CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, April 6, 1992

Appeal No. AP-89-234

IN THE MATTER OF an appeal heard on October 21, 1991, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), as amended;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise dated September 18, 1989, under paragraph 64(*a*) of the *Customs Act*.

BETWEEN

DOUGLAS ANDERSON AND CREED EVANS **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part. With the exception of the Hotchkiss Model 1914, the Browning Model 1918A2 and the Beretta Model 1918/30, the other firearms in issue in the case at hand are not prohibited weapons under the *Criminal Code* and, therefore, do not fall within the meaning of offensive weapons under Tariff Code 9965, Schedule VII of the *Customs Tariff*.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Robert C. Coates, Q.C.
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UNOFFICIAL SUMMARY

Appeal No. AP-89-234

DOUGLAS ANDERSON AND CREED EVANS **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

The goods in issue are 910 firearms of 23 different models that were deemed prohibited weapons under the Criminal Code. Under the Customs Tariff, prohibited weapons under the Criminal Code are considered offensive weapons and, as such, their importation into Canada is prohibited pursuant to section 114 of the Customs Act. The jurisdiction of the Tribunal to hear the case was the first issue and concerned whether a re-determination by the Deputy Minister of National Revenue for Customs and Excise was made within the two-year time limit provided by paragraph 64(a) of the Customs Act. The second issue is whether the goods under appeal are capable of firing more than one bullet from one pressure of the trigger within the meaning of the Criminal Code.

HELD: *The appeal is allowed in part. The evidence supports the view that the modifications of the Hotchkiss Model 1914, serial numbers 49301 and 7571, the Browning Model 1918A2, serial numbers 635066 and 665636, and the Beretta Model 1918/30, serial numbers 01622 and 01652, were not sufficient to prevent from firing in the automatic mode, i.e., capable of firing more than one bullet from one pressure of the trigger. In the absence of evidence to the contrary, the Tribunal is also convinced that all of the firearms of these models were likely modified to the same extent. Therefore, the Tribunal concludes that all fireams in issue, i.e., Hotchkiss Model 1914, Browning Model 1918A2 and Beretta Model 1918/30, are prohibited weapons within the meaning of the Criminal Code and, in consequence, offensive weapons within the meaning of Tariff Code 9965, Schedule VII of the Customs Tariff. As for the remaining firearms in issue, the evidence is that these firearms were not capable of firing more than one bullet from one pressure of the trigger prior to the repairs made by the armourer of the Calgary Police Service. This leads to the conclusion that these firearms lacked that capability at the time of importation and are, therefore, not prohibited weapons under the Criminal Code nor offensive weapons under the Customs Tariff.*

Place of Hearing:	*Calgary, Alberta*
Dates of Hearing:	*October 21 and 22, 1991*
Date of Decision:	*April 6, 1992*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Arthur B. Trudeau, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*P. Keith Ibach, for the appellants* *Bruce Logan, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-89-234

DOUGLAS ANDERSON AND CREED EVANS **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) classifying the goods in issue as offensive weapons, the importation of which is prohibited in Canada according to section 114 of the *Customs Tariff*.[2]

The goods in issue are 910 firearms of 23 different types, which are listed according to number and type in appendix "A." They were imported into Canada on August 4, 1987. On August 12, 1987, H.T. Higinbotham, the customs broker retained by the appellants, applied to the Calgary Customs Office to clear the goods from customs. However, on September 22, 1987, the goods in issue were seized by a customs officer pursuant to section 110 of the Act. The importation was deemed in contravention of that act or its regulations. That decision was further appealed to the Minister of National Revenue (the Minister), pursuant to section 129 of the said act. On September 19, 1989, almost two years after the seizure, the Minister issued, pursuant to section 131, a decision dealing with the seizure. The Minister found no contravention of the Act or its regulations with respect to the 910 firearms in issue. However, these firearms were still subject to tariff classification under the *Customs Tariff*. And in fact, on September 18, 1989, the Deputy Minister had classified the goods as offensive weapons within the meaning of Tariff Code 9965, Schedule VII of the *Customs Tariff*. Offensive weapons under Tariff Code 9965 include prohibited weapons as defined in the *Criminal Code*,[3] that is, any firearms capable of firing more than one bullet from one pressure of the trigger. The Deputy Minister's re-determination was issued pursuant to paragraph 64(*a*) which provides that the Deputy Minister may re-determine the tariff classification of the goods within two years after the time a determination was made under section 58. That decision is now appealed before this Tribunal.

