



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2006-052

Scott Arthur

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, January 30, 2008*

Canada

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IN THE MATTER OF an appeal heard on October 31, 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 December 18, 2006, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

SCOTT ARTHUR

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: October 31, 2007

Tribunal Member: Serge Fréchette, Presiding Member

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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 18, 2006, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CBSA properly classified an airsoft pistol as a prohibited device under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.² The pistol in issue is a spring-operated UA-959C (Israel Eagle) airsoft pistol manufactured by the Unicorn Hobby Corporation of Taiwan. It is purportedly a replica of the Desert Eagle pistol produced by Israel Military Industries Ltd.

3. The pistol in issue was detained by the CBSA on November 7, 2006 at the time of its importation by mail into Canada. On November 16, 2006, Mr. Scott Arthur requested a review of the CBSA's determination regarding the admissibility of the pistol in issue. On December 18, 2006, the CBSA confirmed that, in its view, the pistol 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 January 18, 2007, Mr. Arthur filed an 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,

...

(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

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 [...]

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

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 pistol in issue as a physical exhibit. The CBSA also provided, as a physical exhibit, the authentic firearm that the pistol in issue is alleged to resemble. The Tribunal examined them both.

11. In addition, the CBSA filed an expert report⁵ prepared by Mr. Terry O. Pipes of the Forensic Laboratory Services of the Royal Canadian Mounted Police (RCMP). Mr. Pipes' qualifications as a weapons expert were not questioned by Mr. Arthur. The Tribunal accepted Mr. Pipes as an expert in prohibited weapons. Mr. Pipes reported that, in his expert opinion, the pistol in issue is a replica firearm within the meaning of subsection 84(1) of the *Criminal Code*.

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

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

12. Mr. Arthur submitted that the pistol in issue could not be mistaken as real because it makes a very soft spring “ping” sound when discharged, it has a permanent bright orange muzzle, and it shoots light plastic BB pellets at lower velocities than pellet guns. He added that products that are similar to the pistol in issue and products that are more realistic than the pistol in issue are readily available for sale in stores in Canada and that many of these products shoot lead pellets at velocities of up to 500 feet per second (152.4 metres per second). Mr. Arthur also submitted that he is over the age of 18 years, has a possession and acquisition licence, is a licensed owner of guns, and follows all safe storage and handling practices with firearms.

13. The CBSA submitted that the pistol in issue is a replica firearm and argued that it is designed or intended to exactly resemble, or to resemble with near precision, a real firearm, namely, the Desert Eagle pistol produced by Israel Military Industries Ltd. It submitted that the pistol in issue itself is not a firearm and not a replica of an antique firearm. Regarding some of Mr. Arthur’s arguments, the CBSA submitted that the presence of similar, more realistic or more dangerous goods in the Canadian marketplace has no bearing on the Tribunal’s determination of whether or not the pistol in issue is a prohibited device, as defined in the *Criminal Code*.⁶ It also added that being a responsible owner of firearms is not relevant for the purpose of determining the tariff classification of the pistol in issue. Finally, the CBSA 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

ANALYSIS

14. In order to determine whether the pistol 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.

15. The CBSA submitted that the manufacturer’s Web site⁸ describes the pistol in issue as a 1:1 model of the Israel Eagle handgun, with the words “real gun” appearing four times in the description and the adjective “realistic” appearing three times. It therefore argued that the pistol in issue is designed or intended to exactly resemble, or to resemble with near precision, the Desert Eagle pistol. In its view, the 6-mm orange tip projecting from the muzzle is not a feature which serves to differentiate the pistol in issue from a real firearm.⁹ The Tribunal’s own examination of the pistol in issue and the real Desert Eagle pistol after which it was modelled revealed a close resemblance in size, shape and general appearance.

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6. In support of this argument, the CBSA cited the Tribunal’s decisions in *Robert Gustas v. Deputy M.N.R.* (14 January 1997), AP-96-006 (CITT), and *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (26 September 2003), AP-2002-009 (CITT).
 7. As an example, the CBSA cited the Tribunal’s decision in *John Campeau v. President of the Canada Border Services Agency* (2 March 2006), AP-2005-024 (CITT).
 8. Respondent’s brief, Tab 1.
 9. The CBSA referenced two decisions where the Tribunal held that a red plastic tip at the end of a barrel is not considered to be a distinguishing feature. See *Serge Poirier v. President of the Canada Border Services Agency* (8 March 2007), AP-2006-012 (CITT), and *Stanley T. Wong v. Commissioner of the Canada Customs and Revenue Agency* (12 July 2006), AP-2002-102 (CITT).

16. With respect to the bright orange tip projecting from the muzzle, the Tribunal is of the view that this does not make the pistol in issue sufficiently distinguishable from the Desert Eagle pistol. Regarding Mr. Arthur's contention that the pistol in issue cannot be mistaken as real because it makes a very soft spring "ping" sound when discharged, the Tribunal notes that the sound made by the pistol in issue is not a visual characteristic which can be used to distinguish it from a real firearm. As the Tribunal stated in *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency*, "... the prohibition on the importation of replica firearms logically stems from the concern that they can be mistaken for firearms due to their physical appearance . . .".¹⁰

17. Upon review of the documentation pertaining to the Desert Eagle pistol provided by the CBSA,¹¹ the Tribunal agrees that the Desert Eagle 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 pistol 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.

18. The CBSA submitted that the pistol in issue is not a firearm, since the projectiles that it discharges are not normally capable of causing serious bodily injury or death to a person, as required by the definition of a "firearm" pursuant to section 2 of the *Criminal Code*. It noted that, according to the manufacturer's specifications, the pistol in issue fires plastic BB pellets at a velocity of 88 metres per second. The CBSA submitted that the Tribunal has recognized in numerous cases that a firearm causes injury or death if it has a muzzle velocity which is greater than 124 metres per second. The Tribunal notes that the uncontested evidence provided by Mr. Pipes in his expert report indicates that, during testing, the pistol in issue discharged 6-mm plastic airsoft projectiles with an average velocity of 52 metres per second. In Mr. Pipes' expert opinion, this velocity is not sufficient to cause serious bodily injury or death to a person. Mr. Pipes noted that the term "serious bodily injury" is interpreted by the RCMP Forensic Laboratory Services as the penetration or rupture of the eye. Based on the foregoing, the Tribunal agrees with the CBSA that the pistol in issue is not a firearm. Thus, the Tribunal is satisfied that the pistol in issue fulfils the second condition of the definition of "replica firearm", i.e. it is not itself a firearm.

19. The CBSA submitted that the Desert Eagle 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 Desert Eagle pistol that the pistol in issue was designed to resemble was introduced in 1996.¹² This evidence was not contested. Consequently, the Tribunal is satisfied that the pistol in issue fulfils the third condition of the definition of "replica firearm", i.e. it was not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

20. Accordingly, the pistol 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 pistol in issue is properly classified under tariff item No. 9898.00.00 and, as such, is prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

10. (19 June 2002), AP-2001-078 (CITT) at 3.

11. Respondent's brief, Tabs 10, 11.

12. Respondent's brief, Tab 11.

21. With respect to the argument that similar, more realistic or more dangerous pistols are available for sale in stores in Canada, the Tribunal refers to its decisions in *Wayne Erickson 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

22. Regarding Mr. Arthur’s argument that he is a responsible owner of firearms, the Tribunal agrees with the CBSA that this is not a relevant consideration for the purpose of determining the tariff classification of the pistol in issue.

DECISION

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

Serge Fréchette

Serge Fréchette
Presiding Member

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

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

15. *Erickson* at 3.

16. *Klaasen* at 2.