



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2016-009

T. Meunier

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, October 12, 2017*

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IN THE MATTER OF an appeal heard on May 25, 2017, 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 February 4, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

T. MEUNIER

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: May 25, 2017

Tribunal Panel: Jason W. Downey, Presiding Member

Support Staff: Eric Wildhaber, Counsel
Amélie Cournoyer, Counsel

PARTICIPANTS:**Appellant**

T. Meunier

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed with the Canadian International Trade Tribunal (the Tribunal) by Mr. T. Meunier, pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision rendered on February 4, 2016, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. This appeal involves the tariff classification of an airsoft pistol frame (the good in issue) imported by Mr. Meunier. The Tribunal must determine whether the good was 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 on May 26, 2015, on entry into Canada, the CBSA having classified it under tariff item No. 9898.00.00 as a prohibited device.

4. On August 20, 2015, Mr. Meunier provided the CBSA with a request for a re-determination of the tariff classification, in accordance with subsection 60(1) of the *Act*.

5. On February 4, 2016, the CBSA confirmed, pursuant to subsection 60(4) of the *Act*, that the good in issue was properly classified under tariff item No. 9898.00.00 as a prohibited device prohibited from importation into Canada.

6. On May 4, 2016, Mr. Meunier filed a notice of appeal of the CBSA's decision with the Tribunal pursuant to subsection 67(1) of the *Act*.

7. The CBSA filed a report prepared by William Etter of the Royal Canadian Mounted Police³ and asked the Tribunal to qualify him as an expert in firearms and tool mark identification.

8. The Tribunal held three teleconferences to come to an agreement with the parties about the appropriate procedures to follow in light of the particular circumstances of this case. One of the items discussed was the cross-examination by Mr. Meunier of the expert proposed by the CBSA. As agreed by the parties, Mr. Meunier put his questions to Mr. Etter in writing, and the latter responded in writing. Further submissions were also filed by both parties.

9. With the consent of the parties, the Tribunal decided to hold a hearing by way of written submissions pursuant to Rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁴ The file hearing was held in Ottawa, Ontario, on May 25, 2017. The good in issue was made available to the Tribunal, which examined it.

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

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

3. Report prepared by William Etter, Senior Firearms Technologist, Specialized Firearms Support Services, Royal Canadian Mounted Police, entitled *Inspection of a WE Model Company Model, WE Bulldog Airsoft Frame (complete)*, dated September 7, 2016, Exhibit AP-2016-009-08A, Vol. 1A.

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

GOOD IN ISSUE

10. The good in issue is a WE-Tech 3PX4 Bulldog GBB (WE Bulldog) frame, which is the lower part of a WE Bulldog airsoft pistol. It was manufactured by WE Tactical Training International of Taiwan and purchased from Evike, a distributor in the United States.

11. The package imported by Mr. Meunier contained the frame, a charger and two “replacement back straps” [translation]. The good in issue was therefore imported separately from the airsoft pistol on which it was designed to be installed.

LEGAL FRAMEWORK

12. Subsection 136(1) of the *Customs Tariff* reads 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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13. Tariff item 9898.00.00 reads 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: . . .	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, sauf : [...]
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For the purposes of this tariff item,

Pour l'application du présent numéro tarifaire :

. . .

[...]

(a) “firearms” and “weapon” have the same meaning as in section 2 of the Criminal Code;

a) « arme » et « arme à feu » s'entendent au sens de l'article 2 du Code criminel;

(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 [...]

14. 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.

15. Accordingly, 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 meets the definition of “replica firearm” pursuant to subsection 84(1) of the *Criminal Code*.⁵

16. To be considered a replica firearm, a device must fulfil the following three conditions: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not itself be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

17. 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 barrelled weapon and anything that can be adapted for use as a firearm.	« 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.
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18. 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.
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19. According to subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*, Mr. Meunier bears the burden of proving that the good in issue is *not* a prohibited device. The standard of proof is the balance of probabilities.⁶

POSITIONS OF PARTIES

Mr. Meunier

20. Mr. Meunier submitted that the good in issue is not prohibited from importation because one of the conditions for a device to be considered a replica firearm, namely, the requirement that the device not be a firearm, is not met. Mr. Meunier alleged that the good in issue is a part of a real firearm because he intends to install it on an airsoft pistol that is considered a firearm under the *Criminal Code*. In this respect, Mr. Meunier argued that a device is considered a real firearm and therefore not a replica firearm when the projectile can attain a velocity of 366 ft/s.

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

6. As reaffirmed by the Federal Court of Appeal in *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII), at para. 21.

CBSA

21. The CBSA submitted that the good in issue is a prohibited device because it meets the three conditions that define a replica firearm. The CBSA submitted that the WE Bulldog airsoft pistol, with which the good in issue is designed to be used, is not a firearm because it is not designed or adapted to shoot projectiles at a velocity exceeding 366 ft/s, and that the projectiles it shoots are therefore generally not likely to cause serious bodily injury or death to a person.

