Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Thursday, March 11, 2004

Request No. MP-2003-001

IN THE MATTER OF a ruling under section 90 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended, on the question of who is the importer in Canada of:

BICYCLES

IMPORTER RULING

The Canadian International Trade Tribunal conducted an inquiry, pursuant to section 90 of the *Special Import Measures Act*, further to a request by the Commissioner of the Canada Customs and Revenue Agency for a ruling on the question of who is the importer in Canada of certain bicycles that are subject to the Canadian International Trade Tribunal's order issued on December 9, 2002, in Expiry Review No. RR-2002-001.

The Canadian International Trade Tribunal hereby rules that the importer in Canada of the said goods is Kent International Inc.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will be issued at a later date.

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Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 27, 2003
Date of Ruling:	March 11, 2004
Date of Reasons:	April 5, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member Ellen Fry, Member Meriel V. M. Bradford, Member
Counsel for the Tribunal:	Michèle Hurteau Dominique Laporte
Assistant Registrar:	Gillian E. Burnett
Participants:	Peter E. Kirby for Toys "R" Us (Canada) Ltd. Kent International Inc.
	Susanne Pereira Tatiana Sandler for Canada Customs and Revenue Agency

Witnesses:

Robert Curran Buyer Toys "R" Us (Canada) Ltd.	John Levi Vice-President Kent International Inc.

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Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Monday, April 5, 2004

Request No. MP-2003-001

IN THE MATTER OF a ruling under section 90 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended, on the question of who is the importer in Canada of:

BICYCLES

STATEMENT OF REASONS

BACKGROUND

The Commissioner of the Canada Customs and Revenue Agency (CCRA), pursuant to subsection 89(1) of the *Special Import Measures Act*,[1] made a request on July 25, 2003, for a ruling by the Canadian International Trade Tribunal (the Tribunal) on the question of who is the importer in Canada of certain bicycles that are subject to the Tribunal's order issued on December 9, 2002, in Expiry Review No. RR-2002-001. The subject bicycles originate in or are exported from Chinese Taipei (formerly designated as Taiwan) and the People's Republic of China.

On July 30, 2003, the Tribunal issued a notice of request for a ruling. It invited interested parties to file written submissions containing relevant facts, documents and arguments in support of any views pertinent to the making of the ruling not later than September 5, 2003. Notices of participation, as well as declarations and undertakings, were to be filed not later than August 29, 2003. Notices of participation were filed on behalf of the CCRA, Toys "R" Us (Canada) Ltd. (TRU) and Kent International Inc. (Kent). The Canadian Bicycle Manufacturers Association (CBMA) requested intervener status in these proceedings. On September 11, 2003, the Tribunal denied the CBMA's request on the grounds that the relevant provisions of the *Canadian International Trade Tribunal Rules*[2] did not provide for the CBMA to become a party in these proceedings and that there was no rule that provided for the granting of intervener status to anyone in proceedings under section 89 of *SIMA*.

On October 27, 2003, the Tribunal held a hearing in this matter.

EVIDENCE

Mr. Robert Curran, a buyer for TRU, gave testimony on its behalf. He first explained how the decision to purchase a particular type of bicycle was made. He stated that he visits the various bicycle shows around the world in order to view the colours and designs of bicycles offered for the following year. He stated that TRU's marketing strategy is to focus on children's bicycles and to carry the largest selection in Canada. He indicated that TRU sometimes acts as an importer when there is no other way to get the bicycles, such as bicycles imported under licence, e.g. the Barbie brand. He explained that TRU does not, however, import Kent's bicycles.

1. R.S.C. 1985, c. S-15, as amended [*SIMA*].
2. S.O.R./91-499.

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When asked what motivates TRU either to import or to buy from suppliers in Canada, Mr. Curran explained that the risk associated with exchange rates was a very important consideration in the decision not to import. Mr. Curran noted that the bicycles bought from Kent are purchased in Canadian dollars. He also noted that TRU only becomes the owner of the bicycles when they are delivered to its warehouse and is not held responsible for them until such delivery. He indicated that Kent chooses, deals with and pays the customs broker. In response to a question from the Tribunal, Mr. Curran explained that, when TRU places an order with Kent, it does not specify the factory in which the bicycles must be manufactured and does not know their country of origin, unless it requests a particular country. He stated that Kent's responsibility extends to the warranty on the bicycles and that Kent will take them back if TRU experiences problems. He also pointed out that the warranty offered by Kent is a major advantage, given that TRU does not have the capability to service the bicycles. Kent's representative in Canada takes care of customer issues and will ship parts for bicycles, if required.

