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Used RVs: CITT Goes on Vacation



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tial tariff treatment in each of these cases, and in doing so, has created uncertainty where none existed before.

Facts

The cases in question are *Duhamel & Dewar Inc.* (AP-2005-046) and *Western RV Coach Inc.* (AP-2006-002). In both cases, the importer had the requisite NAFTA Certificate of Origin (CO) in its possession at the time of importation of the recreational vehicle, but NAFTA treatment was denied by the Canada Border Services Agency (CBSA), leading to a liability for customs duties imposed on the importer.

In *Duhamel & Dewar Inc.* (D&D), the importer purchased a used 2000 Monaco Signature motor home from a company called Buddy Gregg Motor Homes Inc. (Buddy Gregg) in Knoxville, Tennessee. Buddy Gregg initially provided a completed and executed CO to the importer, but after the CBSA commenced a NAFTA verification audit and requested further details from Buddy Gregg to support its CO,

A Busy Month

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

Last month, I took part in a range of trade-related activities that involved travel from coast to coast and across the border, including:

- Port Days in Saint John, New Brunswick
- The signing of a new partnership agreement between I.E.Canada and the Saskatchewan Trade and Export Partnership (STEP)
- A Foreign Affairs and International Trade Canada (DFAIT) roundtable discussion on small to medium-sized enterprises (SMEs) and their needs to ensure they succeed in the global economy
- Meetings with Canada Border Services Agency (CBSA) in Ottawa
- I.E.Canada's 75th annual general meeting and gala
- Annual general meetings of I.E.Canada's meat and cheese committees

I was also delighted to take part in Export Development Canada's (EDC) industry stakeholder panel, which was led by Eric Siegel, president and CEO of the crown corporation.

Eric outlined EDC's new initiatives along with its efforts to integrate corporate social responsibility val-

The following article was written by Greg Kanargelidis, partner, Blake, Cassels & Graydon LLP.

The Canadian International Trade Tribunal (CITT) recently issued two decisions dealing with whether used recreational vehicles imported into Canada qualify for duty-free treatment in keeping with the *North American Free Trade Agreement* (NAFTA). The CITT denied preferen-

Used RVs, cont'd on pg. 2

Remember These Dates

I.E.Canada will hold its 76th annual conference, trade show and reception from October 22-24, 2007 at the Doubletree International Plaza Hotel Toronto Airport at 655 Dixon Road.

We are now developing the agenda for the conference. Please contact Fée Kiessling, vice-president of conferences and programs, at: (416) 595-5333 ext. 29 or by e-mail at: fkiessling@iecanada.com if you have ideas for conference topics.

Month, cont'd on pg. 3

Used RVs: CITT Goes on Vacation	2
West Coast Mega-Port Moving Towards Reality	3
New Members	5
Bank of Montreal	6

Used RVs, cont'd from pg. 1

Buddy Gregg responded by withdrawing the CO. The producer of the recreational vehicle in question, Monaco Coach Corporation (Monaco), did provide its own CO for the vehicle, which was rejected by the CBSA. As a result, duty-free treatment was denied and the importer was required to pay customs duties on the imported vehicle at the "Most-Favoured Nation" rate of duty of 6.1 per cent. The CITT upheld the CBSA's actions and dismissed the importer's appeal.

In *Western RV Coach Inc.* (Western RV), the importer purchased a used 1995 Royale Coach motor home from a company called Marathon Coach Inc. (Marathon) in Florida. Marathon provided a completed and executed CO to the importer. The CBSA commenced a NAFTA verification and requested further support for its CO from Marathon. In response, Marathon provided a copy of a certificate of origin for a vehicle issued by the manufacturer, Monaco, to the original purchaser of the recreational vehicle at issue. This was not acceptable to the CBSA which asked for additional documentation to support the NAFTA origin claim. Monaco, the manufacturer, indicated it could not provide further documentation as the supporting documentation was no longer available since the year of production was some eight or nine years earlier. As a result, the CBSA denied duty-free treatment and the importer was also required to pay customs duties on the imported vehicle at "Most-Favoured Nation" rates of duty. The CITT upheld the CBSA's actions and dismissed the importer's appeal.

