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Ruling Outlasts Best Before Date



Greg Kanargelidis, partner, Blake, Cassels & Graydon LLP

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A recent decision by the Federal Court of Canada illustrates a possible strategy available to an importer to delay the implementation of a CBSA ruling that will have significant negative implications for the importer's business. In particular, on January 20, 2009, the Court granted a stay of a revocation of an existing tariff classification ruling and thereby allowed the *status quo* to continue indefinitely, until such time as a challenge to the replace-

ment, negative ruling has been completed.

In *Danone Canada Inc. v. Attorney General of Canada, Minister of Public Safety, and the Canada Border Services Agency*, the Court clarified that importers who are faced with the revocation of a tariff classification ruling by the Canada Border Services Agency (CBSA) may be able to postpone the application of the new ruling, in certain circumstances.

Facts

The particular facts in the case likely influenced the decision of the Court to grant the relief claimed. Danone Canada Inc., a company based in Boucherville, Quebec, considered expanding its facility to produce another product in Canada, called "DanActive."

Danone Canada Inc. of Boucherville, Quebec began in 2006 to consider marketing in Canada a product called DanActive. DanActive contains a patented series of bacterial cultures, which Danone claims has been scientifically proven to boost human immune systems when in-

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Our Upcoming Customs Conference

It's time to mark your calendar for our 18th Annual Emerging Issues in Customs and Trade Conference. The event will take place April 20-22, 2009, at the Hilton Toronto Airport Hotel, at 5875 Airport Road.

If you have any questions about our upcoming conference, please contact Fée Kiessling, project lead, at fkiesling@iecanada.com or (416) 223-7072. We hope to see you at our customs conference!

GHY International

GHY International, an I.E. Canada member based in Winnipeg, Manitoba, has been recognized among Canada's 50 Best Managed Companies of 2008.

The winners of the 2008 Canada's 50 Best Managed Companies Award continue to raise the bar for Canadian business. This year's winners generated \$6.4 billion in combined revenue, had an average revenue increase of 43 per cent (2006-2009) and employ over 28,000 in Canada. The 50 Best Managed companies, in eight provinces and across a significant number of industries, have shown the ability to maintain sustainable growth amid volatile economic conditions.

"These companies are successful today because of their commitment to strong planning, understanding the market and adapting to their customers' needs," says Richard Soenen, Deloitte partner and Manitoba regional leader of the Best Managed program. "Even two years ago, these companies were building contingency plans in the event of economic softness." Indeed, these companies have demonstrated the ability to overcome a diverse range of challenges and maintain growth despite difficult market conditions.

I.E. Canada congratulates GHY International on their achievement!

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gested regularly. Danone Canada Inc. decided to undertake a four year test-marketing plan, during which time it would spend heavily to market the product in Canada, and source the product from a manufacturing facility located in the United States. If the product was successful, Danone Canada Inc. planned to expand its facility to produce the product in Canada.

The problem with this approach is that, depending on the tariff classification of the product, it could be prohibitively expensive to import the product, as a result of the existence of the tariff rate quota system applicable to certain imported dairy products, which impose very high tariffs on imports that are not imported by a tariff rate quota holder. Given the foregoing, before embarking on this four year test-marketing plan, Danone Canada Inc. approached the CBSA for a tariff classification ruling. Danone Canada Inc. also apparently took the proactive step of meeting with the Dairy Farmers of Canada and the Quebec dairy industry, to explain their test-marketing plan and to explain that if the plan is successful, Danone Canada Inc. would require substantial amounts of milk produced in Canada in order to produce the product at Boucherville, Quebec.

On November 17, 2006, CBSA issued Advance Ruling 219663 (the 2006 ruling) finding that DanActive would be classified under tariff item 2202.90.49.00, which is a "beverage containing milk." Under this classification, the tariff rate quotas do not apply, and furthermore the 11 per cent MFN tariff (applicable in 2006) would not apply as the product would qualify for duty-free entry as an originated good under the *North American Free Trade Agreement*.

Danone Canada Inc. relied on the 2006 ruling to begin the importing and sale of the DanActive product in

2007. The company also apparently spent millions of dollars in advertising the product. The company claimed that it was on track to break even in 2008 and forecasted a profit in 2009.

In the meantime, in May 2008, the CBSA informed Danone that the 2006 ruling was under review and requested information from Danone. On October 27, 2008, the CBSA sent Danone notice of Advance Ruling 232911 (the 2008 ruling). This notice informed Danone that the CBSA was revoking the 2006 ruling and replacing it with one classifying DanActive as a "yogourt" under tariff heading 0403.10. The 2008 ruling was to become effective January 27, 2009.

The new classification would have been disastrous to the company's business. This is because the new classification imposes a tariff rate quota of 330 tonnes. Companies that hold a portion of this tariff rate quota may import yogourt from the U.S. duty free. Otherwise, the goods are subject to a duty of 237.5 per cent.

