



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-036

Ka Wong

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 18, 2006*

TABLE OF CONTENTS

DECISION.....i
STATEMENT OF REASONS1
 EVIDENCE.....2
 ARGUMENT2
 DECISION2

IN THE MATTER OF an appeal heard on July 12, 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 President of the Canada Border Services Agency dated September 8, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

KA WONG

Appellant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 12, 2006
Tribunal Member: Serge Fréchette, Presiding Member
Research Manager: Paul R. Berlinguette
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Registrar Officer: Béatrice Gemmel
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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 President of the Canada Border Services Agency (CBSA), dated September 8, 2005, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CBSA properly classified the gun in issue as a prohibited device of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The gun in issue is an airsoft Elite MP5 A4 submachine gun made by I Chih Shivan Enterprise Co., Ltd. of Taiwan, which is purportedly a replica of a Heckler & Koch MP5 submachine gun.

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 June 10, 2006, edition of the *Canada Gazette*.⁴

4. Subsection 136(1) of the *Customs Tariff* reads as follows:

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| 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. |
|---|---|

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.1440.

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

7. Section 2 of the *Criminal Code* defines “firearm” as follows:

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| “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:

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|---|---|
| “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. Ka Wong attempted to import the gun in issue via mail. It is a full-size automatic battery-powered Airsoft AEG replica rifle that fires plastic BB pellets.

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

ARGUMENT

11. Mr. Wong submitted that the gun in issue is available in Canada and was purchased for the purpose of adding it to his collection and not for any criminal purpose. He also submitted that he is fully aware of firearm safety and is in possession of a non-restricted and restricted firearm licence.

12. The CBSA submitted that the gun in issue is a replica firearm, as it is designed or intended to exactly resemble a real firearm, namely, the Heckler & Koch MP5 submachine gun. It submitted that the gun in issue itself is not a firearm and not a replica of an antique firearm. Citing the Tribunal’s decision in *Robert Gustas v. Deputy M.N.R.*,⁶ the CBSA further submitted that it is irrelevant whether other examples of the same gun in issue are available for sale in Canada.⁷

DECISION

13. In order to determine whether the gun 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 gun in issue to meet this definition, it must fulfil the

6. (3 January 2002), AP-96-006 (CITT) [*Gustas*].

7. The CBSA relied on *Gustas*, where the Tribunal held that the fact that similar goods existed in the market had no bearing upon the Tribunal’s determination of whether or not the product in issue was a prohibited weapon as defined in the *Criminal Code*.

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.

14. The CBSA submitted that the manufacturer's Web site advertises the gun in issue as one that resembles with near precision the Heckler & Koch MP5 submachine gun. The Tribunal's own examination of the gun in issue and the real MP5 submachine gun after which it was modelled revealed a close if not almost identical resemblance in size, shape and general appearance. The Tribunal agrees with the CBSA that the MP5 submachine gun is a firearm within the meaning of the *Criminal Code* because it is a barrelled weapon from which bullets can be discharged and that it is 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 gun 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.

15. The CBSA submitted that the gun in issue is not a firearm since the projectile that it discharges, i.e. 6 mm plastic BB pellets, is not capable of causing serious bodily injury to a person. Moreover, according to the manufacturer's Web site, the gun in issue has a muzzle velocity of 95 metres (312 feet) per second. The CBSA argued that, to be considered a firearm and not a replica, an airsoft gun must have a muzzle velocity in excess of 124 metres (407 feet) per second. In support of its position, it submitted in evidence a facsimile message dated October 22, 1999, from the RCMP Central Forensic Laboratory. This evidence was uncontested. Because the gun in issue has a muzzle velocity below this threshold, the Tribunal agrees with the CBSA that it is not a firearm. 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 gun in issue is not itself a firearm.

16. The CBSA submitted that the Heckler & Koch MP5 submachine gun is not an antique firearm, as it was 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*. It submitted evidence that establishes that this particular model of submachine gun was developed in the 1960s. This evidence was not contested by Mr. Wong, and the Tribunal's own examination of the gun in issue revealed that it has a modern-looking design. Thus, the Tribunal is satisfied that the third condition of the definition of "replica firearm" is fulfilled, i.e. the gun in issue was not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

17. Accordingly, the gun in issue fulfils the three conditions that are required 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 gun 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*.

18. With respect to Mr. Wong's argument that similar guns are available for sale in Canada, the Tribunal recalls its decision in *Gustas* that this fact is irrelevant. In his brief, Mr. Wong also stated the following: "I am in possession of a current non-restricted & restricted firearm license. . . ."⁸ As noted by the CBSA, Mr. Wong does not own a business that holds a licence to acquire and possess the gun in issue, as would be required under tariff item No. 9898.00.00. In this connection, the Tribunal notes that replica

8. Exhibit AP-2005-036-4A.

firearms may lawfully be imported into Canada under certain conditions. The onus rests with the importer to obtain the appropriate licence to do so.

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

Serge Fréchette
Serge Fréchette
Presiding Member