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Our Fourth Annual Food Forum



I.E.Canada is extremely fortunate to have Dr. David Acheson, associate commissioner for foods, U.S. Food and Drug Administration, as a speaker on day one of the food forum

questions about consumers' confidence in the food supply chain. Indeed, North America's food supply is perhaps the safest in the world.

In light of these recent crises and the public's growing concern, industry's continued focus on food safety is critical. That's why this year's fourth annual food forum will focus on food supply chain safety.

At I.E.Canada's food forum, which takes place February 18 and 19 in Toronto, you will hear directly from representatives from Health Canada, the Canadian Food Inspection Agency (CFIA), the U.S. Food and Drug Administration (FDA), and industry who have a stake in managing the safety of the food supply. They will update you on Canadian and U.S. initiatives to bolster the safety of food from the domestic supply as well as the safety of food imported into Canada and the United States. Import product safety has become one of the leading priorities for governments and businesses worldwide.

On day one, we have arranged for

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Heartland Port of Choice Study

Transport Canada is embarking on a study concerning future infrastructure investments to support the projected movement of freight to and from the centre of Canada and the U.S. Midwest, and offshore

markets. Transport Canada would like you to complete a web-based questionnaire, which is intended to help the department better understand the decision-making process

Study, cont'd on pg. 4

See You in Calgary



Daniel Kiselbach, partner, Miller Thomson LLP

We hope to see you at the customs valuation 101 session at our sixth annual Western Canada Conference on February 24, 2009. Daniel Kiselbach, partner, Miller Thomson LLP, who will be a presenter at the session, has written the following article about the Minister of National Revenue's ability to require Canadian companies to produce documents that may be supplied by foreign companies.

The Long Arm of the Minister of National Revenue

Can the Minister of National Revenue require Canadian taxpayers to produce information located outside of Canada? This issue was recently considered by the Federal Court of Appeal in *eBay Canada Ltd. v Canada*, 2008 FCA 348 (CanLII) (*eBay*)

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CBSA's Strategic Export Control Program

The following article was written by George Webb, manager, SEC, Strategic Export Control Section (SEC), Canada Border Services Agency.

The Canada Border Services Agency (CBSA) has the responsibility to monitor and control the entry of persons and goods coming into Canada. The Agency's role is to ensure that legitimate travellers and trade are allowed into the country, while preventing the entry of illegal or unauthorized people or goods. This, along with the collection of import duties and taxes, has been the main responsibility of the agency and its predecessors since their inception.

However, the CBSA also has another important responsibility that receives less public attention: the monitoring and control of goods and technology being exported from Canada.

All exports—except for trade to the United States (U.S.) and a few specific items destined to certain other countries—are required to be reported to the CBSA and to Statistics Canada. Exports to the U.S. are recorded as imports by American authorities, who share this data with Canada as part of a longstanding legal agreement. Canadian exports to other countries can be reported on an export declaration, whether it is a paper form (the B13A) or electronically (CAED or G7).

After being reported, the vast majority of Canadian exports travel freely without any controls. But there are several categories of goods that are subject to controls, and which are closely monitored by the CBSA. These include items subject to trade restrictions—such as logs and softwood lumber—as well as items controlled under international protocols, such as products derived from endangered species, and hazardous wastes.

The focus of most of the CBSA's export control efforts is directed at strategic goods. These include goods and technologies that can be classified as weapons or other military items, as well as components and materials that can be used to produce such weapons/military goods. Of particular concern are goods and technologies that are dual-use: they can be used for legitimate purposes, but could easily be diverted to produce chemical, biological, radiological or nuclear weapons of mass destruction (WMD).

The proliferation of WMD is a global concern. Numerous states and non-state entities, including terrorists, are determined to develop a WMD capability. To build an effective capability, they need sophisticated technology and raw materials that can be sourced from many parts of the world, including Canada. No country, including Canada, has been exempt from being a target for clandestine and illicit procurement activities. Businesses dealing in such items as advanced computer technology, precision guidance equipment, radiation hardened technology, and specialty steels (used in nuclear and chemical weapons and missile development) have all been targets for illicit procurement activities.