Danone Canada Inc. faced two main problems with the 2008 ruling. First, Danone Canada Inc. did not have any "tariff rate quota" as it relied on the 2006 ruling under which no such tariff rate quota was necessary. Second, the portion of the quota that Danone might be able to obtain would be too low as Danone Canada Inc. would need to import more than its quota to satisfy the demand for the product in Canada. In summary, it appeared that unless Danone Canada Inc. could successfully appeal the 2008 ruling, thereby leaving the 2006 ruling in place, the cost to import DanActive would be prohibitive and Danone Canada Inc. would have to cease making the product in Canada. Thus, the considerable sums of money already expended in Canada would not be recovered

and furthermore there would not apparently be sufficient funds to build the facility in Canada to produce the product.

Appealing a CBSA Ruling

An importer who is faced with a negative ruling on tariff classification has a right to appeal the ruling. In this connection, the *Customs Act* provides a comprehensive statutory scheme of review. The courts have ruled that as a result of such a comprehensive statutory review framework under the *Customs Act*, there is no authority for an importer to apply for judicial review of the ruling at the Federal Court. Instead, the importer must follow the procedures in the *Customs Act*.

An advance tariff classification ruling is issued in keeping with section 43.1 of the *Customs Act*. A ruling issued under this section may be appealed to the CBSA in keeping with subsection 60(2) of the Act. Where an appeal is filed, the president of the CBSA, as represented by an appeals officer, under paragraph 60(4)(b) of the Act must affirm, revise or reverse the advance ruling. Section 62 directs that such a decision made by an appeals officer under section 60 of the Act may only be appealed to the Canadian International Trade Tribunal (CITT). Finally, section 68 directs that decisions of the CITT may only be appealed to the Federal Court of Appeal on a question of law.

This process (appeal to CBSA, CITT, and then Federal Court of Appeal) would take months and more likely several years before it is ultimately completed. In the meantime, however, the importer is required to abide by any ruling in effect – in this case the 2008 ruling. Since this would not make economic sense, Danone Canada Inc. sought another remedy to avoid the application of the 2008 ruling. In particular, Danone Canada Inc. asked the Fed-

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.

Brazil Beckons

It is virtually impossible to do business in Brazil, an immense country with half the population of South America, without a local partner who understands the country's culture and general environment. And if your company is not already present in this market of nearly 190 million people, it is missing an opportunity to benefit from an emerging economy that, according to a recent forecast by the Paris-based Organization for Economic Cooperation and Development (OECD), will be one of the few nations in the world not to suffer a deep downturn in the coming months under the current global recession.

This was the central message that dominated comments at a half-day seminar on what was aptly termed South America's Trade Powerhouse. In collaboration with the Brazil-Canada Chamber of Commerce (BCCC), I.E.Canada hosted the event in Montreal on February 11.

The speakers were Paulo Cordeiro de Andrade Pinto, Brazilian ambassador to Canada; Mary Anderson,

president of I.E.Canada and of the BCCC; Johane Séguin and Diane Dubé from Export Development Canada (EDC); Feroz Ashraf, vice-president of SNC-Lavalin; and David Verbiwski, Canada's commercial consul in Sao Paulo. Moderating proceedings was international trade lawyer Alfredo Moreira.

Canadian trade with the world's 10th largest economy (GDP of US\$1.4 trillion) has been a story of steady, rather than spectacular, growth. On another front, though, it may surprise some to learn that Canadian investment in Brazil, which is valued at \$8.8 billion, is significantly larger than Canadian investment in the Asian giants of China and India.

There are more than 400 Canadian companies active in Brazil, notably in the energy, infrastructure, environmental, communications technology, and mining sectors. The list includes such firms as Brazalta, Brookfield, Geosoft, Kinross, Bombardier, and SNC-Lavalin. In the other direction, Brazil is the fourth biggest foreign investor in Canada.

In 2007, Canadian exports to Brazil jumped by 14 per cent to \$1.5 billion. Statistics to the end of November 2008 showed a 73 per cent surge in exports from the year-earlier period, while imports declined to \$2.5 billion. Leading Canadian exports are fertilizers; mineral fuel and oil; paper and paperboard; electrical and mechanical equipment; cereals; and aircraft and spacecraft components. Main Canadian imports from Brazil are aircraft and spacecraft; chemical products; machinery; and vehicles.

Mary Anderson urged interested parties to take advantage of the considerable information available on the www.brazcan.org website. In terms of the bilateral trade flows, she also noted (with a visual display of Industry Canada statistics) some

striking features of the proportional position of the individual Canadian provinces in this trade. Here, Quebec stood out, accounting for 48 per cent of the total bilateral trade, followed by Ontario (30 per cent), British Columbia (8 per cent) and Alberta and Saskatchewan (each 5 per cent).

