Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-080

M. Miner

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, January 20, 2011

Canada

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IN THE MATTER OF an appeal heard on October 12, 2010, 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 December 21, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

M. MINER **Appellant**

AND

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

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 12, 2010
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Mr. M. Miner with the Canadian International Trade Tribunal (the Tribunal) 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 21, 2009, with respect to a request for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether two wooden tubes (the goods in issue), which were detained by the CBSA on July 27, 2009, are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*[2] as prohibited weapons.

PROCEDURAL HISTORY

3. At the time of their attempted importation into Canada, the CBSA classified the goods in issue under tariff item No. 9898.00.00 on the basis of a finding that they were prohibited weapons and/or devices of subsection 84(1) of the *Criminal Code*.[3] It followed that the CBSA detained the goods in issue in accordance with subsection 136(1) of the *Customs Tariff*, which prohibits the importation of goods of tariff item No. 9898.00.00. On October 13, 2009, Mr. Miner requested a re-determination of the tariff classification of the goods in issue. Pursuant to subsection 60(4) of the *Act*, on December 21, 2009, the CBSA confirmed that the goods in issue were properly classified under tariff item No. 9898.00.00, finding that they are devices similar to the device commonly known as a "Yaqua Blowgun".

4. On March 22, 2010, Mr. Miner 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*.[4] A notice to this effect was published in the September 11, 2010, edition of the *Canada Gazette*[5] and the file hearing took place on October 12, 2010.

GOODS IN ISSUE

6. Each of the goods in issue is a hollow tube, open at both ends, and is made of wood. The larger of the two measures approximately 260.35 cm long, with an external diameter of approximately 6.35 to 6.98 cm, and weighs approximately 2.35 kg. The smaller one measures approximately 79.75 cm long, with an external diameter of approximately 5.38 cm to 6.35 cm, and weighs approximately 0.63 kg.[6]

7. The CBSA filed the goods in issue as physical exhibits.[7] The Tribunal examined the goods in issue during the file hearing.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. R.S.C. 1985, c. C-46.
4. S.O.R./91-499.
5. C. Gaz. 2010.I.2451.
6. Tribunal Exhibit AP-2009-080-05A at para. 3.
7. Exhibits B-1 and B-2.

LEGAL FRAMEWORK

8. The relevant legislative and regulatory provisions in this appeal are as follows.

9. Section 136 of the *Customs Tariff* reads as follows:

(1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.	(1) L'importation des marchandises des n^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
(2) Subsection 10(1) does not apply in respect of goods referred to in subsection (1).	(2) Le paragraphe 10(1) ne s'applique pas aux marchandises visées au paragraphe (1).

10. 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, [...]
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 [...]

11. Section 2 of the *Criminal Code* defines a "weapon" as follows:

"weapon" means any thing used, designed to be used or intended for use	« arme » Toute chose conçue, utilisée ou qu'une personne entend utiliser pour soit tuer ou blesser quelqu'un, soit le menacer ou l'intimider. Sont notamment visées par la présente définition les armes à feu.
(*a*) in causing death or injury to any person, or	
(*b*) for the purpose of threatening or intimidating any person	
and, without restricting the generality of the foregoing, includes a firearm;	

12. Subsection 84(1) of the *Criminal Code* defines "prohibited weapon" as follows:

"prohibited weapon" means	« arme prohibée »
. . .	[...]
(*b*) any weapon, other than a firearm, that is prescribed to be a prohibited weapon;	*b*) toute arme — qui n'est pas une arme à feu — désignée comme telle par règlement.

13. Section 117.15 of the *Criminal Code* provides the Governor in Council with the power to make regulations prescribing what weapons are to be prohibited weapons.[8] This power was exercised in adopting section 4 of the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*,[9] which reads as follows:

The weapons listed in Part 3 of the schedule are prohibited weapons for the purposes of paragraph (*b*) of the definition "prohibited weapon" in subsection 84(1) of the *Criminal Code*.	Les armes énumérées à la partie 3 de l'annexe sont désignées des armes prohibées pour l'application de l'alinéa *b*) de la définition de « arme prohibée » au paragraphe 84(1) du *Code criminel.*

14. Part 3 of the schedule to the *Regulations* reads as follows:

Former Prohibited Weapons Order, No. 6	Ancien Décret sur les armes prohibées (n° 6)
12. The device commonly known as "Yaqua Blowgun", being a tube or pipe designed for the purpose of shooting arrows or darts by the breath, and any similar device.	**12.** L'instrument communément appelé « Yaqua Blowgun », soit un tube ou tuyau conçu pour lancer des flèches ou fléchettes par la force du souffle, et tout instrument semblable.

