



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. AP-2011-040 and
AP-2011-041

La Sagesse de l'Eau

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, November 13, 2012*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
BACKGROUND	1
PROCEDURAL HISTORY	1
KNIVES IN ISSUE.....	2
OTS Knife	2
OTF Knife	3
LEGAL FRAMEWORK.....	3
POSITIONS OF PARTIES.....	4
SDL.....	4
CBSA.....	5
ANALYSIS	5
CBSA's Expert Witness.....	5
Whether the Knives in Issue Are Prohibited Weapons.....	5
DECISION	8

IN THE MATTER OF appeals heard on July 17, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency, dated October 28, 2011, with respect to requests for review of advance rulings on tariff classification, pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

LA SAGESSE DE L'EAU

Appellant

AND

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

Respondent

DECISION

The appeals are dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 17, 2012

Tribunal Member: Diane Vincent, Presiding Member

Counsel for the Tribunal: Alain Xatruch
Anja Grabundzija

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Rosemary Hong

PARTICIPANTS:

Appellant	Counsel/Representative
La Sagesse de l'Eau	Wendy J. Wagner
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Lune Arpin

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. These are appeals filed by La Sagesse de l'Eau (SDL) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from two decisions made on October 28, 2011, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in these appeals is whether the CBSA properly classified two Smith & Wesson knives (the knives in issue) as prohibited weapons under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² and, therefore, as goods prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.

3. The knife in issue in Appeal No. AP-2011-040 is the Smith & Wesson Military & Police knife—a folding knife that opens “out the side” (the OTS knife). The knife in issue in Appeal No. AP-2011-041 is the Smith & Wesson Out-the-Front, Drop Point, Hostage Rescue Team knife—a knife with a blade that slides open “out the front” (the OTF knife).

PROCEDURAL HISTORY

4. On February 16, 2011, SDL filed applications for advance rulings with respect to the tariff classification of the knives in issue. On October 4, 2011, pursuant to paragraph 43.1(1)(c) of the *Act*, the CBSA issued advance rulings classifying the knives as prohibited weapons under tariff item No. 9898.00.00.

5. On October 7, 2011, SDL requested reviews of the advance rulings pursuant to subsection 60(2) of the *Act* and on October 28, 2011, the CBSA issued decisions pursuant to subsection 60(4) affirming its advance rulings.

6. On November 18, 2011, SDL filed the present appeals with the Tribunal pursuant to subsection 67(1) of the *Act*. The proceedings of the two appeals were combined on December 7, 2011, at SDL's request.

7. On January 17, 2012, SDL filed its brief. On April 10, 2012, the CBSA filed its brief and the expert report of Constable Rick McIntosh of the Ottawa Police Service. The expert report describes the history, design and functionality of one of the knives in issue.

8. On April 18, 2012, SDL sought permission of the Tribunal to put a written interrogatory to the expert with respect to the other knife in issue, to which the CBSA objected on April 23, 2012. On April 26, 2012, the Tribunal requested the CBSA to submit two questions to the expert relating to the other knife in issue.

9. On May 30, 2012, the CBSA filed the expert report of Constable McIntosh with respect to the other knife, together with a reply brief. On June 12, 2012, SDL filed its reply to the second expert report, in which it requested that a portion of the report and the entire reply brief of the CBSA be struck from the record. SDL also requested that the Tribunal order the production of the expert's working file, on the basis that it was necessary in the circumstances to assess the credibility, objectivity and independence of the expert.

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

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

10. On June 14, 2012, in response to SDL's requests, the CBSA requested that the appeals proceed by way of an oral hearing. SDL stated its opposition to the CBSA's request on June 15, 2012.

