



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2000-014

Asia Pacific Enterprises
Corporation

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Wednesday, July 12, 2006*

TABLE OF CONTENTS

DECISION.....i
REASONS FOR DECISION.....1
 EVIDENCE.....2
 ARGUMENT.....2
 DECISION.....3

IN THE MATTER OF an appeal heard on June 8, 2006, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated April 10, 2000, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

ASIA PACIFIC ENTERPRISES CORPORATION

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION

The appeal is dismissed.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 8, 2006

Tribunal Member: Zdenek Kvarda, Presiding Member

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REASONS FOR DECISION

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA) (now the President of the Canada Border Services Agency [CBSA]), dated April 10, 2000, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CCRA properly classified the guns in issue as prohibited devices of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The guns in issue are an M92FS semi-automatic pistol and a Super Ingram M11 submachine gun.

3. 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 A notice to this effect was published in the May 20, 2006, edition of the Canada Gazette.⁴

4. Subsection 136(1) of the *Customs Tariff* reads 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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5. Tariff item No. 9898.00.00 reads 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

. . . .

For the purposes of this tariff item,

(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*

6. Subsection 84(1) of the *Criminal Code*⁵ provides that a "prohibited device" includes, among other things, a replica firearm, which is defined 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.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. S.O.R./91-499.
4. C. Gaz. 2006.I.1231.
5. R.S.C. 1985, c. C-46.

7. 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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8. 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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EVIDENCE

9. Asia Pacific Enterprises Corporation (Asia Pacific) attempted to import the guns in issue via mail. Both are gas operated airsoft guns of the type sold by Western Arms of Japan.

10. The CBSA filed the two guns in issue as physical exhibits, and the Tribunal examined them. The Tribunal also examined the real firearms that the guns in issue are alleged to resemble, which the CBSA provided as physical exhibits.

11. The CBSA filed an expert report prepared by Mr. Derek V. R. Penk of the Forensic Laboratory Services of the Royal Canadian Mounted Police. Mr. Penk’s qualifications as a weapons expert were not questioned by Asia Pacific. The Tribunal accepted Mr. Penk as an expert in prohibited weapons.

ARGUMENT

12. Asia Pacific submitted that the CBSA’s reasoning is flawed because barrelled weapons that fire projectiles that are incapable of causing serious bodily harm or death are prohibited, whereas those which have a muzzle velocity that falls short of 152.4 metres (500 feet) per second, but that are capable of causing bodily injury or death, are not prohibited. According to Asia Pacific, Parliament did not intend this result.

13. Asia Pacific submitted that, because “imitation firearm” includes “replica firearm”, this lends support to the suggestion that a “replica firearm” is one that does not fire a projectile. It argued that serious bodily injury is not specifically defined in the legislation and that Parliament chose to establish the muzzle velocity of 152.4 metres per second as the threshold at which serious bodily harm can occur, since barrelled weapons that are not designed to discharge projectiles at a muzzle velocity beyond this threshold are not considered firearms.

14. Furthermore, Asia Pacific submitted that imitation or replica firearms that do not fire projectiles serve no imaginable, legitimate social purpose. Airguns, however, which include pellet guns, BB guns and paint guns, have a safe, recreational use. Asia Pacific argued that Parliament intended to exclude these items from being prohibited; otherwise, Asia Pacific argued, Parliament would have eliminated the threshold or restricted all barrelled weapons or imitations of barrelled weapons. It also provided an article published in

the May 2001 issue of the *American Journal of Ophthalmology* that documented an eye injury caused by an airsoft gun that is allegedly less powerful than the guns in issue.

15. The CBSA argued that prohibited devices include, *inter alia*, replica firearms and that the guns in issue fulfil all the conditions found in the *Criminal Code* definition of “replica firearm” and, therefore, are prohibited devices.

DECISION

16. In order to determine whether the guns in issue are properly classified under tariff item No. 9898.00.00, the Tribunal must determine if they meet the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*. For the guns in issue to meet this definition, each one must fulfil three conditions: (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.

17. The CBSA submitted that the Western Arms gas-operated airsoft pistol, model M92FS, resembles the Beretta, model M92FS, family of firearms with near precision and that the Western Arms gas-operated airsoft pistol, model Super Ingram M11, resembles model Ingram M11 with near precision. The Tribunal notes that this was confirmed in Mr. Penk’s report.

18. The Tribunal’s own examination of the guns in issue and the real firearms after which they were modelled also revealed a close resemblance in shape and general appearance. The only minor difference was that the real firearms were slightly smaller. The Tribunal also notes that Asia Pacific acknowledged that the guns in issue are 1:1 scale models of real firearms and made mostly of plastic. In light of the foregoing, it is satisfied that the guns in issue fulfil the first condition of the definition of “replica firearm”, i.e. they are designed or intended to exactly resemble, or to resemble with near precision, firearms.

19. The CBSA submitted that the guns in issue are not firearms since the projectiles that they discharge are unlikely to cause serious bodily injury or death to a person, as required by the definition of a “firearm” pursuant to section 2 of the *Criminal Code*. The Tribunal agrees with the CBSA that, to be considered a firearm, an airsoft pistol must have a muzzle velocity that exceeds 124 metres per second (407 feet per second). Because the guns in issue all have muzzle velocities that are below this threshold,⁶ the Tribunal agrees with the CBSA that they are not firearms. Based on the definition of “firearm” found in section 2 of the *Criminal Code*, the Tribunal is satisfied that the second condition of the definition of a “replica firearm” is fulfilled, i.e. each pistol in issue itself is not a firearm. As for Asia Pacific’s reference to an article in the May 2001 issue of the *American Journal of Ophthalmology* that documented an eye injury caused by an airsoft pistol, the Tribunal agrees with the CBSA that this matter is not relevant to this appeal because this incident did not involve the guns in issue.

20. Mr. Penk reported that the Beretta, model M92FS, and model Ingram M11, firearms were manufactured after 1898. The Tribunal notes that Asia Pacific did not contest this. Thus, the Tribunal is satisfied that the third condition of the definition of a “replica firearm” is fulfilled, i.e. each of the guns in issue was not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

6. Mr. Penk’s report indicated that the M92FS and the Super Ingram M11 have average velocities of 96 and 90 metres per second respectively.

21. Accordingly, because the guns in issue fulfill the three conditions that make them “replica firearm[s]” under the *Criminal Code*, the Tribunal finds that they are prohibited devices. Consequently, it finds that the guns in issue are properly classified under tariff item No. 9898.00.00 and, as such, prohibited from importation into Canada under subsection 84(1) of the *Criminal Code* and subsection 136(1) of the *Customs Tariff*.

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

Zdenek Kvarda
Zdenek Kvarda
Presiding Member