



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-018

Tom Pak

v.

Commissioner of the Canada
Customs and Revenue Agency

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

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IN THE MATTER OF an appeal heard on June 7, 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 4, 2003, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

TOM PAK

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 7, 2006
Tribunal Member: Zdenek Kvarda, Presiding Member
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Registrar Officer: Stéphanie Doré
Parties: Tom Pak, for the appellant
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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 4, 2003, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CCRA properly classified the pistols in issue as prohibited devices of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The pistols in issue are a M92F military model pistol, a Glock 19 model pistol and a G19 MILSPEC model pistol.

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.
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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. Dr. Tom Pak attempted to import the pistols in issue via mail. The M92F military model pistol is gas operated and made of black plastic with an orange-red barrel. The Glock 19 model pistol is spring operated and made of silver-grey plastic. The G19 MILSPEC model pistol is gas operated and made of black metal.

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

11. The CBSA filed an expert report prepared by Ms. Kara Lyn Kotylak of the Forensic Laboratory Services of the Royal Canadian Mounted Police. Ms. Kotylak’s qualifications as a weapons expert were not questioned by Dr. Pak. The Tribunal accepted Ms. Kotylak as an expert in prohibited weapons.

ARGUMENT

12. Dr. Pak submitted that the pistols in issue do not resemble with near precision firearms. In support of this position, he submitted that the M92F military model pistol has an orange barrel and that the Glock 19 model pistol is silver in colour. Moreover, the latter is a single-shot spring-loaded pistol, whereas a real Glock firearm is semi-automatic, meaning that the slide moves automatically as the trigger is pulled. Dr. Pak also referred to Ms. Kotylak’s report as evidence that the orange M92F military model pistol and the silver Glock 19 model pistol do not exactly resemble, or resemble with near precision, firearms. He argued that the pistols in issue should be considered firearms because they are capable of causing serious harm to a soft part of the body, e.g. the face or the eye. Furthermore, he submitted that colour is an important characteristic used by manufacturers to distinguish a safe toy from a harmful firearm. According to Dr. Pak, the G19 MILSPEC model pistol is the closest to the definition of a replica and, therefore, would be correctly classified in that manner.

13. The CBSA submitted that the pistols in issue fulfil all the conditions required by the *Criminal Code* definition of “replica firearm” and, therefore, are properly classified as “prohibited devices”. It also

submitted that colour cannot be a decisive factor because colour can be easily altered with paint. With respect to Dr. Pak's arguments that the pistols in issue can cause "serious bodily harm",⁶ the CBSA argued that they have a muzzle velocity that is below the threshold required to be considered firearms.

DECISION

14. In order to determine whether the pistols 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 pistols in issue to meet this definition, each pistol 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.

15. The CBSA submitted that: (1) the M92F military model pistol, made by Tokyo Marui of Japan, resembles with near precision the semi-automatic pistols of the real Beretta M9 series; (2) the Glock 19 model pistol, made by KSG of Japan, resembles with near precision a real Glock 19 semi-automatic pistol; and (3) the G19 MILSPEC model pistol, made by KSG of Japan, is designed to resemble with near precision a real Glock 19. It also argued that the presence of an orange barrel on the M92F military model pistol and the silver finish of the Glock 19 model pistol do not preclude the Tribunal from finding that the pistols in issue are intended to resemble with near precision firearms.

16. The Tribunal's own examination of the pistols in issue and the real firearms after which they were modelled revealed a close resemblance in size, shape and general appearance. The Tribunal also noted that several, if not all, of the logos or markings on the pistols in issue were identical or similar to the ones on the real firearms. As in *Vito V. Servello v. CCRA*⁷ and *Don L. Smith v. CCRA*,⁸ the Tribunal is of the view that colour cannot be a decisive factor, because it can be easily altered with paint.

17. The Tribunal notes that, in her report dated October 14, 2004, Ms. Kotylak determined that the M92F military model pistol was "... modeled after the Beretta 92F semi-automatic pistol ..." and that the Glock 19 model pistol was "... modeled after the Glock model 19 semi-automatic pistol ..." Despite these resemblances, it appears that she concluded that they "... do not exactly resemble, or resemble with near precision, a firearm ..." based solely on their colours.⁹ The Tribunal notes however that the CBSA filed a memorandum from Ms. Kotylak dated January 26, 2006, that reads as follows:

...

As of January 2005, members of the R.C.M. Police Forensic Laboratory Firearms and Toolmark Identification Sections met to discuss the criteria in which potential replicas will be evaluated on.

It was determined that color was no longer a significant factor in the determination of replicas and therefore, in most cases, will not be used in the determination of replicas. This is in response to the variety of after market colored coatings now available for firearms. As well, some manufactures now have firearms available in a variety of colors.

...

6. Exhibit AP-2003-018-9A at 3.

7. (19 June 2002), AP-2001-078 (CITT).

8. (26 September 2003), AP-2002-009 (CITT).

9. Respondent's Expert Report, Tab 1 at 2 reads as follows: "... However, the air soft pistol, Exhibit 1 [the M92F military model pistol], has a barrel, that is orange in color, rather than black ... However, air soft pistol, Exhibit 2 [the Glock 19 model pistol], is silver in color, not black ..."

18. The Tribunal understands that the CBSA's position is that, had Ms. Kotylak's report been made after January 2005, she would have determined that the pistols in issue are "replica firearms" irrespective of their colours.

19. The Tribunal also agrees with the CBSA that the real Beretta M9 and the real Glock 19 are firearms within the meaning of the *Criminal Code* because they are weapons from which bullets can be discharged and because they are capable of causing serious bodily injury or death to a person. Based on the definition of "firearm" found in section 2 of the *Criminal Code*, the Tribunal is satisfied that the pistols 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.

20. The CBSA submitted that the pistols in issue are not firearms since the projectiles that they discharge are not capable of causing serious bodily injury or death to a person. It argued that, to be considered a firearm and not a replica, an air, spring or gas gun (commonly known as "air gun") must have a muzzle velocity in excess of 124 metres (407 feet) per second. In support of its position, the CBSA referred to a facsimile dated October 22, 1999, from the Central Forensic Laboratory of the Royal Canadian Mounted Police. Because the pistols in issue all have a muzzle velocity that is below this threshold, 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 "replica firearm" is fulfilled, i.e. each pistol in issue itself is not a firearm.

21. The CBSA submitted that, because the pistols in issue resemble goods manufactured after 1898, they are not considered to be devices designed or intended to resemble antique firearms. This argument was not contested by Dr. Pak. Accordingly, the Tribunal is satisfied that the third condition of the definition of "replica firearm" is fulfilled, i.e. each of the pistols in issue was *not* designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

22. Accordingly, because the pistols in issue fulfil the three conditions that make them "replica firearm[s]" under the *Criminal Code*, the Tribunal finds that they are prohibited devices. Consequently, the Tribunal finds that the pistols 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*.

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

Zdenek Kvarda
Zdenek Kvarda
Presiding Member