CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, February 27, 2002

Appeal No. AP-99-080

IN THE MATTER OF an appeal heard on November 9, 2001, 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 Deputy Minister of National Revenue dated July 14, 1999, with respect to a request for redetermination under subsection 60(4) of the *Customs Act*.

BETWEEN

CHARLES LEUNG **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. AP-99-080

CHARLES LEUNG **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal heard by way of videoconference in Hull, Quebec, and Vancouver, British Columbia, under subsection 67(1) of the *Customs Act* from a decision of the Deputy Minister of National Revenue dated July 14, 1999, pursuant to subsection 60(4) of the *Customs Act*. The issue in this appeal is whether the Airsoft guns, which were detained by the respondent on May 5, 1999, are replica firearms and, therefore, prohibited devices properly classified under tariff item No. 9898.00.00.

The respondent submitted that the appellant failed to file his appeal within 90 days from the respondent's decision, as required by section 67 of the *Customs Act*. Therefore, the respondent submits, in the first instance, that the appeal must be dismissed.

HELD: The appeal is dismissed. In the Tribunal's view, the goods in issue are replica firearms and, as a result, are properly classified under tariff item No. 9898.00.00. This point is somewhat moot, however, given that it is the Tribunal's view that the appeal was filed late. Pursuant to section 149 of the *Customs Act*, the notice of decision is deemed to have been given on the date appearing on the notice, i.e. July 14, 1999. In accordance with subsection 67(1) of the *Customs Act*, the latest date that the appeal could have been filed was 90 days later, that is, on October 12, 1999. The appeal was not filed with the Tribunal until October 20, 1999. However, the Tribunal decided to hear evidence and argument on both the jurisdiction issue and the classification issue, given the fact that a Tribunal information document concerning the appropriate date to begin the 90-day period was inconsistent with the Act. The appellant had relied on that information document, which has subsequently changed. Neither the Tribunal nor the respondent, in the ensuing two years, notified the appellant of this timing discrepancy.

Places of Videoconference Hearing:	Hull, Quebec, and Vancouver, British Columbia
Date of Hearing:	November 9, 2001
Date of Decision:	February 27, 2002
Tribunal Member:	Patricia M. Close, Presiding Member
Counsel for the Tribunal:	Dominique Laporte
Clerks of the Tribunal:	Anne Turcotte Margaret Fisher
Appearances:	Charles Leung, for the appellant Michael Roach, for the respondent

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-99-080

CHARLES LEUNG **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

This is an appeal heard by way of videoconference in Hull, Quebec, and Vancouver, British Columbia, under subsection 67(1) of the *Customs Act*[1] from a decision of the Deputy Minister of National Revenue dated July 14, 1999, pursuant to subsection 60(4) of the Act. The issue in this appeal is whether the Airsoft guns, which were detained by the respondent on May 5, 1999, are replica firearms and, therefore, prohibited devices properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.[2]

Tariff item No. 9898.00.00 reads, in part, as follows:

> 9898.00.00 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 …
>
> For the purposes of this tariff item,
>
> (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.

Subsection 84(1) of the *Criminal Code*[3] provides that "prohibited device" includes, among other things, a replica firearm.

Subsection 84(1) of the *Criminal Code* defines a "replica firearm" 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".

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. S.C. 1997, c. 36.
3. R.S.C. 1985, c. C-46.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

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EVIDENCE

The goods in issue were filed as exhibits by the respondent. They consist of: (a) one 6-mm calibre MGC Model M16A2 gas-operated Airsoft carbine; (b) one 6-mm calibre MARUSHIN Mossberg Model M500 gas-operated Airsoft shotgun; (c) one 6-mm calibre JAC Colt AR-15 Model M16A1 gas-operated Airsoft rifle; (d) one 6-mm calibre FALCON TOY LTD. Galil gas-operated Airsoft rifle; and (e) one 6-mm calibre JAC Uzi gas-operated Airsoft submachine gun. The appellant confirmed that the exhibits were the goods that he had tried to import.

