



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-047

T. Lysyshyn

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, July 14, 2014*

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IN THE MATTER OF an appeal heard on June 12, 2014, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated October 3, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

T. LYSYSHYN

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Randolph W. Heggart
Randolph W. Heggart
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 12, 2014

Tribunal Member: Daniel Petit, Presiding Member

Counsel for the Tribunal: Alexandra Pietrzak

Student-at-law: Kalyn Eadie

Acting Senior Registrar Officer: Haley Raynor

PARTICIPANTS:**Appellant**

T. Lysyshyn

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Mr. T. Lysyshyn with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision, made on October 3, 2013 by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether three knives imported by Mr. Lysyshyn are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² as prohibited weapons and are therefore prohibited from importation into Canada pursuant to subsection 136(1).

PROCEDURAL HISTORY

3. On July 24, 2013, Mr. Lysyshyn imported the knives in issue, whereupon the CBSA detained them for further inspection.

4. On August 6, 2013, a decision pursuant to subsection 58(1) of the *Act* was sent to Mr. Lysyshyn, informing him that the knives in issue were classified as prohibited weapons and were thus prohibited from importation into Canada.

5. On August 27, 2013, Mr. Lysyshyn submitted a request for re-determination pursuant to subsection 60(1) of the *Act*.

6. On October 3, 2013, the CBSA issued its final decision, pursuant to subsection 60(4) of the *Act*, in which it determined that the knives in issue remained classified under tariff item No. 9898.00.00.

7. On November 13, 2013, Mr. Lysyshyn filed this appeal.

8. On March 12, 2014,³ the CBSA filed its brief and an expert report prepared by Constable Rick McIntosh of the Ottawa Police Service.

9. 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 to which the parties did not object. The hearing was held in Ottawa, Ontario, on June 12, 2014. The knives in issue were made available and were examined by the Tribunal during the file hearing.

KNIVES IN ISSUE

10. The three knives in issue are identical. They are folding knives that measure approximately 23 centimeters in length when opened, and 13 centimeters when closed. The knives are equipped with non-serrated blades with the words “SOG Flash Tanto” etched on one side and “F-555” on the other. The blades and handles are both black.⁵

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. The CBSA subsequently submitted an amended expert report on March 18, 2014.

4. S.O.R./91-499.

5. Exhibit AP-2013-047-B-01.

LEGAL FRAMEWORK

11. Subsection 136(1) of the *Customs Tariff*⁶ provides as follows:

<p>The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.</p>	<p>L'importation des marchandises des n^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.</p>
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[Emphasis added]

12. Tariff item No. 9898.00.00 provides as follows:

<p>Firearms, <i>prohibited weapons</i>, 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</p>	<p>Armes à feu, <i>armes prohibées</i>, 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 [...].</p>
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...

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

[...]

Pour l'application du présent numéro tarifaire :

[...]

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 [...].

[Emphasis added]

13. When dealing with the classification of goods under tariff item No. 9898.00.00, subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System*⁷ do not apply. Furthermore, Note 1 to Chapter 98 of the *Customs Tariff* provides that “[t]he provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a). Goods which are described in any provision of this Chapter are classifiable in the said provision if the conditions and requirements thereof and of any applicable regulations are met.”

14. Therefore, whether the knives in issue are properly classified under tariff No. 9898.00.00 must be determined not according to the *General Rules*, but in accordance with the applicable provisions of the *Customs Tariff* and the *Criminal Code*.⁸

6. S.C. 1997, c. 36.

7. *Ibid.*, schedule [*General Rules*].

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

15. In this regard, the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code* includes the following:

- | | |
|---|--|
| (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or | a) Couteau dont la lame s’ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche; |
| (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. |

16. In order to determine whether the knives in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00 and, therefore, as goods prohibited from importation into Canada, the Tribunal must determine whether they meet the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code*. To be considered a prohibited weapon, a weapon must either be (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife; or (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon.