The case at hand involves two issues. The first issue relates to the jurisdiction of the Tribunal to hear the case. Counsel for the appellants argued that the classification of the Deputy Minister dated September 18, 1989, was made beyond the two-year time limit provided by paragraph 64(*a*) of the Act. Had the Deputy Minister failed to act within the time limit stated in paragraph 64(*a*), her decision would not be in accordance with section 64 and, therefore, the Tribunal would lack jurisdiction

1. R.S.C., 1985, c. 1 (2nd Supp.), as amended.
2. R.S.C., 1985, c. 41 (3rd Supp.), as amended.
3. R.S.C., 1985, c. C-46, Part III.

because, according to subsection 67(1), it can only hear an appeal from a decision made pursuant to section 63 or 64 of the Act. The first issue, therefore, is whether the Tribunal is correctly seized of an appeal under subsection 67(1) or, in other words, whether the decision of the Deputy Minister constitutes a re-determination made pursuant to paragraph 64(*a*) of the Act.

The second issue, the tariff classification itself, calls for a determination as to the meaning of the *Criminal Code* definition of a prohibited weapon when dealing with a tariff classification. The issue, therefore, is whether the goods in issue are capable of firing more than one bullet from one pressure of the trigger.

1. The Jurisdiction of the Tribunal

Counsel for the appellants submitted that, on August 12, 1987, sufficient information supporting the accounting for the goods was presented to Customs officers. He added that, despite the seizure, no determination was made within 30 days after the goods had been accounted for. Counsel then maintained that, according to subsection 58(5) of the Act, a classification is deemed to have been made 30 days after the time the goods were accounted for, that is, 30 days after August 12, 1987. It follows, counsel concluded, that the officer could not have made a further determination of the goods on September 22, 1987, and, therefore, the Deputy Minister's re-determination dated September 18, 1989, was made beyond the two-year time limit provided in paragraph 64(*a*) of the Act.

The respondent's position is that the officer who made the seizure, Mrs. Nancy Stratton, also determined the tariff classification of the goods since she concluded that they were prohibited. Counsel for the respondent argued that the goods were never accounted for and that the absence of a final accounting allowed the officer all the time necessary to classify the goods. Subsection 58(1) of the Act provides that Customs officer Stratton's determination could have been done at any time before the final accounting of the goods and, counsel submitted, that is exactly what she did on September 22, 1987. And, since the seizure and the "determination" are dated September 22, 1987, the Deputy Minister's re-determination dated September 18, 1989 falls within the two-year time limit of paragraph 64(*a*).

For a better understanding of the issue, it is necessary to summarize the relevant provisions of the Act. Subsection 32(1) provides that any goods can be released from customs if they have been accounted for and all duties have been paid. However, subsection 32(2) provides that, under conditions prescribed by regulations, the release of the goods may occur through an interim accounting. In such case, subsection 32(3) states that the person who makes the interim accounting must file a final accounting in the prescribed time. Subsection 58(1) provides that an officer may determine the tariff classification of the goods at any time before or within 30 days, after they are accounted for under subsection 32(1) or (3), which means before or within 30 days after their final accounting, because subsection 32(2) (i.e., the interim accounting) is excluded from that enumeration. Without a classification pursuant to subsection 58(1), subsection 58(5) deems a tariff classification to exist 30 days after the goods have been accounted for pursuant to subsection 32(1) or (3), which again means that a final accounting is required. Finally, paragraph 64(*a*) states that the Deputy Minister may re-determine the classification of the goods within two years after the time a determination was made.

