Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-009

Cherry Stix Ltd.

v.

President of the Canada Borders Services Agency

Decision and reasons issued
Thursday, October 6, 2005

Canada

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IN THE MATTER OF an appeal heard on April 4, 2005, under subsection 67(1) of the Customs Act, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency dated April 8, 2004, with respect to a request for re-determination under subsection 60(4) of the Customs Act.

BETWEEN

CHERRY STIX LTD. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 4, 2005
Tribunal Members:	Ellen Fry, Presiding Member Patricia M. Close, Member Zdenek Kvarda, Member
Counsel for the Tribunal:	Nick Covelli
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael Kaylor, for the appellant Alexander Gay, for the respondent

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REASONS FOR DECISION

1. This is an appeal under subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA), dated April 8, 2004, under subsection 60(4) of the *Act*.

2. Under the *Act*, a value must be attributed to goods that are imported into Canada to determine duty. Subsection 47(1) of the *Act* stipulates that the primary basis for appraising the value for duty of goods is the transaction value of the goods. Subsection 48(1) of the *Act* adds that the value for duty of goods is the transaction value of the goods if the price paid or payable for the goods can be determined and the goods are sold for export to Canada to a "purchaser in Canada". Subsection 45(1) of the *Act* provides that the term "purchaser in Canada" has the meaning assigned by the *Valuation for Duty Regulations*.[2] Section 2.1 of the *Regulations* reads 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.

> 2.1 Pour l'application du paragraphe 45(1) de la Loi, « acheteur au Canada » s'entend :
>
> a) d'un résident;
> b) d'une personne, autre qu'un résident, qui a un établissement stable au Canada;
> c) d'une personne, autre qu'un résident, qui n'a pas d'établissement stable au Canada et qui importe les marchandises faisant l'objet de la détermination de la valeur en douane :
>
> (i) pour sa consommation ou son utilisation personnelles et qui ne les destinent pas à la vente,
> (ii) pour les vendre au Canada pourvu que, avant leur achat, elle n'ait pas passé un accord visant leur vente à un résident.

3. The goods that are the subject of this appeal are women's and children's garments imported by Cherry Stix Ltd. (Cherry Stix) of New York, between September 1, 1999, and July 14, 2003. The goods had been produced for, and sold to, Cherry Stix by third-party overseas suppliers.

4. During the period in question, Cherry Stix was not a resident of Canada, it did not have a permanent establishment in Canada, and it imported the goods for sale. These facts are undisputed. The issue is therefore whether Cherry Stix qualified as a "purchaser in Canada" under subparagraph 2.1(*c*)(ii) of the *Regulations*.

5. On May 13, 2003, the Canada Customs Revenue Agency (CCRA) (now the CBSA) issued a determination that Cherry Stix did not qualify as a "purchaser in Canada" under subparagraph 2.1(*c*)(ii) of the *Regulations* because Cherry Stix had entered into an agreement to sell the goods to a resident in Canada—mainly Wal-Mart Canada Corporation (Wal-Mart)—before purchasing the goods from its overseas suppliers. According to the CCRA, the goods were therefore sold for export to Canada to the Canadian customers, and the value for duty should be based on the selling price by Cherry Stix to the

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.O.R./97-443, s. 1(F) [*Regulations*].

Canadian customers, rather than the selling price by the overseas suppliers to Cherry Stix. The CCRA reached the same determination on August 18, 2003, as did the CBSA on April 8, 2004. Cherry Stix appealed to the Canadian International Trade Tribunal (Tribunal) on June 30, 2004. It is not disputed that Wal-Mart is a resident of Canada.

6. Mr. David Apperman, who is Cherry Stix's corporate comptroller, and Mr. Jay Schultz, who manages the Vancouver Area warehouse of Hudd Distribution (Hudd), which was used by Cherry Stix, both testified on behalf of Cherry Stix. The CBSA did not call any witnesses.

ANALYSIS

7. Cherry Stix would be a purchaser in Canada under subparagraph 2.1(*c*)(ii) of the *Regulations* if, before the "purchase" of the goods, it had not entered into "an agreement to sell the goods" to a resident of Canada. Thus, the Tribunal needs to determine whether, at the time that Cherry Stix purchased the goods from its overseas supplier, there was already "an agreement to sell the goods" between Cherry Stix and a resident of Canada.

