



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-059

A. Downey

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, March 16, 2015*

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DECISION 8

IN THE MATTER OF an appeal heard on February 10, 2015, 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 January 16, 2014, with respect to a request for re-determination pursuant to section 60 of the *Customs Act*.

BETWEEN

A. DOWNEY

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: February 10, 2015

Tribunal Member: Daniel Petit, Presiding Member

Counsel for the Tribunal: Alexandra Pietrzak
Cassandra Baker (student-at-law)

Acting Senior Registrar Officer: Haley Raynor

PARTICIPANTS:**Appellant**

A. Downey

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

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 January 16, 2014, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

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

PROCEDURAL HISTORY

3. Mr. Downey ordered the goods in issue online from Brownells.com.³ They arrived in Canada by mail on October 29, 2013, and were detained by the CBSA at the International Mail Processing Centre under section 101 of the *Act*.

4. On December 2, 2013, the CBSA determined the goods in issue to be prohibited devices under tariff item No. 9898.00.00 and issued a decision, pursuant to subsection 58(1) of the *Act*, prohibiting them from entering Canada on the basis of subsection 136(1) of the *Customs Tariff*.

5. On December 16, 2013, Mr. Downey wrote to the CBSA to ask for a re-determination, pursuant to subsection 60(1) of the *Act*.

6. On January 16, 2014, the CBSA issued a re-determination under subsection 60(4) of the *Act*, upholding its decision classifying the goods in issue under tariff item No. 9898.00.00.

7. On March 4, 2014, Mr. Downey filed the present appeal with the Tribunal under subsection 67(1) of the *Act*.

8. Mr. Downey failed to file a brief in accordance with the initial deadline of May 5, 2014.

9. On May 8, 2014, the Tribunal directed Mr. Downey to file his brief immediately.

10. On May 12, 2014, Mr. Downey requested an extension of time to file his brief.

11. On May 14, 2014, the CBSA informed the Tribunal that it took no position in respect of Mr. Downey's request.

12. On May 15, 2014, the Tribunal granted Mr. Downey an extension of time until May 23, 2014, to file his brief.

13. Mr. Downey again failed to file his brief in accordance with the deadline set by the Tribunal.

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

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

3. Exhibit AP-2013-059-10A at 4, Vol. 1.

14. On June 4, 2014, the Tribunal directed Mr. Downey to file his brief immediately.
15. On June 12, 2014, having received no response from Mr. Downey, the Tribunal directed that Mr. Downey show cause why the appeal should not be dismissed.
16. On June 30, 2014, Mr. Downey filed a copy of his brief.
17. On July 2, 2014, the Tribunal requested the CBSA to provide its comments, if any, on the late filing of Mr. Downey's brief.
18. On July 8, 2014, the CBSA objected to the late filing of Mr. Downey's brief and requested that the appeal be dismissed.
19. On July 10, 2014, the Tribunal informed the parties that, after due consideration, it was prepared to accept the late filing of Mr. Downey's brief.
20. On September 30, 2014, the CBSA filed its brief. The brief included a report (the CBSA report), prepared by Mr. Murray A. Smith, Manager, Specialized Firearms Support Services, Royal Canadian Mounted Police.⁴
21. On September 30, 2014, the CBSA sent its brief, including the report prepared by Mr. Smith, to Mr. Downey.⁵
22. 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*.⁶ The hearing was held in Ottawa, Ontario, on February 10, 2015.
23. The Tribunal examined the goods in issue, as well as a Ruger 22 Charger pistol, provided by the CBSA.

GOODS IN ISSUE

24. The goods in issue are 3 identical Ruger BX-25x2 cartridge magazines, each designed to hold 50 rounds.⁷
25. At the time of their receipt by the CBSA, the goods in issue were separately packaged in clear plastic containers. Each package contained a Ruger BX-25x2 cartridge magazine, a magazine dust cover and a product brochure that described the magazine.⁸

4. Exhibit AP-2013-059-14A, tab 16, Vol. 1.

5. Exhibit AP-2013-059-14, Vol. 1.

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

7. Exhibit AP-2013-059-10A, Vol. 1; Exhibit AP-2013-059-14A at para. 1, Vol. 1.

8. Exhibit AP-2013-059-14A, tab 16, Vol. 1.

STATUTORY FRAMEWORK

26. Subsection 136(1) of the *Customs Tariff* 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]

27. Tariff item No. 9898.00.00 provides as follows:

<p>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</p>	<p>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 [...]</p>
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For the purposes of this tariff item:

Pour l'application du présent numéro tarifaire :

. . .

[...]

(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*

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 [...].

