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## Safety Footwear Importer Wins



Greg Kanargelidis, partner, Blake, Cassels & Graydon LLP

The following article was written by Greg Kanargelidis, partner, Blake, Cassels & Graydon LLP, and Elysia Van Zeyl, associate, Blake, Cassels & Graydon LLP.

A recent tariff classification decision by the Canadian International Trade Tribunal (CITT) illustrates how an importer can lower customs duties and avoid anti-dumping duties by carefully structuring the importation of goods.

### Safety Footwear Imported in Parts

On July 25, 2007, the CITT issued its decision in *Tai Lung (Canada) Ltd. v. President of the Canada Border Services Agency*, AP-2006-034, in which the tribunal stomped on the Canada Border Services Agency's position on how footwear components imported together should be classified for customs purposes. At issue in the appeal were two types of goods imported by Tai Lung. The first good was a boot upper made of leather and incorporating a metal toe cap. The second good was a plastic outer sole. Tai Lung imported the components and subjected them to a number of manufacturing operations in Canada, ultimately producing finished safety footwear. The safety footwear was sold at Canadian Tire locations.

### Parts vs. Unassembled Footwear

In the course of a customs audit, the Canada Border Services Agency (CBSA) concluded that the imported footwear components constituted complete footwear and re-classified them under tariff subheading 6403.40 of the *Customs Tariff*. In 2007, footwear classified under this

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## Our Annual Conference Trade Show

Our annual conference trade show will be held October 22 and 23, 2007, at the Doubletree International Plaza Hotel.

We hope you will visit our trade

show; within minutes you'll have new contacts and information that might otherwise take days to obtain. For details, please visit [www.iecanada.com](http://www.iecanada.com) and look under "upcoming events."

## Annual Conference

We hope you'll join us at our 76th annual conference, which takes place October 22-24, 2007 at the Doubletree International Plaza Hotel in Toronto. Here's your chance to find out how to import or export your goods more easily or to better advise your customers involved in international trade. Learn the latest information about business opportunities, customs, border security, product safety and trade regulations.

Connect with some of North America's most experienced international business people, economists and policy-makers. They'll explain Canada's new vision for trade and customs and the new prospects it will generate. You'll learn about the Canada Border Services Agency's goals for the upcoming decade and how you can align your business with those aims to secure a competitive edge. At our gala, you'll get a true taste of China and who and what you need to know to do business in Asia.

International trade has never faced so many challenges. I.E.Canada has lined up the experts to help you reconfigure your business in the wake of new global players, product recalls, anti-terrorism measures, as well as the growing public and government demand for sustain-

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## Deal Gone Bad? Resolve it Right with Arbitration!

**For a growing number of international companies, arbitration is the preferred way to resolve disputes**

Those working in business know that things don't always turn out as planned. If your business operates internationally, even more issues can result if problems arise. In addition to the uncertainties of the marketplace, arrangements between business partners can go awry for a variety of reasons, such as miscommunication, ill will or plain bad luck. This can lead to undelivered goods, misappropriated technology or even cancelled contracts.

"Often, international transactions involve complicated contracts that engage many parties, including foreign governments or multiple companies," said John Lorn McDougall, partner with Fraser Milner Casgrain LLP and chair of the Canadian Chamber of Commerce's Arbitration Committee. "There are a number of problems that can arise, such as claims for breach of contract or for illegal or wrongful conduct."

What can be done to protect your business against these uncertainties? For more and more companies, the answer is international commercial arbitration and other forms of alternative dispute resolution. As foreign investment and international trade have grown, so too has demand for alternatives to litigation.

International commercial arbitration is experiencing a boom. *The Financial Times* recently reported that three out of four corporate counsel at multinational companies would prefer to settle cross-border commercial disputes by arbitration. It is no wonder, then, that the International Chamber of Commerce (ICC), whose International Court of Arbitration is among the oldest and largest arbitration forums in the

world, has logged more than 500 new cases a year in the last few years. Companies around the world routinely include ICC arbitration clauses in their contracts.

Arbitration has many advantages over litigation. It is often faster and more cost-effective, and it affords flexible procedures in a less public forum. In addition, Mr. McDougall notes that, "in many jurisdictions, home-field advantage can be decisive, making international arbitration preferable to litigating disputes in your adversary's home courts."

Arbitration under the auspices of the ICC is subject to several international treaties, under which countries agree to recognize and enforce arbitral agreements and awards. The main such treaty, the New York Convention, counts over 130 countries as parties. As a result, arbitral awards are generally easier to enforce internationally than court decisions.

Established in 1923, the ICC's International Court of Arbitration (ICC Court) pioneered international commercial arbitration. Today, the ICC Court is comprised of some 120 lawyers and legal experts who are drawn from more than 80 countries and territories from around the world. This gives the court a rich and diverse cultural and legal perspective. In addition, the court is supported by a 50-person secretariat in Paris – which includes 30 attorneys of over 20 nationalities who speak all of the world's main languages – that is routinely considered the best administrative staff in the business.