Sequence of Events

8. In order to assess whether there was already an agreement to sell goods to Wal-Mart at the time that Cherry Stix purchased the goods from its overseas supplier, it is important to understand the sequence of events. The Tribunal has reconstructed the sequence of events relating to the transactions involving Wal-Mart based on the Tribunal's analysis of evidence submitted by Cherry Stix and the CBSA. This is based in particular on Mr. Apperman's testimony and a letter, submitted by the CBSA, dated January 13, 2003, and signed by Mr. Apperman, which purported to set forth the sequence of events that led to the transactions between Cherry Stix and Wal-Mart. At the hearing, Mr. Apperman claimed that much of this letter was incorrect. However, the Tribunal finds that this claim lacks credibility. The letter was prepared in response to the CCRA as part of its investigation; therefore, it is reasonable to assume that Mr. Apperman knew the importance of providing a full and complete account. If, for some reason, he did not in fact understand this in January 2003 when the letter was sent, he should certainly have come to this understanding by May 2003, August 2003 or April 2004 when the CCRA and the CBSA made determinations adverse to the interests of Cherry Stix. However, Mr. Apperman did not take action to correct any inaccuracy prior to initiating this appeal. The Tribunal infers from his failure to do so that the sequence of events listed in the letter is indeed accurate. In instances where the Tribunal considers that there is a contradiction between Mr. Apperman's letter and his testimony concerning the sequence of events, the Tribunal has accepted the evidence in his letter, as discussed below.

9. The first step in the sequence of events was the decision of Cherry Stix and Wal-Mart to enter into a vendor agreement in September 1999. This was followed by a vendor agreement dated June 2001. These vendor agreements established a framework to manage the relationship between Cherry Stix and Wal-Mart in the event that Wal-Mart subsequently purchased goods from Cherry Stix. For instance, the vendor agreement of June 2001 sets forth addresses to be used to mail payment and purchase orders, shipping and freight terms, purchase order allowance codes, payment terms and insurance requirements, and the legal forum to govern any disputes that may arise. While the agreement refers to Wal-Mart as "Purchaser" and Cherry Stix as "Vendor", it expressly stipulates that the terms and conditions in it "do not create an obligation for [the] Purchaser to purchase merchandise or other goods". There is also a section entitled "Purchase Order Terms and Conditions". In addition, it incorporates, by reference, the terms and conditions of the *Vendor Information Manual*, which provides information about Wal-Mart's business environment and business requirements, including those relating to purchase orders and shipping.

10. While Cherry Stix submitted the vendor agreement of June 2001 to the Tribunal, it did not submit the vendor agreement of September 1999. Mr. Apperman testified that he was uncertain whether the terms and conditions of the two vendor agreements were identical. Consequently, the Tribunal did not have a key document covering the period from September 1999 to May 2001.

11. Mr. Apperman's letter indicates that, with the vendor agreement in place, Cherry Stix would have samples of garments designed, produced and placed in its sales line. During his testimony, however, Mr. Apperman indicated that samples were not produced at this stage. The Tribunal considers Mr. Apperman's letter more credible than his testimony on this point. The Tribunal notes that Mr. Apperman admitted that he was not personally involved in the sales process, and that Cherry Stix did not call upon any of its sales associates to testify.

12. According to the letter, Wal-Mart buyers would then visit Cherry Stix's showroom, or Cherry Stix's sales associates would visit Wal-Mart, and the sample garments would be viewed. In his testimony, Mr. Apperman denied that this was the sales process and, instead, stated that Cherry Stix's sales associates would routinely approach Wal-Mart with sketches of garments that Wal-Mart might be interested in purchasing. The samples of sketches that Cherry Stix submitted to the Tribunal indicate that Cherry Stix was proposing to sell specific designs, colours, fabrics, sizes and dimensions, and name Wal-Mart as the customer. Although the Tribunal considers Mr. Apperman's letter more credible than his testimony concerning this aspect of the sales process, the Tribunal accepts his testimony as evidence that sketches were used to assist in the sales process described in the letter.

