



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2016-046

A. Cowan

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, August 22, 2017*

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IN THE MATTER OF an appeal heard on June 6, 2017, 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 November 4, 2016, with respect to a request for re-determination pursuant to section 60 of the *Customs Act*.

**BETWEEN**

**A. COWAN**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: June 6, 2017  
Tribunal Panel: Jason W. Downey, Presiding Member  
Support Staff: Alexandra Pietrzak, Counsel  
Peter Jarosz, Counsel

**PARTICIPANTS:**

<b>Appellant</b>	<b>Counsel/Representative</b>
A. Cowan	Alex Cowan
<b>Respondent</b>	<b>Counsel/Representative</b>
President of the Canada Border Services Agency	Mary Roberts
<b>Intervener</b>	<b>Counsel/Representative</b>
Kai USA-Ltd.	Takashi Hashimoto

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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*<sup>1</sup> from a decision made on November 4, 2016, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether two Kershaw 1670PURBDZ assisted knives (the goods in issue) imported by Mr. Cowan are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*<sup>2</sup> as prohibited weapons and therefore prohibited from importation into Canada pursuant to subsection 136(1).

3. The CBSA has informed the Tribunal that it does not intend to contest this appeal, and has asked the Tribunal to issue an order that the goods in issue are not prohibited.

### PROCEDURAL HISTORY

4. The goods in issue arrived in Canada by mail on or around June 20, 2016, and were detained by the CBSA at the International Mail Processing Centre under section 101 of the *Act*.

5. On September 15, 2016, Mr. Cowan wrote to request the review of the CBSA's determination that the goods were prohibited devices under tariff item No. 9898.00.00 and therefore prohibited from entering Canada.

6. On September 21, 2016, the CBSA acknowledged Mr. Cowan's request.

7. On November 4, 2016, the CBSA issued a re-determination under section 60 of the *Act*, upholding its decision to classify the goods in issue under tariff item No. 9898.00.00.

8. On February 3, 2017, Mr. Cowan filed a letter with the Tribunal advising his intent to appeal a decision from the President of the CBSA pursuant to subsection 67(1) of the *Act*.

9. On February 3, 2017, the Tribunal requested that Mr. Cowan file additional information.

10. On February 15, 2017, Mr. Cowan filed the additional information requested by the Tribunal.

11. On March 2, 2017, the CBSA wrote to advise the Tribunal that it did not intend to contest this appeal, and asked the Tribunal to issue an order that the goods in issue are not prohibited.

12. On March 23, 2017, the Tribunal requested that the parties file submissions outlining why they believe the goods in issue are not prohibited, particularly in light of recent decisions issued by the Tribunal. As both parties asserted that the goods in issue are not prohibited, the Tribunal asked that parties provide joint submissions if possible. On April 18, 2017, the CBSA filed joint submissions on behalf of both the CBSA and Mr. Cowan (the parties).

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

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

13. On May 25, 2017, the Tribunal received submissions from Kai-USA Ltd. (Kai) in support of the appeal.
14. On June 1, 2017, after soliciting comments from the parties, the Tribunal granted Kai intervener status in this appeal.
15. 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*.<sup>3</sup> The hearing was held in Ottawa on June 6, 2017. The goods in issue were made available and were examined by the Tribunal during the file hearing.

## LEGAL FRAMEWORK

16. 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 <sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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[Emphasis added]

17. 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]

18. 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*<sup>4</sup> do not apply. Furthermore, note 1 to Chapter 98 of the schedule to the *Customs Tariff* provides that “[g]oods which are described in any provision of Chapter 98 are classifiable in the said provision if the conditions and requirements thereof and of any applicable regulations are met.”

19. According to the *Customs Tariff*, a “prohibited device” includes any items defined as a “prohibited device” in subsection 84(1) of the *Criminal Code*.<sup>5</sup>

3. SOR/91-499.

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

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

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

*Prohibited weapon* means

*arme prohibée*

(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.

21. Thus, in order to determine whether the goods in issue are properly classified as a prohibited device under tariff item No. 9898.00.00 and therefore prohibited from importation into Canada, the Tribunal must determine whether the goods meet the above definition in subsection 84(1) of the *Criminal Code*.

### TRIBUNAL'S ANALYSIS

22. Past decisions of the Tribunal in *Digital Canoe* and *Abrams* have determined 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.”<sup>6</sup>

23. However, the parties distinguished the goods in the present case, which specifically use a torsion bar and thumb stud that are different from goods which were found to be prohibited devices (which instead used a button and a spring) by referring to the mechanism by which the blade is opened. Kai submitted that “[t]he torsion bar differs greatly from other opening mechanisms featured in the *Criminal Code* in that it actually keeps the blade in the closed position.”

24. The parties jointly submitted that in both *Digital Canoe* and *Abrams* the knives

contained a protrusion on the spine of the blade or a “flipper” which moves through the handle as the blade flips open. In contrast, the knives at issue in this possess only a thumb stud on the blade, which does not pass through the handle at any point when the blade is opening.<sup>7</sup>

The parties jointly argued that it was this slider or flipper located at times inside the handle which undergirds previous Tribunal decisions that the SpeedSafe opening system was a “device” which is prohibited within the meaning of the relevant section of the *Criminal Code*.

