

Connector Article: Legal Assessment of Duty-Free Tobacco Regulations under International Trade Laws

R Y A N H A L L

I. INTRODUCTION

The article by Pei-Kan Yang examines the issue of banning duty-free tobacco as debated among delegates to the Framework Convention on Tobacco Control (FCTC) because it would be a detriment to trade and fiscal interests.¹ Further, Yang tries to examine trade-related issues of regulating duty-free sales of tobacco products, with particular emphasis on its consistency with international trade laws.

This piece will connect the article written by Pei-Kan Yang, and its focus on the regulations of duty-free tobacco at the international level, to Canada, and more specifically Manitoba. Additionally, this piece will examine what regulations are enacted in Canada surrounding duty-free tobacco, and how these regulations relate to the thesis of the article by Yang.

Duty-free tobacco products are regulated nationally by the government of Canada, which thereby controls the importation of these products into Manitoba. This differs from the World Health Organization's (WHO) FCTC is the operating standard. The FCTC is the first treaty negotiated under the auspices of the WHO. It holds countries to the highest standards of health in addressing addictive substances, by asserting the importance of demand-reduction strategies.² The WHO utilizes price adjustments, tax,

¹ Health experts tend to support a total ban on duty-free sales of tobacco products because of its impact on tobacco control. See below footnote.

² *World Health Organization Framework Convention on Tobacco Control*, June 16, 2003, 2302 UNTS 166 art 6.2 at 8 (entered into force 27 February 2005).

limitation of smoke exposure, regulating advertising, packaging, product disclosure, and even education in attempts to lower the demand for tobacco products by consumers.³ Further, it also addresses the illicit trade in tobacco products, including sales to minors, and tried to support economically viable alternatives.⁴ These types of regulatory activities have been implemented in Canada, which this paper will discuss in detail below. We will further discuss how these regulations apply in Manitoba.

II. DUTY FREE TOBACCO IN CANADA

The taxation of tobacco products is used as a factor in attempting to deter consumption. Simultaneously, this has the effect of producing government revenue. This raises the question as to why then the Government of Canada allows for the sale of duty-free tobacco, thereby forfeiting this valuable revenue and deterrence tool.

A. What is duty free?

The Canada Border Services Agency (CBSA) licenses duty-free operators, which sell goods to travelers who are leaving Canada. Duty-free shops are located at 53 land crossing and international airport locations across Canada.⁵ They sell goods free of certain duties and taxes which otherwise apply to goods sold in Canada.⁶ Duty-free shops in Canada are intended only for customers who are in the act of leaving Canada, and any goods purchased duty-free must be immediately exported.⁷ The CBSA oversees duty-free shops, ensuring that the purchasing of duty-free goods is done so lawfully, and immediately exported.⁸ Section 3(1) of the *Duty Free Shop Regulations*⁹ states that “that the goods sold in the duty-free shop are for immediate

³ *Ibid.*

⁴ *Ibid.*

⁵ Government of Canada, “Duty Free Shops” (29 April 2021), online: Canada Border Services Agency <<https://www.cbsa-asfc.gc.ca/import/dfs-bht-eng.html>> [<https://perma.cc/VMS8358M>].

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* at para 3.

⁹ Passed under the authority of the Customs Act R.S.C., 1985, c. 1.

exportation only and must be reported under the Act if they are returned to Canada.”¹⁰ But, products can be purchased duty free from other countries while entering Canada as well, but the CBSA limits these importations.