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

Armes à feu, armes prohibées, 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 [...]

[Emphasis added]

28. 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*⁹ 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."

29. According to the *Customs Tariff*, a "prohibited device" includes any items defined as a "prohibited device" in subsection 84(1) of the *Criminal Code*.¹⁰

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

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

30. Subsection 84(1) of the *Criminal Code* includes the following:

“Prohibited device” means	« dispositif prohibé »
...	[...]
(d) a cartridge magazine that is <i>prescribed</i> to be a prohibited device	d) chargeur désigné comme tel <i>par règlement</i> [...].

[Emphasis added]

31. The term “prohibited device” is prescribed under Part 4 of the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*¹¹ as follows:

3.(1) Any cartridge magazine	3.(1) Tout chargeur qui peut contenir :
...	[...]
b) that is capable of containing <i>more than 10 cartridges</i> of the type for which the magazine was originally designed and that is designed or manufactured for use <i>in a semi-automatic handgun</i> that is commonly available in Canada.	b) <i>plus de dix cartouches</i> du type pour lequel il a été initialement conçu et qui est conçu ou fabriqué pour servir <i>dans une arme de poing semi-automatique</i> qui est habituellement disponible au Canada.

[Emphasis added]

POSITIONS OF PARTIES

Mr. Downey

32. Mr. Downey argued that the name of the goods in issue is misleading. He claimed that, while the name of the goods in issue, Ruger BX-25x2 cartridge magazines, sounds similar to the Ruger BX-25 cartridge magazine, it is not simply “two BX-25 magazines joined together [which] could be separated”.¹² In particular, he submitted that, while the cartridge magazines are manufactured by the same company, they have completely different designs and model numbers.¹³

33. While Mr. Downey conceded that the goods in issue contain 50 rounds,¹⁴ he argued that the goods in issue were not explicitly listed as being able to function with a semi-automatic handgun. He argued that the CBSA incorrectly relied on the description listed on Cabelas.com for its reference and submitted that the Web site, Brownells.com, from which he purchased the goods in issue lists the goods as being compatible with the .22LR Ruger, 77/22 Rifle, 10/22 Rifle, SR-22Rifle, and Ruger American Rimfire Rifle only.¹⁵ As a result, Mr. Downey argued that the goods in issue should not be classified as prohibited devices under the *Criminal Code* and the *Firearms Regulations*.

11. S.O.R./98/462 [*Firearms Regulations*].

12. Exhibit AP-2013-059-10A, Vol. 1. Mr. Downey noted that the Ruger BX-25 cartridge magazine is illegal in Canada because it contains 25 rounds, more than the 10 rounds permitted under subsection 84(1) of the *Criminal Code* and subsection 3(1) of Part 4 of the *Firearms Regulations*.

13. Exhibit AP-2013-059-10A, Vol. 1.

14. *Ibid.*

15. *Ibid.*

34. In addition, Mr. Downey submitted that other cartridge magazines which are capable of being used with the 10/22 family of rifles and, particularly, the “Ruger 22 Charger” pistol are legal in Canada.¹⁶ As such, he contended that the goods in issue should also be legal in Canada.

CBSA

35. The CBSA argued that the goods in issue are “prohibited devices” under subsection 84(1) of the *Criminal Code* and subsection 3 or Part 4 of the *Firearms Regulations*, since they contain more than 10 cartridges and are designed for use in a semi-automatic handgun.

36. The CBSA maintained that the goods in issue were “. . . designed or manufactured for use in a semi-automatic handgun as per the *Firearms Regulations*”¹⁷ [footnote omitted]. In support of this position, the CBSA noted that marketing materials stated that the goods in issue can be used in the Ruger 22 Charger pistol.¹⁸

37. In addition, the CBSA report described the goods in issue as similar to the Ruger BX-25 cartridge magazines, in that “[t]he design of the Ruger BX-25x2 magazine is based on two Ruger BX-25 magazines joined head to tail . . .”¹⁹ The CBSA noted that, in addition to the physical testing by Mr. Smith which confirmed that the goods in issue and the Ruger BX-25 work with the Ruger 22 Charger pistol,²⁰ the manufacturer described the BX-25 cartridge as being designed to work with “. . . any factory original 22 Charger pistol.”²¹

38. While the Ruger 22 Charger is described as a pistol, the CBSA contended that the *Canadian Oxford Dictionary* defines a pistol as follows:

noun a small firearm designed to be held in one hand.²²

Moreover, the CBSA argued that the goods in issue meet the definition for “semi-automatic”, as set out by the *Firearms Regulations*,²³ and “handgun”, as defined by the *Criminal Code*.²⁴ On the basis of these definitions, the CBSA contended that the Ruger 22 Charger pistol meets the definition of a semi-automatic handgun.²⁵

