



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2002-102

Stanley T. Wong

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 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 October 4, 2002, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

STANLEY T. WONG

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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Parties: Stanley T. Wong, 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 October 4, 2002, 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 two Heckler & Koch USP model pistols and one SG Polizei P228 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.

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. Mr. Stanley T. Wong attempted to import the pistols in issue via mail. The two Heckler & Koch USP model pistols are spring powered and black. The SG Polizei P228 model pistol is also spring powered and made of black plastic.

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 Mr. John William Marshall of the Forensic Laboratory Services of the Royal Canadian Mounted Police. Mr. Marshall’s qualifications as a weapons expert were not questioned by Mr. Wong. The Tribunal accepted Mr. Marshall as an expert in prohibited weapons.

ARGUMENT

12. Mr. Wong submitted that the pistols in issue should not be prohibited because they are used in tactical games and that many of his friends and fellow students possess such toys. He also submitted that the Tribunal should regard the pistols in issue as mere playthings and not as dangerous items.

13. The CBSA argued that the pistols in issue fulfil all the conditions set out in the *Criminal Code* definition of “replica firearm” and, therefore, are prohibited devices.

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 the Heckler & Koch USP model pistol, Hop-Up version, is designed as a 1:1 version scale replica of the real semi-automatic pistol of that name and that the SG Polizei P228 model

pistol is designed after the real SIG-Sauer P228 semi-automatic pistol. It argued that the pistols in issue are devices designed or intended to exactly resemble, or to resemble with near precision, firearms. In its view, the fact that the pistols in issue have red tips on their barrels does not make them sufficiently distinguishable from real firearms. As in *Vito V. Servello v. CCRA*,⁶ the CBSA submitted that the Tribunal should give consideration to the overall visible features of the pistols in issue and not the features that are not visible. 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.

16. Although Mr. Wong argued that the pistols in issue are essentially toys, the Tribunal notes that he recognized the realism of the pistols in issue. With respect to the red tips on the barrels of the pistols in issue, the Tribunal is of the view that this does not make them sufficiently distinguishable from real firearms. Mr. Marshall's report indicated that the pistols in issue are designed or intended to resemble with near precision the real semi-automatic pistols.

17. The Tribunal agrees with the CBSA that the Heckler & Koch USP semi-automatic pistol and the SIG-Sauer P228 semi-automatic pistol 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.

18. 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, as required by the definition of "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 (407 feet) per second. Because the pistols in issue all have muzzle velocities that are below this threshold,⁷ the Tribunal is of the view 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.

19. The CBSA submitted that the pistols in issue are not designed or intended to resemble an antique firearm, as the real firearms were manufactured after 1898. This was not contested by Mr. Wong. Thus, the Tribunal is satisfied that the third condition of the definition of "replica firearm" is fulfilled, i.e. each pistol in issue was not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

20. 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*.

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

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

6. (19 June 2002), AP-2001-078 (CITT).

7. The detailed adjustment statement indicated that, to be considered a real firearm, the muzzle velocity must exceed 124 metres per second (407 feet per second). As per Mr. Marshall's report, the pistols in issue do not meet this criterion.