15. Therefore, in order for the goods in issue to be considered prohibited weapons and classified under tariff item No. 9898.00.00, the Tribunal must determine if they meet the definition of "prohibited weapon" under subsection 84(1) of the *Criminal Code*. It is not alleged that the goods in issue are "firearms". In this case, to be considered prohibited, a weapon must be specifically prescribed as such in the legislation. In this regard, *Former Prohibited Weapons Order, No. 6* provides that the device commonly known as a "Yaqua Blowgun" and any similar device is a prohibited weapon for the purposes of paragraph 84(1)(*b*) of the *Criminal Code*.

POSITIONS OF THE PARTIES

16. Mr. Miner submitted that the goods in issue are basically souvenirs and that no ammunition (arrows or darts) or other materials were purchased in order to use the goods in issue as weapons. He explained that after spending one week with a reclusive indigenous tribe known as the Waorani, in Ecuador, living among them according to their customs, he was offered the longer of the two tubes by a tribe elder as a souvenir of his passage. As for the second, shorter tube, he claims to have bought it in a market, where such items are sold to tourists as either children's toys or souvenirs.

17. Mr. Miner referred to the larger device as a "replica Waorani Blowgun", which may at one time have been used by members of the Waorani tribe to hunt spider monkeys. However, Mr. Miner submitted that, over time, it had become warped or bent and that the bore at the end of the chamber had lost its smooth surface, no longer making it possible for a dart to effectively move through the shaft.

18. Mr. Miner had been advised that the larger device could not be restored, recovered, bent or reshaped in a manner that would make it operational as a weapon. With respect to the smaller device, referred to as a "toy blowgun", Mr. Miner submitted that it was not intended for hunting purposes at all, but rather to be used as a popular child's toy.

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8. Section 117.15 of the *Criminal Code* reads as follows: "(1) Subject to subsection (2), the Governor in Council may make regulations prescribing anything that by [Part III of the *Criminal Code*] is to be or may be prescribed."
9. S.O.R./98-462 [*Regulations*].

19. Mr. Miner argued that the material necessary to repair the larger device, or the material to make a dart for use as ammunition, or even to make a poisonous dart, such as the Waorani would use, were not indigenous to or available in Canada. According to Mr. Miner, the goods in issue are not used, designed to be used or intended for use in causing death or injury to any person and could not otherwise be used for the purpose of threatening or intimidating any person. Therefore, he submitted that the goods in issue are not "weapons" within the meaning of section 2 of the *Criminal Code*.

20. Mr. Miner further submitted that the goods in issue present important differences from a Yaqua Blowgun. First, he submitted that the term "Yaqua Blowgun" refers to blowguns created by the Yaqua tribe of Peru, whereas the goods in issue were created by the Waorani tribe of Ecuador. Second, he argued that Yaqua blowguns are capable of propelling ammunition at great force and of inflicting injury, whereas the goods in issue are not.

21. For the above reasons, Mr. Miner submitted that the goods in issue do not meet the definition of "prohibited weapon" pursuant to subsection 84(1) of the *Criminal Code* and are therefore not classifiable in tariff item No. 9898.00.00 and should be admissible for importation into Canada.

22. The CBSA submitted that the goods in issue meet the definition of a prohibited weapon within the meaning of subsection 84(1) of the *Criminal Code* and, therefore, pursuant to subsection 136(1) of the *Customs Tariff*, are classified under tariff item No. 9898.00.00 and therefore prohibited from being imported into Canada. The CBSA submitted that the goods in issue are tubes or pipes designed for the purpose of shooting arrows or darts by the breath and therefore meet the definition of prohibited weapon, as found in *Former Prohibited Weapons Order, No. 6*.