ANALYSIS

22. As a preliminary issue, the CBSA asked the Tribunal to qualify Mr. Etter as an expert witness in firearms and toolmark identification. After reviewing Mr. Etter's curriculum vitae, filed along with his report, and given that Mr. Meunier did not challenge Mr. Etter's qualification as an expert, the Tribunal had no difficulty in qualifying him as an expert in firearms and toolmark identification.

23. The Tribunal notes that it is common ground between the parties that the good in issue meets the first and third conditions of the definition of the term "replica firearm". For the reasons that follow, the Tribunal has no difficulty concluding that it meets these two requirements, since it was designed to exactly resemble, or to resemble with near precision, a firearm that is not an antique firearm.

24. As section 2 of the *Criminal Code* explicitly includes frames in the definition of "firearm", it follows that a replica of such a frame may constitute a replica firearm.

25. Normally, the Tribunal compares the size, shape and general appearance of a replica firearm with the firearm that it reproduces,⁷ and it is understood that the definition of "replica firearm" allows for minor differences.⁸

26. The issue before the Tribunal is whether the good in issue could 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."⁹

27. Because the Tribunal did not have a physical exhibit representative of the real firearm, it relied on Mr. Etter's report, which included detailed photographs, to compare the good in issue with the firearm it allegedly reproduced, namely, the frame of a Beretta PX4 Storm pistol, a semi-automatic firearm.¹⁰

28. As noted by the CBSA, the good in issue and the real Beretta PX4 Storm pistol frame are practically identical in shape, but bear different logos. In the opinion of the Tribunal, this difference between the logos is minor.

29. The Tribunal concludes that the good in issue is designed to resemble with near precision the frame of a real firearm and that it could easily be mistaken for a real firearm.

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

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

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

10. The report by Mr. Etter provided by the CBSA contains a photograph of a real Beretta PX4 Storm pistol frame; see Exhibit AP-2016-009-08A, Vol. 1A, at p. 3.

30. Moreover, according to Mr. Etter, the real Beretta PX4 Storm semi-automatic pistol was not manufactured before 2004.¹¹ Accordingly, it is not an antique firearm.¹²

31. In light of the above, the only issue that remains to be decided is whether the good in issue is itself a firearm, and therefore not a replica firearm, which could have an impact on whether or not it is designated as a “prohibited” firearm.

Is the good in issue itself a firearm?

32. For the reasons that follow, the Tribunal is of the opinion that Mr. Meunier has not met his burden of proving that the good in issue is a firearm, and therefore not covered by the definition of a replica firearm pursuant to subsection 84(1) of the *Criminal Code*.

33. The term “firearm” is not defined in subsection 84(1). The definition contained in section 2 of the *Criminal Code* states that a “firearm” means a “weapon . . . that is capable of causing serious bodily injury or death to a person”.

34. In this case, in light of the definition of “firearm” in section 2 of the *Criminal Code*, to prove that the good in issue is a firearm, Mr. Meunier had to prove, on a balance of probabilities, that it is the frame of a “weapon . . . that is capable of causing serious bodily injury or death to a person”.

35. The Tribunal acknowledges the somewhat contradictory nature of Mr. Meunier’s burden of proof, namely, that of proving that the good in issue *is* a firearm, given the public safety objective of these provisions. The appellant’s burden of demonstrating that an item is potentially dangerous may appear incongruous, but that is how the legislation is drafted, and the Tribunal must follow the path it establishes.

36. The Tribunal accepts the uncontested evidence provided by the CBSA to the effect that the threshold velocity beyond which serious bodily harm is likely to be inflicted by an airsoft pistol by a plastic projectile weighing 0.20 g is 366 ft/s.¹³

37. As indicated above, the good in issue is a WE Bulldog airsoft pistol frame. According to Mr. Etter,¹⁴ the good in issue cannot be installed on a real Beretta PX4 Storm pistol.

38. Mr. Meunier alleged that the good in issue, when imported to Canada, is designed to be used with an airsoft pistol capable of projecting a pellet at a velocity of 370 to 400 ft/s when fitted with a long barrel. Mr. Meunier noted that this barrel differs from the one illustrated on the website of the American distributor Evike, filed by the CBSA, which indicates that the velocity of a projectile of a WE Bulldog airsoft pistol is 265 to 280 ft/s.¹⁵

39. In support of this claim, Mr. Meunier submitted to the Tribunal an email he received from a representative of WE Tactical Training International, indicating that WE Bulldog pistols are normally imported to Canada with a barrel ensuring that the pistols can achieve the required minimum velocity.¹⁶ The Tribunal notes that in the email, the representative invited Mr. Meunier to contact directly the distributor

11. Exhibit AP-2016-009-08A, Vol. 1A, at para. 10.

12. According to subsection 84(1) of the *Criminal Code*, to be considered an antique firearm, the weapon must have been manufactured before 1898.