The CBSA provides a guide for travelers as to how much tobacco they are able to bring with them crossing borders. They advise that if you bring in tobacco products that exceed your personal exemption amount as specified, then you will be required to pay the regular duty and taxes.¹¹ Additionally, such violators will be subject to any provincial or territorial levies that apply on the excess amount.¹² Duty-free tobacco is categorized as either “stamped” or “unstamped,” and has associated rules depending on this designation. Stamped tobacco products are those that are marked “duty paid Canada droit acquitté” having “duty paid” labeled in both English and French.¹³ These tobacco products are sold at duty-free stores, and the CBSA allows travelers who have been away from Canada for more than 48 hours to import one unit of tobacco duty-free: up to 200 cigarettes, 50 cigars, or 200 grams of manufactured tobacco.¹⁴ Unstamped tobacco products are those that are not labelled “duty paid Canada droit acquitté.”¹⁵ A special duty rate is applied to these types of tobacco products. There is a limit of 5-units in the quantity of tobacco products that may be imported if not packaged or stamped.¹⁶ One unit consists of any one of the quantities listed above.

B. Regulations in Canada

Within Canada, the regulation of duty-free imports is controlled by the Government of Canada, through the *Customs Act*. As discussed previously, the CBSA oversees duty-free shops to ensure that the purchase and transportation of duty-free products is done lawfully and consistent with the *Customs Act*. Section 17(1) of the *Customs Act* tells us that imported goods

¹⁰ *Duty Free Shop Regulations*, SOR/86-1072, s.3(1).

¹¹ Government of Canada, “Declare: A guide for residents returning to Canada (Tobacco products)” (2 May 2022), online: Canadian Border Services Agency <https://www.cbsa-asfc.gc.ca/travel-voyage/declare-eng.html#_s8g> [https://perma.cc/72JT-RK4V].

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid* at para 5.

¹⁵ *Ibid* at para 6.

¹⁶ *Ibid.*

are charged duties from the time of import until duties are paid or the charge is otherwise removed.¹⁷ In respects to Tobacco specifically, the *Excise Act*, section 42(1) states in part as follows:¹⁸

[d]uty is imposed on tobacco products manufactured in Canada or imported and on imported raw leaf tobacco at the rates set out in Schedule 1 and is payable

- (a) in the case of tobacco products manufactured in Canada, by the tobacco licensee who manufactured the tobacco products, at the time they are packaged; and
- (b) in the case of imported tobacco products or raw leaf tobacco, by the importer, owner or other person who is liable under the Customs Act to pay duty levied under section 20 of the Customs Tariff or who would be liable to pay that duty on the tobacco or products if they were subject to that duty.

Duty-free is a way around these federal taxes normally applied to imported tobacco. Yang displays worry in the article that duty-free is a way around these taxes, which are intended to be a tool to discourage smoking. The author argues that it seems to be a moral contradiction by the government of Canada that people are able to be exempt tobacco from customs duties, excises tax and value added tax (VAT).¹⁹ Canada uses the following strategies in discouraging smoking (a major health risk): imposing age limits on buying duty-free cigarettes, prescribing an allowance for personal imports of duty-free cigarettes, and applying excise taxes on tobacco products sold in tax- or duty-free stores, etc.²⁰

C. Analysis

In Pei-Kan Yang's article, the author characterizes duty-free trade as a general term which includes three types of transactions—purchasing duty-free products for the purpose of “exportation,” “in transit use” or

¹⁷ *Customs Act*, *supra* note 9, s 17(1).

¹⁸ *The Excise Act*, S.C. 2002, c. 22, s 42(1).

¹⁹ The main value added taxes in Canada (and, combined, the rough equivalent to the Value Added Tax, or VAT in Europe) is the Goods and Services Tax, Provincial Sales Tax or equivalent (in certain provinces and territories), and the Harmonized Sales Tax (in certain provinces, which generally replaces both of the prior taxes).

²⁰ Pei-Kan Yang, “Legal Assessment of Duty-Free Tobacco Regulations under International Trade Laws” (2022) MLJ 3942.

