



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-042

R. McLeod

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, July 10, 2018*

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IN THE MATTER OF an appeal heard on May 24, 2018, 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 October 26, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

R. MCLEOD

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Rose Ritcey
Rose Ritcey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 24, 2018

Tribunal Member: Rose Ritcey, Presiding Member

Support Staff: Courtney Fitzpatrick, Counsel
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PARTICIPANTS:**Appellant**

R. McLeod

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal under subsection 67(1) of the *Customs Act*¹ from a re-determination of the President of the Canada Border Services Agency (CBSA) pursuant to section 60 of the *Act*, made on October 26, 2017.

2. This appeal concerns the tariff classification of a “Walther PPK” Airsoft pistol (the good in issue) imported by Mr. McLeod. 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. On May 3, 2017, pursuant to subsection 58(1) of the *Act*, the CBSA detained the good in issue, classifying it as a prohibited device (namely, a replica firearm) under tariff item No. 9898.00.00 of the *Customs Tariff*.³

4. On May 7, 2017, Mr. McLeod requested a re-determination of the CBSA’s decision pursuant to subsection 60(1) of the *Act*.⁴

5. On October 26, 2017, pursuant to subsection 60(4) of the *Act*, the CBSA upheld the original determination.⁵

6. On November 16, 2017, pursuant to subsection 67(1) of the *Act*, Mr. McLeod filed the present appeal with the Tribunal.⁶

7. On May 11, 2018, the Tribunal received a request to intervene from Mr. J. B. Byrne. Mr. Byrne submitted that he had “appealed to the Recourse Directorate of the Canada Border Services Agency a matter that essentially duplicates the present case” and that he could assist the Tribunal by providing analysis and arguments not fully canvassed in Mr. McLeod’s submissions.⁷

8. On May 14, 2018, the CBSA made submissions opposing Mr. Byrne’s request to intervene. The CBSA submitted that granting an intervention at such a late stage would disrupt the proceedings in a manner disproportionate to Mr. Byrne’s potential contribution. According to the CBSA, the nature of Mr. Byrne’s interest in the proceedings was unclear, as he had not submitted any details regarding the matter he had appealed to the CBSA Recourse Directorate. Further, the CBSA submitted that denying the request would not prejudice Mr. Byrne’s interest since he could file an appeal with the Tribunal in the event he receives an unfavorable decision from the CBSA Recourse Directorate.⁸

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

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

3. Exhibit AP-2017-042-08A at 18, Vol. 1.

4. *Ibid.* at 20.

5. *Ibid.* at 22.

6. Exhibit AP-2017-042-01B at 1, Vol. 1.

7. Exhibit AP-2017-042-14, Vol. 1.

8. Exhibit AP-2017-042-16, Vol. 1.

9. On May 18, 2018, Mr. Byrne submitted a reply to the CBSA's submissions.⁹ Mr. McLeod declined the opportunity to make submissions regarding the request.

10. On May 22, 2018, the Tribunal issued a decision denying Mr. Byrne's request to intervene.¹⁰

11. In denying Mr. Byrne's request, the Tribunal considered the grounds for intervention as set out in Rules 40.1 and 41 of the *Canadian International Trade Tribunal Rules*:¹¹

- the nature of the interest of the proposed intervenor and the manner in which it may be affected;
- why the proposed intervenor's interest would not be adequately represented if the request to intervene is denied;
- the manner in which the proposed intervenor may assist the Tribunal in the resolution of the appeal; and
- any other matters the Tribunal considers relevant.

12. On balance, the Tribunal was not persuaded that Mr. Byrne's intervention in this proceeding was necessary. Mr. Byrne provided no details on the nature of the matter he has appealed to the CBSA Recourse Directorate, making it difficult, if not impossible, for the Tribunal to assess his potential interest in the present appeal. In addition, the arguments in Mr. Byrne's submissions focused largely on the *Firearms Act*,¹² which is not relevant to determining whether the good in issue is a replica firearm for the purposes of tariff classification. The Tribunal also considered that Mr. Byrne will suffer no prejudice as a result of denying his request to intervene since he is able to pursue his own appeal before the Tribunal in due course should he have a need or a desire to do so.