13. Mr. Apperman's letter also indicates that, at some point during the Wal-Mart buyers' visit with Cherry Stix's sales associates, the goods were "sold". Wal-Mart would then send a "work order" to Cherry Stix. At the hearing, Mr. Apperman referred to this as the "assortment plan detail sheet". Although he testified that Wal-Mart would not always send this to Cherry Stix, the Tribunal accepts the evidence in his letter that the "work order" was a normal part of the sequence of events. The assortment plan detail sheets on the record specify colours, fabrics and sizes, as well as Cherry Stix's design number, which references the corresponding sketch. In addition, they specify quantities, prices and delivery periods. They refer to Cherry Stix as the "Vendor".

14. According to the letter, Cherry Stix would then negotiate with overseas agents for the production of the goods covered by the work order (i.e. the assortment plan detail sheet). Mr. Apperman testified that these negotiations were conducted via fax and e-mail, although no examples of relevant fax or e-mail communications were filed with the Tribunal. The letter indicates that "prices, etc." would be finalized during the negotiations. Mr. Apperman further testified that Cherry Stix typically received confirmation of the terms of agreements from its overseas suppliers within two weeks of ordering goods. The examples of order confirmation sheets from the overseas suppliers, filed by Cherry Stix, clearly describe the goods that Cherry Stix had ordered. They accord with the descriptions and design numbers indicated in the sketches and the assortment plan detail sheets. They also seem to indicate the same quantities as on the assortment plan detail sheet. In addition, they include prices, packing terms, shipping information, terms of payment and dates of shipment. Mr. Apperman testified that the date of an order confirmation is administrative and does not necessarily reflect the actual date on which Cherry Stix struck the bargain with its overseas supplier.

15. The letter indicates that, approximately one month before the shipping date to Wal-Mart, Wal-Mart would send a "master purchase order" to Cherry Stix. An example submitted by the CBSA is simply entitled "Purchase Order". More recent examples, submitted by Cherry Stix, are entitled "Purchase Order: Blanket Order/Estimated Quantities (Not firm commitment)". Mr. Apperman's testimony was not

consistent as to whether Cherry Stix usually received these master purchase orders before or after it ordered the goods from its overseas suppliers. However, the fact that the shipping date could be ascertained when the master purchase order was sent clearly implies that the goods had already been ordered from the overseas supplier at this point.

16. Like the assortment plan detail sheet, the master purchase order would specify colours, fabrics, sizes, styles, quantities, prices and delivery dates. However, Mr. Apperman testified that the quantities and prices might have differed from those indicated on the assortment plan detail sheet. In that event, Cherry Stix would determine if the revised quantities or prices were acceptable.

17. The master purchase order introduced new administrative information, in addition to confirming the description of the goods and confirming or restating the quantities and prices. This included a master purchase order number and packing instructions. They also included either an instruction for Cherry Stix to "... contact [Wal-Mart's] allocation [department] 7 business days prior to start of ship date..." or an advisory for Cherry Stix that "[t]his order will be split by warehouses when you call for allocation 7 days prior to shipment".

18. The evidence indicates that, once the goods were produced, the overseas suppliers would place a booking with Cherry Stix's consolidator, who would transmit the booking to Cherry Stix for confirmation that all the information was accurate and that the delivery date was being met. The overseas suppliers would then deliver the goods to the consolidator, and they would be loaded aboard a ship. Cherry Stix would receive a "Container Load" which would allow it to advise Wal-Mart of the incoming shipment. The goods would then be shipped to the port of Vancouver. On the same day, the suppliers would draw payment from Cherry Stix's bank account via an irrevocable letter of credit. The suppliers' invoices on the record clearly describe goods, style numbers, quantities and prices that match those specified in the order confirmation sheets.

19. The Tribunal heard that the goods were first inventoried in a warehouse operated by Hudd. According to the *Vendor Information Manual*, Hudd is a preferred Wal-Mart consolidator. Mr. Schultz testified that Hudd had direct in-house access to Wal-Mart's systems and used them to access the master purchase orders. Mr. Schultz said that Hudd would ensure that the goods conformed to the specifications in the master purchase orders and to the terms and conditions stipulated in the *Vendor Information Manual*.

