



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-004

Scott H. Wu

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 29, 2008*

TABLE OF CONTENTS

DECISION.....i
STATEMENT OF REASONS 1
 BACKGROUND..... 1
 ANALYSIS4
 DECISION6

IN THE MATTER OF an appeal heard on December 18, 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 January 31, 2007, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

SCOTT H. WU

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Randolph W. Heggart
Randolph W. Heggart
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 18, 2007
Tribunal Member: Serge Fr chette, Presiding Member
Counsel for the Tribunal: Georges Bujold
Research Officer: Jo-Anne Smith
Manager, Registrar Office: Gillian Burnett
Registrar Support Officer: Danielle Lanteigne

PARTICIPANTS:

Appellant	Counsel/Representative
Scott H. Wu	Scott H. Wu
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Agnieszka Zagorska

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 January 31, 2007, under subsection 60(4).

2. The issue in this appeal is whether the CBSA properly classified two paintball pistols as prohibited devices under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The pistols in issue are two identical .43 calibre Walther P99 Real Action Marker (RAM) CO2 paintball pistols, which are sold by UMAREX Sportwaffen GmbH & Co. KG (UMAREX), a German company, and other distributors, including Real Action Paintball, a U.S. company which offers them for sale on its Web site. The evidence indicates that the pistols in issue originate in and were exported from Germany. They are labelled as UMAREX product No. 2.4650 P99 RAM Schwatz and are purportedly replicas of the Walther P99 pistol.

3. The pistols in issue were detained by the CBSA on November 28, 2006. Mr. Scott H. Wu requested a re-determination of the CBSA's decision regarding their admissibility for importation into Canada. On January 31, 2007, the CBSA confirmed that, in its view, the pistols in issue were properly classified as prohibited devices under tariff item No. 9898.00.00 and were thus prohibited from importation into Canada. On May 3, 2007, Mr. Wu filed the present appeal with the Tribunal.

4. 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

5. 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.
---	---

6. Tariff item No. 9898.00.00 reads, in part, 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	Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions prohibées et éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes automatiques, désignés comme « marchandises prohibées » au présent numéro tarifaire, [...]
---	---

For the purposes of this tariff item,

Pour l'application du présent numéro tarifaire :

. . .

[...]

(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

b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « dispositif prohibé », « munitions prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du Code criminel [...]

1. R.S.C. 1985 (2d Supp.), c. 1.

2. S.C. 1997, c. 36.

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

7. 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.	« 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.
--	--

8. 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.
--	---

9. 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.
---	---

10. The CBSA filed the pistols in issue as physical exhibits. The Tribunal examined both physical exhibits.

11. Mr. Wu submitted that, under subsection 84(1) of the *Criminal Code*, in order to constitute a “replica firearm”, a device must meet 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. Mr. Wu did not contest that the pistols in issue met the first and third conditions of the definition of “replica firearm”, but argued that they did not fulfil the second condition because, in his view, they are themselves firearms. On the basis of information found on the Internet and filed in evidence by the CBSA, Mr. Wu argued that the pistols in issue can propel a projectile at a velocity ranging from 250 to 350 feet per second (ft/s) which, in his view, is sufficient to cause serious bodily injury (i.e. an eye injury or blindness) if the pistols are not used properly. Based on the above, Mr. Wu submitted that the pistols in issue meet the definition of a “firearm” and, as such, are not replica firearms and should be allowed into Canada.

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

12. In support of his argument, Mr. Wu submitted his own calculations, which are based on the evidence submitted by the CBSA and additional information found on the Internet regarding the weight of paintball projectiles and the concept of “kinetic energy”, which he filed in evidence. According to Mr. Wu, “. . . for a device to fire a projectile that causes bodily injuries and to be considered as a firearm instead of a ‘replica firearm’, it must have a certain amount of kinetic energy great enough upon impact to cause bodily harm”⁵ Mr. Wu argued that his calculations demonstrate that, even if the pistols in issue do not have a muzzle velocity which exceeds 407 ft/s or 124 metres per second (i.e. the minimum muzzle velocity which, according to the CBSA, airsoft guns, such as the pistols in issue, must have in order to be considered firearms and not replicas), they can fire projectiles with sufficient kinetic energy to cause serious bodily injury and, for this reason, should be considered firearms and not replica firearms. In this regard, Mr. Wu also contested the evidence provided by the CBSA regarding the relevant muzzle velocity threshold for air guns because it is based on a projectile weight of 0.22 g, whereas, in Mr. Wu’s submission, the .43 calibre projectile used in the pistols in issue weighs 0.8 g. For this reason, Mr. Wu submitted that the CBSA incorrectly used information provided by the Royal Canadian Mounted Police (RCMP) in order to determine that the pistols in issue are replica firearms.

