Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-062

D. Steeves

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, December 21, 2018

Canada

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IN THE MATTER OF an appeal heard on August 30, 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 February 2, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

D. STEEVES **Appellant**

AND

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

DECISION

The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 30, 2018
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Martin Goyette, Counsel
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PARTICIPANTS:

Appellant

D. Steeves

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Luc Vaillancourt

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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*[1] from a decision, made on February 2, 2018, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

[2] The issue in this appeal is whether 19 spiked finger rings (the rings) imported by Ms. D. Steeves are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*[2] as prohibited weapons and, therefore, prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*.

PROCEDURAL HISTORY

[3] The rings, addressed to Ms. Steeves, arrived in Canada by mail, in three shipments, on or around November 16 and 30, 2017, and were detained by the CBSA under section 101 of the *Act*.[3]

[4] On November 30 and December 5, 2017, the CBSA determined, pursuant to subsection 58(1) of the *Act*, that the rings are classified as prohibited weapons under tariff item No. 9898.00.00 and, therefore, prohibited from importation into Canada pursuant to subsection 136(1).[4]

[5] On December 8 and 12, 2017, Ms. Steeves filed requests for re-determination of the tariff classification of the rings pursuant to subsection 60(1) of the *Act*.[5]

[6] On February 2, 2018, the CBSA confirmed the classification of the goods under tariff item No. 9898.00.00, pursuant to subsection 60(4) of the *Act*.[6] Specifically, the CBSA determined that the rings met the definitions set forth in sections 5 and 15 of Part 3 of the Schedule to the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*.[7] These two sections are reproduced below.

[7] On February 26, 2018, Ms. Steeves filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.[8]

[8] On August 30, 2018, the Tribunal heard the matter by way of written submissions, in accordance with Rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.[9] The goods in issue were made available and were examined by the Tribunal during the file hearing.

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1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997. c. 36.
3. Exhibit AP-2017-062-07A at 72-81, Vol. 1A.
4. *Ibid.* at 83-88.
5. *Ibid.* at 90-93.
6. *Ibid.* at 108-110.
7. SOR/98-462 [*Regulations*].
8. Notice of appeal, Exhibit AP-2017-062-01, Vol. 1.
9. SOR/91-499.

GOODS IN ISSUE

[9] The goods in issue are rings made of metal, designed to be worn on a finger. Each ring has what appear to be two metal spikes or points, which are part of the ring, and which protrude out to resemble "cat ears".

LEGAL FRAMEWORK

[10] 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.

[11] Tariff item No. 9898.00.00 provides 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 . . . .
>
> For the purposes of this tariff item:
>
> . . .
>
> (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;

[12] 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*[10] 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."

[13] According to the *Customs Tariff*, a "prohibited weapon" includes any items defined as a "prohibited weapon" in subsection 84(1) of the *Criminal Code*.[11] Subsection 84(1) of the *Criminal Code* includes the following:

> "Prohibited weapon" means
>
> . . .
>
> (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon;

10. S.C. 1997, c. 36, schedule.
11. RSC 1985, c. C-46.

[14] Items prescribed to be prohibited weapons under section 84 of the *Criminal Code* are listed in Part 3 of the Schedule to the *Regulations*. Sections 5 and 15 of Part 3 of the Schedule, which the CBSA relied upon in its classification of the goods in issue, provide as follows:

5 Any finger ring that has one or more blades or sharp objects that are capable of being projected from the surface of the ring.	**5** Toute bague munie d'au moins une lame ou pointe qui peut être projetée de sa surface.
15 The device known as "Brass Knuckles" and any similar device consisting of a band of metal with one or more finger holes designed to fit over the fingers of the hand.	**15** L'instrument communément appelé « coup-de-poing américain » et autre instrument semblable consistant en une armature métallique trouée dans laquelle on enfile les doigts.

[15] Before the Tribunal, the CBSA submitted that the rings meet the description in section 5 of Part 3 of the Schedule, and are therefore prescribed to be prohibited weapons and, consequently, prohibited from importation into Canada. The CBSA no longer relied on section 15, concerning brass knuckles and similar devices, and for this reason the Tribunal did not consider whether the goods in issue meet the terms of section 15.