"ICC arbitration is flexible – the parties can tailor the arbitration to their needs and have control over many other elements of the arbitration, such as who will hear the case and where the arbitration will take place," said Perrin Beatty, president & CEO of the Canadian Chamber of

Commerce, the Canadian representative to the ICC. "As well, the ICC Court scrutinizes awards for form and substance, which enhances their quality. ICC awards are seen as high quality ones that are respected worldwide. This recognition, and the ICC Court's scrutiny, is very helpful at the enforcement stage."

Arbitration hearings are not public proceedings, Mr. Beatty noted, and only the parties themselves receive copies of the awards. "Unlike court cases that can become the subject of media attention, arbitration cases are not publicized since these are private proceedings."

Also attractive to those in business is the fact that arbitration awards are subject to less challenge than court judgments. There are only limited grounds for challenging an arbitral decision; as a result, arbitral awards are more likely to be final than the judgments of courts.

"For this reason, arbitration can be a more efficient and affordable means of dispute resolution than court litigation," said Mr. McDougall. "From start to finish, the timeline for an arbitration is often shorter than for a similar lawsuit. This means cases can be resolved sooner and at less cost to the parties."

*To learn more about ICC arbitration, please visit [www.chamber.ca](http://www.chamber.ca), under "ICC Arbitration." Contact Brian Zeiler-Kligman, policy analyst, international, with the Canadian Chamber of Commerce at (613) 238-4000 ext. 225 or [bzeiler-kligman@chamber.ca](mailto:bzeiler-kligman@chamber.ca).*

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able practices.

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## 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.*

### Port Regulatory Reforms Urged at ACPA Conference

Some 200 delegates attended the annual conference staged in Montreal in late August of the leading Canadian ports striving to maintain their competitiveness with U.S. counterparts as gateways to North America and to meet the challenges of surging Asian maritime trade. The overall theme for the discussions was: *Canada's Ports: Vital Economic Engines.*

Most of the delegates were senior executives representing the 19 members of Association of Canadian Port Authorities (ACPA) which annually handle more than 280 million tonnes of cargo.

While maritime security was predictably high on the radar screen along with current trends in world shipping, the most heated issue proved to be Ottawa's continued lack of concrete, rapid response to pressing demands for regulatory reforms through major amendments to the Canada Marine Act

(CMA).

"Two federal elections have come and gone and proposed CMA changes have not obtained the legislative priority we wished," remarked Gary LeRoux, the ACPA executive director.

In candid terms, Don Krusel, president and CEO of the Prince Rupert Port Authority, said that "the existing CMA pushed ports to the edge of privatization without pushing them over the edge. It's time to stop talking about proposed changes and to act."

"We cannot change as we would like," he said, "because we have the wrong toolbox stemming from the CMA. The port industry needs fast, effective decisions instead of being an oxymoron joined at the hip by the federal government."

Krusel suggested that with business conditions changing virtually every hour "we could miss direction if we are on autopilot."

In an interview, Mr. LeRoux expressed the hope that there could be a breakthrough this fall on the key CMA amendments that have been sought for several years.

In its submissions to Transport Canada and the minister of transport, the ACPA has been advocating a minimum of five major policy changes. It would appear that the ports could get partly what they desire in three areas.

"We are confident that we will get significant movement on a better borrowing regime, removal of the unnecessary Section 25 of the CMA restricting CPAs from accessing federal funding directly, and a streamlined process for land transaction," LeRoux said. Such reforms would put Canadian ports more on a level playing field with their U.S. neighbours.

Canadian ports want disbursements to municipalities in lieu of taxes (PILT) to be paid by the port property owner (government) and not the port managers (CPAs). But such a request has presently little chance of being accepted. The same goes for the elimination of the gross revenue charge payable by CPAs to the federal government, with such funds being directed to port infrastructure improvements.

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subheading is subject to an 18 per cent tariff on an MFN basis. Tai Lung argued instead that the footwear components were merely parts of footwear and therefore ought to have been classified under tariff heading number 6406.10.90 and dutiable at the rate of 8 per cent in 2007. After due consideration, the tribunal concluded that Tai Lung was a shoe-in to win and booted out the CBSA's position.

#### Canadian Legislation Governing Tariff Classification

In keeping with section 10 of the *Customs Tariff*, the tariff classification of imported goods is determined in accordance with the *General Rules for the Interpretation of the Harmonized System* and the *Canadian Rules* set out in the schedule. The General Rules are comprised of six rules structured in cascading form. The Explanatory Notes to the General Rules indicate that if the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2 and so on until the classification is complete.

