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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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"As a member of both the WCO [World Customs Organization] and WTO [World Trade Organization], Canadian customs laws are, at least to an extent, based on agreements and conventions established by these organizations."

AN OVERVIEW OF CUSTOMS LAWS IN CANADA

Henry J. Chang

Introduction

The World Customs Organization ("WCO") represents Customs administrations in 177 countries, which collectively process approximately 98% of world trade. It also administers the technical aspects of the World Trade Organization ("WTO") agreements on Customs Valuation and Rules of Origin. As a member of both the WCO and WTO, Canadian customs laws are, at least to an extent, based on agreements and conventions established by these organizations. A brief overview of Canadian customs laws appears below.

The Canadian Harmonized System of Tariff Classification

All goods that are imported into Canada must be classified into one of the 10-digit tariff classification numbers found in the *Customs Tariff*[1]. The rate of duty that is applied to the imported goods will depend on the tariff classification and the tariff treatment for those goods.

The *Customs Tariff* is based on the Harmonized Commodity Description and Coding System ("HS"), which was initially developed by the WCO in 1983. The first six digits are the same in all countries that have adopted the HS; the remaining four digits are specific to each country. Within the *Customs Tariff*, goods are classified numerically and divided by chapter (first two digits), heading (first four digits), subheading (first six digits), tariff item (first eight digits), and a final 10-digit classification number (all ten digits).

There are also general rules that clarify how the HS is to be interpreted; these rules are known as the General Interpretive Rules ("GIRs"). The Canadian GIRs consist of six international rules of classification under the HS and three additional rules specific to Canada[2].

The General Tariff and Specific Tariff Treatments

According to Section 29 of the *Customs Tariff*, a General Tariff rate of customs duty of 35% applies to:

a) Goods that originate in countries that are not included in the *List of Countries and Applicable Tariff Treatments*[3]; and

b) Goods that originate in a country set out in the *List of Countries and Applicable Tariff Treatments* but do not meet the requirements for a preferential tariff treatment.

[1] S.C. 1997, c. 36.
[2] http://www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2012/01-99/rules-regles-eng.pdf.
[3] http://www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2012/01-99/countries-pays-eng.pdf.

INTERNATIONAL BUSINESS BULLETIN

"Certain countries are also specifically entitled to preferential tariff treatment, for reasons other than the existance of an applicable FTA [Free Trade Agreement]."

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Tariff Treatments Not Arising From Free Trade Agreements ("FTAs")

Certain preferential tariff treatments are applied to designated groups of countries for reasons other than an applicable FTA. The *List of Countries and Applicable Tariff Treatments*, which is contained in the *Customs Tariff*, identifies countries that are entitled to one or more of these tariff treatments. These preferential tariff treatments include:

a) Most-Favoured-Nation ("MFN") tariff treatment - Countries that are entitled to MFN tariff treatment are members of the WTO.

b) General Preferential Tariff ("GPT") treatment - Canada unilaterally provides preferential access in the form of reduced tariffs on goods imported from developing countries. The GPT, introduced in 1974, benefits more than 180 developing countries and customs territories. Under the GPT, three-quarters of GPT-eligible products enter Canada duty free; the remainder face tariffs lower than the MFN rates applicable to exports from most developed countries. The GPT applies to most products, with the exception of dairy products, poultry, eggs, refined sugar and most textiles, apparel and footwear.

c) Least Developed Country Tariff ("LDCT") treatment - Canada unilaterally provides greater preferential access to imports from a subset of GPT eligible countries in the form of the LDCT. The LDCT was introduced in 1983 and applies to 49 of the world's least developed countries, as defined by the United Nations. In January 2003, the benefits of the LDCT were substantially expanded, and this tariff treatment now provides duty-free and quota-free access for all products from LDCs, with the exception of over-quota access for supply-managed products in the dairy, poultry and eggs sectors. The most important change was the inclusion of textile and apparel products which now enter Canada duty- and quota-free under the LDCT

d) Commonwealth Caribbean Countries Tariff ("CCCT") treatment - Canada unilaterally provides preferential access to imports from 18 Commonwealth Caribbean countries. Under the CCCT, which was introduced in 1986, eligible imports from these countries are provided duty-free access. Currently, exceptions to the duty-free access provided by the CCCT are most textiles, apparel, footwear, headgear, supply-managed agricultural products and other agricultural products subject to over access commitment.