POSITIONS OF PARTIES

Mr. Lysyshyn

17. Mr. Lysyshyn disagreed with the classification of the knives in issue as prohibited weapons under tariff item No. 9898.00.00. In particular, he argued that the knives in issue can only be opened manually by pushing on the thumb tab located on the blade on its unsharpened side or on the base of the blade. He stated that the knives have no button, spring or any other mechanical device which would allow them to open automatically. Moreover, Mr. Lysyshyn insisted that it is only after the blade has been opened by manually pushing on the tab that the blade is balanced by a torsion bar.

18. Mr. Lysyshyn also contended that the knives in issue cannot be opened automatically by centrifugal force. In support of this position, he argued that the operation of the knives does not meet the *Oxford Dictionary* definition of “centrifugal”, which states as follows:

a force, arising from the body’s inertia, which appears to act on a body moving in a circular path and is directed away from the centre around which the body is moving.⁹

19. Mr. Lysyshyn argued that, contrary to the definition of “centrifugal” set out above, the blade does not move in a circular path, but rather travels 180 degrees in a linear fashion.

CBSA

20. The CBSA argued that the goods in issue are properly classified as prohibited weapons because they may be opened by hand pressure applied to a lever protrusion, by hand pressure applied to the thumb stud or by centrifugal force with a flick of the wrist. In particular, the CBSA contended that the goods in

9. Exhibit AP-2013-047-09A at 3, Vol. 1.

issue have blades that open automatically by centrifugal force, and by hand pressure “. . . applied to a lever protrusion (device) located in the spine of the knives’ handles and attached to the handles in ‘some way’.”¹⁰

21. The CBSA referred to several prior Tribunal decisions in which it was found that a knife which can be opened by a “flick of the wrist” is considered to be a knife which opens automatically by centrifugal force, and is therefore considered a prohibited weapon.¹¹ In addition, the CBSA contended that the goods in issue are comparable to the knives at issue in *R. Christie v. President of the Canada Border Services Agency*,¹² in which the Tribunal held the following:

60. . . . it was clear to the Tribunal that all the Stiletto knives in issue opened automatically by application of slight pressure to either the thumb lever or the thumb button, both of which are attached to the handle of the knife in some way. In this regard, the Tribunal was not persuaded by Mr. Christie’s assertion that the thumb button did not meet the requirements of paragraph 84(1) of the *Criminal Code* because it was located on the blade.

[Footnote omitted]

22. Therefore, the CBSA argued that the goods in issue meet the definition of a prohibited weapon under paragraph 84(1)(a) of the *Criminal Code*.

ANALYSIS

Preliminary Issue: Qualification of the CBSA’s Expert Witness

23. The CBSA filed an expert report prepared by Constable Rick McIntosh of the Ottawa Police Service and sought to have Constable McIntosh qualified as an expert in prohibited weapons. Mr. Lysyshyn did not object to this request and did not explicitly question Constable McIntosh’s qualifications as a prohibited weapons expert. However, Mr. Lysyshyn contended that alleged inconsistencies in the report revealed that Constable McIntosh did not actually personally inspect the goods in issue. Specifically, Mr. Lysyshyn argued that the blades of the goods in issue are green, though Constable McIntosh stated, in his report, that they were black.¹³

24. Constable McIntosh’s report describes the operation of the knives in issue. He also reported that, in his expert opinion, the knives in issue are prohibited weapons within the meaning of subsection 84(1) of the *Criminal Code*.

25. The Tribunal accepts Constable McIntosh’s qualification as an expert in the functioning of weapons, particularly knives. However, it is well established that it is the Tribunal’s mandate to determine the legal classification of the knives in issue, i.e. whether they are “prohibited weapons” for the purposes of subsection 84(1) of the *Criminal Code*.¹⁴ Therefore, any opinions expressed by Constable McIntosh in his report that go to the ultimate issue of whether the knives in issue are prohibited weapons were given minimal weight.

10. Exhibit AP-2013-047-06A at para. 21, Vol. 1.

11. *Ibid.* at para. 23.

12. (15 January 2014), AP-2012-072 (CITT) [*Christie*].

