



Information on Corn Duties Relief

In the week of January 16th, Canadian Corn Producers issued news releases raising issues on the applicability of duties relief for the importation of grain corn from the United States for use in the production for exportation of livestock and meat.

What follows below is advice provided by Peter Clark to the Animal Industry Corn Users coalition of which the Canadian Pork Council is a member. This is not a legal opinion; however, Mr. Clark, counsel to the AICU, has been involved in international trade matters for 40 years, first in the federal government where he was a senior negotiator and for the past 26 years as one of Canada's most active international trade practitioners. He has a depth of knowledge and experience in domestic, NAFTA and WTO trade law and dispute settlement processes.

Mr. Clark has done analysis of the relevant regulations, had discussions with other counsel, and draws on his and his firm's experience both in policy administration and as counsel. He also has undertaken consultations with responsible officials.

On the matter of penalties, Mr. Clark indicates the following:

“CBSA does not impose penalties except for fraud or clear infractions of their rules. In the case of drawback, the rules are clear, and no monies are paid until a claim is approved. In the case of the duties relief program, the terms are clearly set out in regulations. CBSA does not impose penalties against companies who act in good faith on CBSA advice.”

If the terms and conditions are met – and the importer is acting in good faith, and does not provide false or misleading information, or otherwise attempt to receive a refund in a manner inconsistent with the rules, there is no question of punitive additional assessments.”

If there are questions about entitlement, these should be addressed with CBSA officials.

We are not aware, nor are the colleagues we consulted, of any situation where importers have been subject to penalty duties where an Agency interpretation or practice has been challenged by another interested party. Indeed, we are not aware of any challenges by Canadian industry to the operation of the duties relief programs as interpreted by CBSA and its predecessors who were responsible for its administration.”

With regard to applicability of duties relief provisions, Mr. Clark says:

“While it is conceivably possible for CCP to challenge the principles of application of drawback under the Federal Court, CBSA is afforded deference in the performance of its functions by the Courts. The purpose of this note is not to provide you with an assessment of the merits, if any, of such a challenge should one arise. But in our discussion it became clear that:

- *Drawback is contemplated in the Customs Tariff.*
- *Canada is not alone in operating such duties relief programs. They have been in existence for more than 100 years.*
- *The only WTO issue is whether or not the government refunds an amount in excess of the duty paid on the input included on the exported product. Canada's rules, regulations and procedures have been designed and tested to ensure proper observance of WTO obligations.*
- *A change in administration and practice as a result of a Federal Court interpretation would most likely be prospective, not retroactive."*

Mr. Clark points out that duties relief has been used in other cases and that it is covered by our international trade obligations:

"Canadian exporters have relied on duty relief in many sectors to ensure access to world price inputs to ensure their export competitiveness. There is nothing in the Customs Tariff nor in regulations to suggest corn used in feeding livestock which is slaughtered and exported as meat is not eligible for drawback or other forms of duty relief.

Imported sugar (including sugar imported from the USA which is subject to SIMA duties) may benefit from drawback when used in the production of candy bars, chocolates confectionery, cakes or cookies – for example.

While the U.S. does not permit duties relief with respect to AD or CV duties – this is a matter of U.S. policy which is specific to the USA.

The NAFTA does not preclude the refund or drawback of SIMA duties on originating (in NAFTA) goods and the Customs Tariff permits such duties relief. It is consistent with Canada's NAFTA and other international obligations. Given Canada's very significant dependence on exports, we do not expect Canada voluntarily to abandon or modify the availability of this competitive tool to its exporters."

Peter Clark indicates the following as the "bottom line":

- ▶ *"Penalties do not apply to those who operate honestly, in good faith, i.e., are not guilty of fraud or misrepresentation.*
- ▶ *Policies change prospectively, not retroactively.*
- ▶ *The rules as currently interpreted and applied permit duties relief for AD/CVD on corn used in production of livestock which is exported as meat.*

The precise terms and conditions, under which duties relief is permitted, may vary from one importer/producer to another. It is essential to ensure from CBSA what the rules, recordkeeping and reporting requirements are. Get these instructions in writing – memory and "I was told" or "he/she said" are not enough.

CBSA audits and verifies records. They must ensure that there are not excess refunds on the one hand, and that the terms and conditions for relief have been met."