In his comments, ambassador de Andrade Pinto acknowledged that poverty was still to be found in the vast country, but in recent years there has been "immense wealth creation" through major reforms to modernize and diversify the economy. "We have built a better Brazil in a larger world," he said, pointing to advances in such areas as technology, manufacturing, and the agro-food industries. Growth forecasts for the Brazilian economy in 2009 range between 2 per cent and 5 per cent, the ambassador said.

He summed up the Brazilian government's vision as "to give added value to what we have."

In a similarly upbeat tone, Johane Séguin from EDC said "it's an exciting time to be involved in Brazil." EDC volume in support of new business, involving 268 companies, exceeded \$3 billion in 2008.

Among the business drivers for Canadian companies in Brazil, Seguin mentioned niche opportunities that match Canadian capabilities, an improved investment climate, developed capital markets and well-established local engineering and Canadian companies. Among the challenges were heavy regulatory tax burdens, a large government bureaucracy, and complicated labour laws.

After giving a summary of the history of SNC-Lavalin's presence in Brazil since the early 1970s, Feroz Ashraf described the success factors

Brazil, cont'd on pg. 5

New Consumer Product Legislation to Affect Traders

The following article was written by Roger Urbanski, executive director, Global Customs Compliance & Product Assurance, Cognitive Solutions.

In the coming years, I.E.Canada members will witness unprecedented regulatory challenges and significant opportunities afforded by trade facilitation. In particular, new legislation in the United States to bolster the protection of the health and safety of consumers will pose challenges for Canada's trade community. Incidentally, it is likely that the Canadian government will adopt similar legislation to protect consumers.

In part, the new U.S. legislation can be attributed to Mattel's recall in the last two years of toys covered in lead paint. Indeed, the *Consumer Product Safety Improvement Act* (CPSIA) will redefine the trade landscape for Canada and the United States. Many of you are likely aware of similar initiatives in the European Union, a key market for Canadian and U.S. exporters.

By law, the CPSIA dramatically improves cooperation between the U.S. Consumer Product Safety Commission (CPSC) and U.S. Customs and Border Protection (CBP). As of November 2008, the CPSIA requires "self-certification" by all manufacturers and importers of products governed by consumer product health and safety laws or regulations. The CPSIA also allows CBP for the first time to prohibit an importation if the product in question is not accompanied by the required certification.

As a sign of improvements to come, however, last November the CPSC and CBP agreed that importers and manufacturers could supply the required information electronically. This development is critical because it complements the practices most other modern trading nations have in place. In addition, this modifica-

tion also supports the World Customs Organization's initiative to ultimately create a "single window" for the electronic submission of all required trade data to all regulators at one time and in one place.

The CPSIA also encourages U.S. regulators to abide by the principles of the International Trade Data System (ITDS); U.S. regulators should receive, process, and review only the information that a specific agency requires to carry out its functions - and not more. As well, regulators should only require the information in a form or format that is compatible with what will someday be allowed under the "single window."

Other requirements under the CPSIA relate to the lead content of the paint used to manufacture products, the presence of phthalates in objects that an infant might place in his or her mouth, and other potentially harmful product conditions. For the most part, these requirements apply to toys and other infant and children's products.

The CPSIA now requires third party testing, certification, and permanent labeling (as of August 2009) of products to document their conformity, and provide manufacture and testing details to retail customers. Consumers of durable infant products must also receive a registration card so that they can be informed of product health and safety alerts, and recalls. These requirements will obviously add to the regulatory burden for companies.

Importers and exporters must insist that the new demands associated with additional trade regulations are matched with some form of trade facilitation. At the moment, the mutual recognition of trade security and other measures, such as the CPSIA, among trading nations, especially the U.S., Canada, and the

European Union, would be the most likely form of trade facilitation.

Fundamental to progress, however, is the reality that all traders must know their products, including where and by whom they are produced, packaged, and shipped. As called for by our complementary Customs-Trade Partnership Against Terrorism (C-TPAT) and Partners in Protection (PIP) programs, traders must devote more resources to their supply chains and heighten their focus on their supply chain partners - suppliers, logistics and trade service providers alike.

I.E.Canada has a vital role to play in making sure members are aware of these developments and how they will affect their businesses.

*Roger was a U.S. Customs officer for over 30 years. He began his career as a Customs inspector at the Peace Bridge and his second career as an import specialist at the Port of Buffalo/Niagara Falls. When he left Buffalo in 1978, an RCMP colleague gave him the book *Entre Amis*. Roger views the border between Canada and the United States much the same way, as something shared between friends. Nonetheless, he believes that it is easy for North Americans to take for granted our undefended border and the many opportunities for shared prosperity.*

Roger recently travelled to Africa to assist with a program intended to ease trade restrictions on African nations that have caused starvation; supplies of fresh food from developed countries cannot reach those in need fast enough.