Mr. John Levi, Vice-President of Kent, testified at the hearing. He stated that Kent has been selling bicycles and other products to TRU for over 20 years and that the two work very closely together. He noted that Kent has a salesperson in Canada to provide assistance in order to deal with day-to-day matters. He explained that, when Kent purchases bicycles from a foreign factory, there is a minimum order to fit into one container, which holds many styles of bicycles. He indicated that a 40-foot standard container holds approximately 320 to 350 26-inch bicycles, or 800 to 900 12-inch bicycles. With respect to the purchasing process, he stated that TRU issues a purchase order that is transmitted to one of the overseas factories with firm delivery dates. He pointed out that Kent assumes all responsibility with respect to the quality and timely delivery of the goods and that Kent has title to those goods. He added that Kent has its own customs broker. Mr. Levi further indicated that Kent provides direct after-sales service to TRU's customers, if they experience problems, and could even authorize a TRU store manager to exchange a bicycle for another.

In response to the CCRA, Mr. Levi explained that Kent usually does not purchase on its own initiative; it waits to get a purchase order from a customer before bringing the bicycles into Canada. He noted that, when TRU issues a purchase order to Kent, that purchase order is transmitted to Kent in New Jersey and that Kent then issues its own purchase order to the factory.

POSITIONS OF THE PARTIES

The CCRA submitted that, under section 89 of *SIMA*, it can request a ruling on which of two or more persons is, for the purposes of *SIMA*, the importer in Canada. The CCRA is of the view that the phrase "importer in Canada" is critical to this determination, and it emphasized that the importer of record under the *Customs Act*[3] is not necessarily the "importer in Canada" under *SIMA* and that they could be different persons.

In the CCRA's view, the Tribunal must answer two questions in order to fulfil its mandate under section 90 of *SIMA*, the first one being the proper interpretation of the phrase "importer in Canada" and the second being, which of the two companies proposed satisfies the meaning of the expression "importer in Canada". The CCRA underlined the fact that there is no legislative definition of "importer in Canada", although the term "importer" is defined in section 2 as follows: "in relation to any goods, means the person who is in reality the importer of the goods". In the CCRA's view, the definition found in section 2 is not

3. R.S.C. 1985 (2d Supp.), c. 1.

conclusive of the interpretation of "importer in Canada", given that Parliament has intentionally chosen to further qualify or to narrow down this definition by adding the words "in Canada". In the CCRA's view, this implies a residency requirement. The CCRA argued that, if the phrase "in Canada" were to be read out of the legislation, this would result in an alteration of *SIMA*, given that this requirement is found in numerous provisions of *SIMA*, and would completely change the way that anti-dumping duties are imposed and the nature of the legislation itself. With respect to the inconsistency between the French and English versions of sections 89 and 90 and the fact that the French text only refers to "*importateur*" (importer), the CCRA argued that, in accordance with the modern rule of interpretation and the overall scheme of *SIMA*, it is necessary to look at other provisions of *SIMA*, such as section 8, which uses the phrase "*importateur au Canada*" (importer in Canada). The CCRA further argued that the phrase "importer in Canada" requires a certain business presence in Canada and that, for that purpose, the factors that may be considered include, for example, Canadian taxes paid and the presence in Canada of an office, inventories, employees and managers. The CCRA submitted that it is clear that, of the two, TRU is in fact the only Canadian company. According to the CCRA, even without a residency requirement, the evidence plainly shows that TRU is clearly the importer in Canada.

TRU and Kent stated that the phrase "importer in Canada" found in the English version of sections 89 and 90 of *SIMA* appears as simply "*importateur*" in the French version. If one were to accept the CCRA's argument that the phrase "importer in Canada" imposes a residency requirement, this would create situations where the person who is in reality the importer in accordance with the definition of importer found in section 2 would not be the importer in Canada. TRU and Kent submitted that the Tribunal must first look at the question of who is in reality the importer. On this issue, the evidence indicates that TRU does business with all its suppliers in the same way that it does with Kent. TRU considers the transactions to be domestic transactions; it does not care about the origin of the goods; its only concern is whether the bicycles will be delivered in a timely manner; and business has been done that way for a number of years. TRU and Kent argued that, for good business reasons, such as costs and risks associated with exchange rates, risks of loss of goods and issues of warranty, TRU has decided to let Kent handle the importations. Kent assumes all the risks and hires and instructs its own customs broker. TRU and Kent also indicated that, in comparison with the situation that existed in some previous Tribunal decisions, the transactions at issue were not structured with the intention of avoiding anti-dumping duties. They submitted that the ownership of the goods and what happens to the goods when revisions are made to a purchase order were critical business factors.

