



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-026

Digital Canoe Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, August 22, 2016*

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IN THE MATTER OF an appeal heard on July 7, 2016, 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 December 16, 2015, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

DIGITAL CANOE INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 7, 2016
Tribunal Member: Jason W. Downey, Presiding Member
Counsel for the Tribunal: Jessica Spina
Student-at-law: Amélie Cournoyer
Supervisor, Registry Operations: Haley Raynor
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Digital Canoe Inc. (Digital Canoe) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on December 16, 2015, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue is whether the knife imported by Digital Canoe (the good in issue) is properly classified as a prohibited weapon under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² and, therefore, as a good prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.

3. The good in issue is a Kershaw “Burst 1970” folding knife, which employs Kershaw’s SpeedSafe assisted-opening system. The knife measures approximately 11.5 centimetres when closed and is equipped with a blade that is approximately 8 centimetres in length. The blade opens when downward pressure is exerted on a protrusion situated at the back of the blade (also referred to as the “spine of the blade”).³

PROCEDURAL HISTORY

4. Digital Canoe filed this appeal with the Tribunal on January 11, 2016. 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 The hearing was held in Ottawa, Ontario, on July 7, 2016. The good in issue was made available and examined extensively by the Tribunal during the hearing.

LEGAL FRAMEWORK

5. The following are excerpts of the relevant legislative and regulatory provisions in this appeal.

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. Among the list of prohibited goods, tariff item No. 9898.00.00 lists “prohibited weapons”. It further specifies that the expression “prohibited weapons” has the same meaning as in subsection 84(1) of the *Criminal Code*⁵ as follows:

Firearms, <i>prohibited weapons</i> , restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or	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
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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

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

3. Exhibit AP-2015-026-06A, tab 6, Vol. 1; Exhibit AP-2015-026-04A, tab P, Vol. 1.

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

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

assembly into automatic firearms, in this tariff item referred to as prohibited goods. . . .	fabrication ou l'assemblage d'armes automatiques, désignés comme « marchandises prohibées » au présent numéro tarifaire [...].
. . .	[...]
For the purposes of this tariff item:	Pour l'application du présent numéro tarifaire :
. . .	[...]
(b) "automatic firearm", "licence", "prohibited ammunition", "prohibited device", "prohibited firearm", <i>prohibited weapon</i> , 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]

8. In accordance with subsection 84(1) of the *Criminal Code*, "prohibited weapon" is defined as follows:

(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.

9. In sum, in order to determine whether the good in issue is properly classified as a prohibited weapon under tariff item No. 9898.00.00 and, therefore, as prohibited from importation into Canada, the Tribunal must determine whether it meets the definition of "prohibited weapon" in subsection 84(1) of the *Criminal Code*.

POSITIONS OF PARTIES

Digital Canoe

10. Digital Canoe argued that the good in issue is an assisted-opening knife that does not fit the description of a prohibited weapon in tariff item No. 9898.00.00 and paragraph 84(1)(a) of the *Criminal Code* because it does not open automatically (1) by gravity or by centrifugal force nor (2) by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

11. According to Digital Canoe, the good in issue opens by applying manual pressure to a protrusion, which is not physically attached to the handle, but rather to the blade (which it described as the "spine of the blade"). Digital Canoe submitted that Memorandum D19-13-2⁶ supports its position and indicates that the good in issue is exempt from the definition of a "prohibited weapon" under subsection 84(1) of the *Criminal Code*.

6. "Importing and Exporting Firearms, Weapons and Devices" (23 June 2009).

CBSA

12. The CBSA submitted that the good in issue is properly classified as a prohibited weapon because it has a blade that opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

13. In the CBSA's view, the protrusion on the blade is a "device" within the meaning of that term in paragraph 84(1)(a) of the *Criminal Code*, as it was designed specifically to open the good in issue. Furthermore, this device can be said to be "... in or attached to the handle ... " because it moves into and passes through the handle as the blade flips open.

14. The CBSA noted that the good in issue is very similar to the knives at issue in the Tribunal's decisions in *Knife & Key Corner Ltd. v. President of the Canada Border Services Agency*⁷ and *R. Christie v. President of the Canada Border Services Agency*.⁸ In both cases, the Tribunal determined that the knives were prohibited weapons within the meaning of paragraph 84(1)(a) of the *Criminal Code* and rejected arguments similar to those made by Digital Canoe.

TRIBUNAL ANALYSIS

15. It is well established that appeals to the Tribunal under subsection 67(1) of the *Act* are heard *de novo*.⁹ The objective is to determine the correct tariff classification applicable to the good in issue. Digital Canoe bears the burden of showing that the CBSA incorrectly classified the good in issue.¹⁰ In this case, Digital Canoe must demonstrate that the good in issue is not properly classified under tariff item No. 9898.00.00.

16. In order to determine whether the good in issue is properly classified as a "prohibited weapon" in accordance with paragraph 84(1)(a) of the *Criminal Code*, the Tribunal will determine whether the blade opens automatically (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.

Does the Good in Issue Open Automatically by Gravity or Centrifugal Force?

17. Neither party has alleged that the good in issue opens automatically by gravity or centrifugal force. In fact, Digital Canoe has argued in opposition of such a finding. Following examination of the good in issue and considering the parties' positions on this matter, the Tribunal finds that it need not endeavour to determine the validity of these arguments, as whether the good in issue opens by gravity or centrifugal force is not at issue.

7. (14 September 2015), AP-2014-030 (CITT) [*Knife & Key*].

