



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-065

R. Atkinson

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, November 20, 2013*

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 DECISION 5

IN THE MATTER OF an appeal heard on August 22, 2013, 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 November 21, 2012, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

R. ATKINSON

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 22, 2013

Tribunal Member: Daniel Petit, Presiding Member

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on November 21, 2012, by the President of the Canada Border Services Agency (CBSA) with respect to a request for re-determination pursuant to subsection 60(4) of the *Act*.

2. Mr. Atkinson attempted to import a customized UMAREX Walther P38 series airsoft pistol (the good in issue).² It reproduces the so-called “U.N.C.L.E. Special” used in the 1960’s television series “The Man from U.N.C.L.E.” The good in issue was detained by the CBSA on May 30, 2012, when it entered Canada,³ on the basis of a determination that it is a prohibited device, specifically, that it is a replica of a Walther P38 semi-automatic handgun (a Walter P38),⁴ and therefore that it is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.⁵ Goods of tariff item No. 9898.00.00 are prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*.

3. On June 12, 2012, Mr. Atkinson filed a request for re-determination under subsection 60(1) of the *Act*.⁶ On November 21, 2012, under subsection 60(4) of the *Act*, the CBSA confirmed its decision.⁷

4. On January 7, 2013, Mr. Atkinson filed the present appeal with the Tribunal.⁸

5. The Tribunal decided to hear the matter by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁹ The hearing was held on August 22, 2013.

6. The Tribunal examined both the good in issue¹⁰ as well as a Walther P38.¹¹

7. The CBSA filed a report¹² (the CBSA report) prepared by Superintendent Murray A. Smith of the Royal Canadian Mounted Police, which makes various observations concerning the good in issue, including the following: it measures 180 mm, weighs 480 g, has a magazine capacity of 12 + 1 rounds and shoots a 0.2 g BB pellet with a velocity of 265 feet per second; the slide, trigger and hammer are all functional; the markings “Walther P38” and “2807 km” appear on the left-hand side; the right-hand side is marked with the serial number “MG 742639”. The CBSA report concludes that the device resembles with near precision a Walther P38 manufactured by Carl Walther Waffenfabrik.

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

2. Exhibit AP-2012-065-10A, Vol. 1, tab A4.

3. *Ibid.*

4. Exhibit AP-2012-055-B-02.

5. S.C. 1997, c. 36.

6. Exhibit AP-2012-065-10A, tab A2.

7. *Ibid.*, tab A1.

8. *Ibid.*, tab A3.

9. S.O.R./91-499.

10. Exhibit AP-2012-065-B-01.

11. Exhibit AP-2012-055-B-02.

12. Exhibit AP-2012-065-10B, tab D2.

STATUTORY FRAMEWORK

8. Subsection 136(1) of the *Customs Tariff* provides as follows:

The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.	L'importation des marchandises des n ^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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9. In this appeal, the Tribunal must determine whether the good in issue is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*, which provides as follows:

Firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms, in this tariff item referred to as prohibited goods	Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions prohibées et éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes automatiques, désignés comme « marchandises prohibées » au présent numéro tarifaire, [...]
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For the purposes of this tariff item,

Pour l'application du présent numéro tarifaire :

. . .

[...]

(b) “automatic firearm”, “licence”, “prohibited ammunition”, “prohibited device”, “prohibited firearm”, prohibited weapon, restricted firearm and “restricted weapon” have the same meanings as in subsection 84(1) of the *Criminal Code*

b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « dispositif prohibé », « munitions prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du Code criminel [...]

10. When dealing with the classification of goods under tariff item No. 9898.00.00, subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System*¹³ do not apply. Furthermore, note 1 to Chapter 98 provides that “[g]oods 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. According to the *Customs Tariff*, a “prohibited device” includes a replica firearm, as defined in subsection 84(1) of the *Criminal Code*.

12. Subsection 84(1) of the *Criminal Code*¹⁴ defines “replica firearm” as follows:

“replica firearm” means any device [requirement 1] that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and [requirement 2] that itself is not a firearm, [requirement 3] but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

« réplique » Tout objet, [condition 2] qui n'est pas une arme à feu, [condition 1] conçu de façon à en avoir l'apparence exacte — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence. La présente définition [condition 3] exclut tout objet conçu de façon à avoir l'apparence exacte d'une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence.

13. S.C. 1997, c. 36, schedule.

14. R.S.C. 1985, c. C-46.

13. The word “firearm”, for the purpose of this tariff item, has the same meaning as “firearm” found in section 2 of the *Criminal Code*, that is:

“firearm” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.	« arme à feu » Toute arme susceptible, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, d’infliger des lésions corporelles graves ou la mort à une personne, y compris une carcasse ou une boîte de culasse d’une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.
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14. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

“antique firearm” means (a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or (b) any firearm that is prescribed to be an antique firearm.	« arme à feu historique » Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement.
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15. Therefore, to be considered a replica firearm, the good in issue must fulfill three requirements: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not itself be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

ANALYSIS

16. Mr. Atkinson’s position is that the good in issue cannot be prohibited from importation as a “replica firearm” because it was customized prior to importation. He argued that therefore it does not resemble exactly or with near precision a Walther P38. He further submitted that the muzzle velocity that the CBSA found for the good in issue cannot be correct because it differs from the manufacturer’s specifications. Mr. Atkinson also claimed that many replica firearms available for sale in Canada more closely resemble real firearms than the good in issue.

