



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## ORDER AND REASONS

Appeal No. AP-2017-041

N. Graff

v.

President of the Canada Border  
Services Agency

*Order and reasons issued  
Monday, May 28, 2018*

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IN THE MATTER OF an appeal submitted on November 13, 2017, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a request by the President of the Canada Border Services Agency, pursuant to Rule 23.1 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, submitted on March 21, 2018, that the Tribunal strike the appellant's brief from the record and dismiss the appeal.

**BETWEEN**

**N. GRAFF**

**Appellant**

**AND**

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

**Respondent**

**ORDER**

The request is denied in part: the appellant's brief remains on the record. The request is granted in part: the appeal is dismissed for failure to show a reasonable prospect of success.

Jean Bédard  
Jean Bédard  
Presiding Member

## STATEMENT OF REASONS

### BACKGROUND

1. On November 13, 2017, Mr. Graff filed this appeal with the Canadian International Trade Tribunal (the Tribunal), pursuant to section 67 of the *Customs Act*,<sup>1</sup> from a decision of the President of the Canada Border Services Agency (CBSA) pursuant to section 60 of the *Act*, made on August 15, 2017.<sup>2</sup> The CBSA's decision confirmed a previous decision classifying a "Zero Tolerance model ZT0452G10 folding knife" (the good in issue) as a "prohibited weapon", pursuant to tariff item No. 9898.00.00 and subsection 84(1) of the *Criminal Code*;<sup>3</sup> this confirmed that the good in issue is prohibited from importation pursuant to section 136 of the *Customs Tariff*.<sup>4</sup>
2. The notice of appeal included a request that the matter be put in abeyance for one year to allow Mr. Graff to research the matter.<sup>5</sup>
3. On November 30, 2017, the CBSA made submissions opposing the request on the grounds that the appellant had failed to provide sufficient reasons why an abeyance should be granted.<sup>6</sup>
4. On December 4, 2017, Mr. Graff made additional submissions to the Tribunal, reiterating the request for abeyance and submitting various arguments.<sup>7</sup> The CBSA did not reply to Mr. Graff's further submissions but maintained its opposition to an abeyance.<sup>8</sup>
5. On December 13, 2017, the Tribunal denied the request for an abeyance of one year, but granted Mr. Graff an additional six weeks to file his appellant's brief.<sup>9</sup>
6. On February 28, 2018, Mr. Graff submitted his appellant's brief to the Tribunal.<sup>10</sup>
7. On March 21, 2018, the CBSA made a request pursuant to Rule 23.1 of the *Canadian International Trade Tribunal Rules*<sup>11</sup> that the Tribunal strike the appellant's brief from the record and dismiss the appeal. In support of the request, the CBSA argued that the appellant's brief does not comply with Rule 34(2) of the *Rules*, which states the required form and content of an appellant's brief in appeals under the *Customs Act*. More broadly, the CBSA submitted that the appellant's brief lacked material facts or argument and disclosed no reasonable cause of action, making it impossible for the CBSA to properly respond and for the Tribunal to regulate the proceedings.<sup>12</sup>

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1. R.S.C. 1985 (2nd Supp.), c. 1 [*Act*].
2. Exhibit AP-2017-041-01 at 1, Vol. 1.
3. R.S.C. 1985, c. C-46.
4. S.C. 1997, c. 36.
5. Exhibit AP-2017-041-01 at 1, Vol. 1.
6. Exhibit AP-2017-041-04 at 1, Vol. 1.
7. Exhibit AP-2017-041-01A at 1, Vol. 1.
8. Exhibit AP-2017-041-05 at 1, Vol. 1.
9. Exhibit AP-2017-041-06 at 1, Vol. 1.
10. Exhibit AP-2017-041-07 at 1, Vol. 1.
11. S.O.R./91-499 [*Rules*].
12. Exhibit AP-2017-041-09 at 1, Vol. 1.

8. On April 27, 2018, Mr. Graff submitted his objection to the CBSA's request.<sup>13</sup> The CBSA chose not to reply to Mr. Graff's submissions regarding the request.<sup>14</sup>

## TRIBUNAL'S ANALYSIS

### The appellant's brief will remain on the record

9. The CBSA requested that Mr. Graff's brief be stricken from the record because it does not conform to the form and content stipulated in subrule 34(2) of the *Rules*.

10. The Tribunal begins by stating that non-compliance with the requirements for submitting an appellant's brief under Rule 34 is not in itself fatal to an appeal. Rule 6 of the *Rules* grants the Tribunal discretion to "dispense with, vary or supplement any of these Rules if it is fair and equitable to do so or to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit."

11. Although the Tribunal expects parties to comply with the *Rules*, it has the discretion to dispense with, vary or supplement them where it considers doing so to be fair and equitable. One such situation is where rigid adherence to formal submission requirements would have the practical effect of depriving a party of recourse to the Tribunal, with implications for procedural fairness and the Tribunal's legislated duty to hear, determine and deal with appeals under the statutory framework established by Parliament.<sup>15</sup> Not only is the Tribunal granted discretion to conduct hearings as informally and expeditiously as the circumstances and considerations of fairness permit, it is mandated to do so in its enabling legislation.<sup>16</sup> These concerns are amplified where, as in the present case, a party is self-represented.

