

# Canada: Enforcement update on Canada's Import Prohibition on forced and child labor

## Background

The Canada Border Services Agency (CBSA) has recently provided public comments to industry professionals concerning its enforcement plans related to the importation of goods suspected to be mined, manufactured, or produced with forced or child labor.

Canada implemented an import prohibition on goods mined, manufactured or produced wholly or in part by forced labor as of 1 July 2020, when Parliament amended the **Customs Tariff** (tariff item no. 9897.00.00) to reflect Canada's new obligations under the USMCA (**Article 23.6: Forced or Compulsory Labor**). The tariff item is subject to further amendment as of 1 January 2024, where the prohibition on the importation of goods mined, manufactured, or produced wholly or in part by child labor will come into force (together with the forced labor import prohibition, the **Import Prohibition**).

The CBSA is charged with enforcing the Import Prohibition. To date, there has been limited enforcement of the same (1 detained shipment, later released), which has created ambiguity on the CBSA's enforcement position. In early November, Doug Band, a Director General at the CBSA, made clarifying comments on the CBSA's enforcement plans for the Import Prohibition at a trade and customs conference in Montréal, Québec.

## Operation of the Import Prohibition

The Import Prohibition is integrated into the Canadian customs framework under its Customs Tariff. The CBSA enforces the Import Prohibition by relying on its authority under section 58(1) of the Customs Act (the **Act**) to determine the tariff classification of goods at or before the time they are accounted for under the Act. If goods are found to be mined, manufactured, or produced with forced or child labor, the CBSA will determine the tariff item of those goods under **heading 98.97**.

**Figure 1: Excerpt from Chapter 98, Customs Tariff (Canada), which will soon be amended to include a prohibition on goods mined, manufactured, or produced wholly or in part by child labor**

Tariff Item	SS	Description of Goods	Unit of Meas.	MFN Tariff	Applicable Preferential Tariffs
9897.00.00 continue	00	Reprints of Canadian copyrighted works and reprints of British copyrighted works that have been copyrighted in Canada;  Goods manufactured or produced wholly or in part by prison labour;  Goods mined, manufactured or produced wholly or in part by forced labour;  Smoke screen apparatus for use on motor vehicles or on vessels of Chapter 89;			

When accounting for goods imported into Canada, an importer is obligated to declare the applicable tariff item on its Canada Customs Form B3. If the tariff classifications of imported goods are not determined by the CBSA at the time of import, they are deemed to be determined as declared and accounted for on Form B3 (Section 58(2)).



At this time, the CBSA has not stated whether it will rely on its authority under section 59 of the Act to re-determine, or further re-determine, the tariff classification of imported goods at any time within four years after the date of their initial determination/deemed determination.

## FAQs

### How does the CBSA target goods for inspection?

The CBSA works with the [Labor Program](#) of Employment and Social Development Canada to identify goods at a high risk of being mined, manufactured, or produced with forced or child labor.

The CBSA publicly stated that their current "commodities of interest," which may be subject to being detained and inspected on suspicion of forced or child labor, are as follows:

- Cotton and cotton products produced/manufactured in the People's Republic of China, specifically in the Xinjiang region.
- Tomatoes and tomato paste.
- Polysilicon (a raw material commonly used in the production of solar cells).

### What can an importer expect if their goods are detained on suspicion of forced or child labor?

Where the CBSA has a reasonable suspicion that goods are mined, manufactured, or produced with forced labor (or child labor, as of 1 January 2024), those goods will be detained and referred to a Senior Trade Compliance Officer (STCO) for a tariff classification determination. Importers will receive notice from the CBSA that these goods are detained and are subject to a determination concerning tariff classification regarding allegations of forced and/or child labor.

The STCOs will send a request for information (RFI) to the importer, who will be required to provide documentation illustrating their complete supply chain (e.g., origin, procurement, and transportation of all materials (including raw materials) from suppliers). The CBSAs position is that an importer's supply chain includes each stage of production, including the mining/manufacture of raw materials. Forced or child labor in any tier of a supply chain will make a good subject to the Import Prohibition. In the CBSAs words: "There is no flexibility with the tariff. Forced labor can be anywhere in the supply chain, and if it is anywhere, the good is prohibited from entry into Canada."

The information requested will include purchase orders, commercial invoices, Bills of Lading, and proof of payment. The CBSA will also likely submit RFIs on the importer's supply chain, including information on the various tiers of the supply chain, the third parties involved in each tier, and the supporting information related to each tier of the supply chain (e.g., invoicing, transportation records, and production records). An importer can also submit other relevant documentation to show their due diligence, such as audit results and inventory records.

The CBSAs expectation is that importers will respond to and complete RFIs within 30 days. While goods are detained throughout the investigation process, an importer is responsible for associated storage fees. Once the STCO makes a determination, the CBSA is required to provide notice of the determination to the importer without delay, including the rationale on which it is made.

### What is the applicable legal standard applied by the CBSA?

Once detained, an importer has a burden to prove on the civil standard of "a balance of probabilities" that the goods are not mined, manufactured, or produced with forced or child labor (i.e., greater than fifty percent). A STCO will make a determination based on all documentation submitted by an importer.

Mr. Band stated that the CBSA does require "sufficient evidence" to trigger the Import Prohibition and that the evidentiary bar is "high and blunt." Typically, the CBSA will rely on visual inspections to determine compliance with Canadian customs laws, especially from the perspective of tariff classification. However, the fact that a visual inspection likely does not reveal evidence of forced or child labor poses challenges



for the CBSA. In commenting on the single shipment detained on the suspicion of forced labor by the CBSA to date, Mr. Band stated that the importer was able to furnish information about their supply chain which permitted the CBSA to make a determination that, on a balance of probabilities, the goods were not mined, manufactured or produced with forced labor. Accordingly, the goods at issue were not subject to the Import Prohibition.