17. The CBSA submitted that the good in issue is made by Maruzen Company, a well-known manufacturer of replica airsoft guns. As such, the CBSA argued that it is a “replica firearm” because it is designed or intended to exactly resemble, or to resemble with near precision, a Walther P38. According to the CBSA’s submission, the physical dimensions, and overall appearance, of the good in issue are nearly identical to those of a Walther P38. The CBSA submitted that the good in issue is not a firearm and that it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. It argued that Mr. Atkinson’s argument with respect to muzzle velocity is not relevant to these proceedings.

18. The Tribunal finds that Mr. Atkinson failed to demonstrate that the good in issue is not properly classified under tariff item No. 9898.00.00.¹⁵ Rather, the evidence shows that the three requirements of the definition of “replica firearm” have been met: (1) the good in issue was designed to exactly resemble, or resemble with near precision, a firearm; (2) it is not a “firearm”; and (3) it is not an “antique firearm”. The three requirements are examined in turn.

19. Regarding requirement 1, Mr. Atkinson essentially argued that the degree of customization to which the good in issue was subjected to prior to importation is sufficient to negate any resemblance to a Walther P38. The Tribunal disagrees. To be sure, the good in issue has a barrel length of 68 mm, which is 2 mm shorter than the 70 mm barrel of the Walther P38; the former has a slightly different grip than the latter; the former also has a “birdcage”-type barrel enhancement; and the internal firing mechanisms are different due to the different ammunition used.¹⁶ These minor differences aside, the Tribunal is satisfied that the good in issue was designed to resemble a Walther P38, if not exactly, at least with near precision.

20. Put differently, there is an unmistakable resemblance in size, shape, general appearance and overall visible features between the good in issue and the Walther P38, and any customization can only be described as minor or superficial.¹⁷ Similarities include the profile of the slide and frame, the trigger mounting point, the profile of the grip frame, the profile of the slide frame, the external hammer, the mounting point for the grips, the shape and position of the take down lever, the extractor, the slide stop, the safety switch, the rear sight, the slide grip and the magazine latch. The overall exterior shape of the frame and slide and the placement of the various mechanical components and their mounting points on the good in issue are nearly identical to those of the Walther P38. Furthermore, the CBSA report states that the extractor on the good in issue “serves no mechanical purpose in a 6 mm BB calibre device” and that “[t]he sole function of the extractor would be to simulate the external appearance of the [Walther P38]”.¹⁸ Close up, or at a distance of a few feet, the two are very similar.

21. All these facts considered, the Tribunal finds that there is clear evidence showing intent to imitate or resemble with near precision the design of the Walther P38.

22. Regarding requirement 2, the Tribunal found that the good in issue is not a firearm because the evidence on file is to the effect that it has a muzzle velocity below that which is considered sufficient to inflict injury. In that respect, the Tribunal prefers the CBSA’s evidence based on actual testing of the good in issue, as opposed to Mr. Atkinson’s reference to a different muzzle velocity set out in the manufacturers’ literature.

15. Under subsection 152(3) of the *Customs Act*, the appellant bears the burden of demonstrating that the classification of the imported good at issue was incorrect and thereby that it is not a prohibited weapon. See *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21.

16. CBSA report. The good in issue also comes with various accessories (barrel extension, scope, shoulder stock and extended magazine) that can be used with the body of the device so as to mimic the “U.N.C.L.E. Special”. For the purposes of customs classification, the Tribunal is of the view that these accessories are not determinative because the body of the device can be used with or without them. As such, the exercise of determining any resemblance with a real firearm must be conducted first and foremost without regard to such optional-use component accessories.

17. The determination of resemblance is primarily a visual exercise; see, for example, *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT), p. 3.

18. CBSA report.

23. Regarding requirement 3, there was no allegation that the good in issue is an “antique firearm”, or a reproduction of an antique firearm, on the basis of the fact that production of the Walther P38 commenced subsequent to 1898, which is the year after which a firearm is no longer eligible to be considered an “antique firearm”. The Tribunal is therefore satisfied the good in issue is not an “antique firearm”. Consequently, that condition is met.

24. The good in issue having met the three conditions of a “replica firearm” as set out in subsection 84(1) of the *Criminal Code*, the Tribunal concludes that it is a prohibited device of tariff item No. 9898.00.00.

25. Finally, the Tribunal would like to make some final remarks. First, to recall, as it has in the past, that the purported presence of other potentially illegal devices in the Canadian marketplace (such as those referred to by Mr. Atkinson) can have no bearing upon the Tribunal’s determination of whether or not the good in issue is a prohibited weapon as defined in the *Criminal Code*.¹⁹ Second, that the Tribunal has no reason to doubt that Mr. Atkinson is an honest law-abiding Canadian who had no bad motive when he tried to acquire the good in issue; however, despite the financial and other possible losses incurred from being deprived of his “U.N.C.L.E. Special”, the Tribunal must reiterate that it applies the letter of the law irrespective of any possible equitable considerations, such as those raised by Mr. Atkinson. Third, so as to avoid frustrations such as the many that Mr. Atkinson has expressed since being deprived of the good in issue, the Tribunal takes this opportunity to encourage importers to seek guidance from the CBSA, prior to importation, so as to ascertain whether a given product can be imported into Canada or under what circumstances.

DECISION

26. The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

¹⁹ See, for example, *R. Gustas v. Deputy Minister of National Revenue* (14 January 1997), AP-96-006 (CITT).