



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-039

P. Matheson

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, September 21, 2015*

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IN THE MATTER OF an appeal heard on September 3, 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 December 15, 2014, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

P. MATHESON

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 3, 2015

Tribunal Member: Peter Burn, Presiding Member

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PARTICIPANTS:**Appellant**

P. Matheson

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on December 15, 2014, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).
2. The issue in this appeal is whether the good in issue imported by Mr. P. Matheson is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² as a prohibited device, namely, a replica firearm, as determined by the CBSA.
3. The good in issue is a replacement component for the “Tokyo Marui M1911A1 Colt Government gas blowback airsoft pistol”³ (Tokyo Marui M1911A1) described by Mr. Matheson as a “lower frame” and by the CBSA as a “lower receiver”. It is made of hard plastic. The inscription “G.H.D.” appears on one side, and the inscription “ASGK Tokyo Marui Made in Japan M1911 A1 U.S. Army No 871072” appears on the other.

PROCEDURAL HISTORY

4. The good in issue was detained by the CBSA when it entered Canada. On September 10, 2014, Mr. Matheson sent the CBSA a request for re-determination under subsection 60(1) of the *Act*. On December 15, 2014, the CBSA confirmed, under subsection 60(4), that the good in issue was classified under tariff item No. 9898.00.00 as a prohibited device and that its importation into Canada was prohibited.
5. On February 23, 2015, Mr. Matheson appealed that decision to the Canadian International Trade Tribunal (the Tribunal). His notice of appeal contained various arguments in support of his position.
6. On April 29, 2015, Mr. Matheson indicated that he did not intend to make further submissions. The Tribunal therefore acknowledged the notice of appeal and attachment submitted by Mr. Matheson as the appellant’s brief for the purposes of this appeal.
7. The CBSA filed its brief on June 29, 2015, as well as a report (the CBSA report) prepared by Mr. Murray A. Smith of the Royal Canadian Mounted Police.⁴ The CBSA asked the Tribunal to recognize Mr. Smith as an expert in the field of identification and classification of firearms.⁵ Mr. Matheson did not object to this request.
8. Mr. Matheson e-mailed the Tribunal on August 11, 2015, expressing his dismay at the process, but did not introduce any new evidence or arguments. He requested an opportunity to directly address the Tribunal at the hearing. The Tribunal called Mr. Matheson and left voicemails on August 12 and 20, 2015, to clarify his request and to determine whether he wished to make further submissions. The Tribunal received no further response.

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

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

3. See Exhibit AP-2014-039-01 (protected) at 5, Vol. 2.

4. Exhibit AP-2014-039-06B, tab 2, Vol. 1.

5. Exhibit AP-2014-039-06, Vol. 1.

9. The CBSA submitted the good in issue into evidence, along with an M1911A1 pistol frame.⁶

10. Having been incapable of contacting Mr. Matheson with respect to his request for an oral hearing, and being satisfied with the information on file, 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*.⁷ The matter was considered on September 3, 2015.

STATUTORY FRAMEWORK

11. 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]

12. 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 :

...

[...]

(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 [...].

[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*⁸ 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 the said provision if the conditions and requirements thereof and of any applicable regulations are met."

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

6. Exhibit AP-2014-039-06, Vol. 1.

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

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

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

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

<p>“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.</p>	<p>« 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.</p>
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16. 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:

<p>“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.</p>	<p>« 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.</p>
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17. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

<p>“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.</p>	<p>« 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.</p>
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18. Therefore, to be considered a replica firearm, the good in issue must fulfill three requirements: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

ANALYSIS

Preliminary Issue

19. While Mr. Smith has been recognized as an expert in similar cases in the past,¹⁰ this does not warrant his automatic qualification as an expert witness. The Tribunal is mindful that, in the case of a file hearing, a witness is not present for examination on his or her qualifications and that there is often no rebutting expert witness testimony. Notwithstanding the CBSA’s request for expert qualification, the Tribunal will not designate the CBSA report as an “expert report” for the purposes of these proceedings.