11. On June 21, 2012, the Tribunal informed the parties that it would not accede to SDL's request to strike a portion of the second expert report and the entire reply brief of the CBSA or order the production of the expert's working file. The Tribunal considered that, although these submissions had gone beyond what the Tribunal had requested, they could be useful to the resolution of the appeals. In addition, the Tribunal was of the view that the circumstances surrounding the tendering of expert evidence in these appeals did not raise questions regarding the credibility and objectivity of the CBSA's expert witness and that that evidence would, in any case, be given the weight that it deserves in light of the circumstances. The Tribunal also rejected the CBSA's request to proceed by way of an oral hearing.

12. 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*,³ as preferred by SDL. The hearing was held in Ottawa, Ontario, on July 17, 2012. The knives in issue were made available to the Tribunal for the hearing. The parties also filed four videos showing the functioning of the knives as part of their submissions.⁴

KNIVES IN ISSUE

13. The knives in issue are two Smith & Wesson knives, manufactured in the United States by Taylor Brands. The knives in issue pertain to the category of assisted-opening knives, as they are commonly referred to.

14. An assisted-opening knife relies on an internal mechanism consisting of a torsion bar, a resilient rod or a spring to "assist" the opening of the blade. In order to open, assisted-opening knives first require the user to apply on the knife an amount of pressure sufficient to overcome an initial bias toward closure. At that point, the internal mechanism takes over and forces the blade into the fully open position.⁵

15. In this case, both knives in issue can be operated single-handedly.

OTS Knife

16. The OTS knife is a folding knife providing two ways to apply the initial force necessary to overcome the bias toward closure.

17. First, the user can push against a round protrusion or "thumb stud" affixed to the blade. Second, the user can push against a "finger actuator", consisting of the external end of a lever mechanism in the handle. The lever in turn pushes against the blade. With both procedures, the pressure causes the blade to start moving out of the handle. Once that the initial bias toward closure is overcome, the torsion bar within the OTS knife creates an opening torque that forces the blade to the fully open position.⁶

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

4. One of these videos was produced by Constable McIntosh.

5. Tribunal Exhibit AP-2011-040-06B at paras. 4-5.

6. *Ibid.* at paras. 11-13.

OTF Knife

18. The OTF knife is a knife with a blade that slides open “out the front”. The handle of the OTF knife contains an extending assembly, consisting of a positioning frame, a “slider” attached to the blade, and a spring attached to the “slider” and the positioning frame. In order to slide open the blade, the user must push on the “slider” and, once the blade has moved forward sufficiently to overcome the initial bias toward closure, the spring ejects the blade into the fully open position.⁷

LEGAL FRAMEWORK

19. The following are excerpts of the relevant legislative and regulatory provisions in these appeals.

20. 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.
---	---

[Emphasis added]

21. 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 [...].
---	---

. . .

[...]

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]

22. In this regard, the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*⁸ includes the following:

(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 . . .

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 [...].

7. *Ibid.* at paras. 17-19.

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

23. In summary, in order to determine whether the knives in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00 and, therefore, as goods prohibited from importation into Canada, the Tribunal must determine whether they meet the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*. To be considered a prohibited weapon, a knife must have 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.

POSITIONS OF PARTIES

SDL

24. SDL argued that the knives in issue do not “open automatically”. It submitted that, being assisted-opening knives that require the user to apply “firm manual pressure” to the blade to overcome the initial bias toward closure, the knives in issue operate in a manner exactly opposite to that of automatic knives (e.g. “switchblades”).⁹

25. SDL first submitted that the knives in issue cannot be opened automatically “by gravity or centrifugal force” (e.g. created by a “flick of the wrist”).¹⁰

26. Second, SDL submitted that the knives in issue are not knives that open automatically “by hand pressure applied to a button, spring or other device in or attached to the handle of the knife”.

