



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-011

Jean-Pierre Pastinelli

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, February 8, 2010*

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IN THE MATTER OF an appeal heard on November 26, 2009, pursuant to 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 April 23, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

JEAN-PIERRE PASTINELLI

Appellant

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: November 26, 2009

Tribunal Member: Serge Fréchette, Presiding Member

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Respondent

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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 April 23, 2009, pursuant to subsection 60(4).
2. The issue in this appeal is whether a “Maruzen Walther P38 series airsoft gun” (the gun in issue) imported by Mr. Jean-Pierre Pastinelli under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² is properly classified as a prohibited device, as determined by the CBSA.

PROCEDURAL HISTORY

3. The gun in issue was detained by the CBSA on March 23, 2009, at the time of its entry into Canada. The CBSA detained the gun in issue because it was classified under tariff item No. 9898.00.00 as a prohibited device. On April 3, 2009, Mr. Pastinelli requested a re-determination of the tariff classification of the gun in issue. Pursuant to subsection 60(4) of the *Act*, on April 23, 2009, the CBSA confirmed that the gun in issue was properly classified under tariff item No. 9898.00.00 as a prohibited device and that its importation into Canada was prohibited.
4. On June 5, 2009, Mr. Pastinelli filed an appeal with the Tribunal.
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 A notice to this effect was published in the October 31, 2009, edition of the *Canada Gazette*⁴ and the file hearing took place on November 26, 2009.
6. The CBSA filed an expert report⁵ prepared by Mr. Martin Champion of the Forensic Laboratory Services of the Royal Canadian Mounted Police (RCMP). Mr. Champion’s qualifications as a firearms expert were not questioned by Mr. Pastinelli. The Tribunal accepted Mr. Champion as an expert in firearms.

GUN IN ISSUE

7. The gun in issue measures 215 mm, weighs 720 g, has a magazine capacity of 12 + 1 rounds and shoots a 0.2 g BB pellet with a velocity of 270 feet per second.⁶ The slide, trigger and hammer are all functional.⁷
8. The CBSA filed two physical exhibits: the gun in issue and an authentic Walther P38 handgun. The Tribunal examined both physical exhibits during the file hearing.

ANALYSIS

9. Following are excerpts of the relevant legislative and regulatory provisions in this appeal.

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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. 2009.I.3299.
 5. Tribunal Exhibit AP-2009-011-06A, Tab C-2; Tribunal Exhibit AP-2009-011-06B.
 6. Respondent’s brief at 1.
 7. *Ibid.* at 3.

10. 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.
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11. 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	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 [...]

12. Thus, 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” pursuant to subsection 84(1) of the *Criminal Code*.⁸

13. Subsection 84(1) of the *Criminal Code* 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. R.S.C. 1985, c. C-46.

14. 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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15. 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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16. Therefore, 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.

17. Mr. Pastinelli submitted that he is an experienced firearm handler, the owner of several registered firearms, and a member of a shooting club. Mr. Pastinelli further submitted that replica firearms similar to the gun in issue are sold legally by various retailers in Canada. He claimed that some of these replica firearms available for sale in Canada resemble more closely real firearms than the gun in issue, as they are made entirely of metal and do not have a red plastic tip at the end of the barrel. Finally, Mr. Pastinelli submitted that these replica firearms available for sale in Canada are more harmful than the gun in issue.⁹

18. The CBSA submitted that the gun 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 Walther P38 handgun. The CBSA submitted that the gun in issue was designed by Maruzen Company, a well-known manufacturer of replica airsoft guns, to resemble a Walther P38 handgun, which is a firearm. The CBSA compared the overall appearance and physical dimensions of the gun in issue with those of an authentic Walther P38 handgun and determined that the two items are nearly identical to each other in terms of shape and appearance. In addition, the CBSA submitted that the gun in issue is not a firearm. Finally, the CBSA submitted that the gun in issue is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

9. Tribunal Exhibit AP-2009-011-03A.

19. Regarding Mr. Pastinelli's submissions, 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 gun in issue is a prohibited device as defined in the *Criminal Code*.¹⁰ The CBSA submitted that the Tribunal has noted that replica firearms may lawfully be imported into Canada under certain conditions, but that the onus rests with the importer to obtain the appropriate licence to do so.¹¹ The CBSA submitted that Mr. Pastinelli does not have a licence to import the gun in issue.

20. As discussed, the first issue that the Tribunal must resolve is whether the gun in issue was designed or intended to exactly resemble, or to resemble with near precision, a firearm.