Most countries have expressed their support for preventing the development of WMD through various treaties and United Nations conventions. A number of countries have expressed particular concern about the movement of certain strategic goods and technology, and have formed specific international monitoring and control groups. These groups include: the Wassenaar Arrangement, which addresses conventional weapons and dual-use technology; the Australia Group, which advocates controls for chemical and biological weapons-related materials and technology; the

Nuclear Suppliers Group, which governs nuclear-related transfers; and the Missile Technology Control Regime, which defines controls for goods used to produce missiles capable of delivering WMD.

Canada has made the prevention of the proliferation of WMD technology one of its primary international commitments. Accordingly, it has endorsed all relevant international treaties and UN conventions, and actively participates in all four of the international weapons control regimes. In addition, federal departments are working on a new, more specific strategy that will strengthen Canada's counter proliferation regime.

To fulfill its commitments to control strategic goods and prevent the proliferation of WMD, Canada has split its export control responsibilities between two departments. The Export Controls Division of the Department of Foreign Affairs and International Trade (DFAIT) is responsible for approving permits for the export of controlled goods, and for confirming the eligibility of the goods to be exported to the intended destination. Additionally, with respect to nuclear and nuclear-related dual use goods, the Canadian Nuclear Safety Commission (CNSC) issues export licences pursuant to the Nuclear Safety and Control Act.

The actual monitoring, inspection and enforcement of the export control legislation is done by the CBSA through its Strategic Export Control (SEC) Program.

The SEC Program was formally established within the Canadian customs service in 1985. It is administered by the CBSA under the authority of the *Export and Import Permits Act (EIPA)* and the *Customs Act*. Export controls apply at all ports of exit, although the Agency depends on its reciprocal intelligence and enforcement relationship with American authorities to deal

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.

Montreal's Chicago Connection

In all parts of the world from North America to Asia, port traffic is slowing as a global recession takes hold. International trade is set to fall by at least 2 per cent this year, the most since the World Bank began measuring it in 1971, recently reported Bloomberg News.

Within this pretty bleak outlook, however, Canada's Port of Montreal appears better positioned than its U.S. rivals on the East Coast to weather the downturn. This, at least, is the considered opinion of Patrice Pelletier, president and CEO of the Montreal Port Authority. His optimism may be justified.

At the recent Gold-Headed Cane ceremony marking the arrival of the first ocean vessel at the port in the New Year, the port announced record throughput for both total and container cargo in 2008 despite the adverse global economic trends in the past few months. Montreal's container cargo rose 7.2 per cent to a record 1.46 million TEU in 2008, according to preliminary figures, while

total traffic was up 2.5 per cent to 26.6 million tonnes.

Pelletier hailed this performance as "an exceptional result achieved despite the economic slowdown that affected us during the last two months of 2008."

It represented, Pelletier said, the highest growth in 2008 among North America's ten leading container ports.

While West Coast ports have been hit hard by the economic decline in Asia's emerging economies, the Port of Montreal has benefited from a more diversified market base in northern Europe, the Mediterranean and the Caribbean.

About 90 per cent of Montreal's container traffic is in the North Atlantic trade, and well over half of this business is generated by shipments to and from the U.S. Midwest and Northeast. Mr. Pelletier did acknowledge that as a result of the recession taking hold in North America as well as elsewhere, Montreal's containerized cargo could drop by about 3.7 per cent in 2009. However, he is confident that Montreal will continue to outperform such competitors as New York/New Jersey, Hampton Roads, and Baltimore.

"To this end, we are counting on the Midwest market, the industrial heartland of North America, which will play an important role in the revival of the U.S. economy, as President-elect Barack Obama has already hinted," Pelletier declares.

"You call us the Port of Montreal," he states, "but we are as much the port for Chicago, the gateway to an inter-provincial, transnational corridor. We hope to transform this Montreal-Chicago connection, which has already made us successful, into a veritable pipeline, with all the infrastructure and systems needed to maximize the fluid transport of merchandise."

He said Montreal intended to capitalize on various competitive advantages to further increase its penetration of the strategic Midwest market.

