



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-069

M. Olson

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, November 22, 2013*

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IN THE MATTER OF an appeal heard by way of written submissions on August 22, 2013,
pursuant to section 67 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 January 11, 2013, with respect to a request for re-determination pursuant to
subsection 60(4) of the *Customs Act*.

BETWEEN

M. OLSON

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

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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M. Olson	
Respondent	Counsel/Representatives
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Mr. M. Olson pursuant to subsection 67(1) of the *Customs Act*¹ from a re-determination of tariff classification made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

PROCEDURAL HISTORY

2. Mr. Olson purchased three airsoft rifles from Airsoft Megastore, an online store, at the end of 2012.² On the basis of the muzzle velocity of 516 feet per second (fps) indicated on the packaging of one of the airsoft rifles, the importation of that airsoft rifle was permitted by the CBSA. The other two airsoft rifles were however detained by the CBSA.

3. On December 6, 2012, pursuant to section 58 of the *Act*, the CBSA classified the two detained airsoft rifles under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*³ as prohibited devices.⁴

4. On December 17, 2012, pursuant to subsection 60(1) of the *Act*, Mr. Olson requested a re-determination of the tariff classification with regard to the two detained airsoft rifles.⁵

5. On January 11, 2013, pursuant to subsection 60(4) of the *Act*, the CBSA re-affirmed its original determination with regard to the tariff classification of the two detained airsoft rifles.⁶

6. On February 26, 2013, Mr. Olson filed his appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 67 of the *Act*.⁷

GOODS IN ISSUE

7. The goods in issue are two airsoft rifles. The first, electric-powered and manufactured in the People's Republic of China (China), is the AGM-033. Its packaging indicates a muzzle velocity of 240 fps.⁸ The second, also electric-powered and manufactured in China, is the BI-3881M. Its packaging also indicates a muzzle velocity of 240 fps.⁹

ANALYSIS

Legal Framework

8. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System)

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Exhibit AP-2012-069-04 at 1, 12.
3. S.C. 1997, c. 36.
4. Exhibit AP-2012-069-06A at tab 2.
5. Exhibit AP-2012-069-06A at tab 3.
6. Exhibit AP-2012-069-06A at tab 4.
7. Exhibit AP-2012-069-06A at tab 5.
8. Exhibit AP-2012-069-06A at tab 6.
9. Exhibit AP-2012-069-06A at tab 7.

developed by the World Customs Organization (WCO).¹⁰ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

9. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*¹¹ and the *Canadian Rules*¹² set out in the schedule. Section 136 of the *Customs Tariff* is a provision within which the classification of imported goods, which would typically occur pursuant to subsection 10(1) of the *Customs Tariff*, is indeed otherwise provided for. That section reads as follows:

<p>136.(1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.</p>	<p>136.(1) L'importation des marchandises des n^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.</p>
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<p>(2) Subsection 10(1) does not apply in respect of goods referred to in subsection (1).</p>	<p>(2) Le paragraphe 10(1) ne s'applique pas aux marchandises visées au paragraphe (1).</p>
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10. Thus, goods of a number of tariff items, including tariff item No. 9898.00.00, are prohibited from importation. In addition, in making it clear that the systemic usage of the *General Rules* is foreclosed with regard to goods properly classified within its ambit, Note 1 to Chapter 98 reads as follows:

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.

Tariff Classification of the Goods in Issue

11. At the time of importation, the CBSA contended that the goods in issue were properly classified under tariff item No. 9898.00.00 as “prohibited devices” and were thus within the ambit of section 136 of the *Customs Tariff*. Tariff item No. 9898.00.00 provides that it covers the following:

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

12. Tariff item No. 9898.00.00 then goes on to list a number of exclusions before further providing as follows:

For the purposes of this tariff item,

- (a) “firearms” and “weapon” have the same meaning as in section 2 of the Criminal Code;
- (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.

10. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

11. S.C. 1997, c. 36, schedule [*General Rules*].

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

13. Subsection 84(1) of the *Criminal Code*¹³ provides that a “prohibited device” includes, *inter alia*, “a replica firearm”, which is itself defined in the *Criminal Code* as follows:

“replica firearm” means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, 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, qui n’est pas une arme à feu, 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 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.
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14. Thus, the definition of “replica firearm” within the *Criminal Code* is in essence a three part test. To be considered a replica firearm, a good must (a) be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (b) not itself be a firearm; and (c) must not be designed or intended to resemble, or resemble with near precision, an antique firearm.

15. At the time of importation, the CBSA contended that the goods in issue met all three parts of the above test. With regard to the first part of the test, the CBSA argued that the Tribunal has held in the past that resemblance, as it pertains to the definition of “replica firearm” in the *Criminal Code*, is a visual exercise.¹⁴ The CBSA asserted that, with regard to size, shape and general appearance, the goods in issue are designed to resemble the M16 and M4 automatic rifles.¹⁵

16. With regard to the second part of the test, the CBSA argued that the goods in issue are not actual firearms. Section 2 of the *Criminal Code* defines “firearm” as follows:

“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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17. The CBSA indicated that the current policy of the Royal Canadian Mounted Police (RCMP) with regard to determining whether airsoft rifles are firearms for the purposes of the *Criminal Code* is whether they possess a projectile velocity of 366 fps, since rifles capable of firing projectiles at that speed or higher have been determined to be “. . . capable of causing serious bodily injury or death . . .”¹⁶ The CBSA further indicated that, at the time of importation, the packaging of the goods in issue identified the goods as possessing muzzle velocities of 240 fps.¹⁷

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

14. Exhibit AP-2012-069-06A at paras. 29-31. In this regard, the CBSA makes reference to *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT).