23. In reply to Mr. Miner's submission, the CBSA submitted that the larger device is not bent and is a tube made from a straight solid piece of wood that had in fact been used as a weapon for hunting purposes in the past. This argument relies on Mr. Miner's submission that the ". . . Replica Waorani Blowgun was no longer used for hunting . . . ."[10] and on the inference that it had at one time been a weapon of some sort. The CBSA claimed that it could still be used as a weapon, by means of shooting darts by the breath, and had the potential to cause serious injury.

24. In response to Mr. Miner's submission that the smaller device was a toy, the CBSA argued that this was irrelevant, as the definition of "prohibited weapon" has no exemption based on length of the tube, so long as it meets the definition of ". . . a tube or pipe designed for the purpose of shooting arrows or darts by the breath . . . ." In further response to one of Mr. Miner's arguments, the CBSA also submitted that it was irrelevant whether material to make a dart for use as ammunition or to render the dart poisonous is indigenous to or available in Canada because *Former Prohibited Weapons Order, No. 6* makes no reference to ammunition used with a blowgun.

ANALYSIS

25. Mr. Miner raised sufficient issues of fact and law with respect to the CBSA's determination to convince the Tribunal that the present appeal is meritorious. As a result, the Tribunal has not been persuaded that the goods in issue meet the definitions provided for in the *Former Prohibited Weapons Order, No. 6*, that they can be defined as "weapons" as enacted at section 2 of the *Criminal Code* or that they meet the further definition of "prohibited weapon" as defined by subsection 84(1) of the *Criminal Code*. Accordingly, the appeal is allowed.

10. Tribunal Exhibit AP-2009-080-03 at para. 13.

26. Central to this matter was the question of evidence before the Tribunal with regard to the relevant characteristics of the goods in issue and the proof of whether each of the goods in issue is in fact a "weapon" and, further, a "prohibited weapon". To this end, the Tribunal particularly considered all the evidence on file, as well as section 2 of the *Criminal Code* and the text of *Former Prohibited Weapons Order, No. 6* in order to determine if they applied to the goods in issue.

27. As is addressed in the paragraphs that follow, this exercise left many questions unanswered because so many aspects of the legislation cannot be severed from questions of evidence, particularly as to the nature, design and function of the goods in issue. In any proceedings, parties must substantiate their claims and arguments with evidence, which can be adduced either as simple facts or sometimes through more complex means, such as expertise.

28. The Tribunal notes that no technical or functional evidence or expertise as to the goods in issue was filed by the CBSA in support of its allegations. Previous decisions of the Tribunal concerning similar goods have underscored the importance of providing the Tribunal with evidence concerning the characteristics of the goods in issue, including the description[11] and/or functionality and/or performance of the alleged prohibited weapons.[12]

29. Such an expertise is often necessary so as to ensure that the goods actually meet the conditions that have been identified by legislation for their importation to be barred. In fact, the legislation in the present appeal poses particular requirements that are intrinsically linked to the administration of evidence and demonstration of certain facts which cannot be overlooked.

30. As is examined in the paragraphs that follow, a reading of *Former Prohibited Weapons Order, No. 6*, in particular, inescapably leads to the acknowledgement that the 28 words of the said provision set out three distinct requirements. Indeed, if that provision is to apply to the goods in issue, the Tribunal must be able to either (1) identify a "device commonly known as a 'Yaqua Blowgun'"; (2) ascertain that such a device is "a tube or pipe designed for the purpose of shooting arrows or darts by the breath"; or (3) identify that the device falls under the definition of "any similar device".

31. In analyzing the legislation, the Tribunal was guided by the cannons of statutory interpretation, chief among them the so-called "modern rule", to the effect that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of a statute, its object and the intention of Parliament.[13]

32. The first requirement of *Former Prohibited Weapons Order, No. 6* pertains to identifying a device commonly known as a "Yaqua Blowgun". This requirement raises two distinct issues of its own. The first pertains to what is actually meant by the use of the term "Yaqua Blowgun", while the second requires the reader to query how "common knowledge" can inform the Tribunal in this instance.