12. The Tribunal is therefore not persuaded that it should strike the appellant's brief from the record on the basis of purported formal or substantive defects. In the Tribunal's view, to so reject the submissions of a self-represented party would run counter to the manner of conducting the Tribunal's proceedings mandated by Parliament. The appellant's brief forms an integral part of the record underlying the Tribunal's decision in this matter. Therefore, in the interest of fulfilling Mr. Graff's right to make his case and be heard, the Tribunal determines that his submissions will remain on the record.

### The appellant's submissions disclose no reasonable prospect of success

13. The CBSA submitted that the appeal should be struck or dismissed because Mr. Graff's submissions lack material facts or argument supporting any reasonable prospect of success. The Tribunal agrees.

14. Pursuant to subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*, the appellant bears the burden of proving that the tariff classification determined by the CBSA is incorrect. In the present case, Mr. Graff therefore bears the burden of proving that the good in issue is not a "prohibited weapon" under the relevant provisions of the *Customs Tariff* and the *Criminal Code*.

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13. Exhibit AP-2017-041-11 at 1, Vol. 1.

14. Exhibit AP-2017-041-12 at 1, Vol. 1.

15. *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*], para. 16(c).

16. *CITT Act*, s. 35.

15. Mr. Graff was provided with several opportunities to make his case so as to meet the burden of proof in this appeal. However, even on a close review, and when affording him a generous interpretation of his submissions, the Tribunal finds that the burden has not been met.

16. In his submissions, Mr. Graff makes the following three claims regarding the good in issue:

- 1) similar goods are purportedly sold by retailers in Canada;<sup>17</sup>
- 2) the CBSA's classification of the good under tariff item No. 9898.00.00 is wrong;<sup>18</sup> and
- 3) the good rightfully belongs to him.<sup>19</sup>

17. The Tribunal has repeatedly stated that arguments identical to those made in Mr. Graff's first claim are not a valid ground of appeal.<sup>20</sup> To be sure, the Tribunal has remarked, as it did in *D. Josefowich*,<sup>21</sup> that anecdotal claims of similar goods being available "in the marketplace propagates an uncomfortable confusion for the general public", but ultimately that such a situation has no impact on the Tribunal's duty to classify goods that are brought before it based exclusively on whether they meet the various tests for classification under tariff item No. 9898.00.00. As such, as stated in *Scott Arthur v. President of the Canada Border Services Agency*, the Tribunal reiterates that "any previous shipments. . . not intercepted by the CBSA or its predecessors is irrelevant. The administrative action, or inaction, of the CBSA cannot change the law . . . ."<sup>22</sup>

18. The second and third claims are mere assertions. Mr. Graff did not provide any evidence in support of his position on the classification of the good in issue, such as any characteristics of the good in issue that might have allowed the Tribunal to find in his favour. Instead, his submissions centred almost entirely on arguments of a legal nature purporting the inapplicability of Canadian law generally.<sup>23</sup> The Tribunal finds those arguments to be unfounded.

19. The Federal Court of Appeal addressed similar arguments in *Dove v. Canada*,<sup>24</sup> and in deciding that matter also cited the decision of the Alberta Court of Queen's Bench in *Meads v. Meads*.<sup>25</sup> The Tribunal finds Mr. Graff's arguments to also be extremely similar to some of those outlined in *Meads*.<sup>26</sup> On the basis of the pronouncements of those courts, and the fact that Mr. Graff provided no evidence or founded legal argument in the present proceedings, the Tribunal finds that the appeal discloses no reasonable ground of success.

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17. Exhibit AP-2017-041-01A at para. 24, Vol. 1.

18. *Ibid.* at para. 28.

19. *Ibid.* at paras. 21-26; Exhibit AP-2017-041-11 at para. 44, Vol. 1;

20. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 21.

21. *D. Josefowich v. President of the Canada Border Services Agency* (9 May 2016), AP-2015-010 (CITT).

22. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 21.

23. Exhibit AP-2017-041-01A at 3-5, Vol. 1; Exhibit AP-2017-041-07 at 1-2, 4, Vol. 1; Exhibit AP-2017-041-11 at 1-7, Vol. 1.

24. 2016 FCA 231, leave to the Supreme Court of Canada refused, 2017 CanLII 32947 (SCC), at paras. 2 and 5.

25. 2012 ABQB 571 [*Meads*].

26. *Ibid.* at paras. 298-301. See also: *R. v. Dick*, 2001 BCPC 275, at paras. 31-41; *R. v. Lindsay*, 2004 MBCA 147, at para. 32; *R. v. Lindsay*, 2011 BCCA 99, at paras. 31-32.

**DECISION**

20. The request is denied in part: the appellant's brief remains on the record. The request is granted in part: the appeal is dismissed for failure to show a reasonable ground of success.

Jean Bédard  
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Presiding Member