



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2011-012

R. Joschko

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Wednesday, December 14, 2011*

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IN THE MATTER OF an appeal heard on December 1, 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 April 5, 2011, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**R. JOSCHKO**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Pasquale Michael Saroli  
Pasquale Michael Saroli  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: December 1, 2011  
Tribunal Member: Pasquale Michael Saroli, Presiding Member  
Counsel for the Tribunal: Eric Wildhaber  
Manager, Registrar Office: Michel Parent  
Registrar Officer: Julie Lescom

**PARTICIPANTS:**

<b>Appellant</b>	<b>Counsel/Representative</b>
R. Joschko	R. Joschko
<b>Respondent</b>	<b>Counsel/Representative</b>
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision of the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether the CBSA properly classified an SW 737 WWII German Luftwaffe paratrooper gravity knife (the knife in issue) as a prohibited weapon under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*,<sup>2</sup> and, as such, prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.

### PROCEDURAL HISTORY

3. The knife in issue was detained by the CBSA on importation on December 9, 2010, and classified as a prohibited weapon under tariff item No. 9898.00.00.

4. On January 4, 2011, Mr. R. Joschko requested a re-determination of the CBSA's tariff classification of the knife in issue and, by extension, of its admissibility for importation into Canada.

5. On April 5, 2011, the CBSA issued a decision pursuant to section 60 of the *Act*, confirming that, in its view, the knife in issue was properly classified as a prohibited weapon under tariff item No. 9898.00.00 and was therefore prohibited from importation into Canada.

6. On May 26, 2011, Mr. Joschko filed an appeal of the CBSA's decision with the Tribunal pursuant to section 67 of the *Act*.

7. On September 15, 2011, the CBSA filed the expert report of Constable Rick McIntosh of the Ottawa Police Service, which describes the history, physical design and mechanical functionality of the knife in issue. Constable McIntosh's qualifications as an expert on knives were not contested by Mr. Joschko, and he was so recognized by the Tribunal for the purposes of the current proceedings.

8. The Tribunal decided to hold a hearing by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*,<sup>3</sup> which coincided with the preference expressed by Mr. Joschko.<sup>4</sup> The Tribunal held the hearing on December 1, 2011. On that date, the CBSA filed the knife in issue as a physical exhibit.

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

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

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

4. Tribunal Exhibit AP-2011-012-03 at para. 18.

**KNIFE IN ISSUE**

9. The knife in issue is an SW 737 WWII German Luftwaffe paratrooper gravity knife. The parties agree, and the Tribunal accepts, (i) that it measures approximately 15.24 cm (6 in.) in length in the closed position (i.e. with the blade retracted); (ii) that it has a single-edged stainless steel blade measuring 10 cm (approximately 4 in.); (iii) that there is a lever on the wooden handle that, when pressed, releases the blade, which falls into place and locks by force of gravity; (iv) that a spike measuring 8.5 cm (3.5 in.) pulls away from the side of the knife to a fully extended position at the base of the knife; and (v) that it has a carrying clip.<sup>5</sup>

**LEGAL FRAMEWORK**

10. The following are excerpts of the relevant legislative and regulatory provisions in this appeal.

11. 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 <sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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[Emphasis added]

12. Tariff item No. 9898.00.00 provides as follows:

Firearms, <i>prohibited weapons</i> , 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, <i>armes prohibées</i> , 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 [...].

[Emphasis added]

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5. Tribunal Exhibit AP-2011-012-05A at para. 3; Tribunal Exhibit AP-2011-012-03 at para. 7.

13. In this regard, the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*<sup>6</sup> includes the following:

- |  |  |
|--|--|
| <p>(a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or . . .</p> | <p>a) Couteau dont la lame s’ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche; [...].</p> |
|--|--|

## POSITIONS OF PARTIES

### Mr. Joschko

14. Mr. Joschko agreed with the CBSA that the knife in issue was a “. . . gravity knife . . .”,<sup>7</sup> although he subsequently submitted that it was more properly described as “. . . a [paratrooper’s] gravity survival tool.”<sup>8</sup>

15. He also implicitly acknowledged that, as a gravity knife, the knife in issue constituted a prohibited weapon when he stated the following: “This knife is a gravity knife and I believe I understand the intention of the prohibition.”<sup>9</sup>

16. However, Mr. Joschko requested that the Tribunal interpret the relevant legislation in a manner that afforded it discretion to allow the knife in issue to be imported given:<sup>10</sup>

- that it has historical and personal sentimental value;
- that it was destined for secure display as part of a small personal collection of wartime memorabilia;
- that it is not a stealth weapon comparable to modern gravity or switch-blade knives;
- that it is less dangerous than certain non-prohibited conventional knives in general use (e.g. steak knives); and
- that identical knives are readily available for purchase in Canada.

### CBSA

17. The CBSA claimed that the fact that the knife in issue was a “gravity knife” was not in dispute and was supported by the expert report of Constable McIntosh,<sup>11</sup> who personally inspected the knife in issue and concluded that “. . . the criteria [of paragraph 84(1)(a) of the *Criminal Code*] have been met.” In this regard, he explained that the knife in issue was designed for single-handed use and that it relied on inertia and/or the force of gravity to open. With specific reference to the manner in which the knife in issue is engaged, he noted the following: “I released the blade through the use of gravity and inertia. . . . By simply holding the Gravity Knife toward the ground and depressing the release lever, the blade is produced.”<sup>12</sup>

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

7. Tribunal Exhibit AP-2011-012-03 at para. 8.

8. Tribunal Exhibit AP-2011-012-07 at para. 2.

9. Tribunal Exhibit AP-2011-012-03 at para. 8.

10. *Ibid.* at paras. 8, 9.

