



Ottawa, Wednesday, January 13, 1999

Appeal No. AP-97-043

IN THE MATTER OF a re-hearing held on November 30, 1998,
under subsection 68(2) of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Federal Court of
Canada - Trial Division, dated May 7, 1997, with respect to a
decision of the Canadian International Trade Tribunal made under
section 67 of the *Customs Act*.

BETWEEN

DOUGLAS ANDERSON AND CREED EVANS

Appellants

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-043

DOUGLAS ANDERSON AND CREED EVANS

Appellants

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This re-hearing followed a decision of the Federal Court of Canada - Trial Division, returning a Tribunal decision for reconsideration. The goods in issue are 910 firearms of 23 different types. These firearms were seized by Customs and further classified by the respondent as “offensive weapons” under Code 9965 of Schedule VII to the *Customs Tariff*. This code refers to the definition of “prohibited weapon” in the *Criminal Code*. The Tribunal concluded that, but for three types of firearms, the goods in issue were not prohibited weapons. On appeal to the Federal Court of Canada - Trial Division, that decision was set aside and returned to the Tribunal based on an error of law regarding the application of case law in interpreting the word “capable” in the definition of “prohibited weapon” in the *Criminal Code*. The issue in this appeal is whether the goods in issue are “prohibited weapons.”

HELD: The appeal is dismissed. As the matter was returned to the Tribunal for reconsideration, this was not a hearing *de novo*. The Tribunal’s decision is, thus, based on the evidence on the record in the original matter. The case law has evolved since the Tribunal’s original decision, especially since the decision of the Supreme Court of Canada in *Her Majesty the Queen v. Bernhard Hasselwander*. Based on the two criteria developed in that decision, i.e. the relative short period of time and relative ease for conversion to an automatic weapon, the Tribunal concludes that the reconversion of a sample of the goods in issue to the automatic mode was done in a relatively short period of time, ranging from 30 seconds to 37 minutes, and with relative ease, considering the tools and the parts used. Therefore, the goods in issue fall within the definition of “prohibited weapon” in the *Criminal Code* and, consequently, are considered “offensive weapons” under the *Customs Tariff*, the importation of which is prohibited into Canada.

Places of Video Conference

Hearing: Hull, Quebec, and Edmonton, Alberta
Date of Hearing: November 30, 1998
Date of Decision: January 13, 1999

Tribunal Members: Patricia M. Close, Presiding Member
Raynald Guay, Member
Peter F. Thalheimer, Member

Counsel for the Tribunal: Gilles B. Legault

Clerks of the Tribunal: Margaret Fisher and Anne Turcotte

Appearances: Rod J.A. Gregory, for one of the appellants (Douglas Anderson)
Jocelyn Sigouin, for the respondent

Appeal No. AP-97-043

DOUGLAS ANDERSON AND CREED EVANS

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TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
RAYNALD GUAY, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

This is a re-hearing of an appeal under subsection 68(2) of the *Customs Act*¹ (the Act) further to a decision of the Federal Court of Canada - Trial Division (the Federal Court), setting aside and returning back for reconsideration a Tribunal decision in the original matter.² The re-hearing of this matter proceeded by way of video conference in Hull, Quebec, and Edmonton, Alberta.

As in the Tribunal's original decision, the goods in issue are 910 firearms of 23 different types. These firearms were seized by Customs and further classified by the respondent as "offensive weapons" under Code 9965 of Schedule VII to the *Customs Tariff*,³ which refers to the definition of "prohibited weapon" in the *Criminal Code*.⁴ The Tribunal, in its original decision, found that, but for three types of firearms, the goods in issue were not prohibited weapons under the *Criminal Code* and, therefore, that they did not fall within the meaning of "offensive weapons" under the *Customs Tariff*. The appellants and the respondent appealed that decision to the Federal Court.

The Tribunal's decision was based, among other things, on its interpretation of case law relevant to the interpretation of the words "prohibited weapons" in criminal proceedings. A specific argument made at that time concerned the possible reconversion of the firearms. These firearms, prior to their importation, had been modified to allegedly prevent them from firing in automatic mode. This argument was central to the case because the *Criminal Code* defines "prohibited weapon" as "any firearm" that is "capable of firing bullets in rapid succession during one pressure of the trigger" (emphasis added). The case law that was cited revolved around the interpretation of the word "capable," hence, the importance of the reconversion issue.

In its decision, the Tribunal, after examining the case law, made a statement as to its irrelevance in a customs matter as opposed to a criminal proceeding. The Federal Court found that this constituted an error in interpretation. The matter was, thus, referred back to the Tribunal for reconsideration. Consequently, the only issue before the Tribunal is an issue of law. Furthermore, based on the Federal Court's reasons and order, the Tribunal's reconsideration dealt with the application of judicial interpretations of the words "prohibited

1. R.S.C. 1985, c. 1 (2nd Supp.).

2. *Douglas Anderson and Creed Evans v. The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-89-234, April 6, 1992.

3. R.S.C. 1985, c. 41 (3rd Supp.).

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

weapon” to the evidence on the record. This was not a hearing *de novo*. Therefore, at the hearing, counsel relied on the evidence on the record in the original matter, including expert testimony of armourers who were called by both sides to explain either the conversion that took place prior to importation or the reconversion that was done based on a random selection of each type of firearm.

