



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-019

Bauer Nike Hockey Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, May 18, 2006*

*Corrigendum issued
Friday, May 19, 2006*

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IN THE MATTER OF an appeal heard on February 1, 2006, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated June 2 and August 2, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

BAUER NIKE HOCKEY INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Elaine Feldman
Elaine Feldman
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 1, 2006

Tribunal Members: Pierre Gosselin, Presiding Member
James A. Ogilvy, Member
Elaine Feldman, Member

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Clerk of the Tribunal: Valérie Cannavino

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STATEMENT OF REASONS

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from decisions of the President of the Canada Border Services Agency (CBSA), dated June 2 and August 2, 2005, under subsection 60(4) of the *Act*.

2. The decisions concerned Bauer[®] Supreme[®] goalie pads (the goalie pads) that were imported between January 20, 2003, and August 9, 2004, by Bauer Nike Hockey Inc. (Bauer Nike) under tariff item No. 9506.99.90 of the schedule to the *Customs Tariff*² as chest protectors. The CBSA reclassified the goalie pads under tariff item No. 9506.99.50 as shin-guards or waist, thigh and hip protective equipment. Bauer Nike appealed, taking the position that the goalie pads should be classified under tariff item No. 9506.99.90 as other sports equipment or under tariff item No. 9506.99.40 as leg pads for cricket. Therefore, the issue is whether the goalie pads are properly classified under tariff item No. 9506.99.50 or should be classified under tariff item Nos. 9506.99.90 or 9506.99.40.

3. The relevant portions of the *Customs Tariff* are as follows:

...	
95.06	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in the Chapter; swimming pools and paddling pools.
...	
9506.99.40	---Leg pads and bats for cricket
9506.99.50	---Shin-guards and elbow or shoulder pads excluding those for football; Waist, thigh and hip protective equipment
...	
9506.99.90	---Other
...	

EVIDENCE

4. The CBSA chose not to call any witnesses. Bauer Nike called two witnesses: Mr. Brian Shikatani and Mr. Jean-François Laperrière. Mr. Shikatani has been a product designer in Bauer Nike's Goal Division since 1990. Mr. Laperrière, an engineer, is Bauer Nike's Director of Protective Equipment Development.

5. Mr. Shikatani was qualified as an expert in the design and production of the goalie pads. Mr. Laperrière was qualified as an expert in the development of shin-guards. Their expert reports were filed before the hearing, and their credentials were reviewed before they gave oral evidence.

6. At the hearing, the CBSA objected to qualifying these witnesses as experts because they were employed by Bauer Nike. It also argued that expert evidence was not necessary to assist the Tribunal in this case. However, the Tribunal was satisfied that the criteria to admit the testimony of Mr. Shikatani and Mr. Laperrière as expert evidence were met. Their testimony was relevant, they were properly qualified to give the expert evidence in question, and there was no exclusionary rule present. Although both witnesses

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

were employed by Bauer Nike, their testimony was straightforward and competent, and the Tribunal did not detect any bias in it. Further, in the absence of any other testimony, their expert evidence was crucial to assist the Tribunal in understanding the nature of the goalie pads and shin-guards.

7. In Mr. Shikatani's expert view, which was supported by a brief instructional video, the goalie pads are mainly designed with goaltending styles and the protection of the net in mind. Protection of the goalie is secondary. Shin-guards would not cover as much of the net. Rather, the purpose of shin-guards is to protect the player. Mr. Shikatani added that the terms "goalie pads" and "shin-guards" are not interchangeable in the hockey industry and that their only correlation is that they are both worn on the leg.

8. According to Mr. Shikatani's testimony, the only relationship between the goalie pads and waist, thigh and hip protective equipment is that they both protect a portion of the thigh and this was insufficient to qualify the goalie pads as waist, thigh and hip protective equipment.

9. Mr. Shikatani further testified that goalie pads evolved from cricket pads and were modified to enhance protection of the goal.

10. In Mr. Laperrière's expert view, the principal function of shin-guards is to protect the legs and knees of hockey players. In addition, he confirmed that the terms "shin-guards" and "goalie pads" are not interchangeable.

11. Mr. Laperrière also testified that hockey pants, rather than other hockey equipment, would constitute waist, thigh and hip protective equipment.

12. Bauer Nike also submitted extensive documentary evidence from multiple sources within the hockey industry.

ARGUMENT

13. Bauer Nike argued that tariff item No. 9506.99.50 deals with unrelated items, i.e. (1) shin-guards and (2) waist, hip and thigh protective equipment, which are separated by a semi-colon. Bauer Nike noted that *McGoldrick's Canadian Customs Tariff "Harmonized System"*³ indicates that "[s]emicolons separate unrelated portions of the text of the HS classification description."⁴

14. Bauer Nike argued that, in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,⁵ the goalie pads are not properly classified under tariff item No. 9506.99.50 because they are neither shin-guards nor waist, hip and thigh protective equipment.⁶

15. Bauer Nike argued that the goalie pads should be classified under tariff item No. 9506.99.90 as other equipment for ice hockey, pursuant to Rule 3 (b) of the *General Rules*, by virtue of their essential character.⁷

3. (Montréal, Qc: McMullin Publishers), 2002.

