



Ottawa, Thursday, January 30, 2003

Appeal No. AP-2002-020

IN THE MATTER OF an appeal heard on December 5, 2002,
under section 67 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 May 7, 2002,
with respect to a request for redetermination under section 60 of
the *Customs Act*.

BETWEEN

WALTER SEATON

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-2002-020

WALTER SEATON

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency. The issue in this appeal is whether a wooden blowgun is properly classified under tariff item No. 9898.00.00 as a prohibited weapon.

HELD: The appeal is allowed. Section 12 of Part 3 of the schedule of the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted* prescribes that “[t]he device commonly known as ‘Yaqua Blowgun’, being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device” are prohibited weapons.

In the Tribunal’s view, section 12 is only intended to cover devices that are “weapons” as defined in the *Criminal Code*. In the Tribunal’s view, it is clear from the evidence that the product in issue is not used, designed to be used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person. Accordingly, the product in issue is not a weapon and, thus, does not fall within section 12.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 5, 2002
Date of Decision:	January 30, 2003
Tribunal Member:	Ellen Fry, Presiding Member
Counsel for the Tribunal:	Philippe Cellard
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Walter Seaton, for the appellant John Unrau, for the respondent

Appeal No. AP-2002-020

WALTER SEATON

Appellant

AND

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

Respondent

TRIBUNAL: ELLEN FRY, Presiding Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency made under subsection 60(4) of the Act on May 7, 2002. The issue in this appeal is whether a wooden blowgun, which was detained by the respondent on March 1, 2002, is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² as a prohibited weapon.

Tariff item No. 9898.00.00 reads, in part, as follows:

9898.00.00 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:

- (a) “firearms” and “weapon” have the same meaning as in section 2 of the Criminal Code;
- (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.

Section 2 of the *Criminal Code*³ defines “weapon” as follows:

“weapon” means any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm.

Subsection 84(1) of the *Criminal Code* defines “prohibited weapon” as follows:

“prohibited weapon” means

- (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon.

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. S.C. 1997, c. 36.
3. R.S.C. 1985, c. C-46.

Section 117.15 of the *Criminal Code* provides the Governor in Council with the power to make regulations prescribing what weapons are to be prohibited weapons.⁴ This power was exercised in adopting section 4 of the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*,⁵ which reads as follows:

4. The weapons listed in Part 3 of the schedule are prohibited weapons for the purposes of paragraph (b) of the definition “prohibited weapon” in subsection 84(1) of the *Criminal Code*.

Part 3 of the schedule of the Regulations contains section 12, which reads as follows:

12. The device commonly known as “Yaqua Blowgun”, being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device.

The product in issue is a wooden blowgun, which is a hollow tube approximately 95 centimetres in length with openings at both ends of the tube. There is a hand-carved wooded mouthpiece approximately 7 centimetres in length encircling one end of the hollow tube. There is also a wooden plug approximately 4 centimetres in length. The product in issue was filed with the Tribunal during the hearing as Exhibit B-1. There were no darts included in the exhibit.

The appellant testified on his own behalf. He testified that he purchased the product in issue in January 2001 during one of his relatively frequent visits to the Amazon Basin. He bought the product in issue from a local vendor in an open-air market outside the village of Balen on the Amazon River. The product in issue is a toy blowgun made for local boys, which the appellant bought as a present for his 12-year old grandson. The appellant testified that, at the time that he bought the product in issue, he challenged the vendor as to whether it would work. As a result, the vendor took one of the darts for the product in issue, inserted it in the blowgun and blew it out through the blowgun. The dart went about a metre. The appellant testified that the darts used in the product in issue are the size of toothpicks and that they are incapable of piercing human skin even at close range. The appellant indicated that he did not personally test this blowgun and that the aforementioned test by the vendor was the only occasion on which he saw it used.

Answering a question asked by the respondent, the appellant acknowledged that the product in issue is a tube or pipe that is designed for the purpose of shooting darts or arrows. In response to a question from the Tribunal, the appellant testified that a Yaqua blowgun is a machined object capable of inflicting very serious harm to either animals or humans. However, in his view, an aboriginal hunter’s blowgun, of which the product in issue was a toy model, was not the same as a Yaqua blowgun and could only harm a very small bird or, at most, if it carried poison, kill a monkey. A photograph filed by the appellant indicated that the length of a hunter’s blowgun was 1.75 metres,⁶ whereas measurement of the product in issue indicated that it was only about 95 centimetres long.⁷

The appellant submitted that the product in issue does not satisfy the definition of “weapon” in the *Criminal Code* and, therefore, cannot be classified as a prohibited weapon. Rather, the appellant submitted

4. Section 117.15 reads, in part, as follows, :

117.15 (1) Subject to subsection (2), the Governor in Council may make regulations prescribing anything that by this Part [Part III of the *Criminal Code*] is to be or may be prescribed.

5. S.O.R. 98-462 [hereinafter Regulations].

6. Appellant’s brief, tab 3.

7. *Transcript of Public Argument*, 5 December 2002, at 8-9.

that the product in issue is a toy. In the alternative, the appellant submitted that the product in issue is not similar to a Yaqua blowgun.

The respondent did not provide any evidence concerning the performance of the product in issue. The respondent submitted that the words “any similar device” in section 12 of the schedule of the Regulations should be given a broad interpretation and that, since the product in issue is a tube or pipe designed for the purpose of shooting arrows or darts by the breath, it should be classified as a prohibited weapon. To support his position, the respondent referred to the Tribunal’s decision in *Rebecca Wigod v. Commissioner of the Canada Customs and Revenue Agency*,⁸ where a wooden blowpipe was classified as a prohibited weapon.

The Tribunal must determine whether the product in issue is properly classified under tariff item No. 9898.00.00 as a prohibited weapon. As in *Rebecca Wigod*, this determination depends on the Tribunal’s assessment of the relevant characteristics of the particular product in issue.

As noted above, section 12 of Part 3 of the schedule of the Regulations prescribes that the device commonly known as “Yaqua Blowgun”, being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device are prohibited weapons. As indicated above, the power under which this provision was enacted is the power under section 117.15 of the *Criminal Code* to make regulations prescribing what **weapons** are to be prohibited weapons. This is reflected in the wording of section 4 of the Regulations, which is “[t]he **weapons** listed in Part 3 of the schedule are prohibited weapons” [emphasis added]. Thus, in the Tribunal’s view, this provision of the Regulations should be interpreted as covering only items that fall within the *Criminal Code* definition of “weapon”.

The Tribunal accepts the appellant’s testimony that the darts used with the product in issue are only the size of toothpicks or matchsticks, can only be projected about a metre and cannot pierce the skin. The Tribunal also notes the appellant’s testimony that, in his experience, the product in issue is not the same as what is commonly known as a “Yaqua Blowgun” and that the product in issue is only a little more than half as long as the aboriginal hunter’s blowgun of which it is a copy.

Based on this uncontradicted evidence, it is clear that the product in issue is not used, designed to be used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person. Thus, the product in issue does not satisfy the *Criminal Code* definition of “weapon” and is not a “prohibited weapon”. In the Tribunal’s view, the product in issue is essentially a toy.

Therefore, the Tribunal determines that the product in issue is not properly classified under tariff item No. 9898.00.00 as a prohibited weapon.

For the foregoing reasons, the appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

8. (10 January 2002), AP-2000-013 (CITT) [hereinafter *Rebecca Wigod*].