10. *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (CITT) [*Lavoie*] at para. 7; *G. Wilkie v. President of the Canada Border Services Agency* (20 January 2014), AP-2013-016 (CITT) at para. 17.

However, the Tribunal notes that Mr. Matheson had an opportunity to make further written comments on the CBSA's brief and the CBSA report before the date of the file hearing but chose not to do so. Therefore, because the evidence contained in the CBSA report remained unchallenged by Mr. Matheson and is otherwise credible, the Tribunal has decided to accept the contents of the CBSA report as uncontroverted evidence.

Is the Device Designed or Intended to Exactly Resemble, or to Resemble with Near Precision, a Firearm?

20. To determine whether the good in issue resembles a firearm, the Tribunal typically compares the size, shape and general appearance of replica firearms with the firearms that they are purported to imitate.¹¹ Furthermore, the Tribunal has held as follows:

... the prohibition on the importation of replica firearms logically stems from the concern that they can be mistaken for firearms due to their physical appearance. This indicates to the Tribunal that features of the good in issue that are not visible are not relevant to its classification.¹²

21. The Tribunal visually inspected the good in issue and determined that it resembles, with near precision, the receiver of the firearm of reference—an M1911A1 Colt semi-automatic pistol (M1911A1 Colt pistol)—and could be mistaken for a real firearm. This finding is supported by the CBSA report and photographs comparing an M1911A1 Colt pistol and the Tokyo Marui M1911A1.

22. In this regard, the Tribunal also accepts that, for the purposes of the application of tariff item No. 9898.00.00, the receiver of the M1911A1 Colt pistol is a firearm. The CBSA filed a copy of the 2013 Standard Catalog of Firearms, which references the M1911A1 Colt pistol.¹³ In addition, since section 2 of the *Criminal Code* explicitly includes receivers in the definition of “firearm”, a replica of such a frame or receiver will also logically constitute a replica firearm.¹⁴

23. Mr. Matheson disputed the CBSA's description of the good in issue as a lower “receiver”, maintaining that it is actually a lower “frame”. He submitted that the good in issue could only have been identified as a lower receiver had it housed the operating parts of the airsoft pistol. Here, the operating parts of the airsoft pistol; specifically, the gas tube, spring and barrel, are housed in the upper slide.

24. The Tribunal accepts Mr. Matheson's assertion that the good in issue does not house the operating parts of the airsoft pistol. However, for the purpose of this analysis, it is not necessary to definitively resolve this issue of terminology, as both receivers and frames are “firearms” under section 2 of the *Criminal Code*. Moreover, the essential question is not whether the good in issue is itself a frame or a receiver, but instead whether the good in issue resembles the frame or receiver of the M1911A1 Colt pistol. The absence of operating parts, which are on the inside of a pistol and therefore not visible, is not relevant in determining physical resemblance of a replica firearm.¹⁵

25. In light of the foregoing, the Tribunal finds that the good in issue does resemble, with near precision, the receiver of the M1911A1 Colt pistol.

11. *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (26 September 2003), AP 2002-009 (CITT); *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) [*Vito V. Servello*].

12. *Vito V. Servello* at 3.

13. Exhibit AP 2014-039-06A, tab 6, Vol. 1.

14. This is consistent with the Tribunal's past treatment of replica receivers. See *Lavoie* at para. 33.

15. See *Vito V. Servello*.

Is the Good in Issue a Firearm?

26. Mr. Matheson repeatedly emphasized that the good in issue is a “toy”, maintaining that, without the other component parts, the good in issue could not dictate the airsoft pistol’s muzzle velocity and could not be used to operate an airsoft pistol. The Tribunal accepts Mr. Matheson’s submissions in this regard and finds that, at the time of importation, the good in issue was incapable of firing a projectile. Therefore, it is not “. . . 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 . . .” as described in the definition of “firearm” in section 2 of the *Criminal Code*.

27. Still, given that the *Criminal Code* definition of “firearm” includes *frames* and *receivers* of such barrelled weapons, the Tribunal further observes that the good in issue is designed to be used in a device (Tokyo Marui M1911A1) that is not a firearm under the *Criminal Code*.