Conditions for Making NAFTA Claims

In keeping with the NAFTA, all goods imported into Canada that qualify as "originating goods" are eligible for importation free of any customs duties. The NAFTA provisions, incorporated into Canadian

law largely pursuant to the *Customs Act, Customs Tariff*, as well as a number of regulations, provide detailed rules of origin for the determination of when any imported goods qualify as "originating goods" for these purposes. The NAFTA also specifies rules regarding the "proof of origin" that must be available or be supplied by the importer who claims the benefits of the NAFTA upon importation of any goods from another NAFTA party.

In keeping with subsection 24(1) of the *Customs Tariff*, goods are entitled to a preferential tariff treatment only if

(a) proof of origin of the goods is given in accordance with the *Customs Act*; and

(b) the goods are entitled to that tariff treatment in accordance with regulations.

For purposes of satisfying the proof of origin requirement set out in paragraph 24(1) of the *Customs Tariff*, an importer must refer to subsection 35.1(1) of the *Customs Act*, which provides among other things that "proof of origin, in the prescribed form containing the prescribed information ... shall be furnished in respect of all goods that are imported." The *Proof of Origin of Imported Goods Regulations* must next be considered. In keeping with subsection 6(1) of the regulations, "where the benefit of preferential tariff treatment under NAFTA ... is claimed for goods, the importer or owner of the goods shall, for the purposes of section 35.1 of the Act, furnish to an officer, as proof of origin, at the times set out in section 13, a Certificate of Origin for the goods, completed in English, French or Spanish." Section 13 provides that the CO must be furnished, among other times, "at any time when requested by an officer."

For purposes of satisfying the re-

quirement in paragraph 24(1)(b) of the *Customs Tariff* that the goods are entitled to the NAFTA preferential tariff treatment claimed by the importer, the importer must refer to the *NAFTA Rules of Origin Regulations* (NAFTA Regulations). The NAFTA Regulations specify the various ways in which particular goods may qualify as "originating goods" for NAFTA origin purposes. The NAFTA Regulations set out four principal rules ranging from goods that are "wholly obtained" within a NAFTA country, to goods produced in a NAFTA country of imported materials, so long as the imported materials meet certain other requirements, such as shifts in tariff classification or a minimum regional value content test.

CITT Veers Off Course of Existing Jurisprudence

The CITT came to the correct result in both the D&D and Western RV cases. However, it appears that the CITT skidded out of control when applying the legislative tests for determining qualification for NAFTA origin claims.

In this connection, the CITT previously had before it similar facts in *Buffalo Inc.* (Buffalo) (AP-2002-023). In Buffalo, the tribunal was asked to consider whether certain imported laces were entitled to NAFTA treatment. The CBSA had rejected the importer's NAFTA treatment claim on the basis that (1) the importer had not provided proper proof of origin and (2) the goods did not qualify for NAFTA treatment. The CBSA appeared to base its conclusion on the fact that the CO was not entirely consistent with the facts and certain other supporting information provided by the exporter and producer of the goods at issue.

The tribunal rejected the CBSA's position and held that a valid CO was provided by the importer. Therefore, the tribunal turned to the sec-

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.

West Coast Mega-Port Moving Towards Reality

A key component of the federal government's Asia Pacific Gateway strategy to better position Canada's maritime trade with the world's fastest-growing markets is moving closer to reality. If everything proceeds as planned, a super-port on the B.C. Lower Mainland – to be called the Vancouver Fraser Port Authority – could be in place by early next year. For Canadian importers and exporters alike, this will represent dynamic change.

The new entity will arise from the merger of Canada's largest port, Vancouver, with the ports of Fraser River and North Fraser. All told, these ports combined represent more than 130 million tonnes of cargo, or about 45 per cent of the overall throughput of the member ports of the Association of Canadian Port Authorities. The Port of Vancouver alone accounts for more than 2 million TEUs, or half of Canada's total containerized cargo. Much is at stake as competition

heats up on North America's West Coast to handle the continued surge of Asian trade. Canada's commercial trade with China, in particular, has been soaring. Commodities such as coal and grain are exported in large quantities from Canada while consumer goods dominate our imports from Asia.

The Lower Mainland ports are determined to not only retain existing markets but to compete more effectively against such U.S. ports as Seattle, Tacoma, and Long Beach. Integration is seen, among other features, as offering better land-use planning, more efficient operations, and greater leverage in long-term funding for capital expenditures.