Certain countries are also specifically entitled to preferential tariff treatment, for reasons other than the existence of an applicable FTA. These country-specific tariff treatments are described below:

a) The Australia Tariff ("AUT") treatment; and

b) The New Zealand Tariff ("NZT") treatment.

The former British Preferential Tariff ("BPT") treatment should also be mentioned. It was rescinded in 1998 because the 1998 tariff revisions included MFN duty rates that were equal to those provided for under the BPT. However, in limited cases where the former BPT rate is less than the rate under the MFN, the BPT rate may still be used.

Tariff Treatments Available under FTAs

The following preferential tariff treatments are

"If the specific requirements of more than one tariff treatment are satisfied, the tariff treatment with the lowest duty rate will be applied."

available as a result of FTAs in force between Canada and each designated country:

a) The United States Tariff ("UST"), Mexico Tariff ("MT") and the Mexico-U.S. Tariff ("MUST") are all preferential tariff treatments under the *North American Free Trade Agreement* ("NAFTA"). The UST was initially established under the former *Canada-U.S. Free Trade Agreement* ("CFTA") and has now been incorporated into the NAFTA; the MT and MUST were created when the NAFTA superceded the CFTA. The following rules are relevant to determining which of these tariff treatments will apply:

   1) Goods are entitled to the UST when they satisfy the NAFTA rules of origin considering only U.S. and Canadian materials as originating. In other words, if Mexico is treated as a non-NAFTA country and the goods still originate, the goods are eligible for UST.

   2) Goods are entitled to the MT when the goods satisfy the NAFTA rules of origin in considering only Mexican and Canadian materials as originating. That is, if the United States is treated as a non-NAFTA country and the goods still originate, the goods are eligible for MT treatment.

   3) If goods that satisfy the NAFTA rules of origin are not eligible for either UST or MT, then MUST is to be applied.

b) The Chile Tariff ("CT") is the preferential tariff treatment under the *Canada-Chile Free Trade Agreement* ("CCFTA").

c) The Canada-Israel Tariff ("CIAT") is the preferential tariff treatment under the *Canada-Israel Free Trade Agreement* ("CIFTA").

d) The Costa Rica Tariff ("CRT") is the preferential tariff treatment under the *Canada-Costa Rica Free Trade Agreement* ("CCRFTA").

e) The Iceland Tariff ("IT"), Norway Tariff ("NT"), and Switzerland-Liechtenstein Tariff ("SLT") are preferential tariff treatments under the *Canada-European Free Trade Association Free Trade Agreement* ("CEFTA").

f) The Peru Tariff ("PT") is the preferential tariff treatment under the *Canada-Peru Free Trade Agreement* ("CPFTA").

g) The Colombia Tariff ("COLT") is the preferential tariff treatment under the *Canada-Colombia Free Trade Agreement* ("CCOFTA").

Requirements for the Application of Preferential Tariff Treatments

Before any of the above tariff treatments may be applied, certain requirements specific to a particular tariff treatment must be satisfied. These requirements appear in various regulations enacted pursuant to the *Customs Tariff*. If the specific requirements of more than one tariff treatment are satisfied, the tariff treatment with the lowest duty rate will be applied.

Rules of Origin

In order for a particular tariff treatment to apply, the imported goods must originate from the country or countries entitled to that particular tariff treatment. According to Subsection 16(1) of the *Customs Tariff*, the term "originate" is defined as follows:

> Subject to any regulations made under Subsection (2), for the purposes of [the

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Customs Tariff], goods originate in a country if the whole of the value of the goods is produced in that country.