Determinations by an STCO will be made on a case-by-case basis, which the CBSA refers to as "shipment-specific risking", for each shipment intercepted by the CBSA, based on available supporting evidence and analysis.

### **Will the CBSA issue guidance regarding how to meet this legal standard?**

In January 2021, the CBSA revised its departmental memorandum on Goods manufactured or produced part by prison or forced labor ("[Memorandum D9-1-6](#)") to provide guidance to importers on what to submit if the CBSA detains goods on suspicion of forced labor. This version of Memorandum D9-1-6 required an importer to provide documentation illustrating their complete supply chain: "the entire system of producing and delivering the goods from the initial stage of sourcing raw materials to the delivery of the product in Canada," including documentation showing the origin, purchase, and transportation of all materials used to manufacture the impugned goods. Subsequent revisions to Memorandum D9-1-6 in May 2021 removed this guidance.

Currently, the May 2021 version of Memorandum D9-1-6 is marked as "under review"; however, Mr. Band stated that the CBSA is finalizing its review (the draft guidance is currently before the [CBSAs Trade and Recourse Committee](#) for comments), and he expects new guidance to be published in Q1 2024. Moreover, he expects that the guidance will continue to be updated as Canada continues to implement further legislation on forced and child labor.

### **What happens if an importer fails to meet this legal standard?**

If an importer cannot show on a balance of probabilities that their goods are not mined, manufactured or produced with forced or child labor, they will receive a notice advising them of the determination of tariff classification. The goods will be classified under heading 98.97 and must be exported from Canada, abandoned to the CBSA, or the importer must appeal the determination.

### **How may an importer appeal a determination?**

An importer can seek a re-determination of the tariff classification by the President of the CBSA within a specified legislative period (90 days) under section 60 of the Act. This is an appeal "de novo," where the President considers all information submitted by the importer in their Notice of Appeal and supporting evidence (including any additional information not before the STCO in the first instance). However, the appeal process may result in lengthy proceedings, with the potential of a further appeal to the Canadian International Trade Tribunal (section 67) and possibly an appeal to the Federal Court of Canada (section 68).

### **May the CBSA detain goods that it presumes are mined, manufactured, or produced with forced or child labor?**

Unlike the United States' [Uyghur Forced Labor Prevention Act](#), in Canada, there is no rebuttable presumption that goods mined, manufactured, or produced wholly or in part in Xinjiang, or any other geographic area, are mined, manufactured or produced with forced or child labor.

The Act authorizes the CBSA to assess each shipment on its own merits. In 2022, the Federal Court [dismissed an application](#) where the applicants argued that CBSA has the authority to implement a "presumptive determination" on all goods imported from Xinjiang on the basis that the goods have an increased likelihood of being produced using forced labor. In responding to the application, the CBSA argued that goods must be classified on a case-by-case basis consistent with the harmonized system on



which tariff items are based and that it can only classify goods that are identified and imported (or intended to be imported) – not hypothetical goods.

In practice, this means that an importer achieving success with respect to one detained shipment, will not guarantee that future shipments will not also be detained on the suspicion of forced or child labor. Practically, it is possible that an importer may have detained goods at various ports at various points in time. It remains unclear if the CBSA will tie information with respect to an importer's supply chain with its business number to avoid delays or multiple detained shipments on suspicion of forced or child labor.

We note that Bill S-204, **An Act to amend the Customs Tariff (goods from Xinjiang)**, which seeks to prohibit the importation of goods manufactured or produced wholly or in part in Xinjiang, remains before Parliament. There is no clear indication of whether this will become law.

### **Will the CBSA issue guidance, given the definition of "child labor" under the Customs Tariff?**

We note that child labor is defined under the Customs Tariff as "labor or services provided or offered to be provided by persons under the age of 18 years **and** that:

- (a) Are provided or offered to be provided in Canada under circumstances that are contrary to the laws applicable in Canada.
- (b) Are provided or offered to be provided under circumstances that are mentally, physically, socially or morally dangerous to them.
- (c) Interfere with their schooling by depriving them of the opportunity to attend school, obliging them to leave school prematurely, or requiring them to attempt to combine school attendance with excessively long and heavy work.
- (d) Constitute the worst forms of child labor as defined in article 3 of the Worst Forms of Child Labor Convention, 1999, adopted at Geneva on 17 June 1999."

The CBSA has not stated whether it plans to issue guidance on the type of documentation and policies it expects an importer to furnish to respond to goods being detained on suspicion of child labor, especially if a supply chain incorporates juvenile labor (labor provided by persons under the age of 18) in its supply chain.

### **If goods are subject to a finding that they are mined, manufactured, or produced by forced or child labor in a foreign jurisdiction – what are my obligations as an importer?**

Mr. Band noted that it is considering this issue but did not presently have a response.

Under section 32.2 of the Customs Act, importers have an obligation to correct a tariff classification within 90 days of having specific information regarding the tariff classification that gives an importer "**reason to believe**" that a declaration is incorrect. This **may** create an obligation on the importer to submit corrections if the same goods subject to a foreign forced or child labor finding were imported into Canada. Whether corrections must be submitted requires a factual and legal analysis, and importers are advised to contact legal counsel for advice if this issue arises. Additionally, importers have other obligations that may be triggered by a forced or child labor finding in a foreign jurisdiction, such as the obligation to disclose the importation of prohibited goods (section 15, Customs Act) or to alert purchasers of the prohibited goods (section 155, Customs Act).



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