



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-016

R. A. Hayes

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, June 15, 2011*

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IN THE MATTER OF an appeal heard on April 13, 2011, pursuant to 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 March 17, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

R. A. HAYES

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Vancouver, British Columbia
Date of Hearing: April 13, 2011

Tribunal Member: Jason W. Downey, Presiding Member

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Research Director: Audrey Chapman

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PARTICIPANTS:**Appellant**

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Counsel/Representative

R. A. Hayes

RespondentPresident of the Canada Border Services
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WITNESS:Lisa Tanasichuk
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Mr. R. A. Hayes with the Canadian International Trade Tribunal (Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA) dated March 17, 2010, with respect to a request for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether certain clothing manufactured by inmates in the United States (the goods in issue) are properly classified as goods manufactured or produced wholly or in part by prison labour, i.e. prohibited goods, under tariff item No. 9897.00.00 of the schedule to the *Customs Tariff*,² as determined by the CBSA.

PROCEDURAL HISTORY

3. On October 23, 2009, Mr. Hayes requested an advance ruling concerning the tariff classification of the goods in issue.³

4. On December 1, 2009, the CBSA issued an advance ruling classifying the goods in issue as prohibited goods under tariff item No. 9897.00.00, pursuant to section 43.1 of the *Act*.⁴

5. On February 9, 2010, Mr. Hayes requested a re-determination of the tariff classification of the goods in issue pursuant to subsection 60(2) of the *Act*.⁵

6. On February 19, 2010, the CBSA issued a preliminary determination to inform Mr. Hayes that it maintained its decision to classify the goods in issue as prohibited goods under tariff item No. 9897.00.00, pursuant to subsection 136(1) of the *Customs Tariff*.⁶

7. On March 17, 2010, the CBSA issued a decision pursuant to subsection 60(4) of the *Act*, confirming that the goods in issue are prohibited and are properly classified under tariff item No. 9897.00.00.⁷

8. On June 16, 2010, Mr. Hayes filed a notice of appeal with the Tribunal, pursuant to section 67 of the *Act*.⁸

9. On August 16, 2010, Mr. Hayes filed his brief with the Tribunal.⁹

10. On October 15, 2010, the CBSA filed its brief and book of authorities with the Tribunal.¹⁰

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

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

3. Tribunal Exhibit AP-2010-016-01.

4. *Ibid.*; Tribunal Exhibit AP-2010-016-07A, tab 5.

5. Tribunal Exhibit AP-2010-016-01.

6. *Ibid.*

7. *Ibid.*; Tribunal Exhibit AP-2010-016-07A, tab 6.

8. Tribunal Exhibit AP-2010-016-01.

9. Tribunal Exhibit AP-2010-016-05.

10. Tribunal Exhibit AP-2010-016-07A.

11. On October 26, 2010, Mr. Hayes requested an oral hearing from the Tribunal.¹¹
12. On December 13, 2010, the Tribunal informed the parties that an oral hearing in this matter would take place in Vancouver, British Columbia, on February 15, 2011. On December 22, 2010, the Tribunal informed the parties that a new date had to be set for administrative reasons. On January 27, 2011, the Tribunal informed the parties that the new date for the hearing would be April 13, 2011.¹²
13. An oral hearing was held on April 13, 2011, in Vancouver. Mr. Hayes called Ms. Lisa Tanasichuk, Manager, Regional Operations (Pacific), CORCAN, as a witness. CORCAN is a rehabilitation program of the Correctional Service of Canada.

GOODS IN ISSUE

14. The goods in issue are described as work wear, made from 100 percent cotton denim, and are marketed under the brand name "Prison Blues". The Prison Blues clothing line comprises several articles, including blue jeans, yard coats, jackets, work shirts, sweatshirts, T-shirts, hats, etc.
15. There is no dispute that the goods in issue are manufactured by prison labour. Specifically, they are manufactured by inmates of the Eastern Oregon Correctional Institution in the United States under the company name "Oregon Corrections Enterprises".¹³
16. Physical exhibits representative of the goods in issue were filed with the Tribunal at the hearing.

