



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-055

L. Lavoie

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, September 6, 2013*

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 DECISION 6

IN THE MATTER OF an appeal heard on August 6, 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 October 16, 2012, with respect to a request for a further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

L. LAVOIE

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 6, 2013
Tribunal Member: Daniel Petit, Presiding Member
Counsel for the Tribunal: Anja Grabundzija
Manager, Registrar Programs and Services: Michel Parent
Registrar Officer: Rosemary Hong

PARTICIPANTS:**Appellant**

L. Lavoie

Respondent

President of the Canada Border Services Agency

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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 October 16, 2012, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether two lower receivers (the goods in issue) imported by Mr. L. Lavoie are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² as prohibited devices, namely, replica firearms, as determined by the CBSA.

PROCEDURAL HISTORY

3. The goods in issue were detained by the CBSA on September 14, 2012 when they entered Canada,³ since the CBSA had determined that they were classified under tariff item No. 9898.00.00 as prohibited devices, namely replica firearms. On September 27, 2012, Mr. Lavoie sent the CBSA a request for re-determination under subsection 60(1) of the *Act*. On October 16, 2012, the CBSA confirmed, under subsection 60(4), that the goods in issue were classified under tariff item No. 9898.00.00 as prohibited devices and that their importation into Canada was prohibited.

4. On December 27, 2012, Mr. Lavoie appealed that decision to the Tribunal.

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*.⁴ The hearing was held on August 6, 2013.

6. The CBSA submitted the goods in issue into evidence,⁵ as well as a Colt receiver⁶ and a complete Colt carbine.⁷

7. The CBSA also filed a report⁸ prepared by Superintendent Murray A. Smith of the Royal Canadian Mounted Police (RCMP) and asked the Tribunal to recognize Mr. Smith as an expert in the field of identification and classification of firearms. Mr. Lavoie did not object this request. The Tribunal recognized Mr. Smith as an expert in the field of identification and classification of firearms.

GOODS IN ISSUE

8. The two goods in issue are identical in every respect. The parties agreed that they were designed to be installed on Western Arms, AGM and Jing Gong air guns. The goods in issue were imported separately from these rifles.

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

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

3. Exhibit AP-2012-055-10A, tab 6.

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

5. Exhibit AP-2012-055-B-01.

6. CMMG receiver, Mod 4SA, Cal. 223-5.56 mm, SA0537, Exhibit AP-2012-055-B-02.

7. Colt AR15A3 Tactical Carbine, Cal. 223, SER LBD020332, Exhibit AP-2012-055-B-03.

8. Exhibit AP-2012-055-16A, tab 1.

9. A logo appears on the right-hand side of the goods in issue, which Mr. Smith identified as the simplified version of the Knight's Armament Company logo, juxtaposed with the inscription "KNIGHT S ARMAMENT CO. VERO BEACH.FL. U.S.A." Another logo is found on the left-hand side, which Mr. Smith identified as the United States Marine Corps logo. This logo bears the inscriptions "MARINE ENV.M-4" and "5.56MM NATO USMC01141".

STATUTORY FRAMEWORK

10. 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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11. Tariff item No. 9898.00.00 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, but does not include the following:	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, sauf :
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...

[...]

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

d) les armes qui, conformément au paragraphe 84(3) du Code criminel, sont réputées ne pas être des armes à feu;

...

[...]

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 [...].

12. Subsection 84(1) of the *Criminal Code*⁹ provides that a prohibited device includes, in particular, a replica firearm, which is defined as follows:

<p>“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.</p>	<p>« 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.</p>
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13. Therefore, in order to determine whether the goods in issue are properly classified under tariff item No. 9898.00.00, the Tribunal must determine whether they are covered by the definition of the term “replica firearm” under subsection 84(1) of the *Criminal Code*. For a device to be considered a replica firearm, the following three conditions must be met:

- it is a device designed or intended to exactly resemble, or to resemble with near precision, a firearm;
- it must not be a firearm; and
- it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

14. In this regard, section 2 of the *Criminal Code* defines “firearm” as follows:

<p>“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.</p>	<p>« 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.</p>
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15. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

<p>“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.</p>	<p>« 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.</p>
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POSITIONS OF PARTIES

16. Mr. Lavoie argued that the goods in issue cannot be prohibited from importation as replica firearms because they are firearms. Mr. Lavoie submitted that this is due to the fact that he planned to install the goods in issue on air guns that qualify as firearms under the *Criminal Code*. In other words, according to

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

Mr. Lavoie, the goods in issue do not meet the second condition of the definition of a replica firearm, i.e. that the device itself must not be a firearm.