However, Subsection 16(2) states that the Governor in Council may, on the recommendation of the Minister of Finance, make regulations:

a) Respecting the origin of goods, including regulations:

   1) Deeming goods, the whole or a portion of which is produced outside a country, to originate in that country for the purposes of the *Customs Tariff* or any other Act of Parliament, subject to such conditions as are specified in the regulations;

   2) Deeming goods, the whole or a portion of which is produced within a geographic area of a country, not to originate in that country for the purposes of the *Customs Tariff* or any other Act of Parliament and not to be entitled to the preferential tariff treatment otherwise applicable under the *Customs Tariff*, subject to such conditions as are specified in the regulations; and

   3) For determining when goods originate in a country for the purposes of the *Customs Tariff* or any other Act of Parliament; and

b) For determining when goods are entitled to a tariff treatment under the *Customs Tariff*.

In other words, where specific rules of origin for a particular tariff treatment appear in regulations enacted under the *Customs Tariff*, these specific rules of origin modify the general rule described in Subsection 16(1), with regard to a particular tariff treatment. Specific rules of origin regulations exist for most of the tariff treatments arising from FTAs.

Valuation

Tariffs are normally expressed as a percentage. Therefore, an accurate valuation of the goods themselves is critical when calculating those tariffs.

According to Section 44 of the *Customs Act*[4], where duties, other than duties or taxes levied under the *Excise Act, 2001*[5] or the *Excise Tax Act*[6], are imposed on goods at a percentage rate, such duties shall be calculated by applying the rate to a value determined in accordance with Sections 45 to 55.

There are essentially six methods of valuation described in the *Customs Act*. According to Subsection 47(1), the primary method of valuation is the transaction value of the goods, calculated in accordance with Section 48. According to Subsection 48(1), the value for duty of goods is the transaction value of the specific goods imported, if they are sold for export to Canada to a purchaser in Canada.

According to Subsection 47(2), where the value for duty of goods cannot be appraised in accordance with Subsection 47(1), it shall be appraised using one of the following secondary methods, in the following order of consideration:

a) *Transaction Value of Identical Goods* (Section 49) - According to Subsection 49(1), where the value for duty of goods cannot be appraised under Section 48, the value for duty of the goods is, the transaction value of *identical goods*

[4] R.S.C., 1985, c. 1 (2nd Supp.).
[5] S.C. 2002, c. 22.
[6] R.S.C., 1985, c. E-15.

"Despite the fact that customs laws in Canada may occasionally bear a passing resemblance to the structure utilized by other WCO/WTO countries, subtle differences that are unique to Canada will always exist."

sold for export to Canada, if the *identical goods* were exported at the same or substantially the same time as the goods being appraised and were sold under the following conditions: (1) at the same or substantially the same trade level as the goods being appraised, and (2) in the same or substantially the same quantities as the goods being appraised.

b) *Transaction Value of Similar Goods* (Section 50) - According to Subsection 50(1), where value for duty of goods cannot be appraised under Section 48 or 49, the value for duty of the goods is the transaction value of *similar goods* sold for export to Canada, if the *similar goods* were exported at the same or substantially the same time as the goods being appraised and were sold under the following conditions: (1) at the same or substantially the same trade level as the goods being appraised, and (2) in the same or substantially the same quantities as the goods being appraised.

c) *Deductive Value* (Section 51) - According to Subsection 51(1), where the value for duty of goods cannot be appraised under Sections 48 to 50, the value for duty of the goods is calculated using the deductive value. This is calculated by determining the Canadian importer's most common selling price of the goods to Canadian customers and then deducting certain expenses from this selling price.

d) *Computed Value* (Section 52) - According to Subsection 52(1), where the value for duty of goods cannot be appraised under Sections 48 to 51, the value for duty of the goods is the computed value. According to Subsection 52(2), the computed value of goods being appraised is the aggregate of:

1) The costs, charges and expenses incurred in respect of, or the value of: (i) materials employed in producing the goods being appraised, and (i) the production or other processing of the goods being appraised, determined in the manner prescribed; and

2) The amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised made by producers in the country of export.

e) *Residual Value* (Section 53) - According to Subsection 47(4), where the value for duty of goods cannot be appraised on the basis of any of the values referred to above, the value for duty of those goods shall be appraised using the residual method described in Section 53. The residual value method does not actually provide any specific rules for determining value for duty. Instead, Section 53 states that, where the value for duty of goods is not appraised under Sections 48 to 52, it shall be appraised on the basis of: (1) a value derived from the method, from among the methods of valuation set out in Sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and (2) information available in Canada.

