

BILL S-2: AN ACT TO AMEND THE CUSTOMS ACT

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LEGISLATIVE HISTORY OF BILL S-2

HOUSE OF COMMONS

| Bill Stage | Date |
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SENATE

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Statutes of Canada **2009, c. 10**

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative history by Michel Bédard

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BILL S-2: AN ACT TO AMEND THE CUSTOMS ACT*

BACKGROUND

On 29 January 2009, Bill S-2, An Act to amend the Customs Act, was introduced in the Senate by the Leader of the Government in the Senate, the Honourable Marjory LeBreton. This bill is identical to Bill S-2, An Act to amend the Customs Act, which was introduced in the 1st Session of the 40th Parliament and which died on the *Order Paper* when Parliament was prorogued on 4 December 2008 and to Bill C-43, An Act to amend the Customs Act, which died on the *Order Paper* when Parliament was dissolved on 7 September 2008. Bill S-2 amends the *Customs Act*⁽¹⁾ to clarify certain provisions of the French version of the Act and to make technical amendments to others. It also imposes additional requirements in customs controlled areas, grants the minister the power to authorize entry, amends provisions concerning the determination of value for duty, and modifies advance commercial reporting requirements. The search powers of customs officers are expanded to include individuals and their goods that are in or are leaving a customs controlled area. The bill also provides that regulations may be enacted that describe the time frame and manner in which information about passengers may be provided by prescribed persons. Finally, it provides that regulations may incorporate material found in associated documents.

The *Customs Act* was first enacted in 1867⁽²⁾ to serve three purposes: (1) to ensure the collection of duties, (2) to control the movement of people and goods, and (3) to protect Canadian industry from real or potential injury caused by the actual or contemplated import of dumped or subsidized goods and by other forms of unfair competition. It is important to note that the Act is not a taxing statute; rather, it provides the legislative authority to

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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

(2) S.C. 1867, c. 6.

administer and enforce the collection of duties and taxes that are imposed under separate taxing legislation, such as the *Customs Tariff*,⁽³⁾ the *Excise Tax Act*,⁽⁴⁾ the *Excise Act*⁽⁵⁾ and the *Special Import Measures Act*,⁽⁶⁾ to name a few.

The current *Customs Act* is the result of the total revamping of the 1867 Act, which was undertaken in 1986 to maintain the original Act's three purposes and to allow for greater flexibility in light of developments in transportation, communication, trade and business practices.⁽⁷⁾ Since 1986, the Act and has been amended continuously in response to free trade and related international agreements, and to fine-tune international trade measures.

DESCRIPTION AND ANALYSIS

A. Clarification of the French Version of the *Customs Act* (Clauses 1, 3(3), 13, 14 and 15)

The bill makes a number of technical changes intended to improve the concordance between the Act's French and English versions.

B. Removal of Authorization Regulation and Expansion of Presentation and Reporting Requirements of Individuals, and for Goods, at Customs Controlled Areas (Clauses 2, 3, 4 and 5)

Clause 2 of the Bill removes the authorization-by-regulation requirement by which the minister currently approves access to a customs controlled area by a person. Thus, the minister may now directly authorize access to a customs controlled area by a person. Further, according to clause 2(2), the minister may amend, suspend, renew, cancel or reinstate an authorization.

Clause 3 of the Bill removes an exemption that applied to persons boarding a flight to a destination outside of Canada who were *leaving* a customs controlled area. By the removal of this exemption, such persons are obligated to present and identify themselves to an officer and to report any goods obtained in the area and answer questions asked by an officer.

(3) S.C. 1997, c. 36.

(4) R.S.C 1985, c. E-15.

(5) R.S.C 1985, c. E-14.

(6) R.S.C 1985, c. S-15.

(7) Department of National Revenue Customs and Excise, *Background Paper for an Act Respecting Customs*, Ottawa, 1983.

Clause 3 also expands the presentation requirements for individuals leaving customs controlled areas, to include the examination of goods (clause 3(2) new paragraph 11.4(1)(b.1)). Further, all individuals who are *in* a customs controlled area must present and identify themselves if requested by an officer and answer questions asked by an officer (clause 3(4)). Presentation and reporting requirements for individuals leaving or in customs controlled areas do not apply to persons who are required to present themselves on arrival in Canada according to section 11, or to report goods according to section 12, of the *Customs Act* (clause 3(4)).

Clause 4 amends the regulation-making powers of the Governor in Council to include regulations prescribing the persons or classes of persons who may be granted access to customs controlled areas and the manner in which a person must present himself or herself upon leaving, or while in, a customs controlled area.

Clause 5 amends the reporting requirements for goods imported into Canada found in paragraph 12(3)(b) of the Act, to provide that a “prescribed person,” rather than “the person in charge of the importation,” is obligated to report to the nearest customs office. Thus, regulations describing “prescribed persons” will determine who must report imported goods at the nearest customs office.