Located 1,600 kilometres inland from the closest coastal port, and with excellent intermodal connections, Montreal offers the fastest maritime access to the U.S. Midwest from Europe. For example, transit time from Bremerhaven to Chicago via Montreal is 9.5 days versus 11.5 days via New York and 13.5 days via Hampton Roads, Virginia.

With the likely aid of federal infrastructure funds, the Port of Montreal has an ambitious \$2.5 billion plan to triple its container-handling capacity to 4.5 million TEU by 2020.

Until recently, the Midwest was one of the fastest-growing regions of North America. With its traditional economic base strengthened by diversification and a vital logistics hub, it remains a potential winner in the long-term scheme of things in the post-recession era.

Due to such a promising context, the Port of Montreal last fall opened a full-time office in Chicago.

Conference, cont'd from pg. 1

Canada). This decision is important to Canadian companies (including importers and exporters) that have entered into information-sharing agreements with foreign companies. *eBay Canada* indicates that where information-sharing agreements exist the Minister may require a Canadian company to produce that information, even if it is located on a server outside of Canada. Canadian companies and companies outside of Canada should consider whether or not they have entered into information-sharing agreements that fall within the reach of the long arm of the Minister. The facts relating to the decision are as follows.

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The SEC Program, cont'd from pg. 2

with most exports to the U.S. CBSA export control teams are located at Canada's major international airports and seaports, where they deal with more than \$100 billion worth of goods being exported each year to non-U.S. destinations.

To handle this large volume and make effective use of resources, the program is intelligence driven. CBSA intelligence officers are assigned to each of the regional export control teams, where they provide support to the Border Service Officers who review export declarations and other documentation and inspect export shipments. The regional export control teams are also closely linked to the Strategic Export Control Section in the Intelligence Directorate at CBSA Headquarters.

Within Headquarters, SEC has a number of functions. It develops and provides intelligence to guide the CBSA's national targeting, inspection and enforcement activities; it provides functional guidance and operational support to the regional units; it establishes policy and direction for the program; and, it serves as a conduit for information and intelligence flow between the CBSA, DFAIT, and other concerned agencies. SEC also serves as Canada's export enforcement representative to the international organizations that deal with controlled goods.

At its core, the SEC program is very much a partnership operation. There is a partnership between the regional export control teams and SEC at Headquarters. Within the Agency, there are partnerships between SEC and other CBSA divisions, including the Export Process Division, who establishes exporting reporting processes; and the Criminal Investigations Division, who conducts follow-up investigations and lays criminal or civil charges when further infractions are found. And, as previously mentioned, there is a core partnership between the SEC program at CBSA and the Ex-

port Permits Division of DFAIT, who review CBSA export detentions to determine when/if permits are required, if the permit is valid, and if enforcement action under the EIPA should be taken.

Beyond these active relationships, the SEC program has partnerships with many other entities. These include the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Department of National Defence, the Controlled Goods Program in Public Works and Government Services Canada (PWGSC), and the Canadian Nuclear Safety Commission. The Agency also works with intelligence units in DFAIT and the Privy Council Office, and with foreign export control agencies, customs services, and law enforcement and intelligence agencies.

The CBSA also tries to work in partnership with various private sector elements involved with the export trade. It works with exporters when there are concerns about purchasers or the ultimate end users of strategic and other controlled goods. The Agency also participates with DFAIT and PWGSC's Controlled Goods Program in a regular series of cross-country seminars to explain how the SEC program works, and what exporters can do to prevent disruptions in their business. Finally, the CBSA operates Project Serve, a program in which regional staff from the export control program meet with businesses to review the program and to help businesses determine how they can comply with the legal requirements. All of this is done with the aim of targeting suspicious export shipments, while facilitating the movement of legitimate trade.

These are the five essential elements to an effective strategic export control program: active export control teams at the major air and marine ports doing documentation review and examinations; a national SEC command centre at Headquarters to

coordinate and guide activities and provide training; a close working relationship with DFAIT's Export Controls Division; active sharing of information and intelligence with other national and international partners; and good relationships with the various elements of the private sector involved with the export business. When all five of these elements are in place, Canada has a strong and effective strategic export control program that helps reduce the threat of weapons proliferation to both Canada and our allies.