39. The CBSA acknowledged that the Ruger 22 Charger pistol had been discontinued; however, the CBSA contended that it was nonetheless “. . . commonly available in Canada.”²⁶

16. *Ibid.* Mr. Downey provided the following list of 10 different types of cartridge magazines: (1) Blackdog 25 round magazine; (2) Blackdog 50 round drum magazine; (3) Butlercreek 25 round hotlips magazine; (4) Butlercreek 25 rounds steel lips magazine; (5) Tactical Innovations 25 round magazine; (6) Battledyne 25 round magazine; (7) HC3R 25 round magazine with 20 round stripper clip; (8) GSG 110 drum magazine; (9) Archangel 25 round magazine; and (10) Champion Target 25 round magazine.

17. Exhibit AP-2013-059-14A at para. 26, Vol. 1.

18. Exhibit AP-2013-14A, tab 25, Vol. 1.

19. Exhibit AP-2013-059-14A, tab 16, Vol. 1.

20. *Ibid.* at para. 43; Exhibit AP-2013-059-14A, tab 16, Vol. 1.

21. Exhibit AP-2013-059-14A at para. 27, Vol. 1.

22. *Ibid.* at para. 33.

23. *Ibid.* at para. 31.

24. *Ibid.* at para. 30.

25. *Ibid.* at para. 37.

26. *Ibid.* at para. 28.

ANALYSIS

Preliminary Issue

40. Throughout its brief, the CBSA referred to the report prepared by Mr. Smith as an “expert witness report”. However, the CBSA did not request, nor make any submissions in support of, qualifying Mr. Smith as an expert.

41. Given that the matter was heard by way of written submissions, Mr. Downey had an opportunity to make further written comments on the CBSA’s brief and the CBSA report before the date of the file hearing²⁷ but chose not to do so. Therefore, the evidence contained in the CBSA report remained unchallenged by Mr. Downey and, as such, the Tribunal has decided to accept the contents of the report as uncontroverted evidence, but will not designate the report as an “expert report” for the purposes of these proceedings.

Classification of the Goods in Issue

42. For the goods in issue to be classified as “prohibited devices” under subsection 84(1) of the *Criminal Code* and, therefore, prohibited from importation pursuant to subsection 136(1) of the *Customs Tariff*, they must meet the definition of “prohibited devices” as articulated in subsection 3(1) of Part 4 of the *Firearms Regulations*.

43. Consistent with the *Firearms Regulations*, a cartridge magazine will be a prohibited device if it (1) contains more than 10 cartridges and (2) is designed or manufactured for use in a semi-automatic handgun that is commonly available in Canada.

Are the Goods Capable of Each Containing More Than 10 Cartridges?

44. The parties have both agreed that the goods in issue are capable of containing 50 rounds.²⁸ As such, there is no dispute that this aspect of the test has been met.

45. The Tribunal therefore finds that the goods in issue are each capable of containing more than 10 cartridges.

Are the Goods Designed or Manufactured for use in a Semi-automatic Handgun that is Commonly Available in Canada?

46. The Tribunal’s own visual inspection of the goods in issue, along with the Ruger 22 Charger pistol, demonstrated that they are capable of being used with the Ruger 22 Charger pistol.

47. Additionally, the CBSA report indicated that the goods in issue were “. . . test fired using a Ruger 10/22 Carbine, a Ruger 10/22 Tactical rifle, and a Ruger 22 Charger pistol”²⁹ and that the “. . . magazine fit

27. Exhibit AP-2013-059-15, Vol. 1A.

28. Exhibit AP-2013-059-10A, Vol. 1; Exhibit AP-2013-059-14A at para. 46, Vol. 1.

29. Exhibit AP-2013-059-14A, tab 16, Vol. 1.

and functioned correctly in all three firearms.”³⁰ Moreover, the CBSA report noted that “[e]ach side of the Ruger BX-25x2 magazine is labeled ‘RUGER BX-25’ and ‘25 SHOT’.”³¹

48. While Mr. Downey asserted that the goods in issue were not identical to the Ruger BX-25 cartridge magazines, he did not dispute that they were capable of being used with the Ruger 22 Charger pistol, that each side of the goods in issue is labeled “RUGER BX-25” or that the packaging of the goods in issue described them as “[a]ll the fun and reliability of the BX-25 10/22 magazine times two”.³²

49. Therefore, in light of the uncontested evidence demonstrating that both Ruger BX-25 cartridge magazines and the goods in issue are functionally identical, to the extent that they are capable of being used with the Ruger 22 Charger pistol, and the marketing and promotional materials highlighting compatibility of the goods in issue with the Ruger 22 Charger pistol,³³ the Tribunal finds that the goods in issue are manufactured for use with the Ruger 22 Charger pistol.

