



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2002-014

Robert Koy

v.

Commissioner of the Canada
Customs and Revenue Agency

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

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 DECISION2

IN THE MATTER OF an appeal heard on June 6, 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 26, 2002, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

ROBERT KOY

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 6, 2006
Tribunal Member:	Zdenek Kvarda, Presiding Member
Research Manager:	Paul R. Berlinguette
Counsel for the Tribunal:	Eric Wildhaber
Registrar Officer:	Stéphanie Doré
Parties:	Robert Koy, for the appellant Michael Roach and John Unrau, for the respondent

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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 26, 2002, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CCRA properly classified the pistol in issue as a prohibited device of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The pistol in issue is a Samurai Edge Kai C/S.E.-03 Barry Burton model airsoft pistol made by Tokyo Marui of Japan.

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.

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.

EVIDENCE

9. Mr. Robert Koy attempted to import the pistol in issue via mail. It is a full-size semi-automatic gas-powered pistol with an extended magazine and muzzle compensator that fires plastic BB bullets. It also has an under-barrel rail mount.

10. The CBSA filed the pistol in issue as a physical exhibit, and the Tribunal examined it. The Tribunal also examined the real firearm that the pistol in issue is alleged to resemble, which the CBSA provided as a physical exhibit.

11. The CBSA filed an expert report prepared by Mr. Kramer D. Powley of the Forensic Laboratory Services of the Royal Canadian Mounted Police. Mr. Powley’s qualifications as a weapons expert were not questioned by Mr. Koy. The Tribunal accepted Mr. Powley as an expert in prohibited weapons.

ARGUMENT

12. Mr. Koy submitted that the pistol in issue is not a replica firearm, i.e. it does not resemble any real firearm (e.g. Colt 45 or Beretta M9 military model), but is an original airsoft pistol sold in very limited numbers. According to Mr. Koy, it is therefore not prohibited from importation into Canada. Mr. Koy also submitted that it is not illegal to import airsoft pistols or antique replica firearms into Canada.

13. The CBSA submitted that the pistol in issue is a replica firearm, as it is designed to resemble with near precision a real firearm, namely, the Beretta M9 series of semi-automatic pistols. It submitted that the pistol in issue itself is not a firearm and not a replica of an antique firearm.

DECISION

14. In order to determine whether the pistol in issue is properly classified under tariff item No. 9898.00.00, the Tribunal must determine if it meets the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*. For the pistol in issue to meet this definition, it must fulfil the following 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.

15. The CBSA submitted that, although the pistol in issue is modelled on the one that is used by a character in a fictional series, the firearm itself is based on the Beretta M9 series of semi-automatic pistols. In support of its position, it referred to the manufacturer's literature, which shows the inherent similarities between the pistol in issue and the Beretta M92F military model. The Tribunal's own examination of the pistol in issue and the real firearm after which it was modelled revealed a close resemblance in size, shape and general appearance. In addition, the Tribunal notes that Mr. Powley's report stated that the airsoft pistol is a device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm. Consequently, the Tribunal is satisfied that the pistol in issue fulfils the first condition of the definition of "replica firearm", i.e. it is designed or intended to exactly resemble, or to resemble with near precision, a firearm.

16. The CBSA submitted that the pistol in issue is not 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. In this regard, the detailed adjustment statement issued by the CCRA indicated that the muzzle velocity of the pistol in issue is below the threshold required to be considered a firearm. Mr. Powley's report also concluded that the pistol in issue is not a firearm. The Tribunal notes that this was not contested by Mr. Koy. 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 "replica firearm" is fulfilled, i.e. the pistol in issue itself is not a firearm.

17. The CBSA submitted that the Beretta M9 series of semi-automatic pistols are not considered antique firearms, as they were not manufactured prior to 1898, the year before which a firearm must have been manufactured to be considered an "antique firearm", pursuant to the *Criminal Code*. Consequently, the pistol in issue is not a device designed or intended to resemble an antique firearm and, therefore, the third condition of the definition of "replica firearm" is fulfilled, i.e. the pistol in issue was *not* designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

18. Accordingly, the pistol in issue fulfils the three conditions that are required for it to meet the definition of "replica firearm" under the *Criminal Code*. Because the *Criminal Code* provides that a "replica firearm" is a "prohibited device", the Tribunal finds that the pistol in issue is 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*.

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

Zdenek Kvarda
Zdenek Kvarda
Presiding Member