedy topics.

The Ministry responsible for trade remedies is the Ministry of Commerce of the People's Republic of China ("MOFCOM").

MOFCOM has initiated over 40 anti-dumping cases in the last 10 years. There have been no subsidy cases and only one safeguard case (on certain steel products, which was terminated after one year). Price undertakings have been accepted in at least one case.

Within MOFCOM, the Bureau of Fair Trade for Imports and Exports ("BOFT") deals with the dumping calculations and the Investigative Bureau of Industry Injury ("IBII") deals with the injury determination. Within a month of an IBII injury decision, the Tariff Office of the State Council usually accepts their recommendation to impose duties. The decision is then published on the MOFCOM website.

The Chinese procedures and substantive rules were amended to closely follow the WTO requirements. However, the administration and procedural legal principles of the system are more akin to the European administrative experience than North American or British principles.

Also, the Chinese system is generally believed to take into account downstream and national interests and an issue in every investigation is whether the authorities should impose duties if they are not in China's holistic trade interests.

Lang Michener has recently been involved in a joint project between CIDA, Centre for Trade Policy and Law, Chinese attorneys and China's MOFCOM. The joint project was an exchange between Chinese and Canadian participants on the subject of trade remedies, involving a discussion of common experiences, learning points and opportunities for improvement in both systems.

China's investigative authorities have been very receptive to perfecting their system in accordance the WTO trade remedy obligations, which requirements are agreed to and must be complied with by all WTO members. A business should seek advice on these requirements if it is faced with a trade remedy proceeding in China.

China's investigative authorities have been very receptive to perfecting their system in accordance the WTO trade remedy obligations, which requirements are agreed to and must be complied with by all WTO members.

To obtain more information about the Chinese system, Chinese attorneys practicing in the area or any other issue related to Canadian or Chinese trade remedies, please contact Peter Jarosz.

Peter Jarosz is an associate in the International Trade Group in Ottawa. Contact him directly at 613-232-7171 ext. 126 or pjarosz@langmichener.ca.

Canada-China Finance – Why a Listing on the TSX?

Sandy (Ningyan) Wang

For many domestic Chinese companies, listings overseas are always a long-term strategy. By exploring the international public markets, Chinese companies can not only raise funds, but also achieve their goals with respect to expanding in the global market, promoting their brands and improving their corporate governance. Despite the fact that the Shanghai Stock Exchange is booming these days, domestic Chinese companies still pay close attention to accessing to a more mature and sophisticated public market overseas, where long-term investments as opposed to short-term speculation are the main focus.

NYSE, NASDAQ, AIM and the HK Stock Exchange have been deeply rooted in the mind of Chinese companies; only a few businessmen in China recognize that the TSX Group is also a big player in the international capital market. To highlight some features, TSX Group ranks 7th in the world and 3rd in the North America by total listed company market capitalization, and its equity exchanges are among the best markets in the world for raising public equity capital. The main board of the TSX is superior to the HK Stock Exchange and close to the NASDAQ in terms of capital sufficiency, P/E multiple and market capitalization.

In addition, the TSX main board and TSX-Venture Exchange are designed for companies at all stages of growth. Small or medium enterprises at an early stage of their development can be accepted by the TSX-Venture as long as they indicate their future growth to their investors. In particular,

the TSX Group is one of the best capital markets in the world with respect to financing for junior mining explorers or natural resources companies.

Among the methods of accessing the Canadian public markets, the TSX-Venture provides a unique program called the Capital Pool Corporation (the "CPC"), in which a private company obtains public company status by way of completing a Qualifying Transaction through purchase, amalgamation, merger or arrangement with a listed CPC on the TSX-Venture. The CPC program is similar to a Reverse Take-Over ("RTO") in that they both involve shell listing companies being taken over by a private company. But the CPC is a brand new and "clean" shell without any operational activities. As a result, the resulting issuer, upon completion of the Qualifying Transaction, would not encounter any historical problems or assume any pre-existing obligations.

Among the methods of accessing to the Canadian public market, the TSX-Venture provides a unique program called the Capital Pool Corporation (the "CPC"), in which the private company obtains the public company status.

Furthermore, the CPC program has such other advantages as: (1) quicker process, which usually takes less than six months for a private company to be listed on the TSX-Venture; (2) cheaper costs because, unlike the RTO, there are no expenses on purchasing the shell company; (3) a greater likelihood of success under this method because, through the CPC program, the private company is more likely to be listed than the Initial Public Offering (the "IPO"); and (4) fewer regulatory reviews. A company in the CPC program only needs to communicate with the TSX-Venture Exchange, but, in an IPO, the company has to deal with both the exchange and the securities commissions. Based on the reasons above, the CPC program on the TSX-Venture is much preferred by medium and small foreign enterprises.

Sandy (Ningyan) Wang is an associate in the Securities Group in Vancouver. Contact her directly at 604-691-6845 or swang@lmls.com.

Prohibitions on Export of Goods to Lebanon Come into Force

Cyndee Todgham Cherniak

On October 19, 2007, the Canada Border Services Agency (CBSA) issued Customs Notice CN-07-030 "*Summary of the Regulations Implementing the United Nations Resolution on Lebanon*," which warms exporters of an export prohibition in the *Regulations Implementing the United Nations Resolution on Lebanon*.