In the case at hand, Mrs. Stratton, an officer of the Department of National Revenue, who testified for the Minister, stated that an interim accounting was filed with the Calgary Customs Office on August 12, 1987. She also testified that on September 22, 1987, she determined the tariff classification of the goods when she seized the 910 firearms. However, the evidence reveals that the seizure was exercised under the authority of section 110 of the Act, which is a procedure distinct from subsection 58(1). Section 110 allows the confiscation of goods in circumstances where an officer believes that

the Act or its regulations have been contravened. As for subsection 58(1), it is silent as to how the officer must make the tariff classification or what the determination should be.

The Tribunal is of the view that when its jurisdiction is questioned as in the case at hand, it must ensure that the decision which is being appealed was made according to the Act or, in other words, that the different steps leading to the decision appealed before the Tribunal were accomplished in accordance with the statutory framework of the legislation. The Tribunal is not a court exercising judicial review and, therefore, cannot review the sufficiency of the said proceedings. It needs only to be satisfied that the Deputy Minister's decision being appealed pursuant to subsection 67(1) of the Act is in accordance with section 63 or 64. If the evidence gathered from the file and at the hearing indicates that the decision made pursuant to paragraph 64(*a*) was made beyond the two-year time limit, the Tribunal must conclude that the decision was not a decision made "pursuant to section 64." In consequence, the Tribunal would lack the jurisdiction to hear the case pursuant to subsection 67(1).

That being said, the re-determination states that it constitutes a decision made pursuant to paragraph 64(*a*) of the Act, which paragraph refers to a first determination made under section 58. Now, paragraph 64(*a*) can only refer to a determination according to subsection 58(1) since subsection 58(5), which deems a determination to exist in certain circumstances, is not applicable in this instance because it states that it does not apply to section 64, and because it requires the filing of a final accounting that was never filed in this instance according to the testimony of the Customs officer. Moreover, the fact that section 64 also requires that notice of the Deputy Minister's decision be given to the person who accounted for the goods under subsection 32(1) or (3), doesn't automatically lead to the conclusion, as contended by the appellants, that a final accounting was made on August 12, 1987.

Briefly summarized, Mrs. Stratton's statement indicates that she received documents sustaining an interim accounting; that no final accounting ever occurred because of the seizure; and, finally, that she did classify the goods as prohibited. In view of her testimony, the Tribunal finds that her determination as well as the Deputy Minister's re-determination are consistent with the statutory framework provided through sections 32, 58 and 64 of the Act. The Tribunal is convinced that no final accounting was made on August 12, 1987, and that Mrs. Stratton made a determination on September 22, 1987. This allows for the re-determination, under paragraph 64(*a*) of the Act, by the Deputy Minister on September 18, 1989, that is, within two years from September 22, 1987. In the Tribunal's view, this is sufficient to conclude that the conditions upon which the Tribunal has jurisdiction pursuant to subsection 67(1) have been met.

2. The Classification of the Goods

Pursuant to section 114 of the *Customs Tariff*, the importation into Canada of goods enumerated in Schedule VII is prohibited. Tariff Code 9965 in Schedule VII prohibits the importation of offensive weapons. Offensive weapons include firearms that are "prohibited weapons" as this term is defined for the purposes of Part III of the *Criminal Code*.

Section 84, Part III, of the *Criminal Code*[4] provides that "prohibited weapon" means:

...

(c) any firearm, not being a restricted weapon described in paragraph (c) of the definition of that expression in this subsection, that is capable of firing bullets in

4. R.S.C., 1985, c. C-46, formerly section 82, Part II.1, R.S.C. 1970, c. C-34, as amended.

rapid succession during one pressure of the trigger; (emphasis added)

...