13. A file hearing was held in Ottawa on May 24, 2018.

GOOD IN ISSUE

14. The good in issue is a "Walther PPK" Airsoft pistol manufactured by ShingPo International Ltd.¹³ The right side is marked "Licensed Trademark of Carl Walther GmbH Germany", and includes what appears to be a serial number "MH916910", and a "Walther" banner at the top of the grip.¹⁴ The left side is marked with the same "Walther" banner and an inscription reading "Carl Walther Waffenfabrik Ulm/Do Modell PPK/S Cal. 9mm kurs/.380 ACP".¹⁵

LEGAL FRAMEWORK

15. Subsection 136(1) of the *Customs Tariff* provides that the importation of goods of tariff item Nos. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.

9. Exhibit AP-2017-042-18, Vol. 1.

10. Exhibit AP-2017-042-19, Vol. 1.

11. S.O.R./91-499 [Rules].

12. S.C. 1995, c. 39.

13. Exhibit AP-2017-042-08D at 2, Vol. 1.

14. Exhibit AP-2017-042-08A at 35, Vol. 1.

15. *Ibid.* at 40.

16. Tariff item No. 9898.00.00 reads as follows:¹⁶

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

For the purposes of this tariff item,

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

17. 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*)

18. Accordingly, in order to determine whether the good in issue is 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 good in issue meets the definition of a “replica firearm” in subsection 84(1) of the *Criminal Code*.

19. To be considered a replica firearm a device must fulfil the following three criteria:

- a. It must be designed or intended to exactly resemble, or to resemble with near precision, a firearm;
- b. It must not be a firearm; and
- c. It must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

20. 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*)

21. 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*)

-
16. 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* 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.”

22. Pursuant to subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*, Mr. McLeod bears the burden of proving that the good in issue is *not* a “prohibited device”.¹⁷ The standard of proof is the balance of probabilities.

POSITIONS OF THE PARTIES

23. Mr. McLeod submitted that the good in issue is “fashioned after a Walther PPK” pistol, and that he imported a similar pistol, which produces greater kinetic energy, from the United States with no issue. He questioned why two Airsoft pistols which look identical are treated differently, with the pistol producing less kinetic energy (the good in issue) being prohibited from importation.¹⁸

24. The CBSA submitted that Mr. McLeod has failed to satisfy the burden of proving the good in issue is not properly classified under tariff item No. 9898.00.00. It also argued that the fact that goods similar to the good in issue have been successfully imported in the past is irrelevant to the appeal.

25. The CBSA submitted that the good in issue resembles with near precision a Walther model PPK/S pistol. The CBSA relied on a report produced by Mr. Murray A. Smith of the RCMP’s Specialized Firearms Support Service which concludes that the good in issue: is not a functional Walther PPK/S pistol; is designed to resemble with near precision a Walther model PPK/S pistol; and that the Walther PPK/S pistol is a firearm manufactured in or after 1968 and is therefore not an antique firearm.

TRIBUNAL’S ANALYSIS

Preliminary Issue: Qualification of the CBSA’s Expert Witness

26. The CBSA requested that the Tribunal qualify Mr. Smith as an expert witness in the field of identification of firearms. This request was accompanied by a copy of Mr. Smith’s *curriculum vitae* and a signed Acknowledgment and Undertaking of Proposed Expert Witnesses.

27. The Tribunal has considered Mr. Smith’s *curriculum vitae*, his acknowledgment and undertaking, and the facts of this case. Noting that Mr. McLeod made no objection to either Mr. Smith’s expertise or his report, the Tribunal accepts Mr. Smith’s qualification as an expert in the identification of firearms.¹⁹

Whether the Good in Issue Is a Replica Firearm

28. As outlined above, the good in issue must satisfy three criteria to meet the definition of a “replica firearm” in subsection 84(1) of the *Criminal Code*.

1) Is the Good in Issue Designed to Exactly Resemble, or Resemble With Near Precision, a Firearm?

29. The CBSA submitted that the good in issue is properly classified as a “replica firearm” because it resembles, exactly or with near precision, a device that is itself a “firearm”, in this case the Walther PPK/S pistol.