4. *Transcript of Public Argument*, 1 February 2006, at 8; Appellant's Supplementary Book of Authorities, Tab 1.

5. *Supra*, note 2, schedule [*General Rules*].

6. *Transcript of Public Argument*, 1 February 2006, at 11, 24-25.

7. Appellant's Brief, paras. 29, 97.

16. In support of its arguments, Bauer Nike made the following points:
- Goalie pads evolved from cricket leg pads, not soccer shin-guards.⁸ Despite changes in materials, goalie pads have not changed in their essential character as cricket leg pads.⁹
 - The equipment for a goalie is quite different in design, functionality and purpose from the equipment for other hockey players. Goalie pads are designed to protect the wearer's foot/ankle, shin/calf, knee and thigh, but also to guard the hockey net (the goal), hence the name "goalie pads".¹⁰ Shin-guards are designed to shield the front part of the leg and the knee.¹¹ The rules of hockey dictate that shin-guards must be worn underneath the uniform and cannot be used by goalies; whereas goalie pads cannot be used by other players and are simply strapped to the goalie's legs.¹²
 - In the sport of hockey, goalie pads are referred to as leg guards or leg pads.¹³ No dictionary definitions or translations of "shin-guards" make reference to leg pads, leg guards or goalie pads.¹⁴ "Shin-guards" is not the ordinary, common, popular or primary term to describe goalie pads in the dictionaries or in hockey shops—or within the hockey industry, which is the test established by the Federal Court of Appeal.¹⁵
 - In a previous appeal, the Attorney General of Canada agreed that chest protectors for motocross were not shoulder pads under tariff item No. 9506.99.50, but rather other equipment used in sports under tariff item No. 9506.99.90. If chest protectors, even though they protect shoulders, are classified under tariff item No. 9506.99.90, then goalie pads, even though they protect shins, should also be classified under tariff item No. 9506.99.90.¹⁶
 - Goalie pads are not mentioned by name or function in tariff item No. 9506.99.50.¹⁷ According to a basic principle of statutory interpretation, a court should not accept an interpretation that requires the insertion of extra wording where there is another acceptable interpretation that does not require any additional wording.¹⁸ This means that the term "leg pads", which is covered under tariff item No. 9506.99.40, cannot be added to the interpretation of tariff item No. 9506.99.50.¹⁹ By defining goalie pads as shin-guards, the CBSA has given unreasonable prominence to the shin over all of the other body parts that they cover and ignores completely the protection of the net.²⁰
 - Goalie pads are 8 to 25 times the price of shin-guards, which confirms that they are not like goods.²¹

8. *Ibid.*, paras. 37-45.

9. *Ibid.*, paras. 96-99.

10. *Ibid.*, paras. 15, 46-54, 100-111.

11. *Ibid.*, paras. 79-81.

12. *Ibid.*, paras. 82-86.

13. *Ibid.*, paras. 55-64.

14. *Ibid.*, paras. 65-78.

15. *Ibid.*, paras. 87-95.

16. *Ibid.*, paras. 122-23.

17. *Ibid.*, paras. 112-21.

18. *Ibid.*, para. 129.

19. *Ibid.*, paras. 124-28, 130.

20. *Ibid.*, paras. 131-33.

21. *Ibid.*, para. 155.

- Parliament restricted tariff item No. 9506.99.50 to goods that have a more specific function than goalie pads, which protect parts other than the shin, such as the knee, foot, ankle and thigh, as well as the net.²²
- Since goalie pads cannot be classified under tariff item No. 9506.99.50 as shin-guards for ice hockey, they should be classified under tariff item No. 9506.99.90 as other equipment for ice hockey.²³
- Even if the function of protecting the net and protecting the wearer were equally essential, it would be contrary to Tribunal jurisprudence to select one over the other; therefore, the most appropriate tariff classification would still be No. 9506.99.90.²⁴

17. Alternatively, Bauer Nike argued that goalie pads should be classified under tariff item No. 9506.99.40 as leg pads for cricket, by virtue of Rule 4 of the *General Rules*. Tariff item No. 9506.99.40 does not specify that the goods covered must be used in the sport of cricket.²⁵ Further, the goalie pads are essentially cricket pads slightly modified for use in hockey and, by their design and function, they are more akin to leg pads for cricket than shin-guards.²⁶

18. For its part, the CBSA argued that the semi-colon in the text of tariff item No. 9506.99.50 denotes a descriptive relationship between shin-guards and waist, hip and thigh protective equipment. One is not necessarily absolutely descriptive of the other, but the second does qualify the first.²⁷

19. The CBSA argued that the goalie pads are properly classified under tariff item No. 9506.99.50 by virtue of Rule 1 of the *General Rules*. In this respect, the CBSA made the following points:

- The term “shin-guards” used in tariff item No. 9506.99.50 is inclusive of all the areas of the body protected by goalie pads. The Tribunal indicated in a case²⁸ involving hockey pants that these areas of the body need not be listed in the tariff item for it to apply.
- The goalie pads are protective equipment. Goalies wear them instead of shin-guards to protect the shin, knee and part of the thigh from injury, not to protect the goal itself.²⁹ As such, they are “waist, thigh and hip protective equipment” under tariff item No. 9506.99.50.
- It does not matter that only goalies wear the goalie pads and that other hockey players wear shin-guards. Hockey skates and hockey sticks are classified under the same tariff item regardless of whether they are used by goalies or other hockey players.³⁰

20. The CBSA also argued that it would be untenable to classify the goalie pads under tariff item No. 9506.99.40 as leg pads for cricket because modern day cricketers do not use the goalie pads, and hockey equipment and cricket equipment are each specifically provided for in the tariff nomenclature.³¹

22. *Ibid.*, paras. 134-39, 158-59.

23. *Ibid.*, para. 142.

24. *Ibid.*, paras. 160-64.

25. *Ibid.*, para. 146.

26. *Ibid.*, paras. 143-52.

27. *Transcript of Public Argument*, 1 February 2006, at 42.

28. *Tropport Acquisitions Inc. v. Deputy M.N.R.* (29 August 1997), AP-96-007 (CITT).

29. Respondent’s Brief, paras. 19-25.

30. *Ibid.*, paras. 26-27.

31. *Ibid.*, paras. 28-29.

DECISION

21. Section 10 of the *Customs Tariff* provides that tariff classification shall be determined in accordance with the *Canadian Rules*³² and the *General Rules*. Rule 1 of the *Canadian Rules* provides as follows: "... the classification of goods in the tariff items of a subheading or of a heading shall be determined according to ... the General Rules ...". The *General Rules* are comprised of six rules structured in cascading form. Rule 1 of the *General Rules* provides as follows: "... classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes ...". If the classification of goods cannot be determined in accordance with Rule 1 of the *General Rules*, then regard must be had to Rule 2, etc.

22. Pursuant to Rule 1 of the *General Rules*, the Tribunal finds that the goalie pads are covered by tariff item No. 9506.99.90. In the Tribunal's view, the classification description associated with tariff item No. 9506.99.40 is too specific to cover the goalie pads. To fall under that tariff item, the classification description would have to read "or similar items" or have other such language. In this case, it is tariff item No. 9506.99.90 that expressly covers "Other" items.

23. The Tribunal also finds that the semi-colon in tariff item No. 9506.99.40 serves to separate two individual and distinct descriptions: first, shin-guards and, second, waist, thigh and hip protective equipment. It finds that the goalie pads do not fall within either of these two descriptions.

24. It is clear that the goalie pads entered as physical evidence do not resemble the shin-guards entered as physical evidence. In contrast to the shin-guards, the goalie pads cover the leg completely from the skate boot to mid-thigh. The goalie pads are bulky and much heavier than the shin-guards. Based on their physical characteristics, the goalie pads and shin-guards could not reasonably be seen as interchangeable.

25. This is reflected in the terminology used in the hockey industry. There is no confusion within the hockey industry between the equipment understood to fall under the definition of "shin-guard" and that understood to fall under the definition of "goalie pad".³³ Further, the marketing literature submitted by Bauer Nike clearly distinguishes between the two items.

26. The price of the two items also differs considerably. The goalie pads are several times the price of shin-guards. The Tribunal accepts Bauer Nike's submission that this is an indication that the goalie pads are not shin-guards.

27. In addition, the rules governing hockey treat the items separately. They prescribe that shin-guards are to be worn under stockings. By contrast, the rules stipulate that goalie pads are to be worn outside the uniform. The rules also specify the maximum width of goalie pads.

28. The second part of the description associated with tariff item No. 9506.99.40 ("waist, thigh and hip protective equipment") is also too specific to cover the goalie pads, which protect only a portion of the thigh and do not cover the waist and hip. Further, the goalie wears specially designed hockey pants to protect the waist, thigh and hips. Accordingly, the goalie pads cannot fall under this tariff item.

32. *Supra*, note 2, schedule.

33. Appellant's Brief, Tab 3 at 1; Mr. Laperrière's expert report, Tab 2.

29. Given that the classification has been determined according to the terms of the headings, in accordance with Rule 1 of the *General Rules*, the Tribunal need not consider the essential character of the goalie pads or their kinship to other goods.

30. Therefore, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Elaine Feldman
Elaine Feldman
Member

IN THE MATTER OF an appeal heard on February 1, 2006, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated June 2 and August 2, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

BAUER NIKE HOCKEY INC.

Appellant

AND

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

Respondent

CORRIGENDUM

In the English version of the statement of reasons for the decision in the above matter, at paragraphs 22, 23 and 28, the references to tariff item No. 9506.99.40 should be to tariff item No. 9506.99.50.

By order of the Tribunal,

Hélène Nadeau
Secretary