[16] As the appellant, Ms. Steeves bears the onus of demonstrating that the CBSA's classification of the goods was incorrect.[12]

PARTIES' POSITIONS

D. Steeves

[17] Ms. Steeves' principal legal argument relied on CBSA memorandum D19-13-2,[13] which states that jewellery to which spikes are affixed will generally not meet the definition of a prohibited weapon. Ms. Steeves also submitted that paragraph 84(1)(b) of the *Criminal Code* is circular because it refers to a prohibited weapon as "anything prescribed to be a prohibited weapon"; that she previously imported identical goods; that some of the factors underlying the CBSA's decision are applicable to other goods, specifically "tactical pens", which she asserts are "legal"; and that the CBSA's reasoning in its decision that the rings could be dipped in poison or bacterial culture fails as it is hypothetical and not specific to the goods in issue and that doing so would actually be dangerous to the wearer.

CBSA

[18] The CBSA submitted that the *Criminal Code* and the *Regulations* prohibit the possession of certain weapons that pose a particular danger to the public, for example, because they are easily concealed, such as knives which open by centrifugal force.[14] The CBSA submitted that the rings pose

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12. Subsection 152(3) of the *Act*; *Canada (Border Services Agency) v. Miner*, 2012 FCA 82 (CanLII) at paras. 7, 21.
13. CBSA, "Importing and Exporting Firearms, Weapons and Devices", November 3, 2016, AP-2017-062-07A, Attachment 29.
14. The CBSA cites: *R. v. Hasselwander*, [1993] 2 S.C.R. 398 [*Hasselwander*], where the Supreme Court of Canada stated that automatic weapons are prohibited because they pose an inherent risk to public safety and have no other purpose than to "kill and maim a large number of people rapidly and effectively"; *R. v. Ferguson*, [1985] 10 O.A.C. 5 (ONCA), where the Ontario Court of Appeal found that the rationale for offences for possessing prohibited weapons in s. 88(1) of the *Criminal Code* is based on the danger posed to the public by easily

such a danger to the public because they can be concealed in the hand ready for use as a weapon, with the spikes either inside the hand or on top of the finger, and that their sole purpose is to inflict harm.

[19] The CBSA submitted that the rings meet the criteria set out in the *Regulations* in that they are finger rings with sharp objects capable of being projected from their surface, and are therefore prescribed to be prohibited weapons and, consequently, prohibited from importation into Canada.

[20] In response to Ms. Steeves' arguments, the CBSA submitted that Memorandum D19-13-2 is not binding on the Tribunal. Furthermore, the CBSA submitted that in any case the Memorandum does not apply to the rings in issue, because it indicates that jewellery to which spikes are affixed are not prohibited weapons. The CBSA submitted that, for the rings in issue in this appeal, the spikes are not affixed to the rings, but rather are part of the rings.

[21] The CBSA further submitted that Ms. Steeves' argument regarding the previous importation of identical goods is irrelevant to the present appeal.

ANALYSIS

[22] In order to determine whether the rings are properly classified as a prohibited weapon 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 section 5 of Part 3 of the Schedule to the *Regulations*.

[23] The issue in this appeal is whether the rings meet the criteria provided in the *Regulations*, namely:

1. They must be finger rings;
2. They must have one or more blades or sharp objects; and
3. The blades or sharp objects must be capable of being projected from the surface of the rings.

"Finger rings"

[24] The Tribunal finds that the first criterion is met, because the rings are designed to be worn on the finger.

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concealed weapons, such as "silencers, switch knives or, in the present case . . . [a] sawed-off rifle which can be easily concealed because of its reduced length"; *R. v. Richard and Walker*, [1981] 36 N.B.R. (2d) 686 (NBCA) at para. 7: "The features which differentiate a knife which is a 'prohibited weapon' from other knives is that the former is one which can be carried or held concealed in the hand and automatically opened by gravity or centrifugal force or by pressure being applied to a part of the handle"; *R. v. Archer*, ([1983] 6 C.C.C. (3d) 129 at para. 7.

"Blades or sharp objects"

[25] Regarding the second criterion, the CBSA submitted a dictionary definition of "sharp" as "having an edge or point able to cut or pierce".[15]

[26] Having examined the rings, the Tribunal is not persuaded that their pointed parts, which could be described as metal spikes, are "sharp objects" within the meaning of the definition submitted by the CBSA, i.e. "having an edge or point able to cut or pierce". The Tribunal's physical examination of the rings revealed that these pointed objects might potentially be capable of causing injury in the manner of any common metal item with a pointed tip. However, they were not "sharp" like a knife blade is, in the sense of being able to pierce or cut with such ease as to render the object obviously dangerous. It is therefore doubtful whether the "spikes" constitute "point[s] able to cut or pierce".

