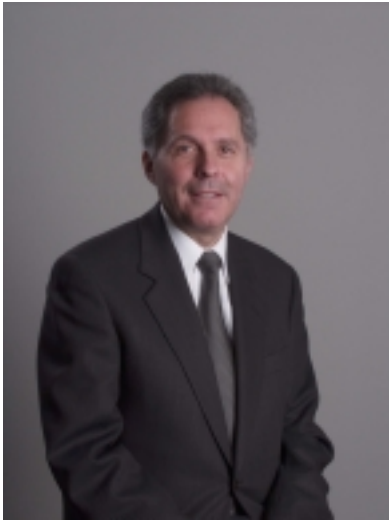


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Twist in NRI Regulations



Michael Kaylor, partner, Lapointe
Rosenstein, LLP

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Judicial Update of the Interpretation of the Phrase "Purchaser in Canada" Under the Customs Act

The following article was written by Michael Kaylor, partner, Lapointe Rosenstein, LLP.

The facts of the decision of the Canadian International Trade Tribunal (the tribunal) in the

Ferragamo decision (AP-2005-053) are relatively straight-forward. Salvatore Ferragamo Italy (SFI) is a manufacturer of high end shoes and accessories. Salvatore Ferragamo USA (FUSA) is the distributor of the Salvatore Ferragamo line in the United States. Ferragamo Canada (FC) is a Canadian retailer which distributes the Salvatore Ferragamo line in Canada. All three parties are related under the provisions of the *Customs Act*. FC has a limited administrative staff in Canada and plays a limited role in the determination of which goods will be purchased and sold in Canada. Management and control of FC rests with FUSA. FUSA entered into an agreement to sell certain goods to FC on a landed duty-paid basis. Following the agreement to sell between FUSA and FC, FUSA itself purchased the goods which were the subject matter of the agreement to sell (to FC) directly from SFI with instructions that the goods would be shipped directly from Italy to Canada. Once the goods arrived in Canada, FUSA acted as the non-resident importer thereof and paid all applicable cus-

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The Canada-Brazil Trade Palette

The following article was written by Mary Anderson, president, I.E.Canada.

The Canada-Brazil economic relationship is simply not achieving its full potential. The goal of the

Canada-Brazil Trade Palette, which was launched by the Brazil-Canada Chamber of Commerce (BCCC) and Export Development Canada (EDC) earlier this month, is to strengthen trade and investment between

Trade Palette, cont'd on pg. 5

Our AGM and Gala

I.E.Canada will celebrate its 75th anniversary at a gala event on Thursday, June 21, 2007 from 6:00 p.m. to midnight, following the annual general meeting at 5:30 p.m. This black tie affair will be an excellent opportunity for leaders in international trade to network and hear from global companies that have embraced corporate social responsibility (CSR) as part of their culture.

The theme for this event will be "Greening Your Business - The New Competitive Advantage." The event will be held at the beautiful, historic Liberty Grand at Exhibition Place in Toronto.

With growing concerns over global warming and its effect on the planet and its people, consumers have become more selective about the products they buy and the cars they drive. By attending this gala, you will have the opportunity to listen to senior level executives from global companies who are aware that they must nurture their market and create social and environmental values in order to generate economic capital in the future and ensure their long-term survival.

I.E.Canada is delighted to confirm corporate presentations from DuPont Canada Company, Hewlett-

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NRI Regulations, cont'd from pg. 1

toms duty and GST owing with respect to same. FUSA then arranged for the goods to be delivered to FC. FC then sold the goods to consumers in Canada. The Canada Border Services Agency (the agency) took the position that FC was a resident in Canada and a purchaser in Canada. The agency also argued that the agreement to sell between FUSA and FC was equivalent to a sale of the goods for export to Canada. Furthermore, the agency alleged that FUSA did not qualify as a purchaser in Canada because, pursuant to paragraph 2.1(c)(ii) of the *Valuation for Duty Regulations* (the regulations), FUSA had, before it purchased the goods from Italy, entered into an agreement to sell the goods to a **resident**, namely FC.