The appellant explained that, in March 1999, he tried to import the goods in issue into Canada from Hong Kong, but that they were detained on arrival at Canadian Customs on May 5, 1999. He testified that he had had the goods in issue in his possession for a long time. Some of them were given to him by friends and represent his memorabilia. He further explained that, because similar replica firearms were being sold in ordinary shops in British Columbia without any certification or licence, he felt that he could import the goods in issue. He also noted that, before shipping the goods, he inquired about the laws in Canada and understood, at the time, that their importation was allowed. He stated that he was unaware that the laws in Canada had changed on December 1, 1998.

The appellant told the Tribunal that the respondent made a decision on July 14, 1999. The notice of decision was received by Ms. Phyllis Loke, who had power of attorney, on July 21, 1999. The notice stated that the goods in issue fall under tariff item No. 9898.00.00 and, as such, were prohibited weapons in Canada. The appellant stated that, on October 19, 1999, an appeal of this decision was sent by facsimile to the Tribunal.

When asked by the respondent if he agreed that the goods in issue were replica firearms designed to resemble actual firearms and that a person not having special expertise in firearms could mistake these goods for real guns, the appellant responded in the affirmative.

Mr. Deryk V.R. Penk, Forensic Laboratory Services Directorate of the Royal Canadian Mounted Police (RCMP), gave testimony on the respondent's behalf. Mr. Penk was qualified by the Tribunal as an expert witness in firearm identification, including the identification and classification of replica firearms. He explained that he had conducted examinations and testing on the goods in issue. He testified that, although the goods in issue have a barrel and discharge projectiles, they were short of the minimum velocity of 129 metres per second required to cause serious bodily injury to a person, which he defined as the incapacitation of a person, either temporary or permanent. He further testified that, based on a comparison of the goods in issue with the RCMP's standard collection of real firearms, the goods resemble with near precision the real firearms. He stated that, in his opinion, the goods in issue were replica firearms, meant to represent real firearms, all manufactured after 1898 and, therefore, also not antique weapons. He further testified that it is common for replica firearms, such as the goods in issue, to be made by Japanese toy companies.

ARGUMENT

With respect to the preliminary issue of the Tribunal's jurisdiction regarding the timing of the appeal, the appellant submitted that the Tribunal has jurisdiction to hear this matter, as the appeal was filed on October 19, 1999, which was within the 90-day period prescribed in a Tribunal information document entitled *Information on Appeals from Customs, Excise and SIMA Decisions*. He indicated that the information document provides that appeals must be filed within 90 days after the person has received a decision.

According to the appellant, the goods in issue are replica firearms that do not have to be registered pursuant to the *Firearms Act*.[4] The appellant argued that individuals do not require a licence to own them and that a specific provision for their export exists under the *Firearms Act*. Reference was made to paragraph 84(3)(*d*) of the *Criminal Code*,[5] which provides, in part, that "any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second" is deemed not to be a firearm. The appellant also cited portions of the *Police Officer Field Handbook*, *Classes of Weapons, Devices & Ammunition*, in order to show that there was no registration or licensing requirements for weapons that are not designed or adapted to discharge a projectile at a muzzle velocity of more than 152.4 metres per second.

The appellant made reference to the *Firearms Officer Desk Manual*, *Weapons Classification*, which deals specifically with replica firearms and provides that they do not have to be registered and that individuals do not require a licence to own them. He argued that similar replica firearms were being sold openly in various stores in Vancouver. Finally, the appellant submitted that, if the importation of the goods in issue is prohibited, the importer may abandon the goods by exporting them to a country that permits their importation, this pursuant to subsection 102(1) of the Act. The appellant asked that the goods in issue be exported to Hong Kong.