8. (15 January 2014), AP-2012-072 (CITT).

9. *Cargill Inc. v. President of the Canada Border Services Agency* (23 May 2014), AP-2012-070 (CITT) at para. 36; *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at para. 8; *Smith v. Minister of National Revenue*, [1965] SCR 582, 1965 CanLII 59 (SCC); *Canada (Minister of National Revenue) v. Rollins Machinery Ltd.*, 1999 CanLII 8763 (FCA).

10. In this regard, subsection 152(3) of the *Act* provides as follows: "... in any proceeding under this Act, the burden of proof in any question relating to ... (c) the payment of duties on any goods ... lies on the person, other than Her Majesty, who is a party to the proceeding" This appeal was filed under subsection 67(1). Because the liability for duties on imported goods depends on their tariff classification, tariff classification is a question "relating" to the payment of duties on the goods under paragraph 152(3)(c). Since the conditions of paragraph 152(3)(c) have been met, Digital Canoe therefore bears the burden of proof. See, for example, *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII).

Does the Good in Issue Open Automatically by Hand Pressure Applied to a Button, Spring or Other Device in or Attached to the Handle of the Knife?

18. The CBSA submitted that the protrusion is a “device” within the meaning of the term in paragraph 84(1)(a) of the *Criminal Code*. In support of its argument, the CBSA noted that the term “device” is defined in *Merriam-Webster’s Collegiate Dictionary*¹¹ as “. . . **f**: a piece of equipment or a mechanism designed to serve a special purpose or perform a special function . . .” For its part, Digital Canoe submitted that the good in issue does not meet the requirements in paragraph 84(1)(a) because, whether or not it is a device, the protrusion is located on the blade of the knife and not on/in the handle.

19. The Tribunal has examined the good in issue and notes that the knife contains a spring/tensioning mechanism, designed to both keep the blade closed on one side of its pressure plane and provide constant tension, which gives impulse to an active deployment of the blade once inertial forces have been overcome. This mechanism allows for a quick deployment of the blade using an asymmetric elliptical nodule at the base of the blade, which remains in contact with the mechanism at all times. Once the initial resting resistance of the blade is overcome (through pressure activation of the protrusion at the back of the handle), the interaction of the asymmetrical nodule and the mechanism propel the blade outwards into an open position.

20. This mechanism is found within the handle of the good in issue and therefore satisfies this component of paragraph 84(1)(a) of the *Criminal Code*, as it is a knife that contains a “. . . spring or other device in or attached to the handle of the knife . . .” It is therefore unnecessary for the Tribunal to determine, within the context of this appeal, whether the protrusion is located on the blade or on the handle and whether the protrusion can be classified as a “device” under paragraph 84(1)(a).

Opens Automatically by Hand Pressure

21. As argued by the CBSA, the Tribunal has previously found that a knife can be said to open “automatically” where it opens as a result of “minimal manipulation”.¹²

22. On the basis of its examination of the good in issue, the Tribunal finds that the blade does open automatically and rapidly, with minimal hand pressure applied indirectly to the spring mechanism via the protrusion on the back of the blade. Excerpts of the product literature included in the notice of detention prepared by the CBSA confirm the Tribunal’s observations and indicate that “Speedsafe opens the knife quickly and easily, and the blade locks into place.”¹³

23. As the Tribunal has previously held, the wording of paragraph 84(1)(a) of the *Criminal Code* does not require that hand pressure be applied directly to a spring itself, as it refers to a “. . . spring or other device in or attached to the handle . . .” Logically, if a spring is completely contained “in” the handle, hand pressure cannot be applied directly to it. In addition, the Tribunal has previously commented that the requirements of paragraph 84(1)(a) could be met where a spring inside the handle was attached to a “slider” on which the user could push to engage the assisted-opening mechanism, because it could be said, in such a case, that hand pressure was applied indirectly to a spring within the meaning of paragraph 84(1)(a).¹⁴

11. Eleventh ed., s.v. “device”.

12. *La Sagesse de l’Eau v. President of the Canada Border Services Agency* (13 November 2011), AP-2011-040 and AP-2011-041 (CITT) at para. 52 [*La Sagesse de l’Eau*]; *Knife & Key* at para. 34.

13. Exhibit AP-2015-026-06A at 23, Vol. 1.

14. *La Sagesse de l’Eau*, at para. 44.

24. In this case, the user applies manual pressure to the protrusion, located on the blade, thereby overcoming the inertial resistance of the spring mechanism located within the handle. In light of the above, the Tribunal finds that the good in issue opens “automatically” through indirect hand pressure applied to a spring via the protrusion.

25. Finally, regarding Digital Canoe’s argument that torsion bar assisted-opening knives, such as the good in issue, are not prohibited according to Memorandum D19-13-2, it is well established by the Tribunal’s jurisprudence that D-Memoranda are administrative policy statements that are not binding on the Tribunal. These memoranda set out the CBSA’s interpretation of the law, but it is the Tribunal’s responsibility to interpret and apply the relevant law in each appeal that comes before it. The Tribunal’s task in this case is strictly to determine whether the good in issue fits the definition of “prohibited weapon” in the *Criminal Code*, regardless of the contents of Memorandum D19-13-2.

Conclusion

26. The Tribunal finds that the good in issue is properly classified under tariff item No. 9898.00.00 as a prohibited weapon, in accordance with the requirements of paragraph 84(1)(a) of *the Criminal Code*, as the good in issue opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.

DECISION

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

Jason W. Downey
Jason W. Downey
Presiding Member