28. The Tribunal finds that the Tokyo Marui M1911A1 is not a firearm because it does not have a muzzle velocity capable of causing “. . . serious bodily injury or death . . .”, as required in the definition of “firearm” under section 2 of the *Criminal Code*. The parties made submissions on the legal limit for the muzzle velocity of a firearm ranging from 366 to 407 feet/second; however, none were persuasively explained.¹⁶ The definition in section 2 of the *Criminal Code* does not specify a minimum muzzle velocity.

29. Mr. Matheson submitted photographs purporting that his airsoft pistol reached muzzle velocities of 379.2 and 377 feet/second,¹⁷ while the CBSA submitted evidence from several retailers indicating that the Tokyo Marui M1911A1 has a muzzle velocity ranging from 249 to 300 feet/second.¹⁸

30. The Tribunal notes these discrepancies advanced by the parties, but accepts the evidence provided by the CBSA that the Tokyo Marui M1911A1 has a muzzle velocity ranging from 249 to 300 feet/second. Fundamentally, the Tribunal is incapable of knowing the conditions under which Mr. Matheson’s muzzle velocity readings were recorded, nor even whether they pertained to the Tokyo Marui M1911A1.

31. In any event, because the Tokyo Marui M1911A1 has a muzzle velocity ranging from 249 to 300 feet/second, it fires well below any of the proposed limits and is therefore not a firearm.

Is the Good in Issue Designed or Intended to Resemble an Antique Firearm?

32. Mr. Matheson argued that his airsoft pistol was designed to resemble an antique firearm; specifically, the Colt 1897. He submitted a photograph of the patent date, April 20, 1897, stamped on the slide of his airsoft pistol.¹⁹ The CBSA submitted that the patent date is not compelling evidence that the firearm was manufactured before 1898 and maintained that the good in issue is a replica of the receiver of the M1911A1 Colt pistol which was developed by Colt starting in 1911.²⁰

16. Exhibit AP-2014-039-01 (protected) at 3, Vol. 2; Exhibit AP-2014-039-06A at para. 36, tabs 4, 5, Vol. 1; *Asia Pacific Enterprises Corporation v. Commissioner of the Canada Customs and Revenue Agency* (12 July 2006), AP-2000-014 (CITT) at para. 19; *Ka Wong v. President of the Canada Border Services Agency* (18 July 2006), AP-2005-036 (CITT) at para. 15; *Stanley T. Wong v. Commissioner of the Canada Customs and Revenue Agency* (12 July 2006), AP-2002-102 (CITT) at para. 18.

17. Exhibit AP-2014-039-01A at 2, Vol. 1.

18. Exhibit AP-2014-039-06A at para. 40, tab 3, Vol. 1.

19. Exhibit AP-2014-039-01A at 4, Vol. 1.

20. Exhibit AP-2014-039-06A at paras. 43-46, tab 2, Vol. 1.

33. The Tribunal has no evidence on the record as to the appearance of the Colt 1897; therefore, the Tribunal cannot ascertain whether the good in issue resembles the Colt 1897. Furthermore, there is no evidence as to whether the Colt 1897 is in fact an antique firearm according to subsection 84(1) of the *Criminal Code*. Finally, the Tribunal observes that the patent date of 1897 stamped on the slide of the airsoft pistol is not a reliable indication of when it was first manufactured.

34. Therefore, the Tribunal is satisfied that the good in issue is a replica of the receiver of the M1911A1 Colt pistol, developed by Colt starting in 1911, and not a replica of an antique firearm as defined in subsection 84(1) of the *Criminal Code*.

CONCLUSION

35. Given that the good in issue meets the three conditions of the definition of “replica firearm” as set out in subsection 84(1) of the *Criminal Code*, the Tribunal concludes that it is a prohibited device. The good in issue was correctly classified under tariff item No. 9898.00.00 and its importation into Canada is prohibited under subsection 136(1) of the *Customs Tariff*.

DECISION

36. The appeal is dismissed.

Peter Burn

Peter Burn
Presiding Member