The Regulations are complex and exporters to Lebanon should consult legal counsel for advice. The Regulations contain prohibitions with respect to arms and related materials – defined to mean any type of weapon, ammunition, military vehicle or military or paramilitary equipment, and includes their spare parts. The scope of the prohibition is very broad as it includes spare parts.

The prohibitions are as follows:

- No person in Canada and no Canadian outside Canada shall knowingly export, sell, supply or ship, directly or indirectly, arms and related material, wherever situated, to any person in Lebanon.
- No owner or master of a Canadian vessel, within the meaning of section 2 of the *Canada Shipping Act*, and no operator of an aircraft registered in Canada shall knowingly carry, cause to be carried or permit to be carried, arms and related material, wherever situated, destined for any person in Lebanon.
- No person in Canada and no Canadian outside Canada shall knowingly provide, directly or indirectly, to any person in Lebanon technical assistance related to the provision, manufacture, maintenance or use of arms and related material. "Technical assistance" means any form of assistance, such as providing instruction, training, consulting services or technical advice or transferring know-how or technical data. "Technical data" includes blueprints, technical drawings, photographic imagery, computer software,

models, formulas, engineering designs and specifications, technical and operating manuals and any technical information. The scope of this prohibition is very broad.

- Sections 3 to 5 do not apply in respect of arms and related material and related technical assistance authorized in advance in writing by the Government of Lebanon or by the United Nations Interim Force in Lebanon.
- No person in Canada and no Canadian outside Canada shall knowingly do anything that causes, assists or promotes, or is intended to cause, assist or promote any act or thing prohibited [above].

An exporter to Lebanon may obtain a certificate from the Minister of Foreign Affairs, which enables an exporter to make exports to Lebanon as an exception to the above prohibition.

A person who fails to comply with the Regulation commits an offence under the *United Nations Act*. A person found to have committed an offence under the *United Nations Act* may be fined up to $100,000 (potentially with an up to a one-year prison term) or receive a prison term up to 10 years. To obtain relevant statutes and regulations, please contact Cyndee Todgham Cherniak.

This article first appeared as a blog entry on the tradelawyersblog.com (TL Blog), posted by Cyndee Todgham Cherniak on October 21, 2007. For more international trade news and events please refer to TL Blog entries by all of the Lang Michener LLP International Trade Group and corresponding lawyers from other countries.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

Canada's Appreciating Currency and GST and Customs Duty

Cyndee Todgham Cherniak

Canada's dollar has been and continues to appreciate. Not much has been written on what businesses should be considering in the context of payments of goods and services tax ("GST") and customs duty.

If a Canadian importer has an advance pricing agreement for income tax purposes, it might be time to revisit the advance pricing agreement in light of the appreciation of the Canadian dollar. Often, the advance pricing agreement is used for the purposes of determining the value of imported goods, services and intangible property and, therefore, has application beyond income tax to GST and customs duty.

There may be opportunities to reduce GST and customs duty payments or to claim refunds of GST or customs duty paid in error.

Are financial institutions that import taxable services and intangible property self-assessing GST to too high an amount (by failing to take into account the appreciation of the U.S. dollar)? Are importers paying too much customs duty on imported goods because the computer programs do not reflect current exchange rates? Are the customs brokers applying the proper exchange rate? Does the documentation reflect outdated exchange rates? What documentation should companies keep in order to justify current exchange rates at a given point in time (and calculations of GST or customs duty)? What is the most appropriate exchange rate for a reporting period for self-assessing GST relating to services or intangible property that have been imported over a month, a quarter or an annual reporting period?

These are just some of the issues to discuss with a commodity tax specialist, as there may be opportunities to reduce GST and customs duty payments or to claim refunds of GST or customs duty paid in error.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

CITT Appeal Decision Rejects CBSA's Proof of Origin Requirements

Peter Jarosz

The Canadian International Trade Tribunal ("CITT") recently released a decision in *MRP Retail Inc.* v. *President of the CBSA* (Appeal No. AP-2006-005). The issue in this appeal was whether imported T-shirts were entitled to preferential tariff treatment (at the Mexico Tariff rate).

The T-shirts were produced in Mexico by Alimex Fashion SA de CV ("Alimex") for California Sunshine. California Sunshine made a number of shipments to MRP between April 10 and July 24, 2001. In each case, it provided a certificate of origin in which, purporting to be the producer of the goods, it certified that they were of Mexican origin. Following an audit, CBSA denied the preferential tariff treatment citing lack of proof of origin.

The CITT stated that the law applicable to this situation was:

> The regulations require a "...[c]ertificate of [o]rigin for the goods...," [1] although no form for a certificate of origin is prescribed.

Thus, if the cotton knit T-shirts and tank tops were cut (or knit to shape) and sewn or otherwise assembled in the United States or Mexico from cotton that was grown in the United States or Mexico, they would be originating goods.