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eral Court of Canada to exercise its jurisdiction to grant interlocutory relief, namely, to order a "stay" or postponement of the 2008 ruling and to retain in force the 2006 ruling, until such time as the statutory

Danone, cont'd on pg. 5

New Members

The following organizations joined I.E.Canada in December and January. We welcome our new members!

Maxxam Analytics Inc.

Robert Wiebe
Mississauga, Ontario

Cirque du Soleil Inc.

Michael Buckley
Montreal, Quebec

Embassy of Uruguay

Alejandro Martinez
Ottawa, Ontario

Integration Point

Clay Perry
Charlotte, North Carolina

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as follows: "Take your time, do your homework, be local, manage the currency risk through hedging, seek the niche markets, and value-added."

There is no free trade agreement between Canada and Brazil, but David Verbiwski from the Canadian consulate in Sao Paulo stressed this did not constitute an important obstacle to increased trade and investment. He described as significant achievements the Canada-Brazil Science and Technology Cooperation Agreement signed last November and the aircraft financing accord concluded in 2007 to set a level playing field (notably to eliminate the bidding wars of the past between Bombardier and Brazil's Embraer group).

Major market prospects identified by Verbiwski comprised the largest information and communications technology market in Latin America, and planned investments of \$18 billion in the environmental sector, \$87 billion in oil and gas industries, and \$67 billion in electric power over the next 10 years.

As did other speakers, Verbiwski underlined the need to work with a local partner. "Once you are in, it's not that hard. While having a local representative is good, company executives (head office) should also get down there at least once a year to visit customers."

leo.ryan@bellnet.ca

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appeal of the 2008 ruling has been completed.

The Honourable Mr. Justice Shore issued a well reasoned decision and considered first whether the Federal Court of Canada has jurisdiction over the matter at issue. The Honourable Justice concluded after a review of the applicable laws and various bodies involved in the review process that the Federal Court does not have jurisdiction to judicially review the 2008 ruling (i.e., the Court cannot consider the merits of whether the 2008 ruling is correct or not). However, Justice Shore ruled that the Federal Court does have jurisdiction to issue an interlocutory injunction pending a decision by the entities with jurisdiction over the merits.

The Court then considered the question of whether the Court should grant an interim stay of the 2008 ruling. In doing so, the Court addressed the following questions: (a) is there a serious question to be tried?; (b) will the applicant suffer irreparable harm if the interim relief is not granted?; and (c) which party will suffer the greater harm by virtue of the granting or refusal to grant the interim relief pending a decision on the merits (the "balance of convenience")? Following its consideration of these questions, the Court concluded that the facts supported the grant of the stay and the Court ultimately granted the stay of the 2008 ruling until the issue is fully disposed of at every level of all jurisdictions concerned. The

Court confirmed that the 2006 ruling is to remain in effect prior to any final disposition of the matter.

Comments

The decision in *Danone Canada Inc.* represents a further option available to an importer faced with the prospect of receiving a negative tariff classification ruling that could have significant negative implications to the importer's business. While following the statutory appeal framework, an importer may seek to postpone the implementation of the ruling and maintain the *status quo* until such time as the appeal is completed, through every level of jurisdiction concerned. The remedy achieved by Danone Canada Inc. is by no means available in each case automatically. However, in an appropriate fact situation such as existed in Danone Canada Inc., the Federal Court may exercise its jurisdiction to grant interlocutory relief to the importer and thereby restrain the CBSA from enforcing its ruling against the importer.

Greg Kanargelidis is a partner with Blake, Cassels & Graydon LLP in the Toronto Office. Greg practises exclusively in the customs, international trade, and commodity tax areas of law. Greg is highly regarded and is included in various leading directories as a leading lawyer in Canada. Greg is also a longstanding member of I.E.Canada, a tireless contributor to I.E.Canada working groups, such as the PIP Working Group and AMPS Working Group, and speaks frequently at I.E.Canada conferences. At the association's Western Canada Conference on February 24, he will provide delegates with an update on the AMPS review. Delegates will learn how CBSA proposes to simplify and restructure the penalty system; and how longstanding issues, such as volumetrics and third party liability, will or will not be addressed. Greg can be reached at greg.kanargelidis@blakes.com or at (416) 863-4306.

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Canadian Association of Importers and Exporters Inc.
Association canadienne des importateurs et exportateurs inc.

160 Eglinton Avenue East, Suite 300
Toronto, Ontario M4P 3B5
Telephone 416 595-5333
Fax 416 595-8226
www.iecanada.com

Editor: Melissa McCormack
Assistant: Maggie Weaver

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