



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-013

Jonathan and Nicolette Ross

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, March 13, 2007*

TABLE OF CONTENTS

DECISION.....i
STATEMENT OF REASONS1
 BACKGROUND.....1
 ANALYSIS2
 DECISION4

IN THE MATTER OF an appeal heard on February 6, 2007, 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 March 27, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

JONATHAN AND NICOLETTE ROSS

Appellants

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 6, 2007
Tribunal Member: Serge Fréchette, Presiding Member
Research Manager: Michael W. Morden
Counsel for the Tribunal: Eric Wildhaber
Registrar Officer: Béatrice Gemmel
Parties: Patricia Ribecco, for the appellants
Alysia Davies, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

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 March 27, 2006, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CBSA properly classified a gun as a prohibited device of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The gun in issue is a Colt Commando M733 airsoft rifle made by Tokyo Marui Company of Japan, which is purportedly a replica of a Colt Commando M733 (or M4) rifle.

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 December 9, 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.
-------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------

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.4135.

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.
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

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.
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

9. Mr. Jonathan Ross, acting on behalf of Mr. Adam Ribecco, attempted to import the gun in issue via mail. It is a full-size, automatic battery-powered Colt Commando M733 airsoft rifle that fires plastic BB pellets.

10. The CBSA filed the gun in issue as a physical exhibit. The CBSA also provided, as a physical exhibit, the authentic firearm that the gun in issue is alleged to resemble. Both exhibits were examined by the Tribunal. In addition, the CBSA submitted in evidence a forensic laboratory report, dated January 10, 2007, from the Forensic Laboratory Services of the Royal Canadian Mounted Police.

11. Mr. Ribecco submitted that the gun in issue had been purchased from a company from which he knows other persons to have previously made similar purchases. He also submitted that the gun would be used in a safe and controlled environment.

12. The CBSA submitted that the gun in issue is a replica firearm and argued that it is designed or intended to exactly resemble a real firearm, namely, the Colt Commando M733 (or M4) rifle. 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 *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency*,⁶ the CBSA further submitted that the alleged importation of other identical or similar weapons is not a relevant factor to consider in determining whether a product is prohibited from importation under the *Customs Tariff*.

ANALYSIS

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*. This definition is met if a product fulfils the 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.

6. (3 January 2002), AP-2000-059 (CITT) [*Ericksen*].

14. The CBSA submitted that vendors' Web sites⁷ advertise the gun in issue as "... a replica of the classic Colt Commando ..."⁸ and "... a very close approximation of the Colt Commando, right down to the Trademarks."⁹ and, therefore, that it resembles, with near precision, a Colt Commando M733 (or M4) rifle. The Tribunal's own examination of the gun in issue and the real Colt Commando rifle 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 Colt Commando M733 (or M4) rifle 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 specification, the gun in issue has a muzzle velocity of 90 metres 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 per second. In support of its position, it relied on evidence contained in the forensic laboratory report, in which the average muzzle velocity of the gun in issue was found to be below 124 metres per second. 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 Colt Commando M733 (or M4) rifle 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 rifle was developed in the 1960s. This evidence was not contested, 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 the argument that similar guns were purchased and imported into Canada from the same company, the Tribunal simply refers to its decisions in *Erickson* and *Romain L. Klaasen v. The President of the Canadian Border Services Agency*¹⁰ where the Tribunal stated that it is "... not a court of

7. CBSA brief, Tabs 9, 10, 11, 12.

8. CBSA brief, Tab 9 at 1.

9. CBSA brief, Tab 10 at 3.

10. (18 October 2005) AP-2004-007 (CITT) [*Klaasen*].

equity and must apply the law as it is . . .”¹¹ and that “. . . any previous shipments . . . not intercepted by the CBSA or its predecessors is irrelevant. The administrative action, or inaction, of the CBSA cannot change the law”¹²

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

11. *Ericksen* at 3.

12. *Klaasen* at 2.