13. Exhibit AP-2013-047-19 at 1, Vol. 1A.

14. *La Sagesse de l’Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) [*La Sagesse de l’Eau*] at para. 35.

26. The Tribunal gives no credence to Mr. Lysyshyn's allegations regarding the reliability of Constable McIntosh's report. The CBSA has relied on Constable McIntosh's expertise in several cases before the Tribunal and, in those instances, the Tribunal has never had reason to doubt his credibility.¹⁵ The Tribunal notes that its own inspection of the knives in issue at the hearing showed that the blades of the knives in issue can reasonably be described as being black, but they could easily and just as reasonably have been described as being very dark green. This fact, coupled with Constable Macintosh's attestation in his report that he did examine the knives in issue, allows the Tribunal to rely on Constable McIntosh's report as being based on a personal examination of the knives in issue.

Are the Knives in Issue Prohibited Weapons?

27. In order to determine whether the knives in issue are properly classified as "prohibited weapons", the relevant definition is paragraph 84(1)(a) of the *Criminal Code*. Accordingly, the test requires that the blade open automatically in one of two ways: (1) by gravity or centrifugal force, or (2) by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

28. Constable McIntosh reported having successfully opened the blade of the knives in issue when he conducted three tests using the thumb stud, three tests using the "SpeedSafe" style lever, and five standard "flick" tests. According to Constable McIntosh, the "flick" tests confirmed that the goods in issue, in addition to their assisted-opening design, were capable of being opened by centrifugal force alone.¹⁶ This contradicts Mr. Lysyshyn's position that the goods in issue can only be opened by applying pressure to the blade or on the tab located on the base of the blade.¹⁷

29. The Tribunal's own examination of the knives in issue confirms that they are capable of being opened by centrifugal force alone through the flick of the wrist, without the use of the thumb stub or lever. As submitted by the CBSA, the Tribunal has repeatedly held that knives that open in this manner are considered capable of being opened by centrifugal force and are thus prohibited weapons within the meaning of paragraph 84(1)(a) of the *Criminal Code*.¹⁸

30. With respect to Mr. Lysyshyn's argument regarding the meaning of "centrifugal", the Tribunal would note that, contrary to Mr. Lysyshyn's contention, the path described by the tip of the blade is indeed that of a 180 degree arc and not that of a straight line. Since an arc is part of a circle, the blades of the knives can reasonably be described as travelling in a circular path.

31. As the Tribunal has found that the knives in issue open automatically by centrifugal force, it is not necessary to address the CBSA's argument regarding the lever mechanism.

32. Finally, though not necessary to the disposition of this appeal, the Tribunal would also like to comment that it was concerned by the fact that neither the manufacturer's packaging of the knives in issue

15. See, for example, *Christie; La Sagesse de l'Eau; R. Joschko v. President of the Canada Border Services Agency* (14 December 2011), AP-2011-012 (CITT); *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT).

16. Exhibit AP-2013-047-06C at 2, Vol. 1.

17. Exhibit AP-2013-047-09A at 2, Vol. 1.

18. *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT) at 2-3; *MilArm Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (12 July 2006), AP-2002-114 (CITT) at para. 13 *Kenneth Lee v. President of the Canada Border Services Agency* (12 July 2006), AP-2003-054 (CITT) at para. 12 *Terry Shannon v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-059 (CITT) at para. 13 *Christie* at paras. 59, 64.

nor the envelopes in which they were shipped properly described their contents. The packaging of the knives in issue describes them as “blades and tools” and, more problematically, the customs declaration on the shipping envelopes describes the knives as “toys”.¹⁹ This latter could be seen as an attempt on the part of the shipper to mislead the CBSA as to the contents of the packages.

CONCLUSION

33. The Tribunal finds that the knives in issue are properly classified under tariff item No. 9898.00.00 as prohibited weapons, in accordance with the requirements of paragraph 84(1)(a) of the *Criminal Code*, as the knives in issue open automatically by centrifugal force.

DECISION

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

Daniel Petit

Daniel Petit
Presiding Member

19. Exhibit AP-2013-047-B-01.