In the case at hand, the goods were modified in Israel before their importation into Canada to prevent them from firing in the automatic mode, and the Tribunal must determine whether they fall within the meaning of that definition. The Tribunal must therefore determine the meaning of the words "is capable."

At the hearing, each party called an armourer as an expert witness. The witness for the appellants, Mr. David A. Tomlinson, President of the National Firearms Association, explained that the goods in issue had been modified in either one of two ways: either converted from fully automatic to semi-automatic, that is, from being capable of firing several bullets during one pressure of the trigger to firing one bullet with one pressure of the trigger; or either, a conversion from fully automatic to manual operation where the firearm needs to be re-cocked manually after each firing of a bullet. He demonstrated these methods using samples taken from the goods in issue.

In this regard, counsel for the appellants maintained that evidence supports the view that at the time the goods were imported, the firearms in issue were converted in a manner rendering them only capable of firing one bullet during one pressure of the trigger. He urged the Tribunal to apply the interpretation of the words "is capable" from the Ontario Court of Appeal in *Her Majesty the Queen v. Bernhard Hasselwander*[5], where the Court stated that the phrase means:

"capable in its present condition" rather than a capability which may be achieved by adaptation.

He also argued that the re-conversion of the firearms to the automatic mode after their importation into Canada would be an offence under the criminal law, that it would therefore requires the *mens rea* (criminal intent), and that such analysis is not relevant for purposes of tariff classification.

Mr. Gregory P. Greene, the armourer of the Calgary Police Service, testified for the respondent. He explained that the shipment was divided into piles according to types and that two examples from each pile were chosen at random and examined. He described to the Tribunal the conversion from the automatic mode to the non-automatic mode and their re-conversion to the automatic mode. A majority of the conversions affected the gas return mechanism (for example, removing by cutting of the gas piston or gas tube, brazing of the gas nut, drilling of the gas block and bridging of the gas regulator), the trigger mechanism (removal of the trigger nose or block and welding affecting the trigger) or the selection lever (welding or brazing of the lever). Re-conversions were made on each sample of firearms to verify their capability of firing in the automatic mode. Almost all of these firearms were tested after having been re-converted. As it flows from Exhibit B-1 entitled "Weapons Classification for Canada Customs," the length of time to re-convert, which varied from 30 seconds to 37 minutes, and the type of equipment required, were dependent of the technique used to convert the firearms to the non-automatic mode. The witness also testified that six firearms listed in Exhibit B-2 entitled "Examination of Weapons" were capable of firing in the automatic mode as taken from the shipment, that is, after having been stripped, cleaned and examined for the modification. These firearms are two Hotchkiss Model 1914, serial numbers 49301 and 7571, two Browning Model 1918A2, serial numbers 635066 and 665636, and lastly, two Beretta Model 1918/30, serial numbers 01622 and 01652.

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5. Court of Appeal for Ontario, File No. 568/90, October 4, 1991.

Counsel for the respondent argued that the evidence revealed that the conversion of the firearms was either very superficial or not sufficient to prevent them from being easily repaired and re-converted to the automatic mode. He asked the Tribunal to apply the test and principle of the Supreme Court of Canada in *Her Majesty the Queen v. Wayne Joseph Covin and Douglas Roy Covin*,[6] which was adopted by the Alberta Court of Appeal in *Her Majesty the Queen v. Global Armaments Ltd. et al.*[7] The Court in the latter decision stated that a modification has to be permanent, that is, not subject to reversal for it to be considered not capable of firing more than one bullet from one pressure of the trigger. Counsel also submitted that there is evidence that a few of the firearms were able to fire in the automatic mode without any re-conversion.