[27] In any event, as the Tribunal considers its analysis regarding the third criterion to be dispositive of this appeal, it does not need to arrive at a definitive view as to the second criterion.

"Capable of Being Projected"

[28] The third criterion requires the sharp objects to be "capable of being projected from the surface of the ring."

[29] The Tribunal applies the modern approach to statutory interpretation, which requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[16] The Tribunal has previously applied this principle when interpreting subsection 84(1) of the *Criminal Code*.[17] This approach applies equally when interpreting regulations, and therefore to the provision of the *Regulations* at issue in this appeal.[18]

[30] The CBSA conceded that the third criterion in section 5 is unclear but argued that, using the modern approach to statutory interpretation, the Tribunal should conclude that it includes finger rings, such as those under appeal, that have sharp metal spikes projecting from their surface. The CBSA refers to *Hasselwander*, where the Supreme Court of Canada considered the word "capable" in the context of subsection 84(1) of the *Criminal Code*. In determining whether a semi-automatic firearm was a prohibited weapon, the Court had to interpret the word "capable" as it was then used to define a prohibited weapon. This definition included any firearm "capable of firing bullets in rapid succession during one pressure of the trigger". The majority found that the adjective "capable" should not be restricted to the narrow meaning of immediately capable, but also included an aspect of

15. Exhibit AP-2017-062-07A at Annex 22.
16. See e.g. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87; see also *Balanceco v. President of the Canada Border Services Agency* (3 May 2013), AP-2012-036 (CITT) at paras. 36-39.
17. *La Sagesse de L'Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT).
18. *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, at paras. 95 to 103.

potential capability for conversion.[19] The CBSA submitted that "capable" should therefore be given a broad meaning, "ranging from immediately capable to potentially capable".[20]

[31] The CBSA submitted a *Canadian Oxford Dictionary* definition of "project" as including "protrude",[21] as well as a definition of "protrude" as to "extend beyond or above a surface".[22] The CBSA submitted that, on the basis of the above, the Tribunal should interpret the definition in the *Regulations* as "finger rings that have sharp objects *immediately or potentially capable* of extending beyond or above their surface". The CBSA argued that such an interpretation is consistent with the purposes and goals of the provisions pertaining to prohibited weapons, which is primarily to render illegal the possession of certain weapons given their potential threat and limited use.

[32] In essence, the CBSA's argument is that a thing that continuously, permanently performs a certain action (allegedly, in this case, a sharp object projecting from the ring) is also, by definition, "capable of" performing the same action. Thus, in the present instance, the spikes are, the CBSA argued, capable of being projected from the surface of the ring as they permanently project from its surface.[23]

[33] In the Tribunal's view, the term "capable" ("qui peut être" in the French version) within the text of section 5 must be given meaning. The use of that term connotes a potential, as opposed to an immediate and continuous, action. The Tribunal considers that the interpretation advocated by the CBSA would read these terms "capable of being projected" ("qui peut être projetée") as if they read "projecting from the surface of the ring". Thus, the interpretation advocated by the CBSA cannot be reconciled with either the English or the French version of the text of section 5.

[34] For the foregoing reasons, on its face, section 5 of the *Regulations* applies to finger rings that have blades and/or sharp objects that can be projected from the surface of the ring; in other words, blades or sharp objects that have some capacity for movement relative to the surface of the ring. It does not, however, apply to blades or sharp objects that are fixed and merely protrude from the surface of the ring.

[35] Applying the foregoing interpretation to the goods in issue, in the present instance, the Tribunal does not consider that the fixed metal spikes, which protrude from the ring but are fixed and part of the ring itself, are "capable of being projected" within the meaning of the *Regulations.* Consequently, the goods in issue are not prohibited weapons within the meaning of section 5 of Part 3 of the Schedule to the *Regulations*.

19. *Hasselwander* at 415-416.
20. Exhibit AP-2017-062-07A at para. 30.
21. *Ibid.* at Annex 23.
22. *Ibid.* at Annex 24.
23. The interpretation advanced by the CBSA is essentially the same as was arrived at in unreported provincial Court decisions discussed in *R. v. J.(M.)*, discussed below.