33. It is important to mention that nowhere in the *Criminal Code* or any adjunct legislation are either of the terms "Yaqua" or "blowgun" specifically defined, either individually or together. The Tribunal presumes that Parliament chooses its words carefully and, therefore, that it intended to identify the very

11. *Gordon Schebek v. President of the Canada Border Services Agency* (18 May 2006), AP-2005-009 (CITT).
12. *Walter Seaton v. Commissioner of the Canada Customs and Revenue Agency* (30 January 2003), AP-2002-020 (CITT) at 3.
13. E. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87. The rule has been cited countless times by Canadian courts. Its most recent citing by the Supreme Court of Canada was in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 37.

specific "Yaqua" type of blowgun when it adopted the provision; if not, it would have simply used the word "blowgun" without any other qualifier. Other than argument, the Tribunal received no evidence as to what imputes the "Yaqua" qualities of such a device.

34. As for the term "blowgun" itself, the Tribunal consulted various dictionary definitions in order to attempt to ascertain, on its own, what actually defines such a device, but none of these inquiries were particularly conclusive in reason of so many variances. What they did reveal, however, was a requirement that a certain functionality had to be demonstrated: the ability for a projectile to be propelled by the force of breath.[14] And indeed, *Former Prohibited Weapons Order, No. 6* appears to be very specific as to the exact type of projectile for which design and functionality must have been intended, limiting such projectiles to "arrows or darts" only. No such demonstration was made in the present case.

35. Furthermore, the Tribunal does not believe that common knowledge can be relied upon to impart what is actually meant by either "Yaqua" or "blowgun", whether used individually or together. The meaning of the word "Yaqua" is in no way notorious. As for the term "blowgun", the above search through leading dictionaries is sufficient to outline how the many different variations as to form, design and function make it difficult to clearly define the true nature of such a device. Again, notoriety fails.

36. Accordingly, in addition to not having been informed of how the goods in issue are alleged "weapons" within the meaning of the *Criminal Code*, the Tribunal was not told precisely what a "Yaqua Blowgun" is or how one functions.

37. This posed challenges specific to the second requirement of *Former Prohibited Weapons Order, No. 6*, namely, whether the goods in issue are ". . . a tube or pipe *designed for the purpose* of shooting arrows or darts by the breath . . ." [emphasis added]. As mentioned above, the Tribunal was presented with contradictory arguments on this issue. However, again, without specific evidence, the Tribunal is unable to come to the conclusion that the goods in issue were specifically "designed" for the "purpose" identified in *Former Prohibited Weapons Order, No. 6*.; design and purpose must be proven, not inferred.

38. The Tribunal also studied whether *Former Prohibited Weapons Order, No. 6* relied upon its own textual body to provide a definition of what actually constitutes a prohibited weapon.

39. Although defining in nature, the Tribunal does not believe that the words "being a tube or pipe designed for the purposes of shooting arrows or darts by the breath" define, in and of themselves, a "Yaqua Blowgun". The Tribunal does believe that these words set out specific descriptive and functional requirements of what the specific weapon called a "Yaqua Blowgun" must be and do. However, due to the prohibitive nature of the measure, even when considering the greater good of society's interests, the Tribunal cannot adduce such a broad, sweeping definition as invited to do so by the CBSA. To believe otherwise, the Tribunal risks viewing various pieces of piping (even a peashooter[15]) as a prohibited device. The Tribunal does not believe that Parliament intended such an all-encompassing definition bordering on the absurd.