50. Additionally, the Tribunal is satisfied that the Ruger 22 Charger pistol meets the definition of a semi-automatic handgun. As set out in the *Firearms Regulations*, the term “semi-automatic” is defined as follows:

1. In these Regulations, “semi-automatic”, in respect of a firearm, means a firearm that is equipped with a mechanism that, following the discharge of a cartridge, automatically operates to complete any part of the reloading cycle necessary to prepare for the discharge of the next cartridge.

1. Dans le présent règlement, « semi-automatique » qualifie l’arme à feu munie d’un mécanisme qui effectue automatiquement, après la décharge d’une cartouche, toute opération du processus de rechargement qui est nécessaire à la décharge de la prochaine cartouche.

51. The CBSA report stated, and the Tribunal accepts, that the Ruger 22 Charger pistol had been used to test fire the Ruger BX-25x2 magazine: “... 15 shots were fired from each compartment of the magazine There were no stoppages or any other problems with the magazine.”³⁴ Therefore, the Ruger 22 Charger pistol can be said to operate automatically to complete a part of the reloading cycle to prepare for the discharge of the next cartridge.

52. The Tribunal also finds that the Ruger 22 Charger pistol is a handgun in accordance with the *Criminal Code*. In particular, the *Criminal Code* defines “handgun” as follows:

84(1) In this Part,

...

“handgun” means a firearm that is designed, altered or intended to be aimed and fired by the action of one hand, whether or not it has been redesigned or subsequently altered to be aimed and fired by the action of both hands.

84(1) Les définitions qui suivent s’appliquent à la présente partie.

[...]

« arme de poing » Arme à feu destinée, de par sa construction ou ses modifications, à permettre de viser et tirer à l’aide d’une seule main, qu’elle ait été ou non modifiée subséquemment de façon à requérir l’usage des deux mains.

30. *Ibid.*

31. *Ibid.*

32. *Ibid.* at para. 3; Exhibit AP-2013-059-14A, tab 23, Vol. 1.

33. Exhibit AP-2013-14A, tab 25, Vol. 1.

34. Exhibit AP-2013-059-14A, tab 16, Vol. 1.

53. Similarly, the *Canadian Oxford Dictionary* defines “pistol” as follows:

noun a small firearm designed to be held in one hand.³⁵

Accordingly, as a “pistol”, the Ruger 22 Charger pistol would also be commonly understood to be a small firearm, designed to be held in one hand, and thus to meet the *Criminal Code* definition of “handgun”. This was further confirmed by the Tribunal’s own visual inspection of the Ruger 22 Charger pistol.

54. Finally, it is necessary to determine whether the Ruger 22 Charger pistol is “commonly available in Canada”. In this respect, the Tribunal finds that the CBSA’s evidence that there are 364 such pistols registered in Canada and that the pistol is available on several internet sites³⁶ meets the threshold of being “commonly” available in Canada.

55. The Tribunal therefore finds that the goods in issue are designed and manufactured for use with a semi-automatic handgun, commonly available in Canada.

Availability of Similar Goods

56. The CBSA did not dispute Mr. Downey’s argument that similar aftermarket cartridge magazines may be acquired in Canada. However, as has been consistently held by the Tribunal in the past, the Tribunal must apply the law as it is. Therefore, as the Tribunal has concluded that the goods in issue are prohibited devices for the purposes of the *Firearms Regulations*, the availability of similar goods in Canada is not a relevant consideration to the Tribunal’s determination of whether the goods in issue are prohibited devices for importation into Canada.³⁷

Conclusion

57. For the foregoing reasons, the Tribunal finds that the goods in issue are cartridge magazines, prescribed to be prohibited devices under tariff item No. 9898.00.00.

DECISION

58. The appeal is dismissed.

Daniel Petit

Daniel Petit
Presiding Member

35. *Ibid.* at para. 33.

36. *Ibid.* at para. 28.

37. See, for example, *D. Morgan v. President of the Canada Border Services Agency* (4 December 2014), AP-2014-006 (CITT) at para. 21; *KA Wong v. President of the Canada Border Services Agency* (18 July 2006), AP-2005-036 (CITT) at para. 18.; *Wayne Ericksen v. Commissioner of the Canada Customs Revenue Agency* (3 January 2002), AP-2000-059 (CITT).