CBSA is also encouraging companies that may have unintentionally violated export control requirements in the past to come forward and report these as part of its voluntary compliance program. In such cases, the Strategic Export Control Program will work with the company to ensure a full understanding of the program and its requirements, and to help to set up its system to prevent violations in the future. The CBSA may still apply an administrative fine for the offences, but if it does, it would be much smaller than if the offence had been discovered by the CBSA (particularly when it involves multiple offences/shipments). If any company wishes to come forward with information, they can contact the SEC program at CBSA Headquarters: CBSA720012005@cbsa-asfc.gc.ca. Any other questions or comments related to the information contained in this article can be sent to the same e-mail address.

Study, cont'd from pg. 1

in determining ports of call. The study will enable Transport Canada to assess the kinds of infrastructure investments Canada will need as North American ports increasingly compete to supply transportation services to the North American Heartland. For background information and the survey link, please visit www.iecanada.com and look under "We Need Your Input."

Our Food Forum, cont'd from pg. 1

the following high profile government decision-makers to provide you with information of critical importance to food companies in North America:

- Paul Mayers, associate vice president, programs, CFIA
- Debra Bryanton, executive director, food safety directorate, CFIA
- Janet Beauvais, director general, food directorate, health products and food branch, Health Canada
- Dr. Samuel Godefroy, director, bureau of chemical safety, food directorate, health products and food branch, Health Canada
- Dr. David Acheson M.D., F.R.C.P., associate commissioner for foods, FDA

Canadian food companies will face new compliance requirements from the Canadian government. On day one of the food forum, you will be briefed on Canada's new allergen labelling regulations, impending requirements for food additives and processing aids, and new requirements for listeria testing in ready-to-eat or ready-to-serve foods, especially meat. You will also receive updates from industry on Canada's new labelling and production compliance requirements for organic foods.

You will also hear about Health Canada's initiatives related to food fortification, health claims, natural health products, trans fat, and sodium. Specifically, Health Canada representatives will discuss the melamine problem and how the department's response to the crisis might be used as a model by Health Canada and the Canadian government for addressing future global food product emergencies.

From the perspective south of the border, the FDA will discuss the progress they've made on their food protection plan as well as their initiatives to increase the safety and security of food imported into the

United States. Importantly, these changes will have implications for Canadian food exporters.

On day one, you'll also have the chance to share your points of view with these government officials. The reception will also offer you an opportunity to network with industry and government experts.

On the second day of the forum, food industry leaders will teach you best practices for recalling unsafe food products from the marketplace. In the morning, manufacturers, importers, and retailers will outline their responsibilities and expectations of their suppliers. After all, product recalls are a shared responsibility of all the players in the food supply chain.

Ron Judge, vice president, food safety and quality, Maple Leaf Foods Ltd., will address his company's responsibilities as a food manufacturer and importer during a product recall. He will also tell you what was learned from the company's recent listeria recall.

Don Lacey Sr., director, quality assurance/customer relations, Loblaw Companies Ltd., will explain the retailer's obligations and expectations of manufacturers and government during a product recall.

CFIA will also describe their role and expectations of the various players in the supply chain when a product is pulled from the market.

Joanne Allen, senior associate principal, manufacturing quality, Kraft Canada, will discuss industry's duty to manage and label allergens in foods. Undeclared allergens are one of the leading causes of food recalls in Canada, a fact which points to the need for Canadian companies to be more vigilant. Joanne will address the legal requirements for labelling allergens and Kraft Canada's best practices, both domestically and

globally. She will also guide you through the steps you need to take to verify that your products are free of allergens or that, if present, allergens are properly labelled on your products.

Linda Smith, executive vice president, senior partner, Fleishman-Hillard Canada, will review communications and risk management strategies during a product recall. She will teach you approaches and best practices for communicating with your customers, your supply chain partners, your employees, and the general public when you are faced with a product recall.

During the second half of day two, you will take part in a hands-on exercise in which you'll practice what you've learned. You will work with the other delegates to execute a mock food product recall based on information that you will be given. In this way, you will discover the actions you need to take to plan and prepare for a food product recall as well as how to effectively execute one. Once you return to your office, you should be able to put in place a product recall plan and conduct a product recall if you ever have one.