C. Clarification of Regulation-making Power of the Governor in Council (Clauses 6, 16 and 17)

Clause 6 creates new section 12.1, which grants the Governor in Council the power to make regulations regarding the advance information that is required for the importation of goods. This regulation-making power is similar to that provided for in paragraph 164(1)(b), which is now repealed by clause 16 of the bill. Thus, the bill transfers the regulation-making power from Part VII of the Act to Part II, which deals with importation. Clause 17 creates new section 164.1, which allows the Governor in Council to incorporate material by reference to any regulation made under the Act. Material may be incorporated by reference regardless of its source and may be amended without public notice in the *Canada Gazette* as required by the *Statutory Instruments Act*.⁽⁸⁾

(8) R.S.C. 1985, c. S-22. Please note that the exemption from publication in the *Canada Gazette* was deleted at committee stage in the Senate.

D. Expansion of Ministerial Powers Regarding Passenger Information (clause 12)

Clause 12 amends section 107.1(1) to provide the minister with the power to prescribe the time and the manner in which information about passengers may be requested from prescribed persons under prescribed circumstances and conditions. **This amendment is based on a recommendation of the Auditor General.**⁽⁹⁾

E. Clarification of the Methods Used in the Valuation of Goods for the Calculation of Duties (Clauses 7, 8, 9)⁽¹⁰⁾

Clause 7 amends the methods available to adjust the transaction value of the goods being imported when the vendor receives a benefit from a subsequent sale. Specifically, clause 7 allows upward adjustments of the transaction price based on factors found in paragraph 48(5)(a) of the Act, which include commissions, packaging costs, royalties and licence fees, and the cost of transportation, to name a few examples. Previously, upward adjustments were allowed only on the basis of proceeds of the subsequent sale, according to paragraph 48(5)(a)(v). This may lead to higher valuations and therefore higher duties being paid by importers.

Clauses 8 and 9 make changes related to the concordance of the English and the French versions of the Act. However, because of the deletion of certain terminology, the French version may in some places differ from that of the English.

Clause 8 also amends the conditions required to utilize the transaction value of identical goods in the determination of duties to be paid. Specifically, the term “to the purchaser” is deleted in paragraph 49(1)(a) by the operation of clause 8(2). This means that an actual purchaser is not required to determine the value of the transaction based on an identical good. This term is also deleted from paragraphs 49(2)(a) to (c) by clause 8(4). The deletion may reflect the absence of a definition for “purchaser” in the Act and may stem from a number of related cases at the Canadian International Trade Tribunal on the matter.

(9) Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons, Chapter 5, October 2007, p. 20, http://www.oag-bvg.gc.ca/internet/docs/20071005c_e.pdf.*

(10) These amendments align the valuation procedure for imported goods with those recommended by Article VII of the General Agreement on Tariffs and Trade. For more information, see World Trade Organization, *Customs Valuation, http://www.wto.org/english/tratop_E/cusval_e/cusval_e.htm.*

Clause 9 also amends the conditions required to utilize the transaction value of similar goods in determining the duties to be paid. Specifically, the term “to the purchaser” is deleted in paragraph 50(1)(a) by the operation of clause 9(2). This means that an actual purchaser is not required to determine the value of the transaction based on a similar good.

F. Clarification of Search Powers of Officers in Customs Controlled Areas to Include Searches of Persons or Goods in, or Leaving, a Customs Controlled Area (Clauses 10 and 11)

Clause 10 amends section 99.2(1) so that a customs officer may search persons who are in or who are leaving a customs controlled area if the officer suspects on reasonable grounds that the person has secreted on or about his or her person anything in respect of which the *Customs Act* or regulations have been or might be contravened, or anything that would provide evidence of a contravention of any federal law prohibiting, regulating or controlling importation or exportation and subject to the rights afforded that person by sections (3) to (5).

Clause 10 also amends section 99.2(2) so that a customs officer may search, in accordance with the regulation, any prescribed person or member of a prescribed class of persons who is in or is leaving a customs controlled area.

Clause 11 amends section 99.3(1) so that a customs officer is authorized to conduct a non-intrusive examination of goods in the custody or possession of a person in or leaving a customs controlled area, in accordance with the regulations. Clause 11 also amends section 99.3(2) so that a customs officer is also authorized to examine any goods, open any baggage, package or container or take samples of goods in the custody or possession of a person who is in or is leaving a customs controlled area and if the officer suspects on reasonable grounds that this Act or any other Act enforced by the officer has been or might be contravened. Lastly, clause 11 amends section 99.3(3) so that a customs officer may also examine abandoned goods or goods not in the possession of any person in a customs controlled area.

G. Coming Into Force

Clause 18 indicates that the bill comes into force on a day to be determined by order of the Governor in Council.