TRU and Kent argued that the phrase "importer in Canada" does not impose any residency requirement and that it merely states that whoever is in reality the importer of the goods is the importer in Canada. Regarding the inconsistency between the French and English texts, TRU and Kent referred to the shared meaning rule, which provides, where one version is ambiguous, that the shared meaning is taken to be the meaning of the unambiguous provision, which, in this case, is the French version.

DECISION

Pursuant to its mandate under sections 89 and 90 of *SIMA*, where, at the request of the CCRA, a question arises as to which of two or more persons is, for the purposes of *SIMA*, the importer in Canada of goods imported into Canada on which duty is imposed, the Tribunal shall rule on the question by determining which of the two or more persons is the importer in Canada of the goods.

In accordance with subsection 89(2) of *SIMA*, when the CCRA makes its request, it must state which of the two or more persons it believes is the importer in Canada of the goods. Of the two, Kent and TRU, the CCRA indicated that it believes that TRU is the importer in Canada of the goods.

The Tribunal must therefore determine which of Kent and TRU is the importer in Canada of the goods.

The English and French versions of sections 89 and 90 of *SIMA* read, in part, as follows:

89. (1) Where a question arises or is raised as to which of two or more persons is, for the purposes of this Act, the *importer in Canada* of goods imported or to be imported into Canada on which duty is payable or has been paid or will be payable if the goods are imported, the Commissioner may, and at the request of any person interested in the importation of the goods shall, request the Tribunal for a ruling on that question.	*89. (1) Si, pour l'application de la présente loi, il faut déterminer qui est l'*importateur *de marchandises qui ont été ou seront importées et sur lesquelles des droits sont exigibles ou ont été versés ou seront exigibles si les marchandises sont importées, le commissaire peut, de sa propre initiative, ou doit, à la demande de toute personne intéressée, saisir le Tribunal de la question.*
(2) Where the Commissioner makes a request under subsection (1) for a ruling on the question referred to therein, the Commissioner shall (*a*) state in the request which of the two or more persons the Commissioner believes is the *importer in Canada* of the goods.	*(2) Dans les cas où il fait la demande visée au paragraphe (1), le commissaire:* *a) mentionne la personne qu'il croit être l'*importateur.
90. Where a request is made to the Tribunal under subsection 89(1) for a ruling on the question referred to therein, the Tribunal (*a*) shall arrive at its ruling on the question by determining which of the two or more persons is the *importer in Canada* of the goods; (*b*) subject to paragraph (*c*), shall give its ruling on the question forthwith after receiving the request therefor.	*90. Dans les cas où il est saisi de la demande visée au paragraphe 89(1), le Tribunal:* *a) détermine qui est l'*importateur*;* *b) rend sa décision dès la réception de la demande.*

[Emphasis added]

Before making a determination as to the identity of the "importer in Canada", the Tribunal must determine the proper interpretation to be given to this phrase. The English version of sections 89 and 90 of *SIMA* uses the phrase "importer in Canada", while the French version uses the term "*importateur*". In addition, subsection 2(1) defines "importer" and "*importateur*" as follows:

> "importer", in relation to any goods, means the person who is in reality the importer of the goods.
> « *importateur* » La personne qui est le véritable importateur des marchandises.