Following its review of all of the facts in the case, the tribunal concluded that there was a sale for export to Canada between SFI and FUSA. However, FUSA could only qualify as a purchaser in Canada if FC was not resident in Canada as defined in section 2(b) of the regulations. This requirement resulted from the fact that the tribunal found that FUSA had entered into an agreement to sell to FC. In order to be “resident” in Canada, FC needed to carry on business in Canada and management and control of FC had to be exercised in Canada. Based on the decision of the Federal Court of Appeal in the *AAiFostergrant* case (2004 FCA 259) FC carried on business in Canada. However, as stated hereinabove, management and control of FC were found to rest with FUSA. For this reason, FC did not qualify as resident in Canada. Consequently, notwithstanding that FUSA had entered into an agreement to sell the goods to FC, it could not be said that FUSA had entered into an agreement to sell the goods to a **resident** in Canada with the result that FUSA qualified as a purchaser in Canada. Consequently, the tribunal concluded that the value for

duty was to be based on the sale price from SFI to FUSA. The case is a straight-forward application of the clearly worded provisions of the regulations (coupled with the relevant provisions of the *Customs Act*) and is the embodiment of the instructions recently reaffirmed by the Supreme Court of Canada in the *Canada Trustco Mortgage* case [2005] 2 S.C.R. 601. The fact pattern as found in the *Ferragamo* case is rather unique with the result that it represents a rather special situation insofar as the application of the principles of value for duty is concerned.

The question which remains unresolved is best illustrated in the following hypothetical situation. A non-resident importer (A) enters into an agreement to sell goods to an unrelated resident, purchaser in Canada (B) on a landed, duty-paid basis. In turn, A purchases, from China, the goods in respect of which it has already entered into an agreement to sell to B. A instructs the Chinese factory to ship the goods directly from China to B in Canada. Once the goods have landed in Canada and duty and GST have been paid through Canada Customs by A, acting as the non-resident importer thereof, A arranges for the delivery thereof to B and issues a commercial invoice of sale to B for the agreed upon purchase price of the goods. B pays the invoice as issued by A. How is the value for duty of the goods in this hypothetical scenario determined? Is the value for duty based on the sale price of the goods from A to B or can one of the “test methods” as determined pursuant to sections 49 *et seq.* of the *Customs Act* be applied? There can be no dispute that the sale from the Chinese manufacturer to A is a sale for export of the goods to Canada. However, pursuant to paragraph 2.1(c)(ii) of the regulations, A does not qualify as a purchaser in Canada because, before it purchased the goods from

the Chinese manufacturer, A had already entered into an agreement to sell the goods to B. B clearly qualifies as a purchaser in Canada because it is resident in Canada. The agency will argue, based on the decision in the *Cherry Stix* case together with the administrative practice set forth in Memorandum D13-4-2, that a “sale” includes “an agreement to sell” and that consequently, the price which B agrees to pay to A in the agreement to sell between A and B, being equal to the actual price ultimately paid by B to A once the goods have been sold to A, represents the value for duty of the imported goods. However, one must not lose sight of the directive as issued in the *Canada Trustco Mortgage* case, at paragraph 10 thereof as follows:

10 It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than

Shipping and Trade Horizons



Leo Ryan

Shipping and Trade Horizons, a Tradeweek column, is produced by Leo Ryan. The column addresses Canadian industry issues and trade developments of interest to our members.

Bold Container Projects on Both Coasts

Hot off the press! The month of May offered further proof that bold visionaries are prepared to take advantage of remote, but deep-water locations, on both of Canada's coasts to launch major container terminal projects aimed at capturing surging Asian trade with North America as West Coast facilities become increasingly congested. All told, two separate projects in British Columbia and Nova Scotia will add at least 3.5 million TEU capacity by 2010 if things go according to plan.

A terminal at Prince Rupert in northern British Columbia actually becomes operational this fall, but more of a surprise has been the announcement on May 29 of a privately-funded US\$300 million deep-water container and logistics park in Melford, Guysborough County, Nova Scotia. It is off the Strait of Canso and faces the Atlantic Ocean. When completed, in principle, by 2010, it will have a capacity of 1.5

million TEU.

Like the Port of Halifax, Melford International Terminal is counting on getting a share of the forecast big influx of cargo anticipated from large container ships from Asia, China and the Indian sub-continent via the Suez Canal. It remains to be seen how much of this cargo will flow to Melford as opposed to Halifax (currently operating at half capacity) and U.S. East Coast ports also seeking to attract the same cargo by expanding infrastructures.