27. With respect to the OTS knife, SDL submitted that the “thumb stud” is not a “button, spring or other device in or attached to the handle of the knife”, but rather a protrusion on the blade itself. As for the “finger actuator”, SDL argued that it is neither comparable to a “spring” or “button” nor an “other device”; rather, it acts in a manner identical to the thumb stud by providing an abutment surface that can be used to manually move the blade the initial distance required to overcome the bias toward closure. It therefore submitted that, while the finger actuator is situated on the handle of the knife, it does not cause the blade to “open automatically”.¹¹

28. Similarly, with respect to the OTF knife, SDL argued that the “slider” is not a “button, spring or other device in or attached to the handle of the knife”, but is rather attached to the blade of the knife itself. SDL added that opening the blade is not “automatic”, as it requires manual pressure to be applied to the blade before the bias toward closure is overcome.¹²

29. SDL relied on the CBSA’s Memorandum D19-13-2¹³ for the proposition that assisted-opening knives are not prohibited weapons within the meaning of subsection 84(1) of the *Criminal Code*, unless they can be opened by gravity or centrifugal force.¹⁴

30. SDL also supported its arguments by reference to a recent bill of the Alaska House of Representatives purporting to clarify that assisted-opening knives do not fall within the meaning of the US federal definition of “switchblade”, which SDL submitted is identical to the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*.

9. Tribunal Exhibit AP-2011-040-06A at paras. 3-6.

10. *Ibid.* at paras. 25-30, 41.

11. *Ibid.* at paras. 32-34, 40.

12. *Ibid.* at paras. 42-43.

13. “Importing and Exporting Firearms, Weapons and Devices” (23 June 2009), at paras. 22-24; Tribunal Exhibit AP-2011-040-06A, tab 12.

14. Tribunal Exhibit AP-2011-040-06A at paras. 34-35.

CBSA

31. The CBSA submitted that the knives in issue have “a blade that opens automatically . . . by hand pressure applied to a button, spring or other device in or attached to the handle of the knife” and that, as such, they were duly classified as prohibited weapons under tariff item No. 9898.00.00.

32. The CBSA submitted that the assessment of whether a knife is a “prohibited weapon” should take into account the purpose of the legislation, namely, to prohibit knives that can rapidly become weapons only by the fact that they can open automatically.¹⁵

33. According to the CBSA, “automatically” means “largely or wholly involuntarily”. In this case, given that the blades of the knives in issue, once put in motion, are ejected by a spring or a torsion bar and are not designed to stop before opening fully, the CBSA argued that the blades open automatically.¹⁶

34. The CBSA also submitted that the knives in issue open by “hand pressure applied to a button, spring or other device in or attached to the handle of the knife”. With respect to the OTF knife, the CBSA submitted that the “slider” is located inside the handle of the knife.¹⁷ As for the OTS knife, the CBSA argued that the “finger actuator” is a button or device affixed to the handle; it is not attached to the blade and does not follow the movements of the blade.¹⁸

ANALYSIS

CBSA’s Expert Witness

35. The Tribunal recognized Constable McIntosh as an expert in the functioning of weapons.¹⁹ However, it is the Tribunal’s duty to determine the legal classification of the knives in issue.²⁰ As such, any statement in Constable McIntosh’s reports as to whether or not the knives in issue come within the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code* cannot be considered as an expert opinion. Constable McIntosh’s expert reports will be considered subject to this proviso.

Whether the Knives in Issue Are Prohibited Weapons

36. In order to determine whether the knives in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00 and, therefore, as goods prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*, the Tribunal must determine whether they are 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

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 [...].

15. Tribunal Exhibit AP-2011-040-10A at paras. 32-33.

16. *Ibid.* at paras. 34-37, 39-51.

17. *Ibid.* at para. 39.

18. *Ibid.* at paras. 52-59.

19. Tribunal Exhibit AP-2011-040-10B, tab A at 6.

20. The Tribunal notes that Constable McIntosh is not an expert in the interpretation of statutes, which is the prerogative of the Tribunal.

37. Accordingly, the test for classifying a knife as a prohibited weapon requires that the blade opens automatically in one of two ways. The automatic opening of the blade may occur either (1) by gravity or centrifugal force, or (2) by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

38. After closely examining the knives in issue, the Tribunal accepts SDL's submission, undisputed by the CBSA, that they do not open by gravity or by centrifugal force.

