



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-013

Y. Gosselin

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, June 9, 2016*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
BACKGROUND	1
PROCEDURAL HISTORY	1
GOOD IN ISSUE	1
STATUTORY FRAMEWORK.....	1
POSITIONS OF PARTIES.....	3
TRIBUNAL’S ANALYSIS.....	4
Preliminary Issue: Qualification of the CBSA’s Expert Witness	4
First Condition: Is the Device Designed or Intended to Exactly Resemble, or to Resemble with Near Precision, a Firearm?	4
Second Condition: Is the Good in Issue a Firearm?	5
Third Condition: Is the Device Designed or Intended to Exactly Resemble, or to Resemble With Near Precision, an Antique Firearm?	6
Conclusion	7
DECISION	7

IN THE MATTER OF an appeal heard on March 10, 2016, 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 July 13, 2015, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

Y. GOSSELIN

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: March 10, 2016
Tribunal Member: Daniel Petit, Presiding Member
Counsel for the Tribunal: Kalyn Eadie
Student-at-Law: Jessica Spina
Supervisor, Registry Operations: Haley Raynor
Senior Registrar Officer: Julie Lescom
Registrar Support Officer: Bianca Zamor

PARTICIPANTS:**Appellant**

Y. Gosselin

Respondent

President of the Canada Border Services Agency

Counsel/Representatives

Maude Breton-Voyer
Lune Arpin

Please address all communications to:

The Registrar
Canadian International Trade Tribunal Secretariat
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

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 July 13, 2015, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).
2. The issue in this appeal is whether the frame of an air pistol (the good in issue) imported by Mr. Y. Gosselin 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.

PROCEDURAL HISTORY

3. The good in issue was detained by the CBSA when it entered Canada on March 30, 2015,³ on the basis of a determination that it is a prohibited device properly classified under tariff item No. 9898.00.00 and, therefore, that its importation into Canada is prohibited. On April 14, 2015, Mr. Gosselin filed a request for re-determination pursuant to subsection 60(1) of the *Act*.⁴ On July 13, 2015, pursuant to subsection 60(4), the CBSA confirmed its decision.⁵
4. On August 4, 2015, Mr. Gosselin appealed that decision to the Tribunal.⁶
5. 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*. The hearing was held on March 10, 2016.
6. The CBSA submitted the good in issue into evidence. The CBSA also filed a report prepared by Superintendent Murray A. Smith of the Royal Canadian Mounted Police (RCMP).⁷

GOOD IN ISSUE

7. The good in issue is a frame designed to be installed on a WE Tactical Co. Ltd. G19 Gen4 airsoft pistol. The good in issue was not imported with the barrel. The parties agree that the good in issue resembles with near precision the frame of a Glock 19 4th Generation pistol.

STATUTORY FRAMEWORK

8. 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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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
 2. S.C. 1997, c. 36.
 3. Exhibit AP-2015-013-011A, Tab 4, Vol. 1A.
 4. Exhibit AP-2015-013-011A, Tab 6, Vol. 1A (received by the CBSA on April 23, 2015).
 5. Exhibit AP-2015-013-011A, Tab 7, Vol. 1A.
 6. Exhibit AP-2015-013-01, Vol. 1.
 7. Report prepared by Superintendent Murray A. Smith, Manager, Specialized Firearms Support Services, Royal Canadian Mounted Police, entitled *Inspection of a G19 Gen4 Airsoft Frame*, dated January 22, 2016, Exhibit AP-2015-013-14A, Vol. 1B [RCMP Report].

9. Tariff item No. 9898.00.00 provides as follows:

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, but does not include the following: . . .

(d) any weapon that, under subsection 84(3) of the Criminal Code, is deemed not to be a firearm . . .

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 . . .

10. Subsection 84(1) of the *Criminal Code* provides that a prohibited device includes, among other things, a replica firearm, which is defined 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.

« réplique » Tout objet, qui n’est pas une arme à feu, 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 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. Therefore, in order to determine whether the good in issue is properly classified under tariff item No. 9898.00.00, the Tribunal must determine whether it is covered by the definition of the term “replica firearm” pursuant to subsection 84(1) of the *Criminal Code*.⁸ For a device to be considered a replica firearm, the following three conditions must be met: (1) it must be a device 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.

12. In this regard, section 2 of the *Criminal Code* defines “firearm” as follows:

“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

« 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

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

barrelled weapon and anything that can be adapted for use as a firearm.

boîte de culasse d'une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.

13. 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.