17. Mr. Lavoie submitted that a device becomes a firearm when its muzzle velocity reaches 366 ft/s. Mr. Lavoie noted that some vendors advertise that Western Arms, AGM and Jing Gong air guns shoot projectiles at velocities exceeding 366 ft/s or, at least, that they can be adjusted to shoot at velocities exceeding 366 ft/s. According to Mr. Lavoie, it is up to the user to ensure that the goods in issue are actually used on rifles with projectiles that reach at least the minimum velocity required, so that they are not illegal replica firearms.

18. The CBSA submitted that the goods in issue meet the three conditions that define a replica firearm.

19. The CBSA submitted that the goods in issue exactly resemble a firearm, in particular, the receivers for a Colt M4 Carbine. It noted, in this regard, that the Colt M4 Carbine is a firearm and that, under section 2 of the *Criminal Code*, so are the receivers designed for this weapon. Thus, according to the CBSA, the goods in issue meet the first condition of the definition of a replica firearm.

20. Furthermore, the CBSA submitted that the goods in issue are not firearms, because they cannot be installed on the Colt M4 Carbine and that the Western Arms, AGM and Jing Gong air guns on which the goods in issue are intended to be installed are not firearms. According to the CBSA, a device becomes a firearm when it shoots projectiles at an initial velocity of more than 152.4 m per second (i.e. 500 ft/s); however, according to the CBSA, the relevant air guns were not designed to shoot projectiles at such a velocity.

21. The CBSA also submitted that the goods in issue are not replica antique firearms, since the Colt M4 Carbine was not manufactured before 1898.

22. In response to the CBSA's brief, Mr. Lavoie noted that the CBSA did not prove that the goods in issue (or the air guns on which they must be installed) cannot shoot at a velocity exceeding 366 ft/s, since it had omitted to test them. Moreover, Mr. Lavoie did not contest that the goods in issue meet the other two conditions of the definition of a firearm.

ANALYSIS

23. The arguments of Mr. Lavoie, who bears the burden of proof in these proceedings,¹⁰ concern the second condition of the definition of a "replica firearm", namely, whether the goods in issue are firearms and thereby do not fall under the definition of "replica firearm". In this case, to resolve this issue, it must be determined whether the Western Arms, AGM and Jing Gong air guns, for which the goods in issue are designed, are firearms.¹¹

24. The Tribunal first notes that the parties do not agree on the definition of "firearm" for the purposes of the definition of "replica firearm" within the *Customs Tariff*. Mr. Lavoie submitted that a device that shoots projectiles at a velocity exceeding 366 ft/s is a firearm. The Tribunal also notes that, according to the evidence on record from the expert, Mr. Smith, this threshold of 366 ft/s corresponds to the minimum

10. Under subsection 152(3) of the *Act*, the appellant bears the burden of proof in these proceedings. See *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at para. 21.

11. Since section 2 of the *Criminal Code* provides that the receiver of a "firearm" is considered a firearm, the goods in issue will be firearms if the air guns for which they are designed are firearms under the *Criminal Code*.

velocity at which a projectile is capable of causing serious bodily injury or death to a person,¹² which is a determining characteristic of a “firearm” according to the definition of this term contained in section 2 of the *Criminal Code*. However, the CBSA submitted that a device is a firearm for the purposes of the *Customs Tariff* only if its muzzle velocity exceeds 152.4 m per second (i.e. 500 ft/s), according to an additional definition contained in subsection 84(3) of the *Criminal Code*.

25. It is not necessary, in this case, to definitively resolve the issue of the correct interpretation of the term “firearm”. Even accepting Mr. Lavoie’s argument that a device becomes a firearm when its muzzle velocity reaches the 366 ft/s threshold, the Tribunal considers that Mr. Lavoie did not fulfill his burden of proof under the *Act* and did not establish that the goods in issue or the air guns for which they were designed are firearms and thereby do not fall under the definition of replica firearms.