39. It therefore remains to be seen whether the blades of the knives in issue open automatically, through hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

Hand pressure applied to "a button, spring or other device in or attached to the handle of the knife"

40. The Tribunal finds that the blades of both knives in issue open by hand pressure applied to "a button, spring or other device in or attached to the handle of the knife".

41. The *Canadian Oxford Dictionary*²¹ defines "button" as "a knob on a piece of mechanical or electronic equipment which performs a particular function when pressed." It also defines "spring" as "a resilient device usu. of bent or coiled metal having the ability to return to its original shape with the removal of force or pressure . . ." and "device" as "a thing made or adapted for a particular purpose, esp. a mechanical contrivance."

42. With respect to the OTF knife, the Tribunal is satisfied that the "slider" constitutes an "other device" within the meaning of the provision. The definition of "device" is broad and, in the view of the Tribunal, it is capable of encompassing a mechanism such as the "slider" of the OTF knife made for the particular purpose of activating the assisted-opening system of the knife.

43. The "slider" of the OTF knife is a protrusion on the blade, located inside the handle. Therefore, the Tribunal accepts that the "slider" is located "in" the handle of the knife. Since hand pressure is applied to the "slider", the Tribunal accepts that hand pressure is applied to a "device" within the meaning of subsection 84(1) of the *Criminal Code*. The Tribunal notes that whether or not "firm" hand pressure is required to open the blade is irrelevant, as subsection 84(1) simply requires that "hand pressure" be applied.

44. The Tribunal further notes that, since the OTF knife contains a spring attached to the "slider", it can also be considered that hand pressure is applied indirectly to a "spring" within the meaning of the provision. Nothing in the provision requires hand pressure to be applied *directly* to a spring.

45. With respect to the OTS knife, the Tribunal finds that the "finger actuator" is a "device" within the meaning of subsection 84(1) of the *Criminal Code*. The finger actuator on the OTS knife protrudes from the handle. It allows to push against the blade and thus activate the assisted-opening mechanism of the knife. As such, it falls within the definition of "device" retained above. The Tribunal is further satisfied that the finger actuator is located "in or attached to the handle of the knife". Since hand pressure is applied to the finger actuator, the Tribunal is satisfied that the blade of the OTS knife opens by "hand pressure applied to . . . [an] other device in or attached to the handle of the knife".

21. Second ed., s.v. "button", "spring" and "device".

“Opens Automatically”

46. The Tribunal accepts that, in the context of subsection 84(1) of the *Criminal Code*, “automatically” means “largely or wholly involuntarily”, as suggested by the CBSA.²² Thus, the Tribunal finds that the need for a minimum of manipulations does not necessarily negate the automaticity of the opening of the blade.

47. According to the Tribunal, that “automatically” cannot mean completely without human intervention is plain from a reading of the provision itself. The provision contemplates a knife with a blade that opens “automatically” *as a result of hand pressure*. This necessarily implies a degree of human intervention.

48. This conclusion is consistent with the decision of the Supreme Court of Canada in *R. v. Vaughan*,²³ which stands for the proposition that some extra manipulations will not preclude a knife from being a “prohibited weapon”. In that case, the Supreme Court accepted that a knife that opened by centrifugal force, but also required the user to remove the safety switch and to change his hold of the knife with a certain dexterity, constituted a “prohibited weapon” within the meaning of subsection 84(1) of the *Criminal Code*.

49. Therefore, in these appeals, the knives in issue will be considered to “open automatically” if it is found that their blades open as a result of hand pressure on a “device” with minimal manipulation.

50. The Tribunal is satisfied that the effective operation of the knives in issue meets the requirement of automaticity in subsection 84(1) of the *Criminal Code*.