The Tribunal observes that the words "is capable" have been subject in criminal proceedings to analysis by the country's higher courts. The Tribunal first supports the strict interpretation of the words "is capable" given by the Ontario Court of Appeal in *Hasselwander*. In that case, the court, with good reasons, made a distinction between the words "that can be adapted" and "is capable," respectively, contained in the definitions of "firearm" and "prohibited weapon." That distinction was not made in *Global Armaments* where the court, in a case involving the definition of "prohibited weapon," applied the test of *Covin* that had dealt with the definition of "firearm." Moreover, in analysing the decision of the Supreme Court in *Covin*, as well as the decision of the Alberta Court of Appeal in *Global Armaments*, the Tribunal notes that, in those decisions, the broad interpretation given to these words was influenced by the fact that a criminal offense involving use and possession of a prohibited weapon was linked to the definition of "prohibited weapons." In the case at hand, there is no offence connected with the definition that the Tribunal has to apply. Therefore, for the purposes of tariff classification, the Tribunal cannot simply borrow the interpretations made with respect to criminal charges. The Tribunal, indeed, has to deal with the classification of the goods at the time of importation. That being said, there is no indication in code 9965, Schedule VII of the *Customs Tariff*, nor in the definition of "prohibited weapon" provided by section 84 of the *Criminal Code*, that the Tribunal must consider any evidence of possible re-conversion of the firearms to the automatic mode. Such possibility might be relevant in a criminal proceeding where a criminal offense is involved. However, in the Tribunal's view, it is irrelevant for the purpose of tariff classification.

There is evidence to support that the modifications of the Hotchkiss Model 1914, serial numbers 49301 and 7571, the Browning Model 1918A2, serial numbers 635066 and 665636, and the Beretta Model 1918/30, serial numbers 01622 and 01652, were not sufficient to prevent them from firing in the automatic mode as they were tested and fired in the automatic mode as taken from the shipment. In the absence of any evidence to the contrary, the Tribunal is also convinced that all the firearms pertaining to each of these models were likely modified in the same manner and to the same extent. In light of the foregoing, the Tribunal concludes that all Hotchkiss Model 1914, Browning Model 1918A2 and Beretta Model 1918/30 in issue are prohibited weapons within the meaning of the *Criminal Code* and, therefore, offensive weapons within the meaning of Tariff Code 9965.

As for the remaining firearms in issue, the evidence is that these firearms were not capable of firing more than one bullet from one pressure of the trigger without the repairs made by the armourers of the Calgary Police Service. This leads to the conclusion that these firearms lacked such capability at the time of importation.

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6. [1983] 1 R.C.S. 725.
7. 105 A.R. 260 (1990)

The Tribunal notes however, as a matter of public interest, that some of the goods in issue have been re-converted by the Calgary Police armourers and are now capable of firing in the automatic mode although, for the above-mentioned reasons, they were not prohibited weapon at the time of import.

CONCLUSION

The appeal is allowed in part. With the exception of the Hotchkiss Model 1914, the Browning Model 1918A2 and the Beretta Model 1918/30, the other firearms in issue in the case at hand are not prohibited weapons under the *Criminal Code* and, therefore, do not fall within the meaning of offensive weapons under Tariff Code 9965, Schedule VII of the *Customs Tariff*.

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APPENDIX A

Type		Quantity
ZB26	7.92 mm	49
Bren Rifle	.303	66
Chatelerault Rifle	7.5 mm	59
Degtyarev (RPD)	7.62	17
CZ59 Rifle	7.62	5
MP-44	7.92K	2
PKM Rifle	7.62	8
PPSh41	7.62T	135
Beretta 1918/30	9 mm	33
Beretta 1938/44	9 mm	23
Beretta 1938	9 mm	7
DSHK 38, 38/46	12.7 mm	25
Lahat Hotchkiss	7.5 mm	7
Shpigan	9 mmK	25
Hungarian ADM	7.62	25
Samoval (CZ25)	9 mm	6
Browning 1918A2	30-06	36
Hotchkiss 1914	8 mm Leb	56
CZ (Vz58)	7.62	259
AK-47	7.62	1
RPK Rifle	7.62	37
SG-43, SGM	7.62	19
Alfa	7.92	10