13. Finally, Mr. Wu argued that the same and similar paintball pistols are available from Canadian retailers and are imported into Canada without any problems.

14. The CBSA submitted that the pistols in issue are replica firearms and argued that they are designed or intended to exactly resemble, or to resemble with near precision, a real firearm, namely, a Walther P99 pistol. On this issue, the CBSA noted that the pistols in issue are advertised as 1-to-1 scale replicas of the Walther P99 and have all the original markings and insignias of the Walther P99.

15. The CBSA also submitted that the pistols in issue themselves are not firearms because, in its view, the projectiles that they discharge are not capable of causing serious bodily injury or death to a person. In support of its position, it submitted in evidence a facsimile dated October 22, 1999, from the RCMP Central Forensic Laboratory. According to this evidence,⁶ in order for an airsoft gun to be capable of causing serious bodily injury and, thus, considered to be a firearm and not a replica firearm, it must have a muzzle velocity in excess of 407 ft/s (or 124 metres per second) when firing a .22 g projectile. The CBSA argued that the pistols in issue have a muzzle velocity of between 250 and 350 ft/s, which is well below the 407 ft/s minimum threshold to be considered a firearm.

16. With respect to the issue of whether the pistols in issue are replicas of antique firearms, the CBSA submitted that the design of the Walther P99 pistol, which the pistols in issue are intended to replicate, dates back to 1994. The CBSA also provided evidence that the earliest versions of the Walther P99 were shown to the public in 1997 and appeared for sale in 1999. Accordingly, the CBSA submitted that, since the pistols in issue are modelled after a modern firearm, the Walther P99, they are not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

17. Regarding Mr. Wu’s argument that similar pistols are imported into Canada without any problems, the CBSA submitted that the presence of identical or similar devices in the Canadian marketplace has no bearing on the Tribunal’s determination of whether or not the importation of the pistols in issue is prohibited under the *Customs Tariff*. It also noted that the Tribunal has reiterated numerous times that it is not a court of equity and must apply the law as it is.⁷

5. Tribunal Exhibit AP-2007-004-15 at 2.

6. Respondent’s Brief, Vol. II, tab 20.

7. In support of its arguments, the CBSA cited the Tribunal’s decisions in *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (26 September 2003), AP-2002-009 (CITT); *John Campeau v. President of the Canada Border Services Agency* (2 March 2006), AP-2005-024 (CITT); and *Jonathan and Nicolette Ross v. President of the Canada Border Services Agency* (13 March 2007), AP-2006-013 (CITT).

ANALYSIS

18. In view of the arguments submitted by the parties, 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*. To be considered a “replica firearm”, a device 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. In addition, to the extent that the pistols in issue do not meet the definition of “replica firearm”, the Tribunal must determine whether they are nevertheless properly classified under tariff item No. 9898.00.00, given that, under the terms of this tariff item, the importation of certain devices other than “replica firearms”, including “firearms”, is in principle also prohibited.

19. It is common ground between the parties that the pistols in issue fulfil the first and third conditions set out in the definition of “replica firearm”. However, the parties held opposing views on the issue of whether the pistols in issue are themselves firearms, i.e. on whether the pistols in issue fulfil the second condition of the definition of “replica firearm”.

20. The Tribunal agrees with the parties that the pistols in issue fulfil the first and third conditions of the definition of “replica firearm”. With respect to the first condition, the Tribunal’s own examination of the pistols in issue and the documents⁸ regarding the real Walther P99 pistol, after which they were modelled, revealed a close resemblance in size, shape and general appearance. Upon review of the documentation pertaining to the Walther P99 pistol provided by the CBSA, the Tribunal agrees that the Walther P99 pistol is a firearm within the meaning of the *Criminal Code* because it is a barrelled weapon from which bullets can be discharged and because it is capable of causing serious bodily injury or death to a person. Consequently, 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, a firearm.