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14. *Merriam-Webster's Collegiate Dictionary*, 10th ed., *s.v.* "blowgun": "a tube through which a projectile (as a dart) may be impelled by the force of the breath"; *Canadian Oxford Dictionary*, 2d ed., *s.v.* "blowgun": "a **hunting weapon** consisting of a tube from which arrows or darts are propelled by blowing" [bold added for emphasis]; *Webster's New World Dictionary of American English, 3rd College* ed., *s.v.* "blowgun": "a long tubelike **weapon** through which darts or pellets are blown" [bold added for emphasis]; *Gage Canadian Dictionary*, 2d ed., *s.v.* "blowgun": "**1.** a tube through which a person blows arrows or darts. **2.** peashooter"; *Webster's Third New International Dictionary*, *s.v.* "blowgun": "**1**: a tube (as of cane or reed) generally about 10 feet long through which a projectile (as a poisoned dart) may be impelled by the force of the breath".
15. *Gage Canadian Dictionary*, 2d ed., *s.v.* "blowgun": "**1.** a tube through which a person blows arrows or darts. **2.** peashooter".

40. As to the third requirement of *Former Prohibited Weapons Order, No. 6*, namely, whether the goods in issue are "any similar device", the Tribunal comes to the conclusion that it cannot determine similarity in comparison to the reference device (the "Yaqua Blowgun"), as that reference device has not been clearly identified. Indeed, in this matter, without specific evidence at hand, the Tribunal is unable to determine whether the goods in issue bear any similarity to a "Yaqua Blowgun", as claimed by the CBSA.

41. The Tribunal understands that Parliament may have been intentionally vague when it adopted *Former Prohibited Weapons Order, No. 6*. If this was Parliament's intention, the result is that the CBSA must adequately demonstrate to the Tribunal that the prohibition of *Former Prohibited Weapons Order, No. 6* should be engaged in these specific circumstances.

42. Again, the Tribunal cannot, on its own, simply speculate as to whether certain goods in issue have the descriptive and functional characteristics that would engage that provision. In the present case, if the goods in issue ever did have such characteristics, there is no evidence on file, as to whether the characteristics were present at the time of importation, which is the moment at which the goods in issue must be assessed.

43. In the absence of such evidence, the Tribunal is of the view that it cannot endorse unsubstantiated allegations or argument to the effect that the goods in issue meet the legal requirements of the legislation prohibiting their importation into Canada. To do so would be speculative.

44. The Tribunal stresses that, throughout its analysis, it was mindful of section 12 of the *Interpretation Act*,[16] and in particular of Parliament's overarching objective of prohibiting the importation of dangerous devices. But ultimately, the Tribunal cannot find that the goods in issue meet the definition of "Yaqua Blowgun" provided by *Former Prohibited Weapons Order, No. 6*.

45. Notwithstanding what precedes, the Tribunal still physically examined the goods in issue carefully in order to evaluate if they were in fact covered by the specific legislation.

46. The visual inspection of the goods in issue performed by the Tribunal consisted of their general observation and manipulation, including looking at their exteriors, and looking through their insides (i.e. their bores) while holding them up to a source of light.

47. From this inspection, the Tribunal was able to observe that the larger device effectively appeared straight from the outside. However, an inspection of its bore revealed a distinct curvature that was significant enough to obstruct, at least partially, a clear line of sight through the inside of the device from one end to the other. No noticeable curvature could be observed in the smaller device. In addition, the bores of both devices appeared to be partially congested by what seemed to be grit and/or mould and/or cob webbing and/or some other foreign material of unascertainable consistency or resistance. Finally, the walls of the bores of both devices appeared rough, cracked and splintered.

48. In the absence of any evidence (expert or otherwise) on the operability of these devices (such as a forensic laboratory report of actual testing of the goods in issue), and because they present the various defects described above, such as the warp, partially obstructed bores, or rough or cracked bore walls, the Tribunal comes to the conclusion that, on the balance of probabilities, it is indeterminate whether the goods in issue are capable of allowing a projectile like an arrow or a dart to be blown through them.

16. R.S.C. 1985, c. I-21.

49. In this respect, the Tribunal was not convinced that the goods in issue could cause injury or death to a person or be used for the purpose of threatening or intimidating a person and therefore does not believe that they can be categorized as "weapons" according to section 2 of the *Criminal Code*. In fact, when considering their condition, the Tribunal fails to see how either of the devices could seriously be viewed as a threat or an intimidation to anyone.

50. Accordingly, in the circumstances of this matter, the Tribunal finds that the goods in issue do not fall under the prohibition set out in section 136 of the *Customs Tariff*.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member