26. According to the evidence submitted by Mr. Lavoie, which consists of advertisements of certain vendors advertising the muzzle velocities of the air guns for which the goods in issue are designed, the muzzle velocities of the Western Arms, AGM and Jing Gong air guns range between 280 and 440 ft/s, depending on the model.¹³

27. At most, this evidence establishes that the goods in issue can either be integrated into air guns that are firearms or into air guns that are *not* firearms, under section 2 of the *Criminal Code*.

28. Therefore, the Tribunal is not convinced that the goods in issue are firearms and not replica firearms. It is well established that the tariff classification according to the *Customs Tariff* is determined at the time of importation of the goods.¹⁴ In this case, the evidence shows that, at the time of importation, the goods in issue were designed to be used as parts of devices which are not firearms under the *Criminal Code*. The fact that they can also be used with other devices that might qualify as firearms, in view of their muzzle velocity, takes nothing away from this conclusion.

29. The Tribunal also notes Mr. Lavoie’s argument that the user can modify all the air gun models so that their muzzle velocity reaches 366 ft/s. However, the same logic applies. The tariff classification according to the *Customs Tariff* must be determined at the time of importation of the goods. The specific use intended by an importer for the imported goods, including modifications to them, is not under the CBSA’s control and is irrelevant to the application of the *Customs Tariff*.

30. The Tribunal is therefore convinced that the goods in issue are not firearms and that the second condition of the definition of replica firearm is met in this case.

31. Regarding conditions 1 and 3 of the definition of the term “replica firearm”, the Tribunal has no difficulty concluding that the goods in issue meet those requirements, since they were designed to exactly resemble, or to resemble with near precision, a firearm that is not an antique firearm. Indeed, Mr. Lavoie did not challenge the CBSA’s conclusion or evidence filed by the CBSA to this effect.

32. The Tribunal examined the goods in issue, the copy of the Colt M4 Carbine and the receiver for the Colt M4 Carbine filed by the CBSA. The Tribunal also examined Mr. Smith’s expert report. The Tribunal was thus able to ascertain that the goods in issue can easily be confused with a receiver designed for the Colt

12. Exhibit AP-2012-055-16A at para. 14.

13. Exhibit AP-2012-055-01.

14. *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366; *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

M4 Carbine.¹⁵ Despite minor differences, for example in the logos or in the alignment of certain pinholes, the general appearance of the goods in issue and the real receivers that they imitate is identical.

33. In this regard, the Tribunal also accepts that, for the purposes of the application of tariff item No. 9898.00.00, the receiver of the Colt M4 Carbine is a firearm. The CBSA filed a copy of reference number 34707 from the Firearms Reference Table,¹⁶ which references the Colt M4 Carbine.¹⁷ In addition, since section 2 of the *Criminal Code* explicitly includes receivers in the definition of “firearm”, the Tribunal considers that the receivers designed for the Colt M4 Carbine are also firearms.

34. Furthermore, the Colt M4 Carbine is not an antique firearm, since this model was not manufactured before 1898,¹⁸ the cut-off year in the *Criminal Code* for the definition of antique firearms.

35. Given that the goods in issue meet the three conditions of the definition of the term “replica firearm” set out in subsection 84(1) of the *Criminal Code*, the Tribunal concludes that they are prohibited devices. Therefore, the goods in issue are correctly classified under tariff item No. 9898.00.00, so that their importation to Canada is prohibited under subsection 136(1) of the *Customs Tariff*.

DECISION

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

Daniel Petit

Daniel Petit
Presiding Member

15. The Tribunal usually compares the size, shape and general appearance of replica firearms and the weapons that they imitate, the main consideration being to know whether the imported goods can be mistaken for real firearms. See, for example, *Don L. Smith v. Commissioner of the Customs and Revenue Agency* (26 September 2003), AP-2002-009 (CITT); *Vito V. Servello v. Commissioner of the Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) at 14.

16. Firearms Reference Table, Royal Canadian Mounted Police Specialized Policing Services, version 4.4-C, 2013.

17. Exhibit AP-2012-055-10A, tab 4.

18. Exhibit AP-2012-055-10A, tabs 1, 4, 5.