"It's been talked about for 30 years, but it's one of those ideas whose time has come," says Capt. Gordon Houston, president and CEO of the Vancouver Port Authority. "If you look at our projected figures for growth over the next 15 to 20 years, there is no port in B.C. that can handle that alone."

Asia-Pacific container traffic is forecast to climb by 300 per cent over the next 15 years, according to a consultant's report on the merger. A new container terminal in Prince Rupert, scheduled to come on stream this fall, will be going after some of this business.

In a ports strategy document released in 2005, the Victoria government calls for B.C. ports to increase their share of Asia-Pacific container cargo from a present 10 per cent to 17 per cent by 2020. Such an increase and a corresponding hike in bulk traffic would pump an additional \$6.6 billion a year into the Canadian economy.

But meeting these ambitious targets will require "significant" additional terminal, rail and road capacity, the consultant's report warns. The report also suggests that a

merged entity would be in a stronger position to handle the truck and railway labour conflicts that have hampered the Port of Vancouver in recent years.

It was in June 2006 that Transport Canada formally invited the three Lower Mainland port authorities to examine amalgamating into one unit. The three boards concerned agreed to pursue the matter.

The next important step came a year later, on June 18, 2007, when the federal government, as part of a coordinated effort, issued a certificate to amalgamate which was published in the *Canada Gazette*.

"This is a major step towards building a world-class gateway that is a driving force in Canada's logistics chain," said Sarah Morgan-Silvester, chair of the Amalgamation Transition Committee.

Capt. Houston was a few weeks ago named as Transition CEO to guide the formation of the proposed Vancouver Fraser Port Authority (VFPA), including the selection of the executive team. The CEOs of the three ports will continue to direct the operations of their respective organizations until the official date of the amalgamation.

Month, cont'd from pg. 1

ues into its day-to-day operations.

Eric also invited each association representative to comment on the greatest challenge or concern for their respective organizations. Many of the participants mentioned the rising value of the Canadian dollar as a key concern for their members. All of the association leaders stressed that international trade is critical to their members. We also discussed the growing importance of integrative trade, which captures all of the elements of international business today – exporting and importing, foreign invest-

Month, cont'd on pg. 5

Used RVs, cont'd from pg. 2

ond issue before it, namely, whether the goods in issue were entitled to preferential NAFTA treatment. In this connection, the tribunal once again disagreed with the CBSA's position and held that there was ample evidence before the CBSA to support the NAFTA treatment claim.

In contrast, in D&D, a CO was initially provided by the exporter of the goods, but was later withdrawn. The original producer of the goods subsequently provided a CO. However, the CBSA argued that this was not sufficient because, among other things, a CO can only be supplied by the "exporter" and not the "producer" of the goods. In support of this position, the CBSA relied on section 97.1 of the *Customs Act*. However, section 97.1 deals with the obligations of an exporter **within Canada** and not with the obligations of an exporter of goods to Canada. The CITT was careful to note in D&D that the CBSA's

"decision ... says nothing of the validity of the certificate of origin *per se*. It makes no reference to whether a certificate of origin from the producer was acceptable or not in the circumstances under examination."

Thus, the tribunal left open the issue of whether a CO provided by the producer rather than the exporter could be acceptable "proof of origin" for purposes of the *Customs Tariff* and *Customs Act*. The tribunal went on to consider whether there was sufficient evidence to support a NAFTA claim. In this connection, the tribunal considered the lack of detailed evidence and instead made specific reference to a letter from Monaco to the CBSA in which Monaco noted that the vehicle at issue was made in the same facility as other vehicles that were considered to qualify for NAFTA treatment.

However, the subject vehicle was manufactured in 1999 while the NAFTA qualifying vehicles were manufactured in 2002. The tribunal, correctly in the writers' opinion, decided that there was not sufficient evidence to support the NAFTA claim.

What is not clear from the D&D decision is whether the tribunal based its decision on the failure by the importer to satisfy paragraph 24(1)(a) of the *Customs Tariff* (i.e., the proof of origin requirement), paragraph 24(1)(b) of the *Customs Tariff* (i.e., proof that the good qualified for preferential treatment), or both.

In Western RV, a CO was provided by the exporter. However, once again the CBSA rejected the CO and the NAFTA treatment claim. The tribunal appeared to follow its previous decision in D&D in dismissing the importer's appeal: "The tribunal finds the above case [D&D] to be consistent with the present appeal on this point."