In addition, the English and French versions of sections 8 and 11 of *SIMA*, which deal with the payment of countervailing and anti-dumping duties, read, in part, as follows:

8. (1) Where the Commissioner makes a preliminary determination of dumping or	*8. (1) Dans le cas où le commissaire prend une décision provisoire de dumping ou de*

subsidizing in an investigation under this Act and considers that the imposition of provisional duty is necessary to prevent injury, retardation or threat of injury, the *importer in Canada* of dumped or subsidized goods that are of the same description as any goods to which the preliminary determination applies . . .	*subventionnement dans le cadre d'une enquête prévue par la présente loi et où il estime que l'imposition de droits provisoires est nécessaire pour empêcher qu'un dommage ou un retard ne soit causé ou qu'il y ait menace de dommage, lorsque des marchandises sous-évaluées ou subventionnées de même description que celles faisant l'objet de la décision sont dédouanées [...]*
shall, within the time prescribed under the *Customs Act* for the payment of duties, at the option of the importer,	*il appartient à l'*importateur au Canada *de ces marchandises, à son choix, dans le délai réglementaire fixé en application de la Loi sur les douanes pour le paiement des droits :*
(*c*) pay or cause to be paid on the imported goods provisional duty in an amount not greater than the estimated margin of dumping of, or the estimated amount of subsidy on, the imported goods, or	*c) soit d'acquitter ou de veiller à ce que soient acquittés des droits provisoires d'un montant ne dépassant pas la marge estimative de dumping des marchandises importées ou le montant estimatif de la subvention octroyée pour elles;*
(*d*) post or cause to be posted security for provisional duty in the prescribed form and in an amount or to a value not greater than the estimated margin of dumping of, or the estimated amount of subsidy on, the imported goods.	*d) soit de fournir ou de veiller à ce que soit fournie, en la forme que le commissaire prescrit, une caution pour les droits provisoires s'appliquant aux marchandises importées, ne dépassant pas cette marge ou ce montant.*
11. The *importer in Canada* of any goods imported into Canada in respect of which duty, other than provisional duty, is payable shall, notwithstanding any security posted pursuant to section 8 or 13.2, pay or cause to be paid all such duties on the goods.	*11. L'*importateur au Canada *de marchandises que la présente loi assujettit à des droits, autres que provisoires, doit, malgré le fait qu'une caution ait été fournie aux termes des articles 8 ou 13.2, acquitter ou veiller à ce que soient acquittés ces droits.*

[Emphasis added]

It is clear from a reading of sections 89 and 90 of *SIMA* that there is an inconsistency between the English and French versions. The English version seems to imply a requirement for the importer to be present in Canada, while the French version does not. Several arguments were made by both sides as to why one version should prevail over the other.

Section 18 of the *Constitution Act, 1982*[4] provides that both versions of an act are equally authoritative and that neither enjoys priority or paramountcy over the other. Therefore, the Tribunal must attempt to reconcile the meaning of the English and French versions of sections 89 and 90 of *SIMA*. The basic rule governing the interpretation of bilingual enactments that are inconsistently drafted is known as the shared or common meaning rule,[5] by which the meaning that is shared by both versions of bilingual legislation ought to be adopted, unless that meaning is for some reason unacceptable. In this instance, there appears to be a fundamental inconsistency between the French and English versions. The French version

4. *Canada Act 1982 (U.K.)*, 1982, c. 11, Sch. B.
5. Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworth, 1994).

requires the Tribunal to address only a single element in making its ruling, namely, which party is the "*importateur*", which is a term defined by subsection 2(1). However, the English version requires the Tribunal to address two elements, namely, which party is both the "importer", as defined by subsection 2(1), and "in Canada". Consequently, the Tribunal does not consider it appropriate to apply the shared meaning rule. However, as stated by Pierre-André Côté in *The Interpretation of Legislation in Canada*,[6] the task of interpretation is not completed by deciding upon the meaning shared by the two versions. The meaning must be compatible with the intention of the legislator, as determined by the ordinary rules of interpretation. The modern principle of the interpretation of statutes, as described by Elmer Driedger in *Construction of Statutes*,[7] has been adopted in Canadian law.[8] It is expressed as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[9]

In the scheme of *SIMA*, the purpose of the Tribunal's ruling under section 89 is to identify the party that is liable for the payment of anti-dumping duties and the subject of the associated rights and obligations under *SIMA*. In this regard, the two fundamental sections of *SIMA* that impose the liability for provisional duty and duty other than provisional duty are sections 8 and 11 respectively. Each of these sections uses the phrase "importer in Canada" ("*importateur au Canada*") in both English and French versions. Parliament added the phrase "in Canada" ("*au Canada*") to both versions by a recent amendment.

Accordingly, the Tribunal considers that Parliament intended the language in sections 89 and 90 of *SIMA* to be consistent with the language in sections 8 and 11, so that the Tribunal's ruling identifies clearly the party liable under the latter sections. Therefore, the Tribunal considers that its ruling should identify the "importer in Canada" rather than merely the "importer".

