



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2006-057

Allen Zerr

v.

President of the Canada Border  
Services Agency

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

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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 January 17, 2007, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**ALLEN ZERR**

**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
Counsel for the Tribunal:	Alain Xatruch
Research Officer:	Jo-Anne Smith
Registrar Officer:	Danielle Lanteigne
Parties:	Allen Zerr, for the appellant Claudine Patry, 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](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision of the President of the Canada Border Services Agency (CBSA), dated January 17, 2007, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the CBSA properly classified two paintball rifles as prohibited devices under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.<sup>2</sup> The rifles in issue are two identical Real Action Marker (RAM) RAP4 paintball rifles, which are manufactured in Hong Kong by Asia Paintball Supply (APS) Ltd. and distributed in North America by Real Action Paintball of Santa Clara, California. They are purportedly replicas of a Colt M4 carbine.

3. The rifles in issue were detained by the CBSA on October 31 and November 29, 2006 at the time of their importation by mail into Canada. On December 4, 2006, Mr. Allen Zerr requested a review of the CBSA's determination regarding the admissibility of the rifles in issue. On January 17, 2007, the CBSA confirmed that, in its view, the rifles in issue were properly classified as prohibited devices under tariff item No. 9898.00.00 and were thus prohibited from importation into Canada. On February 1, 2007, Mr. Zerr 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*.<sup>3</sup>

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 <sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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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, [...]
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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 [Act].

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

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

7. Subsection 84(1) of the *Criminal Code*<sup>4</sup> 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.
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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.
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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.
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10. The CBSA filed the rifles in issue as physical exhibits. The CBSA also provided, as a physical exhibit, the authentic firearm that the rifles in issue are alleged to resemble. All exhibits were examined by the Tribunal.

11. In addition, the CBSA filed an expert report<sup>5</sup> prepared by Mr. Jacques Rioux of the Forensic Laboratory Services of the Royal Canadian Mounted Police (RCMP). Mr. Rioux’s qualifications as a weapons expert were not questioned by Mr. Zerr. The Tribunal accepted Mr. Rioux as an expert in prohibited weapons. Mr. Rioux reported that, in his expert opinion, the rifles in issue are replica firearms within the meaning of subsection 84(1) of the *Criminal Code*.

12. Mr. Zerr submitted that rifles which are identical to the rifles in issue are available for sale in Canada from retailers that order them from the same company. He also submitted that he knows several persons who are hunters and who order real hunting rifles from the United States and that they have no problems. In addition, Mr. Zerr argued that, if he is not allowed to have the rifles in issue, he should be able to return them in order to get a refund or a credit from the vendor.

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

5. Tribunal Exhibit AP-2006-057-17A.

13. The CBSA submitted that the rifles 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, the Colt M4 carbine. It submitted that the rifles in issue themselves are not firearms and not replicas of antique firearms. Regarding Mr. Zerr'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 rifles in issue are prohibited devices as defined in the *Criminal Code*.<sup>6</sup> 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.<sup>7</sup> It also added that the Tribunal does not have jurisdiction to deal with the question of the disposal of the goods.

## ANALYSIS

14. In order to determine whether the rifles 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.

15. The CBSA submitted that the distributor's Web site<sup>8</sup> advertises the rifles in issue as being "... identical to the legendary M4 rifle used by SWAT Teams and the U.S. Military . . ." <sup>9</sup> and, therefore, that they exactly resemble, or resemble with near precision, the Colt M4 carbine. The Tribunal's own examination of the rifles in issue and the real Colt M4 carbine after which they were modelled revealed a close resemblance in size, shape and general appearance. Upon review of documentation pertaining to the Colt M4 carbine provided by the CBSA,<sup>10</sup> the Tribunal agrees that the Colt M4 carbine 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. Consequently, the Tribunal is satisfied that the rifles 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.

16. The CBSA submitted that the rifles in issue are not firearms, since the projectiles that they discharge 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*. In this regard, the Tribunal accepts the uncontested evidence provided by Mr. Rioux in his expert report, which indicates that, during testing, the rifles in issue discharged paintballs with average muzzle velocities of 94.60 metres per second and 95.76 metres per second. In Mr. Rioux's expert opinion, these velocities are not sufficient to cause serious bodily injury or death to a person. Mr. Rioux 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 rifles in issue are not firearms. Thus, the Tribunal is satisfied that the rifles in issue fulfil the second condition of the definition of "replica firearm", i.e. they are not themselves a firearm.

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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 7.

9. Respondent's brief, Tab 7 at 1.

10. Respondent's brief, Tabs 9, 10.

17. The CBSA submitted that the Colt M4 carbine 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 introduced in 1991.<sup>11</sup> This evidence was not contested. Consequently, the Tribunal is satisfied that the rifles 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.

18. Accordingly, the rifles 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 rifles 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*.

19. With respect to the arguments that rifles which are identical to the rifles in issue were purchased and imported into Canada from the same company and that people have ordered real hunting rifles from the United States without problem, the Tribunal refers to its decisions in *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency*<sup>12</sup> and *Romain L. Klaasen v. President of the Canada Border Services Agency*<sup>13</sup> where the Tribunal stated that it is “. . . not a court of equity and must apply the law as it is . . .”<sup>14</sup> 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 . . .”<sup>15</sup>

20. The other argument raised by Mr. Zerr centred upon the disposal of the rifles in issue. As previously stated in *Catherine Roozen v. Deputy M.N.R.*<sup>16</sup> and *Charles Leung v. Deputy M.N.R.*,<sup>17</sup> the Tribunal does not have the jurisdiction to deal with the question of the disposal of the goods. Should Mr. Zerr wish to pursue this issue, it is a matter to be dealt with by the CBSA or the courts.

## DECISION

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

Serge Fréchette  
Serge Fréchette  
Presiding Member

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11. Respondent’s brief, Tab 16.

12. (3 January 2002), AP-2000-059 (CITT) [*Ericksen*].

13. (18 October 2005), AP-2004-007 (CITT) [*Klaasen*].

14. *Ericksen* at 3.

15. *Klaasen* at 2.

16. (1 March 1999), AP-96-057 (CITT).

17. (27 February 2002), AP-99-080 (CITT).