I.E.Canada's food forum will provide you with practical tools to prepare for government food safety initiatives in North America and ensure that your systems and products are safe and compliant. Members of Canada's food industry have a unique opportunity to become world leaders in global food chain safety and security.

To register for the food forum or for more information, please visit: www.iecanada.com/events.html. The two-day event will take place at the Renaissance Toronto Airport Hotel, 801 Dixon Road.

We hope to see you on February 18 and 19 at the food forum!

Conference, cont'd from pg. 3

In *eBay Canada* the Minister received a Federal Court order authorizing the Minister to issue a requirement to eBay Canada respecting unnamed persons in accordance with subsection 231.2(3) of the *Income Tax Act*. Section 231.2 provides the Minister with the power to require the production of information or documents for any purpose related to the administration or enforcement of the *Income Tax Act*. (Section 289 of the *Excise Tax Act* has a similar provision which may be used in connection with GST audits.)

eBay Canada was required to produce names, addresses and gross sales information for unnamed persons (identified as “power sellers”) who had Canadian addresses. Power sellers were persons who had achieved a certain level of revenue from eBay Canada sales. The Minister suspected that there were approximately 10,000 power sellers, but did not know their identities. The Minister required the information in order to determine whether the power sellers were tax-compliant.

Information respecting power sellers was stored on a computer server located outside of Canada. The information was made available to eBay Canada via its computer technology in Canada. eBay Canada had an information-sharing agreement with eBay International and its U.S. parent company.

eBay Canada applied to the Federal Court to review and set aside the order authorizing the requirement. It took the position that section 231.2 did not apply and that the Minister was seeking to require the production of “foreign-based” information (addressed in section 231.6). eBay

Canada argued that the Minister was seeking foreign-based information because the information was housed on a server located outside of Canada. Section 231.6 defines “foreign-based information or document,” which in part, reads “any information or document that is available or located outside of Canada.” In dismissing eBay Canada’s application the Federal Court held that the location of the server was irrelevant, that the electronically-stored information was available to eBay Canada in Canada and, as such, the required information was not foreign-based.

eBay Canada appealed. In dismissing the appeal the Federal Court of Appeal noted that eBay Canada had entered into an information-sharing agreement and that “with a click of a mouse” the information was accessible in Canada by eBay Canada (even though it was stored on a server outside of Canada). It did not agree that information must be downloaded in Canada (not just readable on a computer screen) before it can be said to be “located in Canada.” This was rejected as being “formalistic in the extreme.” The Federal Court of Appeal held that the information was located in Canada because it was readily accessible in Canada. Therefore, section 231.6 of the *Income Tax Act* (relating to foreign-based information or documents) did not apply, and the order authorizing the requirement was upheld.

The Federal Court of Appeal indicated that the purpose of section 231.6 of the *Income Tax Act* was to improve the Minister’s power to obtain documents or information particularly with respect to cross-border transfer pricing. Under this provision a taxpayer has the right to review and set

aside a requirement on the grounds that it is unreasonable. This was designed to avoid imposing an undue burden on taxpayers respecting the production of documents and information located outside of Canada. However, in *eBay Canada* the Federal Court of Appeal noted that the unreasonableness of the requirement was largely an irrelevant consideration. This was because eBay Canada had ready access to the information under the information-sharing agreement.

In conclusion it should be noted that the nature and extent of the Minister’s right to require production of documents and information have been the subject of many hotly contested cases. This suggests that the boundaries of the Minister’s power to issue requirements will be examined again in the context of tax litigation. One result of the *eBay Canada* case may be the issuance of more requirements relating to income tax or GST audits. Another result may be the reaction of the Canadian corporations and corporations outside of Canada who may be well-advised to review their information-sharing agreements in order to address potential disclosure risk.

In the event of a GST audit, the Minister might issue a requirement to a Canadian importer to provide all documents relevant to valuation of goods to establish the validity of values declared in respect of sales between related companies. This case indicates that the Minister is entitled to require production of all documents relevant to a GST audit if they are readily accessible to the importer.

You’ll have the chance to ask the experts about this issue during the customs valuation session at our Western Canada Conference in Calgary.

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