The CITT emphasized that nowhere do the regulations prescribe the form of certificate itself or indicate that it must be provided by a "producer." In any event, the CITT view was that California Sunshine could be considered the producer of the goods. The CITT concluded that the certificates of origin tendered in this case met the low threshold imposed by section 24 of the *Customs Tariff Act*; the real issue in the appeal was whether or not MRP has proven that the goods in issue met the prescribed rules of origin.

The CITT also stated that there is no legal requirement stipulating that specific dates or periods must be indicated on a certificate of origin. Given the blanket wording of some of the certificates, it was reasonable to interpret those certificates as covering all relevant shipments that occurred on or before the dates of the certificates. There was no evidence on the record to contradict this interpretation.

The Tribunal found that it could not accept the CBSA's argument that audit-type, detailed, supporting business information was required to prove origin as this would be tantamount to imposing the comprehensiveness and exacting certainty sought in an audit of the origin of goods as the standard of proof for an appeal under section 67 of the Act. The Tribunal was of the view that it should be possible for an importer to adduce evidence on appeal that would satisfy the Tribunal of the origin of the goods without necessarily meeting the CBSA's auditing standards. MRP proved by a preponderance of evidence, but was not required to do so beyond all possible doubt (as the CBSA suggested), that the goods in issue were originating goods.

The Tribunal found that it could not accept the CBSA's argument that audit-type, detailed, supporting business information was required to prove origin.

The Tribunal was satisfied that the goods in issue were made in Mexico from originating materials. This was a marked departure from the views of the CBSA regarding the strictness of the Certificate of Origin process and has clarified the standards on exporters and importers regarding this procedure.

Peter Jarosz is an associate in the International Trade Group in Ottawa. Contact him directly at 613-232-7171 ext. 126 or pjarosz@langmichener.ca.

News and Events

Announcements

Cyndee Todgham Cherniak Joins Lang Michener's Toronto Office

Cyndee Todgham Cherniak joined Lang Michener's Toronto office as Counsel in the International Trade Law and the Business Law Groups. Cyndee's practice is focused on international law, including WTO and RTA analysis, interpretations, opinions, government relations strategies and dispute settlement, NAFTA verifications, value for duty, tariff classification, import and export controls, bilateral restraint agreements and investment treaties, textile references, anti-dumping and countervailing duties, safeguard actions, government procurement, investor-state disputes, the *Foreign Extraterritorial Measures Act*, compliance programmes/codes of conduct and customs duties. Cyndee also has expertise in commodity tax (i.e., Goods and Services Tax, Ontario retail sales tax and customs duties.)

Cyndee is listed in the *Canadian Legal Lexpert Directory* as an up-and-coming international trade practitioner and commodity tax practitioner. She is listed as an up-and-coming international trade and WTO practitioner in Canada in *Chambers Global: The World's Leading Lawyers for Business* and is also listed in *The Legal Media Group Guide to the World's Leading International Trade Lawyers*.

News

Lang Michener International Trade Lawyers Among World's Leading

Three lawyers from our International Trade Group have been named in The Legal Media Group *Guide to the World's Leading International Trade Lawyers*. Included in this publication are: **C. J. Michael Flavell, Q.C.**, Chair, International Trade Group and **Geoffrey Kubrick**, Counsel, International Trade Group and **Cyndee Todgham Cherniak**, Counsel, International Trade Group.

Lang Michener Lawyers Recognized as Best Lawyers in Canada 2008

Several Lang Michener lawyers were recognized by their peers in the *Best Lawyers in Canada* 2008 edition, including **C. J. Michael Flavell**, and **Geoffrey C. Kubrick** for International Trade and Finance Law.

Canadian Capital Markets – TSX China Roadshow

Lang Michener was pleased to sponsor the June and October 2007 TSX China Roadshows showcasing the significant pool of Canadian capital expertise – financial, legal and technical – to Chinese companies. The TSX Roadshow team, including **Stephen D. Wortley**, **William Sheridan**, **Michael Taylor** and **Sandy Wang**, participated in a series of capital marketing seminars, networking lunches and forums with delegates from China. Visit www.tsx.com/china for more information.

Events

3rd Annual Trade and Export Finance, China Conference – Beijing, China – November 29 & 30, 2007

Presented by Euromoney Seminars and Trade Finance

November 29 & 30, 2007
Shangri-La Hotel
Beijing, China

Cyndee Todgham Cherniak will be presenting at the 3rd Annual Trade and Export Finance, China Conference. Over 200 domestic and international experts, representing financial institutions, State-Owned Enterprises and corporate importers and exporters, will gather in Beijing this November to present on and debate the major themes, issues and challenges for the Chinese trade market this year. For more information, please visit www.tradefinanceconferences.com.

Centre for Trade and Policy and Law and Jiangsu Province Department of Commerce (DOFCOM)

November 29–30, 2007
Nanjing, China

Peter Jarosz presents "Transparency and Trade Remedies: A Canadian Legal Perspective" at a conference for Chinese government, business and industry associations organized by the Centre for Trade and Policy and Law and Jiangsu Province Department of Commerce ("DOFCOM") in Nanjing on November 29–30, 2007.

InternationalTradeBrief

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