The second element of the Tribunal's ruling is to determine which party, as between TRU and Kent, is the importer of the subject bicycles.

The Tribunal is of the opinion that the evidence clearly demonstrates that Kent is the party that is in reality the importer of the goods. For good business reasons, TRU has decided that it does not want to take the risks inherent in being the importer. Most of the details of those business reasons form part of the Tribunal's confidential record.[10] TRU and Kent have been doing business this way for a number of years, and the evidence shows that TRU acts in the same manner in respect of other goods that it purchases from other suppliers. The evidence did not indicate that, for any reason, the arrangement between TRU and Kent was structured in a way that is intended to mask the true identity of the importer. Indeed, TRU testified that the way in which it does business with Kent is the way in which it normally operates.

The bicycles that TRU purchases from Kent are purchased in Canadian dollars. TRU only becomes the owner when the bicycles are delivered to its warehouses in Canada. A specific instance discussed during

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6. 3d ed. (Cowansville: Carswell, 2000).
7. 2d ed. (Toronto: Butterworths, 1983).
8. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
9. *Ibid.* at 41.
10. *Transcript of In Camera Hearing*, Vol. 1, 27 October 2003 at 5-6.

the *in camera* session, in which TRU made revisions to a purchase order, confirms this fact.[11] Accordingly, Kent assumes the risks associated with the delivery, as well as with exchange rate fluctuations. The evidence also indicates that TRU generally has no control over the country of origin or the manufacturing process of the bicycles that it purchases from Kent. Kent also retains its own customs broker that handles the transactions.

The third element that the Tribunal is required to address is whether Kent is the importer "in Canada". The phrase "in Canada" clearly indicates that there is a requirement for a presence in Canada. However, *SIMA* does not indicate what type of presence is required. For example, there is no provision in *SIMA* that imposes a residency requirement or another specific type of presence, such as a permanent establishment in Canada.

In the Tribunal's view, had Parliament intended to impose such a requirement, it would have expressly provided for this, as has been done, for example, in the definition of "purchaser in Canada"[12] under the *Customs Act*.

The Tribunal also notes that neither the *Customs Act* nor the *Excise Tax Act*[13] requires an importer to be resident in Canada or to have a permanent establishment in Canada. Non-resident importers and importers without permanent establishments in Canada can therefore be liable for duties under those acts.

Accordingly, the Tribunal considers that, in its ruling, it should apply the plain and ordinary meaning of "in Canada". In the Tribunal's view, this entails a presence in Canada that does not necessarily amount to residency or a permanent establishment.

The Tribunal notes that, if one were to adopt an interpretation where a non-resident importer or an importer without a permanent establishment could not qualify as the "importer in Canada" for the purposes of *SIMA*, this would result in situations where, for the same goods, one company could be liable for anti-dumping duties, while a different company would be liable for duties and taxes under the *Customs Act* and the *Excise Tax Act*. It is also worth noting that customs duties, anti-dumping assessment and excise tax are accounted for under the CCRA's B-3 forms,[14] all of which are to be completed by the same importer.

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11. *Ibid.* at 68-69.
12. For example, the *Valuation for Duty Regulations,* enacted under the *Customs Act,* define "purchaser in Canada" as follows:

    2.1 For the purposes of subsection 45(1) of the Act, "purchaser in Canada" means
    (*a*) a resident;
    (*b*) a person who is not a resident but who has a permanent establishment in Canada; or
    (*c*) a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,
    (i) for consumption, use or enjoyment by the person in Canada, but not for sale, or
    (ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident. SOR/97-443, s. 2.
13. R.S.C. 1985, c. E-15.
14. See, for example, the CCRA's confidential brief at Tab 4.

The Tribunal finds that the testimony given during the *in camera* session, e.g. the way in which orders are handled,[15] the way in which the goods are released to the purchaser in Canada[16] and the warehousing of the subject goods, clearly demonstrates that Kent does have a presence in Canada.

Accordingly, pursuant to section 90 of *SIMA*, the Tribunal hereby rules that the importer in Canada of the subject bicycles is Kent.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

15. *Transcript of In Camera Hearing*, Vol. 1, 27 October 2003 at 12.
16. *Ibid.* at 69, 73.