In Western RV, the tribunal set out the "four things" that the importer was required to prove in order for the vehicle in issue to qualify for NAFTA treatment. The first of the four things was as follows:

(1) that the imported good, including its component parts and traced materials, met the statutory proof-of-origin requirement, i.e., that a certificate of origin accompanied by the statements required by the regulations was tendered for the vehicle

The tribunal noted that "since the [4] tests are cumulative, failure to meet any one of the four requirements will result in the failure of the appeal on the first issue." Following its analysis of the evidence and argument, the tribunal stated that

"the good in issue did not meet the statutory proof-of-origin requirement for preferential tariff treatment. Therefore, the tribunal determines that the good in issue is not entitled to preferential tariff treatment."

The tribunal's decision in Western RV appears to be inconsistent with its previous decision in Buffalo, or in the alternative appears to read into the legislation an additional requirement for the satisfaction of the proof-of-origin requirement. It is arguable that the "proof of origin" requirement is satisfied upon presentation by the importer of a CO completed and signed by the exporter (or possibly, by the producer). However, since it appears that the CO was indeed tendered by the importer in Western RV, the tribunal's decision makes unclear what more, in addition to the CO, the importer must do in order to satisfy its "proof of origin" requirement. It is hoped that the tribunal will clarify its position in subsequent decisions on NAFTA origin claims.

NAFTA Certificate Does Not Immunize Importers from Duty Assessments

Regardless of the criticisms of the manner in which the tribunal set out its reasons for decision in D&D and Western RV, the message from the two decisions is clear: the existence of a CO does not protect an importer from duty assessments where the CO is not ultimately supported by additional documentation from the exporter and/or producer of the goods. Also, in the case of "used goods," information provided by the exporter is arguably of greater evidentiary weight than from the producer, since the producer's information will not include evidence of any alterations or

Used RVs, cont'd from pg. 4

repairs made to the vehicle following initial production and sale.

Based on the decisions in D&D and Western RV, an importer buying a used good from an exporter who offers a CO should, to the extent possible, obtain as much information as possible from the exporter concerning alterations or repairs to the vehicle from the date of original manufacture to the date of sale.

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Business Achievement Award

The Canadian American Business Council (CABC) is requesting nominations for the prestigious 2007 Canadian American Business Achievement Award. Each year, the council seeks information about innovative and successful alliances between Canadian and American firms to recognize the benefits that these partnerships bring to both countries in jobs, innovation and revenue creation.

These efforts culminate in the presentation of the Award for Canadian American Business Achievement, given to two companies, one Canadian and one American, whose joint enterprise has demonstrated:

- Strong business growth
- Remarkable innovation
- The capacity to provide the partners with a global advantage

This year CABC will celebrate Canadian American business achievement on November 9, 2007 at the Metro Toronto Convention Centre in Toronto, ON.

The nomination form is available on our website at: http://iecanada.com/industry_news/2007/07_11_07_CABC_Award_Nomination_Form.pdf

Month, cont'd from pg. 3

ment and the international sale of services.

Interestingly, Canadian companies have reacted differently to stricter security requirements for moving goods into the United States. Some companies are willing to implement the necessary security measures to ensure compliance and safeguard their access to the U.S. market while others have scaled back their trade activity with the United States given the considerable cost to comply with the country's onerous security requirements.

Stephen Poloz, senior vice-president of corporate affairs and chief economist, EDC, provided our group with an overview of the crown corporation's spring 2007 global export forecast. Stephen noted that the world economy has become a tightly woven array of trading and investment linkages, with economic shocks in one part of the world inevitably resurfacing somewhere else.

EDC recognizes that one of its key roles is to facilitate the smooth flow of Canadian goods across borders and support Canadian businesses abroad. EDC is working closely with I.E.Canada on a strategic research project to examine how Canadian businesses are automating trade payments. EDC wants to determine whether there are gaps in service that need to be addressed. I.E.Canada members may be contacted by EDC in the context of this research project.

I was also invited to hear Pamela Wallin share her views on the Canada-U.S. relationship at a meeting in New York City, which marked the end of her four-year term as Canada's consul general in New York City. Pamela made it clear that enhanced security requirements in the U.S. are not going away and show no signs of letting up.