COMMENTARY

The *Customs Act* is a linking legislation between duties and tariffs paid by importers under the *Customs Tariff* and security and safety legislation under various other Acts. **The Canada Border Services Agency (CBSA) enforces the *Customs Act*.** Comments on the bill by the transportation industry have focused on the new provisions expanding the powers of officers in customs controlled areas and increasing border security. For example, the Greater Toronto Airports Authority (GTAA) encourages the passing of the bill so that airport security will be improved.⁽¹¹⁾

The advance information requirements proposed by the bill are intended to improve risk assessment of imported goods at the border. Combined with the expanded search powers of officers, this may lead to decreased amounts of dangerous counterfeit goods entering Canada through customs-controlled areas.⁽¹²⁾ The changes made to the valuation of imported goods may also decrease the number of disputes regarding the calculation of duties.⁽¹³⁾ This may also increase revenues obtained from duties if the value of imported goods is more likely to be adjusted upward as a result of the proposed changes in the valuation provisions.⁽¹⁴⁾

Debate at second reading in the Senate highlighted that the “incorporation by reference” provision in clause 17 contained an exemption from publication in the *Canada Gazette* for materials incorporated by reference in any forthcoming regulation regarding advance information requirements.⁽¹⁵⁾

(11) See “GTAA applauds proposed Customs Act amendments,” *Canada NewsWire*, 15 February 2008.

(12) See Iain Marlow, “Dangerous fake goods cross border unchallenged; Agency has no power to seize items but fears over Chinese imports could change that,” *Toronto Star*, 2 July 2007.

(13) For an examination of the issues involved in determining duties based on a purchase in Canada, see *Cherry Six Ltd. v. Canada (Border Services Agency)* (2005) 10 T.T.R. (2d) 527 (C.I.T.T.) and *Ferragamo U.S.A. Inc. v. Canada (Border Services Agency)* (2 March 2007), Doc. AP-2005-053 (C.I.T.T.).

(14) See the *Valuation for Duty Regulations*, SOR/86-792, SOR/95-14 and SOR/97-443; and see Canada Border Services Agency, Memorandum D13-3-1, “Methods of Determining Value for Duty,” 19 April 2001, at <http://www.cbsa-asfc.gc.ca/publications/dm-md/d13/d13-3-1-eng.pdf>.

(15) Senate, *Debates*, 2nd Session, 40th Parliament, 25 February 2009, p. 251, http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/012db_2009-02-25-E.pdf. In the House of Commons during debate at second reading it was stated that, “[i]ncorporation by reference, as this process is called, can help simplify the regulatory process and is often used to incorporate material of a technical nature” (4 May 2009, p. 3018), <http://www2.parl.gc.ca/content/hoc/House/402/Debates/050/HAN050-E.PDF>. An example of material that could be incorporated by reference are international standards published by the International Standards Organization. Please note that the “incorporation by reference” provision applies to all regulations enacted under the *Customs Act*.

According to testimony by the CBSA on 30 March 2009 at the Standing Senate Committee on National Security and Defence, the bill is expected to improve advance information reporting requirements⁽¹⁶⁾ to allow the CBSA to detect unknown or high-risk shipments, and will help combat internal conspiracies and organized crime at ports of entry by increasing the inspection powers of customs personnel.⁽¹⁷⁾ Debate and evidence heard at committee stage focussed on the size and location of customs-controlled areas, as well as advance information reporting requirements for ground transport carriers. Repeated at Senate committee stage was apprehension regarding the “incorporation by reference” provision and the lack of parliamentary scrutiny over incorporated material because of the *Canada Gazette* publication exemption. As a consequence, the Senate committee deleted a portion of clause 17 of the bill.⁽¹⁸⁾

In the House of Commons at second reading the debate focussed on the effect of the bill on cross-border Canada–US trade. After second reading on 5 May 2009 the bill was referred to the House of Commons Standing Committee on Public Safety and National Security and was passed without amendment by the committee on 26 May 2009. Debates at third reading in the House of Commons raised additional issues, such as solicitor–client privilege and the new inspection powers of customs officials in customs-controlled areas, trade protectionism, the interception of contraband,⁽¹⁹⁾ and privacy concerns over the collection of information by the CBSA.

(16) This is known as the “eManifest” program, which is part of a larger Advance Commercial Information program. After implementation of the “eManifest” program, all transport carriers will be required to provide the CBSA with electronic information in advance of the arrival of commercial cargo at a port of entry. For more information see Canada Border Services Agency, *eManifest*, <http://www.cbsa-asfc.gc.ca/prog/manif/menu-eng.html>.

(17) Senate, Standing Committee on National Security and Defence, *Evidence*, 2nd Session, 40th Parliament, 30 March 2009, pp. 3:11–3:12 (Deirdre Kerr-Perrott, Vice-President, Innovation, Science and Technology, CBSA), http://www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/defe-e/03cv-e.htm?Language=E&Parl=40&Ses=2&comm_id=76.

(18) Senate, Standing Committee on National Security and Defence, *Second Report*, 2nd Session, 40th Parliament, 31 March 2009, <http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/defe-e/rep-e/rep02mar09-e.htm>. Proposed subsection 164.1(2) was deleted, and subsection 164.1(1) was renumbered section 164.1.

(19) These include counterfeit goods and weapons such as guns.