14. Pursuant to subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*, Mr. Gosselin had the onus to establish that the good in issue is *not* a prohibited device.⁹

POSITIONS OF PARTIES

15. According to Mr. Gosselin, the muzzle velocity of the airsoft pistol on which the good in issue is to be installed is central to this appeal. Mr. Gosselin submitted that his pistol has a muzzle velocity, or can be modified by the user to have a muzzle velocity, of more than 366 ft./s and that it is therefore not a replica firearm.¹⁰

16. In support of his position, Mr. Gosselin referred to two Web sites that sell WE Tech airsoft pistols on which the good in issue can be installed, and which indicate that their muzzle velocity is 370 ft./s.¹¹

17. The CBSA submitted that the good in issue meets the three conditions that define a replica firearm.

18. The CBSA submitted that a real Glock 19 4th Generation frame is specifically designed to be installed on a real Glock 19 4th Generation pistol and, since section 2 of the *Criminal Code* defines “firearm” as including frames or receivers by themselves, a real Glock 19 4th Generation frame is considered to be in itself a firearm.

19. The CBSA submitted that the good in issue exactly resembles a real Glock 19 4th Generation frame because of its size, shape and general appearance. The CBSA relied on the RCMP Report, which lists the similarities and the minor differences between the good in issue and a real Glock 19 4th Generation frame. The CBSA conceded that there are minor differences, such as the internal mechanisms and the detachable parts, but submitted that they do not sufficiently distinguish the good in issue from a real frame because the internal mechanisms are not visible from the outside, and the internal mechanisms and the detachable parts are not an integral part of the frame.

20. The CBSA further submitted that the good in issue is not a firearm because it cannot be installed on a real Glock 19 4th Generation pistol. According to the CBSA, the frame is designed to be installed on a WE Tactical G19 Gen4 airsoft pistol, which is not a firearm within the meaning of subsection 84(3) of the

9. As confirmed by the Federal Court of Appeal in *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII), at paras. 21-22.

10. Exhibit AP-2015-013-08, Vol. 1.

11. Exhibit AP-2015-013-08, Vol. 1.

Criminal Code. This airsoft pistol has not been modified to shoot projectiles at a velocity capable of causing serious bodily injury, that is, at a velocity above 366 ft./s.¹²

21. Additionally, the CBSA submitted that the good in issue is not a replica of an antique firearm because the Glock 19 4th Generation pistol was not produced before 1898.

TRIBUNAL'S ANALYSIS

Preliminary Issue: Qualification of the CBSA's Expert Witness

22. In its brief, the CBSA referred to Mr. Smith's report as an "expert witness report". However, the CBSA did not ask that Mr. Smith be qualified as an expert witness and did not file submissions in this regard.

23. Since this is a file hearing, Mr. Gosselin had the opportunity to file other comments on the CBSA's brief and Mr. Smith's report before the hearing, but chose not to do so. Therefore, the evidence contained in Mr. Smith's report was not contested by Mr. Gosselin.

24. In similar cases, the Tribunal has decided to accept such reports as uncontroverted evidence without qualifying them as "expert reports"¹³. The Tribunal will proceed in the same manner in the present case.

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

25. Since section 2 of the *Criminal Code* explicitly includes frames in the definition of "firearm", a replica of such a frame will also logically constitute a replica firearm.

26. The Tribunal usually compares the size, shape and general appearance of a replica with the firearm it imitates,¹⁴ and it is well established that the definition of "replica" allows minor differences.¹⁵ The main issue remains whether the good in issue can be mistaken for a real firearm, since "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."¹⁶

27. However, since the Tribunal was not in possession of the actual firearm in this case, it relied on the RCMP Report to effect its comparison of the good in issue with the firearm it was purportedly designed to imitate.

12. Exhibit AP-2015-013-11A at paras. 42-48, Vol. 1A.

13. *A. Downey v. President of the Canada Border Services Agency* (16 March 2015), AP-2013-059 (CITT) at paras. 40-41; *P. Matheson v. President of the Canada Border Services Agency* (21 September 2015), AP-2014-039 (CITT) at para. 19.

14. *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (23 September 2003), AP-2002-009 (CITT).

15. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 16.

16. *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) at 14.

28. The RCMP Report filed by the CBSA contains pictures of real Glock 19 4th Generation frames and compares them in detail with the good in issue.¹⁷ The following similarities were noted in the report:

- A. Overall profile of the back strap and tail
- B. Back strap pin hole
- C. Manufacturer's markings
- D. Patent markings
- E. Three finger grip recesses
- F. Trigger guard profile
- G. Locking block pin hole (simulated on the airsoft frame)
- H. Trigger axis pin hole
- I. Slide lock pin hole
- J. MBS (multiple back strap) marking (outlined but otherwise blank on the airsoft frame)
- K. Profile of the muzzle end of the frame¹⁸

29. Mr. Gosselin, who bears the burden of proof in these proceedings, did not contest these facts and did not deny the resemblance between the good in issue and a real Glock 19 4th Generation frame. Mr. Gosselin also did not deny that a real frame is a firearm, as defined in section 2 of the *Criminal Code*.