A recent market assessment and feasibility study by TranSystems Corp. of Norfolk, Virginia, identified Melford as one of the best sites remaining on the east coast of North America for a new terminal.

Important to note: a new rail spur to be built by RailAmerica shortline operator will connect with the CN continental network at Truro.

Meanwhile, the Port of Prince Rupert will soon emerge as a trade corridor of some significance between North America and Asia. COSCO Container Lines Americas, Inc., part of Beijing-based China Ocean Shipping, will be the first container operator to route Asian freight over the Prince Rupert box terminal this fall and across CN's North American rail network. Others will likely follow.

The long-awaited development was announced in mid-May by CN after signing a contract with COSCO Container Lines Americas under which COSCO will commence service starting in fourth quarter 2007.

Due to be completed in October, Phase 1 of the Prince Rupert terminal will have initial capacity of 500,000 TEU and is part of a broader plan to build a facility capable of handling 2 million TEU a year by 2010, or possibly earlier.

Initial prime target: the inbound containers from Asia that can be loaded onto dedicated freight trains offering seamless delivery into Chicago and the crucial U.S. Midwest market. The intermodal facility will transfer containers from ship to train for delivery to Chicago in a time of 107 hours.

"We are extremely pleased to have COSCO as our first carrier – it is a good fit for our business model," Don Krusel, president and CEO of the Prince Rupert Port Authority, said in an interview.

"It is important to note that COSCO will provide exporters in British Columbia with market penetration in Asia," Krusel said, referring in part to backhaul shipments of forest products carried by rail into Prince Rupert from an intermodal terminal currently being built by CN in Prince George, some 800 kilometres east of Prince Rupert. The carrier will also, as expected, ship consumer goods from China into Prince Rupert for onward delivery into the Midwest and Central Canada.

Our Gala, cont'd from pg. 1

Packard (Canada) Co. and Honda Canada Inc. You will learn their best practices and find out how you can incorporate their ideas into your corporate planning and programs. As a result, you will be able to demonstrate to your customers, investors and the world, that your company is actively engaged in CSR.

I.E.Canada is delighted to confirm sponsorships from the following organizations:

- Export Development Canada (dinner sponsor)
- Blake, Cassels & Graydon LLP (program guide sponsor)
- HSBC Bank (welcoming reception)
- Canadian Society of Customs Bro-

Our Gala, cont'd on pg. 5

Member Profile



Geo. H. Young & Co. Ltd. has been a member of I.E.Canada since August 1999.

Reynold Martens, executive vice president, GHY International, prepared the following member profile by answering a series of questions posed by Jane Carter of I.E.Canada.

Background

GHY was established in 1901 by George Henry Young in Winnipeg, Manitoba, with a mission to provide Canadian importers with premium service, integrity, quality and professional representation before Canada Customs.

The company is privately owned and managed by Richard Riess, the fourth generation great grandson of George Henry Young. GHY has expanded to become one of the largest providers of customs and trade services in central Canada.

Headquartered in Winnipeg, Manitoba, GHY manages imports into Canada by all modes of transportation and at all ports of entry. The company has Canadian service centres in Toronto, Vancouver and Calgary and owns a nationally licensed U.S. customs brokerage subsidiary, GHY USA, Inc. to facilitate imports into the U.S. at all ocean, air, inland and frontier ports.

GHY facilitates well over \$2 billion (CAD) of trade for international traders based throughout Canada and the United States, including top 500 Canadian and U.S. companies in the automotive, apparel, aerospace,

food processing, agricultural, sports entertainment, and manufacturing sectors, to name a few.

Geo. H. Young & Co. Ltd. is the Canadian customs brokerage arm of GHY International, a group of companies that also includes GHY USA, Inc., a wholly owned U.S. customs brokerage subsidiary; GHY Consulting & Trade Services; GHY Cross Border Logistics; GHY Warehousing & Distribution; and GHY Trade Information Services.

The company is structured around the values of personalized customer service, quality, and accountability, which have been its hallmarks since inception.

Each client is assigned to a client service cluster, headed by a senior account manager, and supported by a strong cast of specialists in release, customs rating, and administration, which ensures that there is personal accountability for responsiveness, service, and quality.