20. According to Mr. Apperman, if everything was in order, Cherry Stix would send an allocation request form to Wal-Mart. Mr. Apperman testified that the nature of this request was to ask Wal-Mart if it would like to place an order for the goods. However, the title and content of the allocation request forms on the record indicate that their actual purpose was to request instructions for allocating the goods among the various Wal-Mart centres, seven business days before the shipping date, as Cherry Stix was instructed to do in the master purchase orders. This is consistent with Mr. Apperman's letter, which indicates that Cherry Stix would advise Wal-Mart in advance that shipment was pending.

21. This view is also consistent with the example of an e-mail reply to the allocation request form from Wal-Mart, filed by Cherry Stix. It states as follows: "here are the splits you requested". It cites Cherry Stix's vendor number, the master purchase order number and the shipping dates. In addition, it includes what Mr. Schultz called the "shipping purchase order" number for each destination. These are referred to in Mr. Apperman's letter as "individual purchase orders". Mr. Apperman testified that these purchase orders were needed to ship the goods to the various Wal-Mart destinations and to receive payment.

22. The evidence indicates that Wal-Mart would follow up on the e-mail reply with a formal document entitled "Purchase Order: An order for goods and services placed against a pre-existing contract or blanket [order]". Mr. Apperman referred to this follow-up at the hearing as, among other names, a "confirmed purchase order". These documents were virtually identical in form and content to the master purchase orders, including the same purchase order numbers and dates. In addition, they included the individual (or shipping) purchase order number, plus a corresponding delivery address for each. According to Cherry Stix, the individual (or shipping) purchase orders also served the function of identifying the Wal-Mart distribution centres to which the goods should be shipped. However, Mr. Apperman also testified that the total quantities and prices sometimes differed from those in the master purchase orders, and Mr. Schultz, who indicated that a small reduction in the quantities sometimes occurred, verified this statement with respect to changes in quantities.

23. The balance of the evidence indicated that, at the time of shipment, Cherry Stix would issue an invoice for each Wal-Mart destination, which was based on the corresponding individual (or shipping) purchase order number. Wal-Mart would then send proof of delivery and deposit payment into Cherry Stix's bank account.

When Did Cherry Stix "Purchase" the Goods?

24. The Tribunal must determine when Cherry Stix "purchased" the goods from its overseas suppliers. Although the term "purchase" is not defined in the *Act* or the *Regulations*, subsection 48(1) of the *Act*, which provides the context for subparagraph 2.1(*c*)(ii) of the *Regulations*, contemplates a *sale* of goods for export to Canada. The CBSA and Cherry Stix both agreed that a "purchase" of goods is part of a sale of goods, but they could not agree on the point in a sale at which a "purchase" occurs. Cherry Stix argued that it occurs when the buyer takes physical possession of the goods. The CBSA argued that it depends on the intention of the seller and the buyer.

25. Resolution of this issue necessitates the consideration of general contract law. For a contract to arise, one person must make an offer and another person must accept it. In common law, an offer is a definite promise to be legally bound once its terms are accepted. Likewise, the United Nations Convention on Contracts for the International Sale of Goods, 1980,[3] which accords with generally accepted contract principles,[4] provides that an offer is defined as "[a] proposal for concluding a contract addressed to one or more specific persons . . . [that] is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance."[5] According to the CISG, a proposal is sufficiently definite if ". . . it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." In common law, an acceptance is valid if the person who received the offer actually communicates, to the person who made the offer, that he accepts all the terms of the offer. Under the CISG, the acceptance of an offer generally becomes effective at the moment when it reaches the person who made the offer.[6] A contract

3. 1980, U.N. Doc. A/Conf. 97/18 (1980); 19 Int'l Legal Material 668 (1980) [CISG]. The CISG generally applies to contracts of sale of goods between parties whose places of business are in different countries. Both the United States, in which Cherry Stix had a place of business, and the People's Republic of China, which was the place of business of at least one of the overseas suppliers, were parties to the CISG. As for the other purchases by Cherry Stix involving suppliers in Chinese Taipei, which is not a party to the CISG, the provisions of the CISG on the formation of contracts sufficiently accord with generally accepted contract principles to be nevertheless of guidance.
4. H. Gabriel, *Contracts for the sale of goods: a comparison of domestic and international law* (Oceana: New York, 2004) at 66.
5. Article 14 of the CISG.
6. According to Articles 18(2) and (3) of the CISG.

for the international sale of goods is formed ". . . at the moment when an acceptance of an offer becomes effective. . . ".[7]

26. For the agreement to be binding, something of value must generally be given or promised in consideration for the promise sought to be enforced. In a contract of sale, the seller's promise to sell is consideration for the buyer's promise to pay.