RELEVANT PROVISIONS OF THE CUSTOMS TARIFF

17. Tariff item No. 9897.00.00 reads as follows:

Chapter 98

SPECIAL CLASSIFICATION PROVISIONS - NON COMMERCIAL

...

II. -PROHIBITION PROVISIONS

9897.00.00 ...

Goods manufactured or produced wholly or in part by prison labour;

...

18. The relevant chapter note to Chapter 98 provides as follows:
1. The provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a). Goods which are described in any provision of this Chapter are classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

11. *Ibid.*

12. Tribunal Exhibit AP-2010-016-13; Tribunal Exhibit AP-2010-016-14; Tribunal Exhibit AP-2010-016-17.

13. Tribunal Exhibit AP-2010-016-01; Tribunal Exhibit AP-2010-016-07A at 3.

19. Section 132 of the *Customs Tariff* provides as follows:

132. (1) The Governor in Council may, on the recommendation of the Minister, make regulations

...

(m) for the purposes of tariff item No. 9897.00.00,

(i) amending that tariff item to exclude goods manufactured or produced wholly or in part by prison labour from that tariff item, or prescribing the conditions under which such goods may be excluded from that tariff item,

...

20. Section 136 of the *Customs Tariff* provides as follows:

(1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.

(2) Subsection 10(1) does not apply in respect of goods referred to in subsection (1).

21. Section 1 of the *Prison Manufactured or Produced Goods Regulations, 1998*¹⁴ provides as follows:

EXCLUSION

1. Tariff item 9897.00.00 of the *Customs Tariff* is amended to exclude goods manufactured or produced wholly or in part by prison labour, on the condition that the goods are imported solely for personal use and not for sale or for any business or occupational use, by:

(a) a non-resident of Canada; or

(b) a resident of Canada, reporting the goods at the time of his or her return to Canada.

ANALYSIS

22. The legislative and regulatory framework set out above clearly indicates that the importation into Canada of goods manufactured abroad in whole or in part by prison labour is prohibited unless the goods are imported solely for personal use. Any importation of goods for “sale or for any business or occupational use” is prohibited (the prohibition).

23. Mr. Hayes indicated that the goods in issue are “. . . manufactured wholly in the [E]astern Oregon State Correctional Facility in Pendleton, Oregon . . .” and that “[i]nmates working in this facility are paid industry standard wages”¹⁵

24. As such, the goods in issue are goods manufactured wholly by prison labour.

25. Mr. Hayes indicated that he travelled to Oregon, where he purchased samples of various “Prison Blues” articles of clothing directly from Oregon Corrections Enterprises, and then brought those purchases back to Canada. There is no record to indicate that a declaration of those goods was made either at the time of importation or thereafter.

26. At the hearing, Mr. Hayes stated that, when he imported these goods, they were for personal use. Customs duty and excise tax, if applicable, do not appear to have been paid at the time of importation or thereafter. These are the goods that were shown to the Tribunal at the hearing as exhibits.

14. S.O.R./98-41.

15. Tribunal Exhibit AP-2010-016-05 at 2. This statement was confirmed at the hearing. See *Transcript of Public Hearing*, 13 April 2011, at 20-23.

27. At the hearing, Mr. Hayes specified that his intentions go beyond strict personal use. He stated that he wants to use the various “Prison Blues” articles purchased as samples when calling upon retailers in Canada that might be interested in placing orders with him for such goods.¹⁶ He explained that, if he could generate interest among such retailers, he would purchase a larger quantity of items (an initial order of \$15,000 to \$20,000) that he would then distribute commercially. In short, and in Mr. Hayes’s own words, he is a “budding entrepreneur”¹⁷ who is “. . . trying to start [his] own import/export company”¹⁸

28. To allay any confusion, it is irrelevant, for the purposes of tariff classification, that the end purchasers of the goods in issue, after retail sale, may in fact use them for personal purposes or not. What is of importance, rather, is that Mr. Hayes, as the prospective importer of record, clearly intends to import the goods in issue for a larger-scale commercial purpose, i.e. resale in Canada.