That message was confirmed by the

U.S. government officials who spoke at the June 17-19 conference held by the American Association of Exporters and Importers (AAEI) in New York City. Although there may be "fatigue around security," the U.S. Department of Homeland Security has a serious, long-term commitment to security and to the "titanic" struggle to keep the "bad guys" out.

The importance of compliance was certainly an underlying theme at the events I attended last month. As well, there was a sense of confidence amongst the meeting participants and a willingness to be creative in facing challenges to being globally competitive.

New Members!

The following organizations joined I.E.Canada in June 2007.

Carestream Health Inc.

Kevin D. Williams
Supervisor, Import/Export Compliance
Rochester, New York

Griffith Laboratories Worldwide, Inc.

Robert Wimmi
Director of Purchasing
Toronto, Ontario

Hartwick O'Shea + Cartwright Ltd.

Kyle Hartwick
Vice President
Mississauga, Ontario

Kemilak Company

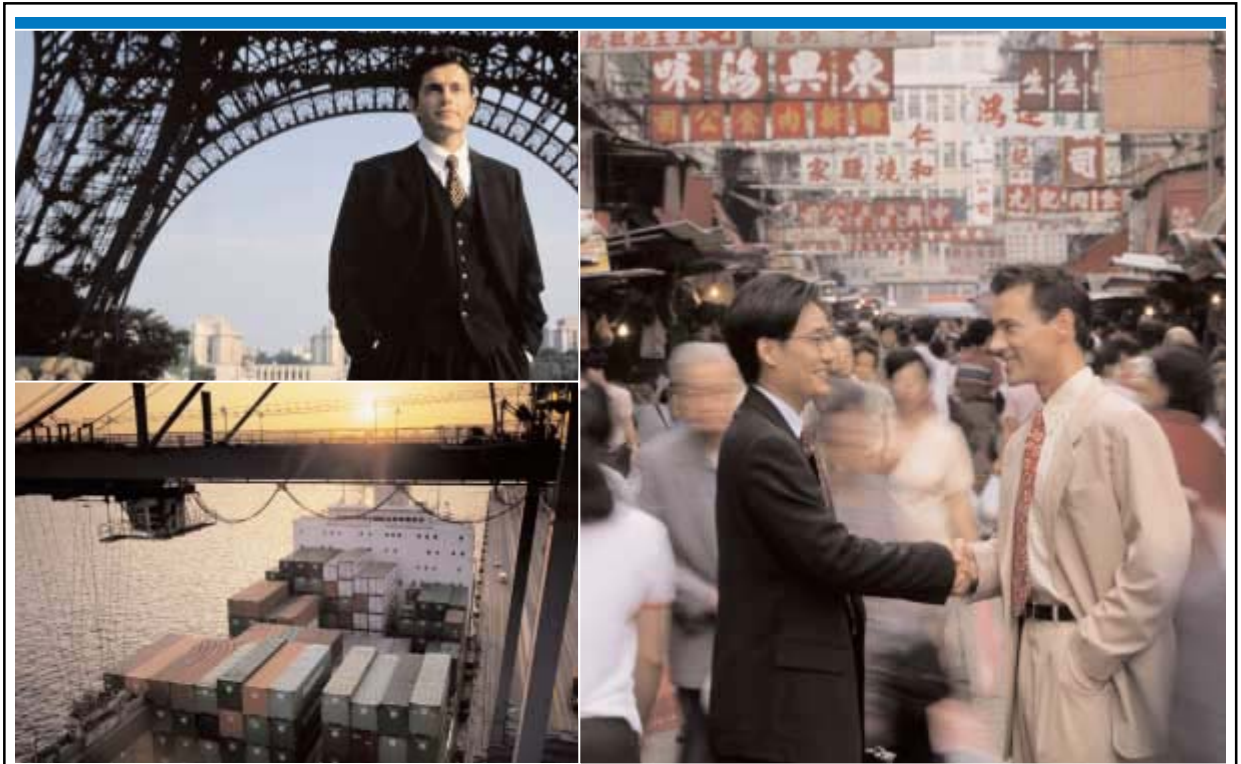
Jasenko Ljubica
Communico Logist
Split, Croatia

Legrand Canada Inc.

Jim McNaughton
Logistics Coordinator
Vaughan, Ontario

Vanasse & Associés Consultants Inc.

Therese Vanasse
PDG
St-Leonard, Quebec



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