27. A contract may be unenforceable if essential terms are omitted. These include such things as price and quantity. However, these terms need not be conclusively settled if the agreement provides a manner for fixing them later.

28. The terms of a legally binding contract are not always apparent to a third party. A legally binding contract may be partly in writing, oral, or a combination of both. The terms of the contract may also be implied from the conduct of the parties. Thus, the contract may be contained in one or more documents and/or consist of an exchange of communications. The negotiations that led to the contract may have taken place against a backdrop of established practices between the contracting parties, which impose mutually agreed upon, but unexpressed, terms.[8]

29. Applying these principles to the evidence, the Tribunal is satisfied that Cherry Stix's orders from its overseas suppliers constituted offers. Mr. Apperman's testimony was that, after receiving the assortment plan detail sheet, Cherry Stix's overseas agents negotiated with a supplier and finalized the terms with it. Based on Mr. Apperman's testimony, the Tribunal considers that "acceptance" of the offer was communicated by the overseas suppliers to Cherry Stix by way of fax and e-mail. The order confirmation sheets show definite quantities, prices and other specifics, confirming the terms that had already been agreed upon during the fax and e-mail exchanges. Therefore, Cherry Stix purchased the goods within the meaning of subparagraph 2.1(*c*)(ii) of the *Regulations* at some point prior to receiving the order confirmations from its overseas supplier.

Timing and Nature of the Transactions Between Cherry Stix and Wal-Mart

30. For domestic sales of goods, common law is subject to, or supplemented by, each province's sale of goods statute, which is based on the Uniform Law Conference of Canada's *Sale of Goods Act*. With respect to the relationship between Cherry Stix and Wal-Mart, the Tribunal is satisfied that a review of Ontario's *Sale of Goods Act*[9] is warranted. The vendor agreement of June 2001 provided that it and all disputes arising under it were to be "governed by and construed in accordance with the law of Canada". The Tribunal notes that Wal-Mart's corporate headquarters were located in Ontario, and this is where it appears that the vendor agreement was concluded. Further, the evidence implies that the bargaining between Cherry Stix and Wal-Mart took place in Ontario, either exclusively or in part. Both Cherry Stix and the CBSA indicated that the provisions of the *OSGA* would be of guidance to the Tribunal in this matter, and the Tribunal agrees.

31. The *OSGA* makes a distinction between a "sale" of goods and an "agreement to sell" goods. Whereas, in a sale, the seller transfers the right of ownership of the goods to the buyer, in an agreement to sell goods, the transfer of the right of ownership of the goods is to take place ". . . at a future time or subject to some condition thereafter to be fulfilled. . . ".[10] In other words, a sale is a contract for the sale of goods

7. Article 23 of the CISG.
8. See S.M. Waddams, *The Law of Contracts*, 4th ed. (Canada Law Book: Toronto, 1999).
9. R.S.O. 1990, c. S.1 [*OSGA*].
10. Subsection 2(3) of the *OSGA*.

that is performed presently, and an agreement to sell goods is a contract for the sale of goods that is to be performed in the future and, if fulfilled, results in a sale.[11] Thus, in regard to subparagraph 2.1(*c*)(ii) of the *Regulations*, the issue is whether, before Cherry Stix purchased the goods (i.e. the moment when it came to an agreement with its overseas supplier by fax or e-mail), it agreed to transfer the right of ownership in these goods to Wal-Mart at a future time or subject to a condition to be fulfilled thereafter.