“Gold” level clients are managed in a separate stream of accountability, which includes regular meetings to proactively review compliance priorities in the prime areas of tariff classification, valuation, and origin. Gold clients have preferred, on demand access to their account manager and GHY’s consulting group for special projects or trade advice.

GHY’s business approach to managing trade compliance is to work in collaboration with clients to develop a strategy that reflects their

unique situation and which makes commercial sense in light of the costs, benefits and regulatory risks involved.

GHY has made significant investments in technology to support their client service focus, has been recognized as a lead partner of IBM globally for innovative use of their i Series technology, and uses leading software for managing core Canadian and U.S. brokerage operations. The company also has various options available to work with clients to develop business-to-business e-commerce solutions for trade documentation, electronic file sharing, EDI, and emerging Canadian and U.S. customs programs including ACI, CSA and ACE.

GHY is PIP approved (Canada), C-TPAT certified (U.S.), ACE approved (U.S.) and CSA enabled. The company is also capable of assisting Canadian and U.S. exporters to achieve their certifications for the emerging security-based cross border environment via its partnership stake in Supply Chain Security Canada Inc., one of six firms approved by Export Development Canada (EDC) to support their recently introduced loan program for that purpose.

Richard Riess, president, and Reynold Martens, executive vice president, are in leadership roles as directors and advisors for I.E.Canada, Canadian Society of Customs Brokers, Canadian Manufacturers and Exporters Association, University of Manitoba, Red River Community College, World Presidents Organization, and the Manitoba International Gateway Council. They are also active in other arts, community and charitable organizations.

What are the benefits of being a member of I.E.Canada?

There are many benefits to being a member of I.E.Canada. As a mem-

NRI Regulations, cont'd from pg. 2

one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

It has already been accepted by the Federal Court of Appeal that the *Customs Act*, like the *Income Tax Act* is a complex and detailed statute. Had Parliament wished to cast a wide net, as it were, so that an agreement to sell would be included under the meaning of the word "sale," it would have done so as is the case in the definition of the word "sale" in the *Special Import Measures Act*. Consequently, since the transaction value (i.e. sale price) can only be used as the basis for value for duty in the face of a sale for export to Canada (and not an "agreement to sell" for export to Canada), it can be argued that the transaction value method of customs valuation is inapplicable in the circumstances of the hypothetical scenario set forth hereinabove, and that A is entitled to invoke one of the test methods in order to determine the proper value for duty of the imported goods. One can expect that an actual case, similar to the hypothetical scenario, will be tested before the tribunal.

Member Profile, cont'd from pg. 4

ber, we have access to information on developments in trade policy as they happen and the opportunity to network with other members. Topical seminars presented by I.E.Canada in our region allow us to invite our clients to attend with us.

How has the association helped your organization with respect to trade issues?

The association has provided us with additional perspectives on trade issues. We are given timely access to developing issues via *I.E.Today*, I.E.Canada's daily e-mail. We are also able to access resources through other members and I.E.Canada staff.

What are the most valuable benefits you receive from I.E.Canada that you feel are most important to your organization?

The benefits that are most valuable to our company include access to a broad base of importers and exporters, timely and accurate information, and regional seminars that we can co-market with I.E.Canada for our clients' benefit.

What is the value of membership to a new importer/exporter business?

If you are a new importer/exporter business, membership will provide you with an information source and connections to other resources.

I.E.Canada membership also enables you to network with other members for the purposes of marketing, receiving trade advice, and sharing approaches to problem solving. You also receive up-to-date information daily on import and export issues by e-mail.

Our Gala, cont'd from pg. 3

kers (post-dinner social)

Individual tickets are available for only \$150; the price includes networking reception, dinner, business presentations, post-dinner social, dancing, parking and the GST. Corporate tables of eight can be purchased for the low price of \$1200. The Greening Your Business Package is available for \$2500.

For further details, please visit www.iecanada.com/events.html or call Fée Kiessling, VP, conferences & programs, at 416-595-5333 ext. 29, or e-mail fkiesling@iecanada.com.

Trade Palette, cont'd from pg. 1

Canada and Brazil by reducing trade barriers and by making information about the two countries readily available. Initially, the public-private partnership will focus on identifying the key limitations to trade between Canada and Brazil and developing the means to deliver information and services that will meet the needs of Canadians and Brazilians doing business in each other's countries. The Canada-Brazil Trade Palette will provide general information available publicly and will charge fees for the services of trusted advisors.