Conclusion

Despite the fact that customs laws in Canada may occasionally bear a passing resemblance to the structure utilized by other WCO/WTO coun-

"Foreign workers, international students, and visitors who travel to Canada often encounter a number of customs issues relating to the temporary importation of their personal belongings, vehicles or commercial goods."

tries, subtle differences that are unique to Canada will always exist. For this reason, foreign businesses should always seek advice from local counsel before importing goods into Canada. ■

CUSTOMS LAWS APPLICABLE TO TEMPORARY IMPORTATIONS MADE BY NON-RESIDENTS

Henry J. Chang

Introduction

Foreign workers, international students, and visitors who travel to Canada often encounter a number of customs issues relating to the temporary importation of their personal belongings, vehicles, or commercial goods. However, many individuals will not be aware of these issues until they actually arrive at the border. This article is intended to provide a brief overview of Canadian customs laws as they apply to the temporary importation of goods by non-residents.

Temporary Importations of Baggage and Personal Conveyances

The rules applicable to workers, students, and visitors who wish to *temporarily* import baggage and vehicles into Canada *for personal use* appear in the *Non-residents' Temporary Importation of Baggage and Conveyances Regulations*[1] (the "Baggage and Conveyances Regulations"); additional guidance on this topic appears in Memorandum D2-1-1, which is issued by the Canadian Border Services Agency ("CBSA"). Baggage and personal conveyances admitted under these circumstances are admitted under tariff item No. 9803.00.00 of the *Customs Tariff*[2].

According to Section 3 of the Baggage and Conveyances Regulations, a person who is not a resident may temporarily import baggage or conveyances under tariff item No. 9803.00.00 for the personal use of that person in Canada, if the conditions described in that section are satisfied. If eligible, such baggage or conveyances are admitted free of both customs duty and Goods and Services Tax/Harmonized Sales Tax ("GST/HST"). Usually, the importer verbally declares these items and no formal documentation is required.

Section 4 of the Baggage and Conveyances Regulations states that the baggage that a temporary resident or visitor may temporarily import under tariff item No. 9803.00.00 includes goods that the person imports for his or her personal use, are appropriate for his or her needs, and are consistent with the purpose, nature and duration of his or her intended stay in Canada. However, Section 4 limits the amount of alcohol, tobacco, and ammunition that may be temporarily imported.

CBSA Memorandum D2-1-1 provides that articles such as tape recorders, typewriters, personal computers, and similar items commonly carried by travellers for their own use while on business trips are admissible as personal baggage. However, goods for demonstration or exhibition, commercial samples, or articles associated with commercial lectures or presentations to be given in Canada are not admissible as personal baggage.

Memorandum D2-1-1 specifies that non-residents who enter Canada on a temporary basis to carry out work on behalf of a Canadian or foreign-based employer may be able to temporarily

[1] SOR/87-720.
[2] S.C. 1997, c. 36.

"Time limits for temporary importations... [depend] on whether the importer is a worker, student or visitor."

import professional and commercial goods without payment of duties based on "various special provisions" if certain conditions are met. This implies that professional tools and equipment should not be admitted as personal baggage under tariff item No. 9803.00.00. However, in practice, CBSA officers occasionally disregard this rule.

Section 2 of the Baggage and Conveyances Regulations defines the term "conveyance" as any vehicle, aircraft, water-borne craft or other contrivance that is used to move persons or goods but does not include a mobile home trailer that is more than 2.6 metres (9 feet) in width. Section 3 imposes additional limitations on the temporary importation of conveyances by workers, students, and visitors; it states that such conveyances may not be used in Canada for:

a) Moving passengers or goods for compensation or for transporting goods for sale, or

b) Soliciting sales or subscriptions on behalf of the Canadian office of a business or on behalf of a business based in Canada.