32. The *OSGA* provides further guidance to help answer this question. It stipulates that an agreement to sell goods may be made on the basis of a description of the goods and may be contingent on the seller's success in acquiring them.[12] It also stipulates that the price may be determined by the parties in the course of their dealings, rather than in the agreement.[13] There is no such stipulation for quantity and, therefore, the common law rule that the agreement need only indicate the manner for fixing the quantity, e.g. based on the seller's output or the buyer's requirements,[14] applies. In addition, the *OSGA* makes it clear that an agreement to sell goods may be conditional.[15] It also stipulates that an agreement to sell goods may be made in writing, by word of mouth, or partly in writing and partly by word of mouth, or may be implied by the conduct of the parties.[16] Thus, as discussed above, the terms of a legally binding contract are not always apparent on the face of a single document.

33. Turning to the evidence, Cherry Stix placed considerable weight on the fact that the purchase order terms and conditions in the vendor agreement dated June 2001 stipulate that ". . . the Purchase Order and all its attachments, instructions and exhibits . . . sets forth the entire agreement between Seller and Purchaser with respect to the sale and purchase of the goods." It also stipulates that "[a]cceptance of this order may be made only by shipment of the goods" to Wal-Mart and that the "[s]eller's invoice, confirmation memorandum or other writing may not vary the terms of this order." Cherry Stix argued that, by operation of these clauses, there could not have been a sale or agreement to sell the goods until it shipped the goods to Wal-Mart, which shipment occurred after it purchased the goods. However, while clauses such as these are indications of what the seller and the buyer actually intended, they cannot be viewed in isolation from the conduct of the parties and the other communication between them.[17]

34. Cherry Stix did not submit into evidence the vendor agreement that was in effect from September 1999 to May 2001, and it is not clear from the evidence whether the subsequent vendor agreement, which was submitted into evidence, did or did not include the same clauses. Therefore, the wording of the vendor agreement dated June 2001, insofar as it governs the legal relationship between the parties, would only apply to the goods sold to Wal-Mart from that date on.

35. In the Tribunal's view, the totality of the evidence indicates that Cherry Stix and Wal-Mart did enter into an agreement to sell the goods before Cherry Stix purchased them. As discussed below, before Cherry Stix even looked for a potential supplier, it agreed to acquire and transfer to Wal-Mart the right of ownership in goods of an agreed description. In exchange, Wal-Mart agreed to pay a price to Cherry Stix upon delivery, which was to be confirmed in the course of their dealings. Cherry Stix and Wal-Mart also agreed on quantities, subject to Wal-Mart's right to finalize these quantities later.

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11. Subsection 2(4) of the *OSGA*.
12. Section 6 of the *OSGA*.
13. Section 14 and subsection 9(1) of the *OSGA*, respectively.
14. *Advent Systems v. Unisys*, 925 F.2d 670 (3d Cir. 1991); *Gertner Corp. v. Case Equipment Co.*, 815 F.2d 806 (1st Cir. 1987).
15. Subsection 2(2) of the *OSGA*.
16. Section 4 of the *OSGA*.
17. *Continental Bank leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21.

36. In the Tribunal's view, this agreement was formed during the discussions between Cherry Stix's sales associates and Wal-Mart's buyers. As indicated in Mr. Apperman's letter, Cherry Stix's sales associates approached Wal-Mart's buyers with samples of goods and, at this point, the goods were "sold" to Wal-Mart. It is reasonable to consider that this must have involved a meeting of the minds on basic terms of the sale, such as quantities and prices, as is the normal commercial behaviour of sales associates and buyers.

37. In the Tribunal's view, the purpose of the assortment plan detail sheet was to confirm the agreement to sell the goods that had already been concluded by word of mouth. It set forth a detailed description of the goods, the delivery date, and the tentative quantities and prices. In addition, it clearly identified Cherry Stix as the "VENDOR". The Tribunal accepts the evidence in Mr. Apperman's letter that this document was in the nature of a "work order" rather than his testimony that it was a document used only internally by Wal-Mart. It was the receipt of the assortment plan detail sheet that set off the chain of events that resulted in the purchasing of the goods from the overseas suppliers, the manufacture of the goods and the exportation of the goods to Canada for Wal-Mart.

38. Cherry Stix's instructions to its overseas suppliers also support the conclusion that an agreement to sell the goods to Wal-Mart preceded Cherry's Stix's purchase of them. The order confirmations from Cherry Stix's suppliers identify "W-CANADA", which Mr. Apperman acknowledged means Wal-Mart, as the "Buyer". In addition, the specifications contained in the order confirmation sheets mirror the specifications contained in the assortment plan detail sheets.