Dealing, first, with the issue of jurisdiction, the respondent argued that the appeal was filed outside the 90-day period. He submitted that the decision was issued on July 14, 1999, in care of Ms. Loke, who had the authority to handle the matter on behalf of the appellant. The respondent referred to section 149 of the Act, which provides that, when a notice is given by mail, it is deemed to be given on the date of mailing or, in the absence of such evidence, deemed to be the date appearing on the notice. As the notice of decision is dated July 14, 1999, the appeal should have been filed, at the latest, on October 14, 1999. The respondent argued that, since the notice of appeal is date-stamped October 20, 1999, the appeal was, therefore, not filed within the 90-day period. The respondent urged the Tribunal to follow the reasoning adopted in Appeal No. AP-99-042,[6] in which the appeal filed on the 91st day was dismissed for lack of jurisdiction. The respondent further argued that the Tribunal is not a court of equity, but merely a statutory creature that has only the jurisdiction to inquire into matters given to it under statute.

With respect to the merits of the case, the respondent submitted that the goods in issue are properly classified under tariff item No. 9898.00.00 as prohibited devices. The respondent also submitted that this tariff item adopts the definition of "prohibited device" found in subsection 84(1) of the *Criminal Code*, which expressly provides that it covers replica firearms. The respondent argued that: the goods in issue meet the three conditions of the definition of "replica firearm" under the *Criminal Code*, as the evidence is clear that the goods in issue are designed or intended to exactly resemble, or to resemble with near precision, a firearm; they are not firearms, as the projectile that they can discharge is not capable of causing serious bodily injury or death to a person; and, finally, they are not designed or intended to resemble antique firearms. In accordance with subsection 136(1) of the *Customs Tariff*, the importation of goods of tariff item No. 9898.00.00 is prohibited. The respondent argued that, in the event that the appeal is dismissed, the goods in issue must be forfeited to the Crown and, relying on the Tribunal's decision in Appeal No. AP-96-057,[7] submitted that the Tribunal did not have jurisdiction in respect of the disposal of the goods in issue.

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4. S.C. 1995, c. 39.
5. *Supra* note 3.
6. *Pabla Fashions* v. *DMNR* (30 August 2000) (CITT) [hereinafter *Pabla*].
7. *Catherine Roozen* v. *DMNR* (1 March 1999) (CITT) [hereinafter *Roozen*].

DECISION

The Tribunal will deal, first, with the jurisdiction issue. According to the respondent, the appeal should be dismissed, as it was filed outside the 90-day statutory period, and the Tribunal has no authority to extend that deadline. On the other hand, the appellant argued that the Tribunal has jurisdiction to hear this matter, given that he relied upon the Tribunal information document.

The Tribunal acknowledges that its information document was not consistent with subsection 67(1) of the Act. Further, it notes that, where there is an inconsistency between an information document and the legislation, the legislation must prevail. The relevant sections of the Act are as follows:

> 67.(1) A person aggrieved by a decision of the Deputy Minister made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the Deputy Minister and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given. [Emphasis added]
>
> 149. For the purposes of this Act, the date on which a notice is given pursuant to this Act or the regulations shall, where it is given by mail, be deemed to be the date of mailing of the notice, and the date of mailing shall, in the absence of any evidence to the contrary, be deemed to be the day appearing from such notice to be the date thereof unless called into question by the Minister or by some person acting for him or Her Majesty.

Pursuant to section 149 of the Act, the notice of decision is deemed to have been given on the date appearing on the notice, i.e. July 14, 1999. In accordance with subsection 67(1) of the Act, the latest date that the appeal could have been filed was 90 days later, that is, on October 12, 1999. As the appeal was received by the Tribunal on October 20, 1999, i.e. more than 90 days after notice of the decision was given, it was filed late, according to the legislative sections quoted above. However, the Tribunal takes note of the appellant's argument that he relied on the Tribunal information document, which provides that "[a]ppeals must be filed within 90 days after the person has received a decision." [Emphasis added] The Tribunal acknowledges that the information document, which has subsequently been changed, was not consistent with subsection 67(1) of the Act.[8] Moreover, the Tribunal notes that the appeal, dated October 19, 1999, the 90th day, was not sent by facsimile to the Tribunal, as the appellant argued, on that day. Rather, as the facsimile date indicates, it was only sent to and received by the Tribunal on October 20, 1999. The appeal, therefore, was late regardless of the starting date of the 90-day period.