“importation.”²¹ Duty-free sales refers to purchasing products for “exportation” and “in transit use” while duty-free importation focuses on the importation of these goods. The government of Canada provides regulations and legislation on each of these areas. Yang contends that the “exportation” rationale should not apply to the “importation” of duty-free products by international travelers, but instead, the reason for allowing importation of duty-free products falls under the main consideration of personal use by international travelers.²² Yang believes that steps need to be taken in respect to the importation of duty-free tobacco. As it is put in the article, “Instead of a total elimination of duty-free privilege, imposing a series of restrictive measures can be an alternative policy choice to regulate duty-free sales of tobacco products.”²³ A mix of qualitative and quantitative restrictions could be the proper approach to restricting the allowance of duty-free tobacco products on the international level, but it seems Canada has already taken this approach. With strict restrictions on what tobacco quantities can be brought into Canada duty-free, as well as various forms of “non-price regulations” on the control over duty-free sales of tobacco products, including packaging, labeling and age limitation for cigarette buyers, as examples.²⁴

III. DUTY FREE TOBACCO IN MANITOBA

Manitoba is able to levy taxes provincially consistent with the Customs Act. The “Tobacco Tax” applies to cigarettes and all other tobacco products including up to \$65 per carton of cigarettes, \$5 per cigar, and 27.5 cents per gram of raw leaf tobacco.²⁵ In accordance with The Tobacco Tax Act, “a person may possess the following amounts of tobacco products that are not

²¹ *Ibid* at 64.

²² *Ibid* at 64-65.

²³ *Ibid*.

²⁴ *Ibid*. See also, World Health Org., Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products), FCTC/COP3(10), UNWHAOR, 3rd sess, (2008) at 8.

²⁵ The Government of Manitoba, “Tobacco Tax” online: *Manitoba: Taxes Administered* <<https://www.gov.mb.ca/finance/taxation/taxes/tobacco.html#:~:text=The%20Tobacco%20Tax%20applies%20to,maximum%20tax%20%245.00%20per%20cigar>> [<https://perma.cc/B4FX-R6S3>].

marked or stamped for sale in Manitoba when they enter Manitoba from another province or from outside Canada: One carton of cigarettes (200 cigarettes), and 200 grams (7 ounces) of fine cut tobacco, and 50 cigars or cigarillos.”²⁶ Tobacco in excess of these amounts become subject to the Manitoba “tobacco tax” and “retail sales tax,” which is required to be paid upon entry into Manitoba.²⁷ The Tobacco Tax Act of Manitoba says in section 20.1(2) that:

[s]ubject to the approval of the Lieutenant Governor in Council, the minister may, on behalf of Her Majesty in right of Manitoba, enter into an agreement with the Government of Canada with respect to the administration and enforcement in the province of this Act in respect of tobacco that is brought or caused to be brought into the province by a purchaser, or delivered in the province to a purchaser, from outside Canada.²⁸

Additionally, section 20.1(3) reads as follows:²⁹

A purchaser shall at the time he or she brings tobacco or causes tobacco to be brought into, or receives delivery of the tobacco in, the province

- (a) make such report to the agent for enforcement as that agent for enforcement shall require with respect to the tobacco;
- (b) produce or forward to the agent for enforcement a receipt or other evidence, if any, in respect of the acquisition of tobacco that is a cigar; and
- (c) pay the tax payable in respect of the tobacco to the agent for enforcement.

But, if the tax payable in respect of the tobacco and the expenses relating to its detention are not paid within 60 days, as set out by subsection 20.1(5), the tobacco is forfeited to Her (now His) Majesty in right of Manitoba.³⁰ But, these taxes do not apply as long as travelers import tobacco in a way consistent with the *Customs Act*.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *The Tobacco Tax Act*, C.C.S.M. 2021, c. T80, s 20.1(2).

²⁹ *Ibid.*

³⁰ *Ibid* at s 20.2(6).

IV. CONCLUSION

To conclude, there are many layers of relevant legislation at both the federal and provincial levels when dealing with the importation of duty-free tobacco products. Taxes on tobacco products not only support government revenue, but they are meant to deter tobacco consumption. The article displays this how duty-free tobacco seemingly undermines these important fiscal and policy goals. This allowance for travelers to import products without the application of taxes allow for the consumption of products that could be harmful without any deterrence effect.