29. As such, Mr. Hayes is attempting to carry on the business of selling, in Canada, imported goods manufactured by foreign prison labour. As indicated above, the importation of such goods into Canada for commercial purposes such as Mr. Hayes’s is prohibited. Put otherwise, Mr. Hayes’s business model is inoperable because he cannot legally have access to the product that he is seeking to sell. Mr. Hayes indicated that Oregon Corrections Enterprises warned him that this very issue could be a problem.¹⁹

30. Mr. Hayes maintained that the prohibition should not apply to his business model. In support of his position, he argued that “[t]he spirit and intent of [the legislative prohibition], therefore, clearly must be to prohibit and restrict the commercial use of ‘slave labour’ practices or ‘no cost’ labour.” To this end, he pointed out that inmates producing the goods in issue “. . . are paid industry standard wages”²⁰

31. Mr. Hayes argued that “. . . doing business with Oregon Corrections Enterprises is identical as doing business with CORCAN”, that the goods in issue are “. . . not so offensive as to be prohibited, such as in the case of prohibited weapons or pornography”, that their commerce “. . . leads to lower rates of inmate recidivism” and that “[t]he Government of Canada is supposed to be sensitive to both cross border crime and crime prevention initiatives and the creation of liberal trade through agreements such as NAFTA, as well as the creation of employment and small business initiatives such as [his] own”.²¹

32. The Tribunal notes that the foregoing views are more properly characterized as policy considerations rather than legal grounds of appeal and may, in any event, be erroneous. The Tribunal adds that it does not doubt Mr. Hayes’s honest business intentions and notes that he indicated that he would have hoped to donate some proceeds of his business to a charitable organization that helps inmates transition into society after release.

33. Put simply, in appealing this matter, Mr. Hayes is effectively asking the Tribunal to overturn the prohibition. That is a relief that the Tribunal is not empowered to grant.

16. *Transcript of Public Hearing*, 13 April 2011, at 31-35.

17. *Ibid.* at 35.

18. *Ibid.* at 31.

19. *Ibid.* at 27.

20. Tribunal Exhibit AP-2010-016-05 at 2. Mr. Hayes testified that he visited the Oregon Corrections Enterprises facility in Pendleton and was of the view that it complied with U.S. legislation regarding prisoners’ pay. *Transcript of Public Hearing*, 13 April 2011, at 20-23. Ms. Tanasichuk described in general terms the compensation received by CORCAN inmates. *Transcript of Public Hearing*, 13 April 2011, at 53-54.

21. Tribunal Exhibit AP-2010-016-05 at 1-2.

34. Parliament has entrusted the Tribunal with the mandate of applying the *Customs Tariff*. As it stands, the *Customs Tariff* contains the prohibition. Accordingly, the Tribunal must uphold the prohibition when the conditions of its application are found to be present, such as in the circumstances of this matter.

35. The relief sought by Mr. Hayes would require an amendment to tariff item No. 9897.00.00 or to the *Manufactured or Produced Goods Regulations, 1998*. This is a matter for Parliament or the Governor in Council, not the Tribunal.²² In this regard, the Tribunal notes the letter addressed to Mr. Hayes by the Honourable James A. Flaherty, Minister of Finance, dated June 18, 2010, which reads as follows:

As a matter of government policy, tariff item No. 9897.00.00 of the *Customs Tariff* prohibits the entry into Canada of goods manufactured or produced wholly or in part by prison labour. Similar prohibitions apply in most countries, including the United States. Our Government does not intend to alter this policy in the foreseeable future.²³

DECISION

36. The appeal is dismissed.

Jason W. Downey _____

Jason W. Downey
Presiding Member

22. Parliament has the power to amend legislation. As well, under subparagraph 132(1)(m)(i) of the *Customs Tariff*, the Governor in Council, on the recommendation of the Minister of Finance, has the power to amend the *Manufactured or Produced Goods Regulations, 1998*, or to make further regulations with respect to tariff item No. 9897.00.00 in order to amend that tariff item to exclude goods manufactured or produced wholly or in part by prison labour from that tariff item or to prescribe the conditions under which such goods may be excluded from that tariff item.

23. Tribunal Exhibit AP-2010-016-022.