#### Arguments of the Parties

Tai Lung argued that the footwear components at issue should be classified according to Rule 1 of the General Rules. Rule 1 provides that "classification shall be determined according to the terms of the headings and any relative Section or

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## Fée Kiessling Leaves I.E.Canada



Fée Kiessling (centre) at I.E.Canada's 75th Anniversary Gala on June 21, 2007

*Mary Anderson, president of I.E.Canada, wrote the following article.*

It is with regret that I announce that Fée Kiessling has left I.E.Canada. As vice-president of conferences and programs, Fée was instrumental in developing I.E.Canada's truly outstanding conference and seminar programs. She has a remarkable talent for spotting the emerging issues, assembling the right speakers and creating partnerships with association sponsors. Fée has been responsible for enhancing the professional development of members with exceptional programs designed to meet the needs of those in customs, logistics and international trade. Fée is highly respected by association members and by members of Canada's international trade community.

Fée's immediate plans include spending more time with her family. Fée has offered to continue her involvement with the association. We look forward to her support in orchestrating our two anchor conferences in the spring and fall of 2008.

On behalf of all members of the association I would like to recognize

Fée's remarkable contribution to I.E.Canada and wish her future success.

### Footwear, cont'd from pg. 3

Chapter Notes, and provided such headings or Notes do not otherwise require, according the following provisions." Tai Lung claimed that if the goods could be classified in accordance with Rule 1, there was no need to consider any additional rules. Tai Lung proposed that the imported goods fell squarely within heading 64.06 as "parts of footwear."

The CBSA argued instead that the footwear components should be classified in accordance with Rule 2(a) of the General Rules. Rule 2(a) stipulates that "any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article." The CBSA argued that the effect of Rule 2(a) was to expand the scope of Rule 1 by allowing unassembled and unfinished goods to be classified as though they were assembled and finished. In the CBSA's opinion, the imported

goods had the essential character of the finished product. The processes Tai Lung performed did not alter the principal features of the footwear, which in the opinion of the CBSA was to cover the foot, ankle and part of the leg. Furthermore, the outer soles were imported with the corresponding number and sizes of uppers, attached to which were hang tags describing the product and the price, labels and laces.

Tai Lung argued that its processes involved more than simply assembling the two components. It subjected the goods to a variety of processing methods, including priming, gluing, heating, trimming, polishing, grinding, quality control and testing. In addition, the footwear could not be sold until the footwear conformed to CSA safety standards. Tai Lung contended that these processes resulted in the goods taking on a new form and possessing different qualities and properties than the original components. The imported components, without further processing, could not be worn as a safety boot. For this reason, Tai Lung argued that the goods in issue did not satisfy the requirements for Rule 2(a) of the General Rules regarding articles presented unassembled or disassembled.

### General Rule 1 Applied, Rule 2(a) Not Applicable

The tribunal agreed with Tai Lung that the imported goods belonged under tariff heading number 64.06. It held that the language of tariff heading number 64.06 clearly encapsulated the imported goods, as it precisely covered "parts of footwear" including uppers whether or not attached to soles other than outer soles. As Rule 1 resolved the classification, resorting to Rule 2(a) was unnecessary and improper. Furthermore, even if there was ambiguity about whether tariff heading 64.06 applied, the tribunal held that Rule 2(a) would not enable the

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## I.E.Canada Welcomes a New Quebec Chapter Chair



Randell Carr, the new chair of I.E.Canada's Quebec Chapter

"I'm excited to introduce Randell Carr as the new chair of our Quebec Chapter," says Mary Anderson, president of I.E.Canada. "I know that he will do an excellent job in leading the chapter and infusing it with new ideas. Randell's ability to think strategically is enhanced by his international experience," adds Mary.

"I'm really impressed by Randell's understanding of the needs of members and his desire to raise their issues within a broader platform," says Mary.

"As the new chair of the Quebec Chapter, I pledge to carry on the good work of Jean-Marc Clément by offering members in Quebec the chance to learn about global trade initiatives that affect importers and exporters," says Randell. "I also hope to provide a forum where trade professionals can share best practices associated with corporate integration of international supply chain functions and tips on the business case tools they need to gain senior management support for integrated customs and compliance automation initiatives."

"I believe that today's importers and exporters face an incredible chal-

lenge as a result of increases in trade volumes and tougher government compliance requirements. A recent McKinsey study projected that global trade volumes would grow from less than \$10 trillion today to more than \$70 trillion by 2020. Manual processes can no longer manage the risk associated with this volume of international transactions. Automation promises a solution to the challenge but only if the automation initiatives are applied to the entire supply chain. A lot of good work is being done on this front, but the ultimate effect will be limited if automation of customs and compliance is not integrated with corporate purchasing, logistics and finance," notes Randell.