11. Tribunal Exhibit AP-2011-012-05C.

12. *Ibid.*

18. The CBSA also submitted that its position was consistent with the definition of “gravity knife” approved by the American Knife & Tool Institute (AKTI)<sup>13</sup> and its own definition of that term in the CBSA’s customs memorandum<sup>14</sup> on the matter.<sup>15</sup>

19. The CBSA contended that, as a gravity knife described in the definition of “prohibited weapon” in paragraph 84(1)(a) of the *Criminal Code*, the knife in issue is properly classified under tariff item No. 9898.00.00.

20. Finally, the CBSA argued that it was not open to the Tribunal to allow the knife in issue to be imported, as requested by Mr. Joschko, as “[t]he [Tribunal] is not a court of equity and must apply the law and [customs] regime as it currently stands . . . [with] [c]onsiderations, such as intended use of a good, [being] irrelevant to the [Tribunal’s] classification of a good.”<sup>16</sup>

## ANALYSIS

21. In order to determine whether the knife in issue is properly classified under tariff item No. 9898.00.00 and therefore prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*, the Tribunal must determine whether it is captured by the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*, which provides as follows:

**84.** (1) In this Part,

...

“prohibited weapon” means

(a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or . . .

**84.** (1) Les définitions qui suivent s’appliquent à la présente partie.

[...]

« arme prohibée »

a) Couteau dont la lame s’ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche; [...].

22. As noted earlier, the parties agreed, at least initially, that the knife in issue was a “gravity knife”, although Mr. Joschko subsequently submitted that it was more properly described as “. . . a [paratrooper’s] gravity survival tool.”

13. Tribunal Exhibit AP-2011-012-05A at para. 16. The AKTI defines “gravity knife” as follows:

1. A specific type of knife as issued to World War II German paratrooper (Fallschirmjäger) units.
2. A folding knife in which the blade is held in the closed position by a latch mechanism released by a button on the handle of the knife and lacking some feature, such as a detent, spring over-center or other such mechanism which creates a bias toward closure.

14. Tribunal Exhibit AP-2011-012-05B, tab 14. Memorandum D19-13-2, “Importing and Exporting Firearms, Weapons and Devices” (23 June 2009), provides as follows:

22. Weapons that fall under paragraph (a) include the following:

...

(c) **Gravity Knife** – A gravity knife is a folding knife which may be opened automatically by force of gravity. The knife may be additionally controlled by a lever or button, but typically, applying pressure to such a device and pointing the knife downward will result in the knife’s blade releasing and locking into place.

15. Tribunal Exhibit AP-2011-012-05A at paras. 15-17.

16. *Ibid.* at para. 24.



23. The Tribunal's observations, from its own physical inspection of the knife in issue<sup>17</sup> during the hearing, are consistent with the physical and functional characteristics jointly identified by the parties, as discussed above.

24. The Tribunal's own inspection and testing of the knife in issue also confirmed the observations of Constable McIntosh as to both the physical design and functioning of the opening and closing mechanism and, in particular, of the fact that the blade, which is concealed within the body of the knife, is automatically released through force of gravity, by pointing the knife toward the ground and depressing a fulcrum-style lever at the top of the knife.

25. The Tribunal therefore finds that the knife in issue falls squarely within the ambit of paragraph 84(1)(a) of the *Criminal Code*.

26. On the basis of the foregoing analysis, the Tribunal finds that the knife in issue is properly classified as a prohibited weapon under tariff item No. 9898.00.00 and, as such, is prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.

27. With respect to the argument that identical knives are currently available for sale in Canada, the Tribunal refers to its decisions in *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency*<sup>18</sup> and *Romain L. Klaasen v. President of the Canada Border Services Agency*,<sup>19</sup> where the Tribunal explained that it is "... not a court of equity and must apply the law as it is",<sup>20</sup> that the fact of "... any previous shipments ... not intercepted by the CBSA or its predecessors is irrelevant"<sup>21</sup> and that "[t]he administrative action, or inaction, of the CBSA cannot change the law."<sup>22</sup>

28. Similarly, while the knife in issue may be of historical and sentimental value, and while there is no basis to question Mr. Joschko's claim that he is a responsible person who would treat the knife in issue strictly as part of his wartime memorabilia, these considerations can have no bearing upon the Tribunal's determination of whether the knife in issue is a "prohibited weapon" within the meaning ascribed to that term by the *Criminal Code*, as the disposition of that issue is based strictly on the physical description of the knife in issue.

## DECISION

29. For the foregoing reasons, the appeal is dismissed.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

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17. Tribunal Exhibit AP-2011-012-B-01.

18. (3 January 2002), AP-2000-059 (CITT) [*Ericksen*].

19. (18 October 2005), AP-2004-007 (CITT) [*Klaasen*].

20. *Ericksen* at 3.

21. *Klaasen* at 2.

22. *Ibid.* at 2.