



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-021

Jonathan Bell

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, August 5, 2008*

Canada

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IN THE MATTER OF an appeal heard on July 8, 2008, 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 December 4, 2007, with respect to a request for re-determination, under subsection 60(4) of the *Customs Act*.

BETWEEN

JONATHAN BELL

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

André Scott
André Scott
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Pasquale M. Saroli
Pasquale M. Saroli
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 8, 2008

Tribunal Members: André Scott, Presiding Member
Serge Fréchette, Member
Pasquale M. Saroli, Member

Counsel for the Tribunal: Alain Xatruch

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PARTICIPANTS:**Appellant**

Jonathan Bell

Respondent

President of the Canada Border Services Agency

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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 December 4, 2007, under subsection 60(4).
2. The issue in this appeal is whether the CBSA properly classified an MP-5 Destron Leader Megatron action figure as a prohibited device under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The action figure in issue belongs to the Transformers Masterpiece series. It is made of plastic and transforms from a toy robot with moveable parts to a purported replica of a Walther model P-38 semi-automatic pistol with optical sight (Walther P-38 pistol).
3. The action figure in issue was detained by the CBSA on November 2, 2007, at the time of its importation by mail into Canada. On November 7, 2007, Mr. Jonathan Bell requested a review of the CBSA's determination regarding the admissibility of the action figure in issue. On December 4, 2007, the CBSA confirmed that, in its view, the action figure in issue was properly classified as a prohibited device under tariff item No. 9898.00.00 and was thus prohibited from importation into Canada. On December 16, 2007, Mr. Bell filed an appeal with the Tribunal.
4. On February 28, 2008, Mr. Bell filed his brief with the Tribunal and, on May 5, 2008, the CBSA filed its brief. On June 17, 2008, the CBSA advised the Tribunal that, on the basis of a report prepared by a Royal Canadian Mounted Police (RCMP) firearms expert, it no longer opposed the appeal. On June 20, 2008, the CBSA filed, at the Tribunal's request, a copy of the said expert report. The Tribunal notes that, despite the fact that the CBSA no longer opposed the appeal, it nonetheless remained seized of the matter and was therefore required to render a decision under section 67 of the *Act*.
5. 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

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

The importation of goods of tariff item	L'importation des marchandises des n ^{os}
No. 9897.00.00, 9898.00.00 or 9899.00.00 is	tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00
prohibited.	est interdite.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. S.O.R./91-499.

7. 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

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

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, [...]

Pour l’application du présent numéro tarifaire :

[...]

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 [...]

8. 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.

9. 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.

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

10. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

“antique firearm” means	« arme à feu historique »
(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	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.
(b) any firearm that is prescribed to be an antique firearm.	

11. The CBSA filed the action figure in issue as a physical exhibit. The CBSA also provided, as a physical exhibit, the authentic Walther P-38 pistol that the action figure in issue is alleged to resemble. The Tribunal examined both physical exhibits.

12. As mentioned above, at the Tribunal’s request, the CBSA filed the expert report⁵ prepared by Mr. Robin Y. Thériault of the RCMP’s Forensic Laboratory Services. The Tribunal accepted Mr. Thériault as an expert in prohibited weapons. Mr. Thériault reported that, in his expert opinion, the action figure in issue did not exactly resemble a firearm as defined under section 2 of the *Criminal Code*.

ANALYSIS

13. In order to determine whether the action figure 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*. 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.

14. Mr. Bell submitted that the action figure in issue is essentially a toy and that, due to its grossly oversized proportions and added elements, it cannot be considered an exact or near replica of a Walther P-38 pistol. Mr. Bell’s view was corroborated by Mr. Thériault’s expert report, which states that the action figure in issue does not exactly resemble a firearm, as it is approximately 30 percent larger than an actual Walther P-38 pistol.

15. After having examined both the action figure in issue and the authentic Walther P-38 pistol provided by the CBSA, the Tribunal is also of the view that the action figure in issue is significantly larger than the Walther P-38 pistol. Consequently, the Tribunal is satisfied that the action figure in issue does not fulfil the first condition of the definition of “replica firearm” as set out in subsection 84(1) of the *Criminal Code*, i.e. it is not designed or intended to exactly resemble, or to resemble with near precision, a firearm.

16. Having determined that the action figure in issue does not meet the first condition of the definition of “replica firearm” under the *Criminal Code*, the Tribunal need not continue with its analysis and finds that the action figure in issue is not properly classified as a “prohibited device” under tariff item No. 9898.00.00. Therefore, it is not prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

5. Tribunal Exhibit AP-2006-052-14A.

DECISION

17. For the foregoing reasons, the appeal is allowed.

André Scott
André Scott
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Pasquale M. Saroli
Pasquale M. Saroli
Member