[36] The Tribunal's interpretation is in keeping with two provincial court decisions submitted to the Tribunal by the CBSA, which considered whether the predecessor to section 5 of the *Regulations*, containing the same definition, applied to finger rings with fixed, immovable spikes.[24]

[37] In *R. v. J.(M.)*,[25] the British Columbia Youth Court considered that the predecessor to section 5 of the *Regulations* did not cover finger rings with fixed, immovable projecting blades or spikes. Collings J. relied in large part on the French version of the *Regulations*, which at the time used the word "escamotable", by contrast to the English formulation "capable of being projected from the surface of the ring". Collings J. interpreted "escamotable" in the French version as "concealable, disappearing or retractable" to conclude that the definition in the *Regulations* could not apply to rings with fixed spikes or sharp objects. In light of the French version, Collings J. considered that the English version of the *Regulations* had to be interpreted literally:

> The awkward English phrase must be construed quite literally; that is to say, there must be blades or points that do not normally project from the surface of the ring, but that are "capable of being projected from the surface of the ring".[26]

[38] The second decision, *R. v. Collette*,[27] is even more on point. In that case, the Alberta Provincial Court considered the same prohibition on spiked finger rings after the French version was amended to its current formulation,[28] and concluded as follows:

> The English version of section 2(d) of the Order makes it clear that the ring, to be prohibited, must possess blades or sharp objects that have a capability of being projected from the surface of the ring much in the way that a switchblade or flick knife can cause its blades to extend from the body of the knife. . . . This particular ring, being one piece with no moveable parts, cannot fit within the definition set forth in section 2(d) of the Order. The spikes which form part of the ring are not capable of being projected from the surface of the ring – they permanently project from the surface. The Order is directed at rings which contain blades or sharp objects that can, at the instigation of the wearer, be raised from the surface.[29]

[39] The CBSA also argued that its proposed interpretation is consistent with the inclusion of similar goods in the *Regulations*. The CBSA submitted evidence to the effect that spiked finger rings similar to the goods in issue are a type of Japanese martial arts weapon known variously as a "kakute", "kakuwa", "kakushi" or "kakushu".[30] The CBSA argued that the spiked finger rings are listed in the *Regulations* alongside other weapons of Japanese origins.[31] In other words, section 5

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24. The Courts in *R. v. J.(M.)* and *R. v. Collette* were considering the identical definition to that currently found in the *Regulations*, though under what was then an Order in Council: Prohibited Weapons Order, No. 2, SOR/78-277, s. 2(d).
25. 52 C.C.C. (3d) 284, [1989] B.C.J. No. 2133 (QL); Exhibit AP-2017-062-07A at Annex 16.
26. Exhibit AP-2017-062-07A at 295, Vol. 1A.
27. 12 W.C.B. (2d) 703, [1991] A.J. No. 334 (QL); Exhibit AP-2017-062-07A, Attachment 17, Vol. 1A.
28. The French version of the *Regulations* has since been amended to refer to a finger ring with "au moins une lame ou pointe qui peut être projetée de sa surface", which more closely corresponds to the English version.
29. Exhibit AP-2017-062-07A at 300, Vol. 1A.
30. *Ibid.* at 62-63.
31. *Former Prohibited Weapons Order, No. 2*, SOR/78-277, as amended by SOR/85-215. See sections 2-5 of Part 3 to the Schedule to the *Regulations*. *Former Prohibited Weapons Order, No. 2* prohibits weapons known as "nunchaku" (section 2), "shuriken" (section 3) and "manrikigusari" or "kusari" (section 4).

should be read as a part of an effort by the government to prohibit a series of Japanese martial arts weapons.

[40] The Tribunal notes, however, that the other Japanese martial arts weapons referred to by the CBSA are explicitly referred to in the *Regulations* by their Japanese name, whereas section 5 only contains a physical description of certain prohibited finger rings, which may or may not, depending on the interpretation of its terms, include the "kakute"-style spiked finger rings. For this reason, this argument by the CBSA is unavailing.

[41] In light of its conclusion, the Tribunal does not consider it necessary to examine all of the arguments put forward by the appellant. The Tribunal does, however, note that it reaches its conclusion without regard to CBSA Memorandum D19-13-2, which Ms. Steeves relied upon in her arguments. The Tribunal has consistently held that it is not bound by policy directives, such as this memorandum.[32]

CONCLUSION

[42] For the foregoing reasons, the Tribunal finds that the rings in issue do not meet the definition in section 5 of Part 3 of the Schedule to the *Regulations*. This being the case, the Tribunal finds that the goods in issue are not properly classified as prohibited weapons under tariff item No. 9898.00.00.

DECISION

[43] The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

32. *Digital Canoe Inc. v. President of the Canada Border Services Agency* (22 August 2016), AP-2015-026 (CITT) at para. 25.