39. The manner in which the goods were produced by the overseas suppliers also supports the conclusion that an agreement to sell the goods preceded Cherry's Stix's purchase of them. The suppliers attached Wal-Mart trademark labels, Wal-Mart's unique CA number[18] and Wal-Mart retail price tags to the goods. The CBSA submitted that Cherry Stix would only have the goods manufactured with a Wal-Mart trademark and Wal-Mart's CA number with Wal-Mart's consent, and the Tribunal considers that this is undoubtedly the case. In addition, Mr. Apperman admitted that the goods could only be shipped as is to Wal-Mart, not to other customers. Furthermore, Wal-Mart tested samples of the goods during the pre-production and production stages. When completed, the goods were shipped to a Wal-Mart consolidator to check for compliance with the master purchase order and Wal-Mart's *Vendor Information Manual*.

40. While it is true that the quantities were sometimes later reduced in the master purchase order or individual (or shipping) purchase orders, the Tribunal is satisfied that it was an implied term of the agreement that delivered quantities would be subject to changes in Wal-Mart's requirements. Cherry Stix ordered the goods on the basis of the quantities in the assortment plan detail sheet. Then, in time for inspection and assortment by Hudd upon the arrival of the goods in Canada, Wal-Mart sent the master purchase order showing updated quantities that were either the same as or lesser than the quantities indicated on the assortment plan detail sheet. Finally, just a week before delivery, Wal-Mart sent the individual (or shipping) purchase orders, which, again, totalled either the same as or lesser than the total quantities in the master purchase order. This represented Wal-Mart's finalized requirement, allocated among the various Wal-Mart locations. This view is consistent with the stipulation in the 2001 vendor agreement that Wal-Mart could cancel the purchase order at any time prior to shipment by Cherry Stix. Given that Wal-Mart had the right to cancel the entire agreement, it would be reasonable for the parties to agree that Wal-Mart could decrease the quantities purchased under the agreement.

18. A CA number is a five-digit identification number. Each is unique to a Canadian textile retailer under the *Textile Labelling Act*, R.S.C. 1985, c.T-10.

41. The Tribunal notes that the existence of a term giving one party the right to cancel a purchase does not necessarily mean that a contract of sale does not yet exist. It could simply be a term in an agreement to sell goods. The Tribunal is satisfied that such was the case here.

42. Similarly, the Tribunal is satisfied that it was a term of the contract that prices might change after the initial agreement to sell the goods. According to Mr. Apperman, if the prices stipulated by Wal-Mart in the master purchase order were unacceptable to Cherry Stix because they were lower than the prices in the assortment plan detail sheet, Cherry Stix had the option to cancel the transactions with Wal-Mart and the supplier before the goods were produced.

43. Cherry Stix delivered the goods to Wal-Mart in accordance with the individual (or shipping) purchase order after accepting any changes to the quantities and prices proposed in the various purchase orders. This was consistent with what was contemplated in the vendor agreement.

CONCLUSION

44. For these reasons, the Tribunal finds that, at the time that Cherry Stix purchased the goods from its overseas supplier, there was already "an agreement to sell the goods" between Cherry Stix and Wal-Mart, a resident of Canada. Therefore, Cherry Stix was not a "purchaser in Canada" with respect to those transactions.

45. With respect to the transactions involving the Canadian customers other than Wal-Mart, the Tribunal notes that paragraph 152(3)(*c*) of the *Act* provides that the burden of proof for any question relating to the payment of duties on the importation of goods rests with the party to the proceedings other than Her Majesty. Therefore, in this appeal, Cherry Stix had the onus of proving that it satisfied the requirement of being a "purchaser in Canada" with respect to each of the covered transactions. However, virtually all of Cherry Stix's arguments and evidence related to the transactions involving Wal-Mart only. Cherry Stix presented little evidence with respect to the transactions involving the other Canadian customers. The little evidence that was submitted concerning Canadian customers other than Wal-Mart was insufficient.

46. Therefore, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Zdenek Kvarda
Zdenek Kvarda
Member