Section 3 clearly excludes residents of Canada. The term "resident" is defined in Section 2 as "a person who, in the settled routine of that person's life, makes his home, resides and is ordinarily present in Canada."

Section 3 instead applies to "temporary residents" and "visitors." Both of these terms are defined in Section 2, in a manner that differs slightly from how they are used in the *Immigration and Refugee Protection Regulations*[3]. The definition of "temporary resident" includes a person who is not a resident of Canada and who resides temporarily in Canada for the purpose of:

a) Studying at an educational institution;

b) Employment for a period not exceeding 36 months; or

c) Performing preclearance activities on behalf of the Government of the United States.

The above definition also includes the spouse or common-law partner or any dependent of a person described above. However, it does not include "visitors," which are defined separately as a person who is not a resident or a temporary resident and who enters Canada for a period not exceeding 12 months.

Time limits for temporary importations under tariff item No. 9803.00.00 are described in Section 5; the applicable time limit depends on whether the importer is a worker, student, or visitor:

a) Goods imported by a visitor (or the spouse, common-law partner, or dependent of that person) may remain in Canada until the earlier of:

   1) The expiration of the date that the visitor has declared that he or she intends to leave Canada; and

   2) 12 months after the date of importation.

b) Goods imported by a student (or the spouse, common-law partner, or dependent of that person) may remain in Canada until the day on which that person completes his or her studies at an educational institution.

c) Goods imported by a temporary foreign

[3] SOR/2002-227.

"Subject to certain exceptions... most commercial goods may be temporarily imported into Canada duty-free."

worker (or the spouse, common-law partner, or dependent of that person) may remain in Canada until the earlier of:

1) The day on which that person completes his or her employment in Canada; and
2) 36 months after the day on which that person arrives in Canada.

Where it is impossible or impracticable for a visitor or temporary resident to comply with the above time limits, the Minister may extend the length of time during which any imported baggage or conveyances that are classified under tariff item No. 9803.00.00 may remain in Canada. In the case of a visitor, the time limit may be extended to a maximum of 18 months. In the case of a student or worker, the time limit may be extended to a maximum of 6 months beyond the termination of studies or employment.

Temporary Importations of Professional and Commercial Goods

Commercial goods that are temporarily imported into Canada normally fall under tariff item No. 9993.00.00. As mentioned above, professional tools and equipment, goods for demonstration or exhibition, commercial samples, or articles associated with commercial lectures or presentations to be given in Canada are generally considered commercial goods and must be classified under tariff item No. 9993.00.00, rather than as personal baggage under tariff item No. 9803.00.00. Guidance relating to tariff item No. 9993.00.00 appears in CBSA Memorandum D8-1-1.

Subject to certain exceptions specifically mentioned in tariff item No. 9993.00.00, most commercial goods may be temporarily imported into Canada duty-free. Of course, some goods are already duty-free under a preferential tariff rate. If the goods are normally duty-free and would not be entitled to relief of the GST/HST even if they were temporarily imported, the importer should instead permanently import the goods under their applicable tariff item rather than temporarily import them under tariff item No. 9993.00.00, since there will be no savings on either duty or GST/HST.

Temporary importations under tariff item No. 9993.00.00 are subject to the following conditions:

a) The goods may not be sold or further manufactured or processed in Canada. The term "further manufacturing or processing" does not include "repair" but it does include "alteration." A "repair" is defined as a corrective maintenance activity that restores a good to its "as-finished" condition. Therefore, where the goods will be subjected to a process that goes beyond repair, the goods do not qualify under tariff item No. 9993.00.00.

b) Goods imported for sale or as spare parts for repair services are not eligible under tariff item No. 9993.00.00, even when there is a reasonable expectation that some of the goods will not be sold and the unsold units will be exported or the parts will not be used and the unused parts will be exported (an exception exists for spare parts imported by a non-resident for the purpose of racing).

c) The goods may not be leased except where imported for use: (1) in an emergency or emergency response training exercise, (2) on loan pending delivery of new machin-

"At the time of importation, a CBSA officer will review the intended use of the goods and decide whether the number of goods being imported is reasonable."