The Tribunal also notes that this case distinguishes itself from *Pabla*. In that case, the decision on jurisdiction was taken immediately upon receiving the appeal. In this case, the Tribunal received the appeal two years prior to the hearing. During this period, the respondent and/or the Tribunal could have informed the appellant that the appeal was filed late. Neither did so.

In view of the inaccurate information document and the fact that neither the respondent nor the Tribunal raised the issue with the appellant, the Tribunal decided to hear evidence and argument on the classification issue, as well as on the jurisdiction issue.

It is the decision of the Tribunal that the appeal should not be allowed. Not only was the appeal filed late, regardless of how the period is calculated, but also, it is the Tribunal's view that the respondent correctly classified the goods in issue as replica firearms under tariff item No. 9898.00.00.

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8. The Tribunal notes that amendments to section 67.1 of the Act came into force on November 29, 2001 allowing an appellant, who has not filed an appeal within the 90-day period, to apply for an order extending that time.

The Tribunal is convinced by the testimony that the goods in issue are replica firearms. Not only did the appellant refer, throughout his testimony, to the goods as replica firearms but also the evidence is clear. The appellant acknowledged that the goods in issue fulfil all the requirements to be considered as such: they are designed or intended to exactly resemble, or to resemble with near precision, a firearm; they are not themselves firearms; and they are not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. As a replica firearm is included under the definition of "prohibited device" found in subsection 84(1) of the *Criminal Code*, the Tribunal is of the opinion that the respondent is correct in classifying the goods in issue under tariff item No. 9898.00.00.

The Tribunal does not agree with the appellant's contention that the goods in issue are excluded from tariff item No. 9898.00.00 by virtue of paragraph 84(3)(*d*) of the *Criminal Code*. Under tariff item No. 9898.00.00, an exclusion is provided for "(d) any weapon that, under subsection 84(3) of the Criminal Code, is deemed not to be a firearm". Paragraph 84(3)(*d*) reads, in part, as follows:

> (3) . . . the following weapons are deemed not to be firearms:
>
> (d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
>
> (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second, or
> (ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.

In the Tribunal's view, even if the goods in issue are not capable of firing a projectile at a velocity exceeding 152.4 metres per second, in fact, not even capable of firing at 129 metres per second, as the expert witness testified, this does not, in and of itself, warrant an exclusion. According to the evidence before the Tribunal, the goods in issue were not designed, such as perhaps a bee-bee gun, to fire at a certain low velocity. Rather, they were designed by companies to resemble firearms capable of firing at velocities that far exceed those provided for in paragraph 84(3)(*d*) of the *Criminal Code*. It is the Tribunal's view that it is this resemblance to such guns which causes replica firearms to be listed as prohibited devices in the *Criminal Code*, not their firing capacity. Since prohibited devices are classified under tariff item No. 9898.00.00, so are the goods in issue.

Although the Tribunal has no jurisdiction in respect of the *Firearms Act*, the appellant made reference to the fact that replica firearms do not have to be registered under that act. The Tribunal finds instructive the information contained in the fact sheet of the Canadian Firearms Centre, which was part of the appellant's aid to argument. It provides that, as of December 1, 1998, the import, manufacture and sale of replica firearms will be illegal (except under certain regulated circumstances). There is also a note indicating: "If you transport your replica firearms out of Canada for any reason, you will be prohibited from bringing them back again."

The other arguments raised by the appellant centred upon either fairness or the disposal of the goods in issue, neither of which is within the Tribunal's jurisdiction. The Tribunal is not a court of equity. Nor, as was previously stated in *Roozen*, does it have the jurisdiction to deal with the question of the disposal of the goods. Should the appellant wish to pursue this issue, it is a matter to be dealt with by the respondent or by the courts.

In light of the foregoing, the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member