



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-006

D. Morgan

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, December 4, 2014*

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IN THE MATTER OF an appeal heard on November 13, 2014, pursuant to section 67 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 April 28, 2014, with respect to a request for re-determination pursuant to section 60 of the *Customs Act*.

BETWEEN

D. MORGAN

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 13, 2014

Tribunal Member: Daniel Petit, Presiding Member

Counsel for the Tribunal: Eric Wildhaber
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Registrar Officer: Alexis Chénier

PARTICIPANTS:**Appellant**

D. Morgan

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on April 28, 2014,² by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The subject of this appeal is the CBSA's determination that three devices made of hard durable material, which the CBSA has described as resembling the Colt LE6920 SOCOM M4-A1 Carbine³ (M4 Carbine) (the goods in issue), are replica firearms and thus prohibited devices under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.⁴

3. On May 9, 2014, Mr. D. Morgan filed the present appeal. The Tribunal decided to hear the matter by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁵ The hearing was held on November 13, 2014.

4. The CBSA filed a report⁶ (the CBSA report), prepared by Mr. Murray A. Smith of the Royal Canadian Mounted Police, which made various observations concerning the goods in issue. The CBSA report described the goods in issue as inert rubber replicas of the M4 Carbine and incapable of discharging a projectile or being readily modified to do so. It identified two of the goods in issue as blue, and one as black, and concluded that the goods in issue of both colours resembled with near precision an M4 Carbine.

5. The Tribunal examined the goods in issue, as well as an M4 Carbine provided by the CBSA.

STATUTORY FRAMEWORK

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

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

7. Tariff item No. 9898.00.00 provides as follows:

Firearms, prohibited weapons, restricted weapons, <i>prohibited devices</i> , 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, <i>dispositifs prohibés</i> , 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 [...]
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For the purposes of this tariff item:	Pour l'application du présent numéro tarifaire :
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. . .	[...]
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(b) "automatic firearm", "licence", "prohibited	b) « arme à autorisation restreinte », « arme à feu
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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. Exhibit AP-2014-006-06A at para. 14, note 8, Vol. 1.

3. Exhibit AP-2014-006-06A at para. 10, Vol. 1.

4. S.C. 1997, c. 36.

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

6. Exhibit AP-2014-006-06A, tab 1, Vol. 1.

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

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]

8. 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 provides that “[g]oods which are described in any provision of this Chapter are classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.”

9. According to the *Customs Tariff*, a “prohibited device” includes a replica firearm, as defined in subsection 84(1) of the *Criminal Code*.⁸

10. Subsection 84(1) of the *Criminal Code* defines “replica firearm” as follows:

“replica firearm” means any device [requirement 1] that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and [requirement 2] that itself is not a firearm, [requirement 3] but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

« réplique » Tout objet, [condition 2] qui n’est pas une arme à feu, [condition 1] conçu de façon à en avoir l’apparence exacte — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence. La présente définition [condition 3] exclut tout objet conçu de façon à avoir l’apparence exacte d’une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence.

11. The word “firearm”, for the purpose of this tariff item, has the same meaning as “firearm” found in section 2 of the *Criminal Code*, that is:

“firearm” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

« arme à feu » Toute arme susceptible, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, d’infliger des lésions corporelles graves ou la mort à une personne, y compris une carcasse ou une boîte de culasse d’une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.

7. S.C. 1997, c. 36, schedule.

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

12. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

“antique firearm” means

- (a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or
(b) any firearm that is prescribed to be an antique firearm.

« arme à feu historique » Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement.

13. Therefore, to be considered replica firearms, the goods in issue must fulfill three requirements: (1) they must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) they must not themselves be firearms; and (3) they must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

ANALYSIS

Are the Goods in Issue Designed or Intended to Exactly Resemble, or to Resemble With Near Precision, a Firearm?

14. Mr. Morgan argued that, for goods to be classified as replicas, they must be exact copies of real firearms. He submitted that the goods in issue do not contain moving parts, are not constructed from the same material as real firearms, are blue in colour and, therefore, are not exact copies of real firearms.⁹

15. As the Tribunal has held in the past, the determination of whether goods resemble firearms is primarily a visual exercise, considering resemblance in size, shape and general appearance.¹⁰ Furthermore, exact resemblance is not the only standard, but goods that resemble firearms with near precision are also to be classified as replica firearms.