21. With respect to the third condition, the CBSA submitted that the Walther P99 pistol 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 the particular model of the Walther P99 pistol that the pistols in issue were designed to resemble was introduced in 1997 or 1999.⁹ This evidence was not contested. Consequently, the Tribunal is satisfied that the pistols in issue fulfil the third condition of the definition of “replica firearm”, i.e. they were not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

22. Turning to the second condition, i.e. the issue of whether the pistols in issue themselves are firearms within the meaning of section 2 of the *Criminal Code*, the Tribunal notes that the parties have not filed expert evidence or specific analyses regarding the issue of whether the pistols in issue are “. . . barrelled weapon[s] 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 . . .” Therefore, the Tribunal must examine this issue in light of the general information and other evidence on the record.

8. Tribunal Exhibit AP-2007-004-18A.

9. Respondent’s Brief, Vol. II, tab 14.

23. The CBSA argued that, for the pistols in issue to be considered firearms and not replicas, they must have a muzzle velocity in excess of 124 metres per second (407 ft/s) when firing a projectile weighing 0.22 g. The evidence indicates that the muzzle velocity of the pistols in issue is below this threshold. However, there is no evidence that the pistols in issue fire a projectile weighing 0.22 g. On this issue, Mr. Wu argued that the projectile or paintball fired by the pistols in issue weighs 0.8 g, but he relies on information that pertains to a device other than the pistols in issue, namely, a paintball rifle.¹⁰ Thus, the evidence on the weight of the projectile fired by the pistols in issue is unclear.

24. For this reason, Mr. Wu's calculations to purportedly establish that the pistols in issue are capable of causing serious bodily injury to a person, which assume that the weight of the projectile is 0.8 g, may not be accurate and are not persuasive. In any event, Mr. Wu was not qualified as a firearm or weapon expert. Consequently, the Tribunal considers that his statement that "... it is [reasonable] to assume if the kinetic energy has reached 2.0 joules, bodily injury (or penetration of eye) will likely result..."¹¹ has little probative value. The Tribunal further notes that the information provided by Mr. Wu indicates that most airsoft guns are considered replica firearms, as they lack the capacity to cause serious bodily injury.¹² In the Tribunal's opinion, the evidence on the record does not indicate that the pistols in issue have this capacity. Accordingly, the Tribunal is of the view that it has not been established that the pistols in issue discharge projectiles that are 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*.

25. Based on the foregoing and noting that the pistols in issue are intended for recreational use (i.e. paintball and military simulation games), the Tribunal agrees with the CBSA that the pistols in issue are not firearms. Thus, the Tribunal is satisfied that the pistols in issue fulfil the second condition of the definition of "replica firearm", i.e. they are not themselves firearms.

26. In view of the above, the pistols in issue fulfil 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 pistols in issue are properly classified under tariff item No. 9898.00.00 and, as such, are prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

27. The Tribunal also notes that, even if it had accepted the argument submitted by Mr. Wu that the pistols in issue are firearms within the meaning of section 2 of the *Criminal Code*, they would nevertheless be properly classified under tariff item No. 9898.00.00. Indeed, tariff item No. 9898.00.00 not only includes prohibited devices, such as replica firearms, but also includes *firearms*, subject to certain exceptions that are not relevant to this appeal. For the purposes of this tariff item, "firearm" has the same meaning as in section 2 of the *Criminal Code*. Mr. Wu's argument is that the pistols in issue meet the definition of "firearm" because of their potential to cause serious bodily injury. Under subsection 136(1) of the *Customs Tariff*, goods that are classifiable under tariff item 9898.00.00, which clearly includes "firearms", are prohibited from importation into Canada. Accordingly, assuming for the sake of argument that the pistols in issue are "firearms", they would also be classifiable under tariff item No. 9898.00.00, and their importation would remain prohibited.

10. Appellant's Reply Brief, Attachment 2.

11. Tribunal Exhibit AP-2007-004-15 at 3.

12. Appellant's Brief, Attachment 2 at 9.

28. With respect to the argument that identical or similar pistols are available for sale in stores in Canada, the Tribunal refers to its decisions in *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency*¹³ and *Romain L. Klaasen v. President of the Canada Border Services Agency*¹⁴ where the Tribunal stated that it is “. . . not a court of equity and must apply the law as it is . . .”¹⁵ 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 . . .”¹⁶

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

13. (3 January 2002), AP-2000-059 (CITT) [*Ericksen*].

14. (18 October 2005), AP-2004-007 (CITT) [*Klaasen*].

15. *Ericksen* at 3.

16. *Klaasen* at 2.