



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-005

Ken Mitivier

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, November 24, 2004*

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STATEMENT OF REASONS1

IN THE MATTER OF an appeal heard on November 8, 2004, 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 May 3, 2004, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

KEN MITIVIER

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario

Date of Hearing: November 8, 2004

Tribunal Member: Pierre Gosselin, Presiding Member

Counsel for the Tribunal: Dominique Laporte

Clerk of the Tribunal: Margaret Fisher

Parties: Ken Mitivier, for the appellant
Elizabeth Kikuchi, for the respondent

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STATEMENT OF REASONS

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 (now the Canada Border Services Agency [CBSA]), dated May 3, 2004, under subsection 60(4) of the *Act*. The Tribunal decided to hold a hearing by way of written submissions in accordance with rule 25 of the *Canadian International Trade Tribunal Rules*.²

2. The issue in this appeal is whether the device in issue is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*³ as a prohibited device, as determined by the CBSA, or should be classified under tariff item No. 9503.90.00 as other toys, as claimed by Mr. Ken Mitivier.

3. 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,

(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*.

4. Subsection 84(1) of the *Criminal Code*⁴ 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.

5. The CBSA filed the device in issue as an exhibit, along with a real IMI model Desert Eagle semi-automatic pistol. It also filed a forensic laboratory report prepared by Mr. John Marshall of the Forensic Laboratory Services of the Royal Canadian Mounted Police, in which it was stated that the device in issue, a soft air pistol, was a device designed or intended to resemble with near precision an IMI model Desert Eagle semi-automatic pistol.

6. In order for the device in issue to be properly classified under tariff item No. 9898.00.00, it must meet the three conditions of the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.O.R./91-499.

3. S.C. 1997, c. 36.

4. R.S.C. 1985, c. C-46.

must not itself be a firearm;⁵ and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.⁶

7. Based on the evidence on the record, and on the visual examination of the device in issue and the real IMI model Desert Eagle semi-automatic pistol, the Tribunal finds that these three conditions are met. The Tribunal is of the opinion that the device in issue is properly classified under tariff item No. 9898.00.00 as a prohibited device.

8. Therefore, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

5. 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.

6. 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.