51. On the basis of the video evidence filed by the parties, as well as the Tribunal’s own examination of the knives in issue, the Tribunal is satisfied that pressure on the relevant device in the handle of the knives rapidly releases the blades. The manipulations required from the user to activate the assisted-opening mechanisms of the knives in issue appear to be altogether minimal. The Tribunal notes that, once the user pushes on the device, almost all of the travel of the blade is achieved by the internal mechanism and not through hand pressure. In addition, in the case of both knives, once the blade is put into motion as a result of the initial pressure, the blades do not stop before they are fully opened; no further manipulation by the user is required.

52. With respect to SDL’s technical argument that the opening of the blades of the knives in issue cannot be considered “automatic” given that the blades must be *manually moved* an initial distance to overcome the *bias toward closure*, the Tribunal notes that the legislation does not prescribe the internal mechanics of the knife. As stated above, the requirement of automaticity seems to be that the blade of the knife effectively opens with minimal manipulation as a result of, in this case, hand pressure on a “device”. “Device” is broadly defined and so long as the required manipulations remain minimal, the internal mechanics of the knife do not matter. For this reason, the fact that a small portion of the travel of the blade is effected manually and the fact that the knives in issue have an initial “bias toward closure” are irrelevant.

53. The Tribunal had the benefit of the video evidence of Constable McIntosh,²⁴ wherein he compares the operation of the OTF knife to that of other knives not in issue in these appeals, but recognized as being prohibited weapons pursuant to subsection 84(1), such as “switchblades”. It appears to the Tribunal, on the basis of all the evidence, that neither the manual input required to push open the blades of the knives in issue nor the resulting reaction of the knife can be meaningfully distinguished from the handling and functioning of a switchblade.

22. Tribunal Exhibit AP-2011-040-10A at para. 34.

23. [1991] 3 S.C.R. 691, adopting the reasons of Beaugregard J.A. of the Court of Appeal, 1990 CanLII 3059 (Q.C.A.).

24. Tribunal Exhibit AP-2011-040-10B, DVD.

54. The Tribunal notes that the conclusions reached above appear to be consistent with the intent of Parliament in enacting subsection 84(1) of the *Criminal Code*. The modern rule of statutory interpretation requires “. . . the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²⁵ The jurisprudence has identified the purpose of subsection 84(1) as being to prohibit knives that can be easily concealed and rapidly deployed.²⁶ The Tribunal considers that the knives in issue present these attributes. Indeed, they effectively operate similarly to knives such as switchblades already recognized as prohibited weapons. Including the knives in issue in the subsection 84(1) prohibition is therefore consistent with the purpose of the provision.

55. With respect to SDL’s reference to US legislative developments concerning the legal treatment of assisted-opening knives, the Tribunal notes that it is not bound by US legislation or by interpretations thereof. The fact that certain jurisdictions may have adopted legislation specifically allowing assisted-opening knives does not help interpret the Canadian legislation.

56. Finally, with respect to SDL’s reliance on the CBSA’s Memorandum D19-13-2, the Tribunal notes that it is not bound by its contents. The interpretation of the *Act* and of subsection 84(1) of the *Criminal Code* as these provisions relate to goods in issue in a given case is properly the domain of the Tribunal.

DECISION

57. For the foregoing reasons, the appeals are dismissed.

Diane Vincent
Diane Vincent
Presiding Member

25. See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, citing Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

26. See, for example, *R. v. Richard and Walker*, [1981] N.B.J. No. 274 (N.B. C.A.) at para. 7: “The features which differentiate a knife which is a ‘prohibited weapon’ from other knives is that the former is one which can be carried or held concealed in the hand and automatically opened . . .” See also *R. v. Archer*, [1983] O.J. No. 92 (Ont. C.A.) at para. 7: “In our view the purpose of proscribing the possession of knives that have a blade that can be opened by centrifugal force was to suppress the possession of knives having a blade which, by pressure on a button or by a flicking of the knife, is immediately opened thereby making the knife available for use as a weapon.”