BCCC and EDC have agreed to work collectively on the Canada-Brazil Trade Palette.

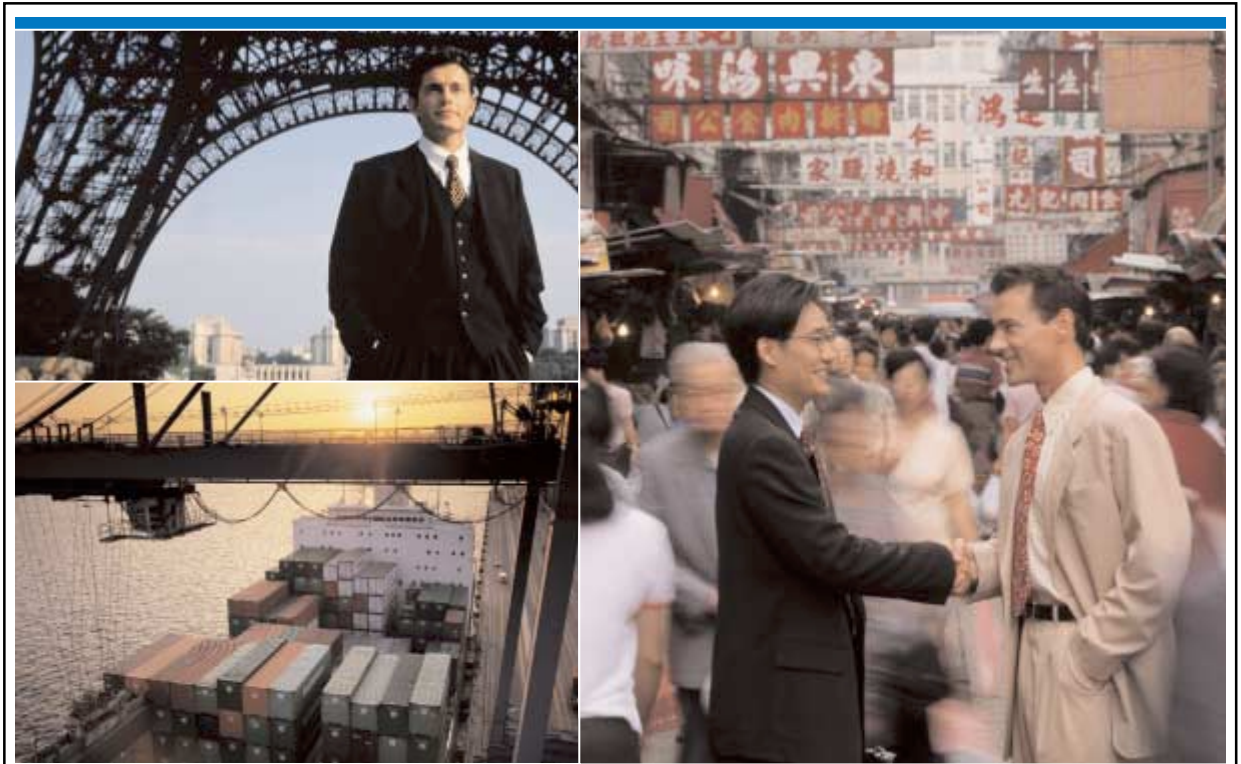
BCCC's primary objective is to foster stronger commercial relations between Canada and Brazil. The BCCC plays a vital role in keeping Canadian companies and individuals informed of the latest political and economic developments in Brazil. The BCCC is a non-profit association strategically managed through I.E.Canada.

EDC, Canada's export credit agency, offers innovative commercial solutions to help Canadian exporters and investors expand their international business.

We Value Learning from You

In order to make this project successful, it is crucial to have public, private and academic organizations actively involved. If you are doing business with Brazil, we invite you to become part of this initiative. You can contribute to the Canada-Brazil Trade Palette by providing advice and information or sharing your knowledge and expertise.

For details, please contact Bill Jermyn at (416) 766-5666 ext. 222 or by e-mail at: bjermyn@williamjermynassociates.com.



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