15. Exhibit AP-2012-069-06A at paras. 29-31.

16. Exhibit AP-2012-069-06A at para. 34.

17. Exhibit AP-2012-069-06A at para. 35.

18. With regard to the third part of the test, the CBSA argued that the goods in issue are not designed or intended to resemble antique firearms, since such firearms are defined within subsection 84(1) of the *Criminal Code* as firearms, *inter alia*, “manufactured before 1898”, and the goods in issue resemble rifles manufactured in 1964 and 1984.¹⁸

19. Thus, on the basis of the reasoning that the goods in issue meet the definition of “replica firearm”, making them prohibited devices within the meaning of the *Criminal Code*, and further, on the basis of the fact that tariff item No. 9898.00.00 covers prohibited devices as defined in the *Criminal Code*, the CBSA concluded that the goods in issue were properly classified under that tariff item and were prohibited from importation.

20. For his part, Mr. Olson did not indicate or submit an alternative tariff classification for the goods in issue. Mr. Olson contended that the muzzle velocities of the goods in issue are well in excess of 366 fps, making them “firearms” and thus not “replica firearms” within the meaning of the *Criminal Code*.

21. Subsequent to the filing of its brief on June 3, 2013, the CBSA received a report from the RCMP regarding the muzzle velocities of the goods in issue. The report concluded that the AGM-033 possesses a muzzle velocity of 407 fps and that the BI-3881M possesses a muzzle velocity of 400 fps.¹⁹ Both muzzle velocities are above the threshold of 366 fps stipulated by way of policy with regard to the definition of “firearm”, thus meaning that the goods in issue are not “replica firearms” within the meaning of the *Criminal Code*. On the basis of that report, the CBSA rightly concluded that the goods in issue do not fall within the definition of “prohibited devices” and further concluded that they are thus not classifiable under tariff item No. 9898.00.00.²⁰

22. In light of the above, the CBSA submitted that the goods in issue should instead be classified under tariff item No. 9304.00.90 as other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of heading No. 93.07. However, the CBSA did not provide submissions with regard to the inclusion of “firearms” within tariff item No. 9898.00.00. Mr. Olson made no submissions on the proposed alternative classification²¹ and, further, made no submissions regarding the possibility that the goods in issue could remain classified under tariff item No. 9898.00.00 despite the new agreement between the parties regarding the inapplicability of the definition of “replica firearm”.

23. Notwithstanding this dearth of submissions, reference can be made by the Tribunal to the exemptions contained within tariff item No. 9898.00.00. One exemption, of particular note, reads as follows:

(d) any weapon that, under subsection 84(3) of the Criminal Code, is deemed not to be a firearm.

18. Exhibit AP-2012-069-06A at paras. 38, 39.

19. Exhibit AP-2012-069-10A at para. 6.

20. Exhibit AP-2012-069-10A at paras. 7, 9.

21. In making no submissions against the proposed alternative classification, the Tribunal considers Mr. Olson as being in silent agreement with the CBSA on the issue.

24. Paragraph 84(3)(d) of the *Criminal Code* provides as follows:

(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be firearms:

...

d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

(3) Pour l'application des articles 91 à 95, 99 à 101, 103 à 107 et 117.03 et des dispositions de la *Loi sur les armes à feu*, sont réputés ne pas être des armes à feu :

[...]

d) toute autre arme pourvue d'un canon dont il est démontré qu'elle n'est ni conçue ni adaptée pour tirer du plomb, des balles ou tout autre projectile à une vitesse initiale de plus de 152,4 m par seconde ou dont l'énergie initiale est de plus de 5,7 joules ou pour tirer du plomb, des balles ou tout autre projectile conçus ou adaptés pour atteindre une vitesse de plus de 152,4 m par seconde ou une énergie de plus de 5,7 joules.

25. It is noteworthy that 407 feet is equivalent to 124.05 metres and that 400 feet is equivalent to 121.92 metres. Thus, the goods in issue possess muzzle velocities below 152.4 metres per second, placing them within the exception to the definition of "firearm" contained in paragraph 83(3)(d) of the *Criminal Code* and, as a result, contained in tariff item No. 9898.00.00. Having thus been excluded from classification as "replica firearms" or as "firearms" of tariff item No. 9898.00.00, the goods in issue can be classified in accordance with the *General Rules*.

26. The only option before the Tribunal with regard to the classification of the goods in issue is tariff item No. 9304.00.90, and the Tribunal is indeed satisfied, pursuant to a consideration of the terms of that tariff item, that the goods in issue should be classified under tariff item No. 9304.00.90 pursuant to Rule 1 of the *General Rules*.

DECISION

27. The appeal is allowed.

Daniel Petit

Daniel Petit

Presiding Member