30. Having examined the good in issue and compared it with pictures of a real Glock 19 4th Generation frame, the Tribunal finds that the good in issue is designed to resemble with near precision the frame of a real firearm and that it could be mistaken for a real firearm. The minor differences, such as the internal mechanisms and the detachable parts, are not readily visible and do not sufficiently distinguish the good in issue from a real Glock 19 4th Generation frame.

Second Condition: Is the Good in Issue a Firearm?

31. The condition that the device not be a firearm is contained in the definition of "replica" in subsection 84(1) of the *Criminal Code*.

32. The term "firearm" is not defined in subsection 84(1). The Tribunal's jurisprudence applies the definition found in section 2 of the *Criminal Code*,¹⁹ which states that "firearm" means "a barrelled weapon . . . that is capable of causing serious bodily injury or death to a person . . ." In fact, section 2 contains the general definitions that apply to the entirety of the *Criminal Code*.

33. According to the uncontroverted evidence on the record, a firearm can cause serious bodily injury when it has a muzzle velocity of 366 ft./s or greater.²⁰

34. Mr. Gosselin contended that, according to the information found on a Canadian Web that sells airsoft pistols, the good in issue can attain, or can be modified to attain, a muzzle velocity of 370 ft./s.²¹

17. Exhibit AP-2015-013-14A, Figure 2, Tab A, Vol. 1B; Exhibit AP-2015-013-14A, Tab 5, Vol. 1B.

18. Exhibit AP-2015-013-14A at para. 11, Tab A, Vol 1B.

19. See, for example, *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 18. Several other cases could be cited. Of course, the *stare decisis* principal does not apply to the Tribunal's decisions.

20. Exhibit AP-2015-013-14A at para. 14, Tab A, Vol. 1B.

35. First, the CBSA submitted that, according to the RCMP Report, the good in issue cannot be installed on a real Glock 19 4th Generation pistol and, therefore, cannot be modified to be used as a firearm in this way.²²

36. Second, the RCMP Report indicates that airsoft pistols on which the good in issue would normally be installed have a muzzle velocity of 285 ft./s, which is under the threshold to cause serious bodily injury.²³ In addition, the CBSA noted that the manufacturer's Web site also indicates that such models reach a muzzle velocity of 285 ft./s.²⁴

37. To determine if goods are firearms and not replicas, the Tribunal must consider the state of the goods at the time of importation.²⁵ However, at the time of importation of the good in issue, it was impossible to know on what type of airsoft pistol it would be installed.

38. In the absence of information to the contrary, the Tribunal accepts that it is likely that the good in issue would be installed on a WE Tactical G19 Gen4 airsoft pistol, as submitted by the CBSA.

39. Moreover, Mr. Gosselin had the burden of proving that the good in issue *is* a real firearm and not a replica, as determined by the CBSA.

40. Mr. Gosselin did not discharge his burden. One of the Web sites referred to by Mr. Gosselin concerns a WE Tech G17 airsoft pistol and not the G19, which is the good in issue. Moreover, these Web sites are not those of the manufacturer of the good in issue, but those of a third party. Finally, Mr. Gosselin did not file any information indicating how the good in issue could be modified to reach a muzzle velocity of 370 ft./s.

41. In light of the foregoing, the Tribunal finds that the good in issue is not a firearm and that the second condition of the definition of "replica firearm" is met.

Third Condition: Is the Device Designed or Intended to Exactly Resemble, or to Resemble With Near Precision, an Antique Firearm?

42. Pursuant to subsection 84(1) of the *Criminal Code*, to be considered an antique firearm, the firearm must have been manufactured before 1898. The RCMP Report indicates that real Glock 19 4th Generation pistols were not manufactured before 1982.²⁶

43. It was not alleged that the good in issue is designed to resemble an antique firearm.

44. Therefore, the Tribunal accepts that the good in issue does not resemble an antique firearm.

21. Exhibit AP-2015-013-08, Vol. 1.

22. Exhibit AP-2015-013-14A at paras. 9-10, Tab A, Vol. 1B.

23. Exhibit AP-2015-013-14A at paras. 17-18, Tab A, Vol. 1B.

24. Exhibit AP-2015-013-11A, Tab 2, Vol. 1A.

25. *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366; *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

26. Exhibit AP-2015-013-14A at para. 8, Vol. 1B.

Conclusion

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

DECISION

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

Daniel Petit

Daniel Petit

Presiding Member