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

18. Exhibit AP-2017-042-01B at 1-2, Vol. 1.

19. The Tribunal has previously accepted submissions produced by CBSA weapons specialists as expert evidence in cases regarding prohibited weapons or devices. See, for example, *R. Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CITT) at paras. 40-41; *T. Lysyshyn v. President of the Canada Border Services Agency* (14 July 2014), AP-2013-047 (CITT) at paras. 23-26.

30. In order to determine whether the good in issue is designed or intended to exactly resemble, or resemble with near precision, a firearm, the Tribunal usually compares the size, shape and general appearance of a replica with the firearm it imitates.²⁰ The Tribunal has previously noted the words “features in common” and “of the same appearance” in the definition of “resemble” and found that the definition of “replica” allows for minor differences.²¹ The Tribunal has also previously stated that determining whether a device is designed to exactly or with near precision resemble a firearm is “primarily a visual exercise”.²²

31. In his report, Mr. Smith lists numerous similarities between the good in issue and a conventional Walther PPK/S pistol.²³ The report concludes that the overall size and proportions of the good in issue and the conventional Walther PPK/S pistol are similar, that the weight of the good in issue and the conventional pistol (0.56 kg and 0.64 kg, respectively) have a similar “feel”, and that the good in issue is designed to resemble with near precision a Walther Model PPK/S pistol.²⁴

32. The CBSA also referred to Mr. McLeod’s statement in his brief that the good in issue is “fashioned after a Walther PPK” as further evidence that it is intended to exactly or with near precision resemble an actual firearm.²⁵

33. Mr. Smith’s report states that certain non-visual, internal components of the good in issue (for example, in the slide rails and ejector) differ markedly from a conventional Walther PPK/S pistol. His report concludes that, while these internal differences are generally not visible in a complete and assembled Airsoft pistol, they are quite evident when disassembled.²⁶

34. The CBSA submitted that non-visible characteristics should not be considered when determining whether the good in issue resembles a replica firearm and referred to the Tribunal’s statement in *Servello* that “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.”²⁷ Mr. McLeod did not contest the CBSA’s arguments that assessing resemblance to a firearm is a primarily visual exercise, or submit arguments or evidence that non-visual differences should be considered.

35. At the file hearing, the Tribunal visually inspected the good in issue, having regard to its size, shape and general appearance, comparing it to the pictures and specifications of the Walther PPK/S submitted by the CBSA. In making this comparison, the main consideration was whether the good in issue could be mistaken for a real firearm. The Tribunal concluded that the minor differences noted by Mr. Smith in his report, such as certain internal mechanisms and minor outer markings, are not readily visible and do not sufficiently distinguish the good in issue from a real Walther PPK/S pistol.

36. Based on this comparison and Mr. Smith’s uncontested expert evidence, the Tribunal finds that the good in issue resembles, exactly or with near precision, a Walther PPK/S pistol.

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

21. *Vito V. Servello v. The Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) [*Servello*] at 3; *Y. Gosselin v. President of the Canada Border Services Agency* (9 June 2016), AP-2015-013 (CITT) [*Gosselin*] at para. 26.

22. *Servello*; *Don L. Smith* at 3.

23. Exhibit AP-2017-042-08A at 37-38 and 40, Vol. 1.

24. *Ibid.* at 43.

25. Exhibit AP-2017-042-01B at 1, Vol. 1.

26. Exhibit AP-2017-042-08A at 36, Vol. 1.

27. *Servello* at 3.

2) Is the Good in Issue a Firearm?

37. The CBSA submitted that the good in issue is not a firearm because it is not capable of causing serious bodily injury. It submitted that a firearm can cause serious bodily injury when it has a muzzle velocity of 366 feet per second (fps) or greater.²⁸ This standard is based on the minimum velocity necessary to rupture or penetrate the eye, and has previously been accepted by the Tribunal.²⁹

38. The CBSA relied on the test certification included in the parcel with the good in issue, which stated that it has a muzzle velocity between 251 and 275 fps when firing a 0.2 gram pellet (the standard ammunition used in the good in issue).³⁰ Mr. Smith's report also cites numerous web sites advertising Walther PPK/S pattern Airsoft pistols with muzzle velocities of between 160 and 300 fps, and concludes that the muzzle velocity of the good in issue is unlikely to cause serious bodily injury even if projectiles heavier than 0.2 grams are used.³¹

39. The CBSA also submitted that the good in issue cannot be adapted for use as a firearm. This is relevant because if the frame of the good in issue could be used as a frame for a conventional pistol, it could be considered a "firearm" instead of a replica firearm. In that regard, the CBSA relied on Mr. Smith's report, which notes that the frame of the good in issue cannot be used as a frame for a conventional pistol.³²

40. Mr. McLeod did not contest this aspect of the CBSA's submissions.

41. On the basis of the foregoing evidence, the Tribunal finds that the good in issue is not a firearm.

3) Is the Good in Issue Designed to Resemble an Antique Firearm?