13. Exhibit AP-2016-009-07A, Vol. 1, at paras. 42-46; Exhibit AP-2016-009-05, Vol. 1, at para. 11.

14. Exhibit AP-2016-009-08A, Vol. 1A, at paras. 11, 16.

15. Exhibit AP-2016-009-07A, Vol. 1, Tab 3.

16. Exhibit AP-2016-009-05, Vol. 1, Tab P-2.

from which Mr. Meunier purchased the good in issue, Evike, in order to ensure that his package contained such a barrel. There is no evidence in the record of any such communication between Mr. Meunier and Evike.

40. Mr. Meunier also submitted to the Tribunal excerpts of websites of Canadian companies selling WE Bulldog airsoft pistols, indicating that these could attain a velocity exceeding 366 pi/s.¹⁷ The Tribunal notes that one of these excerpts states the following: “velocity of 370 fps/ .20gr with *long barrel*. Comes with fake silencer and original barrel”¹⁸ [emphasis added, translation].

41. As for the CBSA, in addition to the excerpt from the distributor’s website Evike, it submitted an excerpt from WE Tactical Training International’s website indicating that the WE Bulldog airsoft pistol is designed to shoot a projectile *at a maximum velocity of 330 ft/s*.¹⁹

42. The Tribunal notes that Mr. Meunier also submitted an excerpt from the manufacturer’s website confirming that the velocity of the projectile of the WE Bulldog is 330 ft/s. Mr. Meunier alleged, however, that the information found on the manufacturer’s website is meant primarily for local buyers who may use the good in issue differently from international buyers. Mr. Meunier argued, therefore, that the manufacturer’s website does not reflect the fact that international buyers like himself may use the good in issue with a barrel capable of shooting a projectile at velocities exceeding that posted on the website.

43. Having reviewed the evidence on the record, the Tribunal finds that there is insufficient evidence to demonstrate on a balance of probabilities that the good in issue is the frame of an airsoft pistol capable of shooting a projectile at a velocity capable of “causing serious bodily injury or death to a person”.

44. The excerpts from the manufacturer’s website submitted by both parties and the excerpt from the website of the distributor from which Mr. Meunier purchased the good in issue indicating that the velocity of a projectile of a WE Bulldog is less than 366 ft/s are determinative in this case.

45. As for the excerpts from the third-party websites submitted by Mr. Meunier, these establish, at most, that the good in issue *may* be attached either to airsoft pistols that are firearms or to airsoft pistols that are not firearms. This constitutes insufficient proof for Mr. Meunier to meet his burden of proof in this case.²⁰ The possibility that the part may be attached to a longer barrel, whether through assembly or some sort of modification, is not determinative of its intended use.

46. Moreover, no evidence was presented indicating that the package purchased by Mr. Meunier from the distributor Evike contained the additional parts described in the manufacturer’s email that would enable the projectile to reach the velocities it claims. Having examined the good in issue, the Tribunal notes that it was imported without a barrel, and that, accordingly, the parts that can supposedly increase the velocity of the projectile of the pistol were not imported with the good in issue.

47. The Tribunal also acknowledges Mr. Meunier’s argument that it is likely that Canadian buyers use the good in issue with a barrel that allows for increased velocity of the projectile of the pistol, but notes that the specific use intended by an importer for the imported goods is not under the CBSA’s control and is therefore irrelevant to the application of the *Customs Tariff*.

17. Exhibit AP-2016-009-05, Vol. 1, Tab P-3; Exhibit AP-2016-009-10, Vol. 1A, Tabs P-10, P-11 and P-12.

18. Exhibit AP-2016-009-10, Vol. 1A, Tab P-11.

19. Exhibit AP-2016-009-08A, Vol. 1A, Tab C.

20. *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (CITT) at paras. 26-27.

48. It is well established that the tariff classification according to the *Customs Tariff* is determined at the time of importation of the goods.²¹ The evidence shows that the good in issue is designed to be used as a part of a device that is not a firearm under the *Criminal Code*. The fact that it can, after importation, also potentially be used with devices that might qualify as firearms, in view of their projectile velocity, is insufficient to establish on a balance of probabilities that the good in issue is a firearm frame.²²

49. Accordingly, the Tribunal agrees with the CBSA that the good in issue meets the third condition of the definition of the term “replica firearm”, namely, that it is not itself a firearm.

CONCLUSION

50. Given that the good in issue meets the three conditions of the term “replica firearm” set out in subsection 84(1) of the *Criminal Code*, the Tribunal concludes that it is a prohibited device. Accordingly, the good in issue is properly classified under tariff item No. 9898.00.00 as a prohibited device prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member

21. *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] SCR 366, 1965 CanLII 82 (SCC); *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CIIT) at para. 21.

22. *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (TCCE) at para. 28.