25. By contrast, the evidence was that the goods in issue only have a thumb stud which is located on the blade, not the handle.<sup>8</sup> The parties jointly submitted that the thumb stud does *not* pass through the handle while the knife is opening.<sup>9</sup>

26. The parties' joint position of the nature of the goods in this appeal was supported by Kai's evidence and argument. Kai argued that they do not meet the definition of a “device in or attached to the handle of the knife”.

6 *Digital Canoe Inc. v. President of the Canada Border Services Agency* (22 August, 2016), AP-2015-026 (CITT); *R. S. Abrams v. President of the Canada Border Services Agency* (21 December 2016), AP-2016-004 (CITT).

7 Exhibit AP-2016-046-07A at para. 5, Vol. 1.

8. Exhibit AP-2016-046-07A at para. 5, Vol. 1.

9. Exhibit AP-2016-046-07A at para. 5, Vol. 1.

27. Kai submitted that there is a difference in the operation between a knife which is opened by a button and spring, and one which is opened by a thumb stud and torsion bar. Kai submitted that “[t]he blade of a knife that uses a spring and button opening mechanism is constantly under pressure to only open, and the button releases the energy generated by the coiled spring.”<sup>10</sup> By contrast, Kai stated that a torsion bar functions like “a kickstand on a bicycle – there is a bias towards closure that must be overcome before it fully extends to the open and locked position. . . . [I]t actually keeps the blade in the closed position.”<sup>11</sup>

28. Kai contended that, whereas a spring mechanism functions to open the knife, a torsion bar such as the one present “keeps the blade closed until the thumb stud is engaged, at which point that same energy keeping it closed then assists in the opening.”

29. The parties’ evidence also noted that, unlike the goods in both *Digital Canoe* and *Abrams*, it is possible to control the speed at which the blade of the goods in issue open or to only open the blade partway by exerting continuous pressure on the thumb stud.

30. In their joint submission, the parties stated that the goods in issue are not prohibited pursuant to the CBSA’s policy in Memorandum D19-13-2, which was updated in November 2016 to remove the exception for torsion bar assisted-opening knives. The relevant part of the memorandum reads as follows:

(a) **Automatic knife** – An automatic knife is one that houses a blade that will open automatically by applying hand pressure to a button, spring, lever, or other device, in or attached to the handle of the knife, including knives that have a button, spring, lever, or other device, located in the spine of the handle and attached to the inner part of the blade.

**Note:** Knives that have a “thumb stud” attached to the blade of the knife, that is independent of the handle (not protruding from the handle in the closed or folded position), and that open automatically by applying pressure to the thumb stud, do not generally meet the above definition of a prohibited weapon, and as such do not generally fall under TI 9898.00.00. However, if such a knife is found to also open by gravity or by the application of a centrifugal force alone, it may still be considered to be prohibited.<sup>12</sup>

[Emphasis added]

31. Finally, the parties quoted from an unreported decision by the Ontario Superior Court<sup>13</sup> in which the court held that assisted-opening knives which can be opened by applying pressure to a metal stud did not fall within the definition of a prohibited weapon since

the blade does not open automatically by gravity or centrifugal force. Hand pressure is applied to a device on or integral to the blade. Hand pressure is not applied to a device in the handle or on it. Nor is pressure applied to a spring. If anything, pressure is released from the spring in these devices once it is operated.<sup>14</sup>

32. Having reviewed all of the evidence and the joint submissions, the Tribunal finds that the present goods are to be distinguished from those which were under appeal in the *Digital Canoe* and *Abrams* cases. They do not meet the definition of a prohibited device as found in the *Criminal Code* as the thumb stud here

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10 Exhibit AP-2016-046-10 at 2, Vol. 1.

11 Exhibit AP-2016-046-10 at 2, Vol. 1.

12. It must be also noted that, while the Tribunal may consider the language in Memorandum D19-13-2, it is not bound by it. In fact, in previous cases involving automatic knives the Tribunal specifically stated that it was not obliged to follow the language in Memorandum D19-13-2: *La Sagesse de l’Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CIIT) at paras. 29, 56.

13. *The Queen v. Hero Army Surplus* (28 June 2007), Case No. 06-04612-00 (Ontario Superior Court of Justice). A copy was not provided to the Tribunal.

14. Exhibit AP-2016-046-07A at para. 7, Vol. 1.



is located on the blade and not in the handle or on it. The stud is not specifically intended to activate an opening mechanism, but rather assists in a controlled deployment of the blade by the user. For all these reasons and following the lack of objection by the respondent and the joint position of the parties, the Tribunal finds that the goods at issue are not a prohibited device and are therefore not classified under tariff item No. 9898.00.00.

33. The Tribunal hereby grants the appeal.

Jason W. Downey

Jason W. Downey

Presiding Member