Randell is an experienced international manager who has provided financial data analysis and consolidated reporting services to the world's largest distribution companies, including Wal-Mart, Tesco PLC and Groupe Casino. He has also led a number of Canadian business development projects with American Express and MasterCard International.

Randell can speak English, French and Spanish. He has developed an extensive network of business contacts while living or working in Calgary, Dallas, Winnipeg, Atlanta, San José, Toronto, Madrid, London, Paris, Brussels, Milan and Stockholm.

Randell is based in Montreal where he is the president of International Trade Bureau, a clearinghouse for global supply chain optimization services.

### Footwear, cont'd from pg. 4

goods to be classified as unassembled complete footwear under heading 64.03. The tribunal was convinced by Tai Lung that its operations went beyond mere assembly. The 'further working' by Tai Lung changed the essential charac-

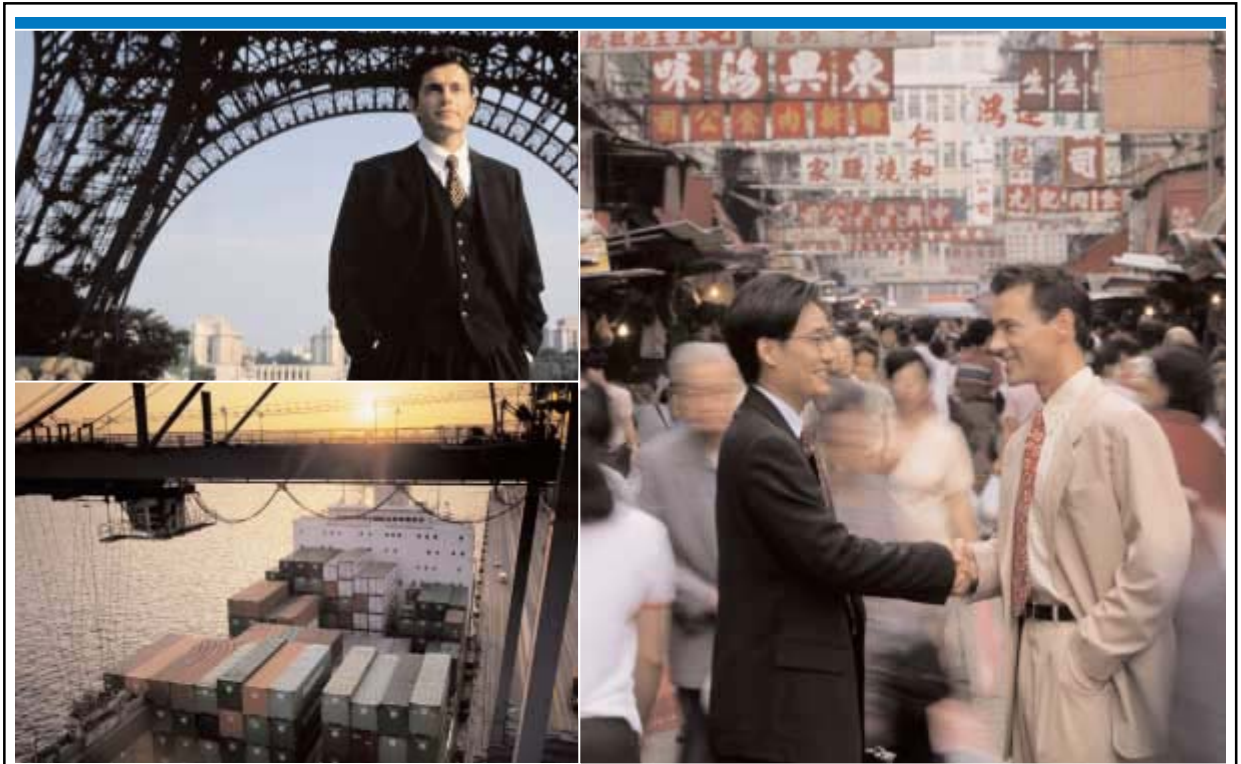
ter of the goods. The tribunal noted that the goods could not have been worn for their intended purposes in the absence of additional work by Tai Lung. Therefore, the goods fell outside Rule 2(a) in any case.

### Commentary

The tribunal's decision in *Tai Lung* illustrates well the distinction between goods that are "parts" and goods that are "unassembled or disassembled" for purposes of tariff classification. The decision also illustrates the benefits of carefully structuring an import transaction so that duties are minimized or eliminated. By importing "parts of footwear" rather than the fully assembled footwear, the applicable tariff rate dropped from 17.5 per cent to 8 per cent (in 2007). Also, because the components originated in China, importing components rather than completed footwear saved the importer an additional 39.4 per cent in anti-dumping duties for importations occurring prior to December 27, 2006. (Anti-dumping duties were imposed on leather safety footwear exported from or originating in China, in the five-year period ending December 26, 2006.)

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