21. In this respect, the Tribunal notes that the CBSA submitted a copy of Firearm Reference No. 23319 from the Firearms Reference Table, which indicates that the Walther P38 handgun is identified and classified as a firearm.¹² Based on this evidence, the Tribunal accepts that the Walther P38 handgun is a firearm.

22. Further, the Tribunal's own physical examination of the gun in issue reveals that it can easily be mistaken for a Walther P38 handgun. Notwithstanding the slight difference between the two guns in terms of the colouration of the handle and metallic shine, the shape, size and general appearance of the two guns appear to be identical. Likewise, the orange colouration on the tip of the barrel of the gun in issue does not make it sufficiently distinguishable from the authentic Walther P38 handgun.¹³

23. The Tribunal is of the view that the physical handling of the gun in issue and the Walther P38 handgun is generally the same and that the weight difference between the two guns is such that it does not make the handling of the two any different.

24. The Tribunal further notes that the gun in issue has the same mechanical movements as the Walther P38 handgun, which results in a similar handling experience. For example, both goods have a locked-breech action, as well as the same magazine release mechanism.

25. These observations are supported by the expert report of Mr. Champion, wherein he writes that the gun in issue resembles with near precision a Walther P38 semi-automatic pistol, in exterior dimensions and features.¹⁴

26. On the basis of the above, the Tribunal concludes that it is incontestable that the gun in issue is designed or intended to exactly resemble, or to resemble with near precision, a firearm. Therefore, the gun in issue satisfies the first condition of the definition of "replica firearm".

27. The Tribunal must now determine whether the gun in issue is itself a firearm.

10. The CBSA cited the Tribunal's decision in *Robert Gustas v. Deputy M.N.R.* (14 January 1997), AP-96-006 (CITT).

11. The CBSA cited the Tribunal's decision in *Ka Wong v. President of the Canada Border Services Agency* (18 July 2006), AP-2005-036 (CITT).

12. Tribunal Exhibit AP-2009-011-06A, Tab C-1. The Firearms Reference Table is an electronic database maintained by the RCMP. The database is the primary reference point for firearm identification and classification.

13. The Tribunal has previously addressed the issue of whether or not the presence of a coloured tip distinguishes a replica firearm from a real firearm in *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT).

14. Tribunal Exhibit AP-2009-011-06A, Tab C-2.

28. The CBSA submitted that the gun in issue is not a firearm, as 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 “firearm”, under section 2 of the *Criminal Code*.

29. In this regard, the Tribunal accepts the uncontested evidence provided by Mr. Champion in his expert report, which indicates that, during testing, the gun in issue discharged 6.0 mm calibre 3.0 grain plastic airsoft projectiles with an average muzzle velocity of 83.08 metres per second.¹⁵ In Mr. Champion’s expert opinion, this velocity is not sufficient to cause serious bodily injury or death to a person. Mr. Champion noted that the term “serious bodily injury” is interpreted by the RCMP Forensic Laboratory Services as the penetration or rupture of the eye.

30. Based on the foregoing, the Tribunal is satisfied that the gun in issue is not a firearm. Thus, the gun in issue fulfils the second condition of the definition of “replica firearm”, i.e. it is not itself a firearm.

31. Finally, the Tribunal turns to the issue of whether the gun in issue was designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

32. The CBSA submitted that the Walther P38 handgun 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 under the *Criminal Code*. The CBSA submitted evidence that establishes that this particular model of handgun was manufactured by Carl Walther Waffnenfabrik in 1938.¹⁶ This evidence was not contested by Mr. Pastinelli.

33. Consequently, the Tribunal agrees with the CBSA that the gun in issue fulfils the third condition of the definition of “replica firearm”, i.e. it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

34. Accordingly, because the gun in issue fulfils the three conditions that are required to meet the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*, the Tribunal finds that it is a prohibited device. Consequently, the Tribunal finds that the gun in issue is properly classified under tariff item No. 9898.00.00 and, as such, is prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*.

35. Regarding Mr. Pastinelli’s submission that he is a member of a shooting club and the owner of several registered firearms and, by implication, a responsible owner of firearms, the Tribunal is of the view that this is not a relevant consideration for the purpose of determining the tariff classification of the gun in issue.¹⁷

36. With respect to Mr. Pastinelli’s arguments that replica firearms which are identical or similar to the gun in issue are available for purchase from other retailers in Canada, the Tribunal refers to its decision in *Romain L. Klaasen v. President of the Canada Border Services Agency*, where the Tribunal stated 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.”¹⁸

15. *Ibid.*

16. *Ibid.*, Tab C-1.

17. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT).

18. (18 October 2005), AP-2004-007 (CITT) at 2.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member