16. According to Mr. Morgan’s own submission, the goods in issue are intended to be used “. . . in reality based scenarios . . .”¹¹ and, without the goods in issue, “. . . members of National Defence and Law Enforcement will not have the advantage of training scenarios to ready them for real life dangerous situations.”¹² The inference is clear that the goods in issue are valuable to Mr. Morgan’s purposes because of their resemblance to dangerous firearms. The Tribunal recognizes that Mr. Morgan made these arguments to support the reason for which he wants access to the goods in issue, as supported by his evidence in the form of a reference letter and purchase order from the Department of National Defence. However, by confirming how realistic they actually are, the Tribunal finds that Mr. Morgan’s position in fact supports a finding that the goods in issue do truly resemble firearms.

17. Upon its own visual examination, the Tribunal also found that the goods in issue resemble, with near precision, the M4 Carbine. As to the differences identified by Mr. Morgan and acknowledged by the CBSA, the difference in material is not so striking so as to prevent the goods in issue from being recognized as firearms; similarly, the lack of moving parts are not immediately obvious, and this feature merely serves to prove that the goods in issue are not themselves firearms, as required by the definition of “replica firearm”.

9. Exhibit AP-2014-006-04, Vol. 1.

10. See, for example, *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (26 September 2003), AP-2002-009 (CITT).

11. Exhibit AP-2014-006-04, Vol. 1.

12. *Ibid.*

18. Regarding colour, two of the goods in issue are blue and, therefore, different from the black M4 Carbine that the Tribunal had available for inspection (the third device is black and, therefore, identical in that respect). In its report, the CBSA acknowledged that the colour blue is often used to denote use for training purposes, which might purportedly be a sign that they are inert.¹³ However, the CBSA also presented evidence that authentic firearms are manufactured in a variety of non-traditional colours.¹⁴ In the Tribunal's view, the difference in colour does not prevent the goods in issue from resembling, with near precision, real firearms, since colour can easily be mistaken, particularly in poor lighting, and could obviously be altered after importation by repainting.

Are the Goods in Issue Themselves Firearms?

19. In order to meet the definition of a "replica firearm", the goods in issue must not actually be firearms. As noted above, "firearm" is defined in section 2 of the *Criminal Code*. To paraphrase, a firearm must be able to, or be able to be adapted to, discharge projectiles capable of causing serious bodily harm or death. The Tribunal finds that the goods in issue are not firearms, as they contain no moving parts and cannot fire a projectile (as confirmed by Mr. Morgan¹⁵), nor could they be adapted to do so.¹⁶

Are the Goods in Issue Designed or Intended to Exactly Resemble, or to Resemble With Near Precision, an Antique Firearm?

20. An antique firearm is defined as a firearm manufactured before 1898. The evidence before the Tribunal shows that the M4 Carbine was developed by Colt starting in 1988 as the XM4 Carbine and adopted by the U.S. military in 1994, when it was designated the U.S. M4 Carbine (commonly referred to as the M4 Carbine).¹⁷ Therefore, the goods in issue are not antique firearms.

Other Matters

21. The CBSA did not contest Mr. Morgan's assertions that he is an instructor for military, law enforcement and security personnel,¹⁸ nor did it specifically dispute that similar goods may be acquired in Canada. It was not necessary for the Tribunal to make findings on these matters, as they were not relevant to the determination of whether the goods in issue are prohibited devices. Similar arguments have previously been rejected by the Tribunal. For example, in *KA Wong v. President of the Canada Border Services Agency*,¹⁹ the Tribunal confirmed that the availability of similar goods in Canada is not a relevant consideration and noted that, while "... replica firearms may lawfully be imported into Canada under certain conditions[,] [t]he onus rests with the importer to obtain the appropriate licence to do so."²⁰

22. There is no evidence on the record that Mr. Morgan has the appropriate licence for the importation of the goods in issue.

23. For the foregoing reasons, the Tribunal finds that the goods in issue are replica firearms of tariff item No. 9898.00.00 and are therefore prohibited devices.

13. Exhibit AP-2014-006-06A, tab 1 at para. 15, Vol. 1.

14. Exhibit AP-2014-006-06A, tab 1 at para. 12, Vol. 1; Exhibit AP-2014-006-06A, tab 13, Vol. 1.

15. Exhibit AP-2014-006-04, Vol. 1.

16. Exhibit AP-2014-006-06A, tab 1 at para. 19, Vol. 1.

17. Exhibit AP-2014-006-06A, tab 1 at para. 4, Vol. 1.

18. Exhibit AP-2014-006-06A at para. 55, Vol. 1.

19. (18 July 2006), AP-2005-036 (CITT).

20. *Ibid.* at para. 18.

DECISION

24. The appeal is dismissed.

Daniel Petit

Daniel Petit
Presiding Member