In his oral argument, counsel for one of the appellants, Douglas Anderson (counsel for the appellant), acknowledged that, since the seizure of the goods in issue, the case law has changed significantly, particularly since the decision of the Supreme Court of Canada in *Her Majesty the Queen v. Bernhard Hasselwander*.⁵ Counsel admitted that, based on the evidence on the record, it appeared that some of the goods in issue would be able to be reconverted to their fully automatic mode status. Counsel further admitted that, even though the goods in issue were seized in 1985, the law that applies is the law as it stands today. Consequently, counsel added, the only issue for the Tribunal is to determine whether the length of time that it took the respondent’s expert to reconvert the firearms falls within the parameters of the decision in *Hasselwander*. Counsel argued, in this regard, that there was some evidence from the appellant’s expert as to the time and expertise required to reconvert the goods in issue. He asked the Tribunal to consider that evidence when applying the principles set forth in *Hasselwander*.

Also relying on *Hasselwander*, counsel for the respondent argued that the Supreme Court of Canada determined that the word “capable” means “capable of conversion to an automatic weapon in a relatively short period of time with relative ease”⁶ (emphasis added). Counsel further relied on the Tribunal’s decision in *Special Missions Group Limited v. The Deputy Minister of National Revenue*,⁷ a case, she claimed, similar to the one at hand in terms of modifications brought to the firearms. The Tribunal, in that case, applied the *Hasselwander* decision and found that the firearms were capable of being reconverted to automatic weapons in a relatively short period of time with relative ease. Counsel added that the Tribunal also concluded that it was irrelevant whether the replacement parts were actually available and whether the firearms were imported by people who were knowledgeable on weapons. Counsel argued that the type of tools and parts used in this case to reconvert the goods in issue into the automatic mode are such that the goods were capable of being reconverted with relative ease. Given that the time of reconversion ranged from 30 seconds to 37 minutes, counsel concluded that the time period was also relatively short. On that basis, the goods in issue were “prohibited weapons” at the time of their importation.

It is worth noting that most of the written submissions of counsel for the appellant dealt with the availability of other programmes and remedies, including a deactivation procedure monitored by the Royal Canadian Mounted Police, and the disposition of goods illegally imported or the disposal of things abandoned or forfeit under sections 102 and 142 of the Act respectively. Although, at the hearing, counsel moved away from these submissions, the Tribunal wishes to clarify that it does not have jurisdiction with respect to any of these programmes or remedies. The Tribunal’s jurisdiction, in this case, is limited to determining the classification of the goods in issue under section 67 and subsection 68(2) of the Act.

As admitted by counsel for the appellant, the case law has changed considerably since the Tribunal’s original decision, particularly since the *Hasselwander* decision. The Tribunal is of the view that, in light of that decision, the only issue is to determine whether the length of time and the ease or difficulty with which it took the respondent’s expert to reconvert a sample of these firearms make them fall within the parameters of

5. [1993] 2 S.C.R. 398.

6. *Ibid.* at 416.

7. Appeal No. AP-89-284, February 13, 1996.

the *Hasselwander* case. The Tribunal also notes that, contrary to the case law that existed at the time of the original decision, the *Hasselwander* decision makes it clear that the word “capable” in the English version of the definition of “prohibited weapon” includes “a potential for conversion⁸” and that the definition of the word “*pouvant*” in the French version includes “a potential which has yet to be realized, a future possibility as opposed to just an immediate capacity.⁹” Thus, in cases involving converted firearms (or reconverted firearms for that matter), the Supreme Court of Canada has established two criteria for determining whether a specific firearm is capable of firing bullets in the so-called automatic mode, namely, a relatively short period of time for the conversion and the relative ease of that conversion.

Having examined the evidence on the basis of the criteria in *Hasselwander*, the Tribunal finds that the reconversion of the goods in issue to the automatic mode was done in a relatively short period of time, ranging from 30 seconds to 37 minutes. The Tribunal notes, in this regard, that, in *Special Missions Group*, reconversion work ranging from five minutes to one hour was found to fall within the parameters of the *Hasselwander* decision. As to the relative ease with which the reconversion was made, the Tribunal is of the view that among the factors to consider are the type of tools involved (including the general, as opposed to the specialized, nature of the tools involved, their complexity, etc.) and the availability of the parts or the ease with which they can be either adapted or replaced. The Tribunal notes, in this regard, that the testimony of the respondent’s expert was that the reconversion took place not in a machine shop but merely in the armourer’s workshop of the Calgary Police Service. The tools used included a drill press, a grinder, a Dremel tool, an arc welding set, an acetylene torch, emery paper, files, grinding stones and hacksaws. As to the parts used, only in one instance was it necessary to make a piston head, otherwise the piston heads were found with the firearms. In the Tribunal’s view, most of the tools used are not complex, while the parts used were readily available or were easy to replace and, therefore, the reconversion also meets the second test of *Hasselwander*. The Tribunal finally notes that counsel for the appellant has made no arguments regarding the three types of firearms that were able to fire in the automatic mode as taken from the shipment.

The Tribunal concludes that all the goods in issue are “prohibited weapons” within the definition of the *Criminal Code* and, consequently, that they fall under the definition of “offensive weapons” within the meaning of Code 9965 of Schedule VII to the *Customs Tariff*, which prohibits their importation into Canada.

Patricia M. Close

Patricia M. Close
Presiding Member

Raynald Guay

Raynald Guay
Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

8. *Supra* note 6.

9. *Ibid.*