42. Mr. McLeod has not alleged that the conventional Walther PPK/S pistol is an antique firearm. Mr. Smith's report indicates that the Walther PPK pistol was manufactured after 1930, and that the PPK/S variant was manufactured no earlier than 1968.³³ The CBSA also submitted further independent evidence that the Walther PPK/S was introduced after 1968.³⁴

43. Having found that the good in issue is designed to resemble the Walther PPK/S pistol and accepting Mr. Smith's evidence that the Walther PPK pistol was manufactured after 1930, the Tribunal concludes that the good in issue is not designed or intended to resemble an "antique firearm".

Conclusion

44. Given that 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 can only conclude that it is a prohibited device. Therefore, the good in issue is properly classified under tariff item No. 9898.00.00, and its importation into Canada is prohibited by subsection 136(1) of the *Customs Tariff*.

28. Exhibit AP-2017-042-08A at 25-27, 36-37, Vol. 1.

29. *Gosselin* at para. 33; *Ka Wong v. President of the Canada Border Services Agency* (18 July 2006), AP-2005-036 (CITT) at para 15.

30. Exhibit AP-2017-042-08D at 1, Vol. 1.

31. Exhibit AP-2017-042-08A at 36-37, 43-44, Vol. 1.

32. *Ibid.*

33. *Ibid.* at 35.

34. *Ibid.* at 47.

45. Nonetheless, the Tribunal acknowledges that Mr. McLeod's position in this dispute is rooted in the apparent inconsistency that he was able to import an identical or similar device from the United States. In that regard, Mr. McLeod specifically contested the CBSA's submission that "[his] argument that he imported a similar airsoft pistol from the US and received it with no issues is irrelevant to the purpose of this appeal."³⁵

46. With regard to Mr. McLeod's argument on this point, the Tribunal can only reiterate its previous statements that it is "not a court of equity and must apply the law as it is", and 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"³⁶

47. In his submissions, Mr. McLeod also suggested that similar goods may be available for retail in Canada. In this regard, the Tribunal notes its past comments that:

this dichotomy in the marketplace propagates an uncomfortable confusion for the general public. On the one hand, similar goods are readily available on the shelves of many large retailers, while, on the other hand, the CBSA is litigating cases such as this one against individual importers, albeit through an alternative argument. There is little direction to be ascertained from this approach.³⁷

And that:

Although this situation is irrelevant under the *Criminal Code* and the *Customs Tariff*, for the determination of the tariff classification . . . the Tribunal understands the degree to which the average citizen can be confused in such a situation, which gives reason to anticipate unequal administration of customs control and the *Criminal Code*.³⁸

48. As the above comments indicate, the Tribunal acknowledges the confusion that could be created by the possible availability of similar goods in Canada, either at retail stores or online. However, these circumstances do nothing to alter the law the Tribunal is bound to apply, namely, the *Customs Tariff* as informed by relevant provisions of the *Criminal Code*. As the Tribunal has repeatedly concluded, "the availability of similar goods in Canada is . . . not a relevant consideration to the Tribunal's determination of whether the good in issue is a prohibited device for importation into Canada."³⁹

DECISION

49. The appeal is dismissed.

Rose Ritcey
Rose Ritcey
Presiding Member

35. Exhibit AP-2017-042-10 at 1, Vol. 1.

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

37. *D. Josefowich v. President of the Canada Border Services Agency* (9 May 2016), AP-2015-010 (CITT) [Josefowich] at para 46.

38. *J. Hains v. President of the Canada Border Services Agency* (25 October 2013), AP-2012-023 (CITT) at para. 33.

39. *Josefowich* at para. 47.