ery or equipment on order, or (3) as temporary replacements for machines or other equipment previously accounted for and undergoing repairs. However, this condition only applies where the importer of the goods is the lessor (i.e., where the goods will be leased or sub-leased by the importer to another party) but not where the importer is the lessee (i.e., the goods are leased by the importer and imported for the importer's own use).

d) The use of the goods must be specified by the importer at the time of reporting of the goods under the *Customs Act*[4], that use must not be limited or restricted by regulation, and the goods must be released for that specified use.

e) The goods must be imported in no greater quantity than is reasonable for the use specified. At the time of importation, a CBSA officer will review the intended use of the goods and decide whether the number of goods being imported is reasonable.

f) The goods must be accompanied by prescribed documents and by security of a nature and in an amount satisfactory to CBSA, unless otherwise provided by regulation:

   1) To ensure that the goods being imported temporarily will be subsequently exported from Canada, the inspecting CBSA officer may require a security deposit. The maximum amount of the security deposit cannot exceed the duties (including the GST/HST and any other excise taxes) that would be payable if the goods were permanently imported.

   2) Unlike personal baggage and conveyances, the temporary importation of commercial goods is not declared verbally. Instead, the goods must be formally declared on an E-29B temporary importation permit, a B3 Canada Customs Coding Form, an A.T.A. Carnet, or a Canada/China-Taiwan Carnet. The type of documentation that should be presented will depend on whether the good would normally be subject to customs duties and whether GST/HST would be fully-relieved, partially relieved, or fully payable.

g) The goods must not be diverted to a use that is limited or restricted by regulation, or to a use that would preclude the goods from being classified under this tariff item.

h) Within 18 months of the date of the reporting of the goods under the *Customs Act* or within any other period prescribed for those goods, the goods must be: (1) exported from Canada and satisfactory evidence of the exportation must be provided to CBSA, (2) destroyed and the destruction must be certified by a CBSA officer or other designated person, or (3) consumed or expended under prescribed circumstances. Although the maximum time limit permitted is 18 months, if the importer expects the goods to be in Canada for less than 18 months, the time limit actually applied will reflect that amount of time. For example, if the goods are imported for a sporting event, the duration of the temporary importation should be close to the date the event finishes. If the goods cannot be exported before the expiry date identified

[4] R.S.C., 1985, c. 1 (2nd Supp.).

on the customs documentation, the importer may apply for an extension before the expiration date. If the total period of importation will remain within 18 months of the date of release, the request for an extension may be made at the nearest CBSA office. Otherwise, the application for an extension must be made in writing to the nearest regional CBSA office.

Commercial goods are not automatically exempt from GST/HST. Therefore, once it has been determined that the goods are considered duty-free under tariff item No. 9993.00.00, the next step is to decide whether they are fully or partially relieved of the GST/HST normally payable under Division III of Part IX of the *Excise Tax Act*[5], or of the excise duties payable under Sections 21.1 to 21.3 of the *Customs Tariff*.

CBSA Memorandum D8-1-1 also provides guidance on what goods will be entitled to full or partial relief of GST/HST when temporarily imported. A detailed list of the goods that are entitled to full or partial GST/HST relief appears in Appendix A to CBSA Memorandum D8-1-1. Even in cases where the temporary importation of a good is both duty-free and GST/HST free, the time limit on the temporary importation for GST/HST relief may differ from the time limit imposed under tariff item No. 9993.00.00. It is always advisable to carefully review the time limits for both duty and GST/HST relief.

Conclusion

In summary, it is a relatively simple process for a non-resident to temporarily import his or her personal baggage and conveyance into Canada, as long as they are for personal use. Normally, this type of temporary importation may be declared verbally and no customs duties or GST/HST will be payable. However, the situation becomes more complex in the case of commercial goods, which normally include professional tools and commercial equipment. Such importations must be formally declared and GST/HST may be payable. Non-residents who wish to temporarily import such goods should always seek legal advice before they appear at the Canadian border. ■

[5] R.S.C., 1985, c. E-15.

EXPECT THE BEST

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