



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-062

J. Humber

v.

President of the Canada Border
Services Agency

*Decision issued
Wednesday, November 27, 2019*

*Reasons issued
Friday, December 13, 2019*

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DECISION 14

IN THE MATTER OF an appeal heard on July 30, 2019, 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 January 25, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. HUMBER

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Susan D. Beaubien
Susan D. Beaubien
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 30, 2019
Tribunal Panel: Susan D. Beaubien, Presiding Member
Support Staff: Peter Jarosz, Counsel
Jessye Kilburn, Student-at-Law

PARTICIPANTS:**Appellant**

J. Humber

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. Mr. J. Humber made an online purchase of a Rockstead folding knife, model HIGO-JH 878 (“Rockstead Knife”).¹ When the Rockstead Knife was shipped from the United States for delivery to Mr. Humber in Canada, the item was detained by the President of the Canada Border Services Agency (CBSA). A Notice of Detention was issued on or about July 13, 2018, for the purpose of assessing whether the item was admissible for importation into Canada.²

2. Upon inspection, the CBSA found that the Rockstead Knife was a prohibited weapon, as defined by the *Criminal Code*.³ The stated premise for this finding was that the knife could be opened by centrifugal force alone on five out of five attempts. As such, the CBSA classified the Rockstead Knife⁴ under tariff item 9898.00.00 of the *Customs Tariff*.⁵ Goods that are classified under tariff item 9898.00.00 are prohibited from being imported into Canada.

3. Mr. Humber disagreed with the CBSA’s decision and sought reconsideration.⁶ It appears that he made representations to the CBSA in writing, by email and over the telephone.⁷

4. In essence, Mr. Humber contended that the Rockstead Knife could not be opened by centrifugal force alone, as asserted by the CBSA. He relied on a definition that was asserted to have been copied from “Webster’s”, namely, “centrifugal force: an apparent force that acts outward on a body moving around a center, arising from the body’s inertia (Physics noun/definition).”⁸

5. Mr. Humber asserted that the prohibition against knives that open by way of centrifugal force was directed to “butterfly” or “Bali song style martial arts blades”, which have free swinging blades that are not retained by the handle of the knife.⁹ Such knives do not lock in either the open or closed position. Instead, the blade swings freely in an arc around an open bearing pivot.

6. These features are not found in the Rockstead Knife. In contrast, the Rockstead Knife has a thumb stud on the blade. The thumb stud assists in opening the knife by enabling the user to overcome the bias which acts to retain the blade in a closed, folded position. In this regard, Mr. Humber claimed that the thumb stud is the functional equivalent of a nick that is commonly found on the blade of many conventional folding knives, including Swiss Army Knives.

7. At some point, it appears as if Mr. Humber was informed by the CBSA¹⁰ that it was relying upon the content of the Tribunal’s decision in *T. LaPlante*¹¹ to underpin its decision in relation to the Rockstead Knife.

¹ Exhibit AP-2018-062-05A, Vol. 1 at 45.

² Exhibit AP-2018-062-05A, Vol. 1 at 42.

³ Subsection 84(1), R.S.C., 1985, c. C-46 [*Criminal Code*].

⁴ Exhibit AP-2018-062-05A, Vol. 1 at 49-50.

⁵ S.C. 1997, c. 36 [*Customs Tariff*].

⁶ Exhibit AP-2018-062-01, Vol. 1 at 14-18.

⁷ Exhibit AP-2018-062-01, Vol. 1 at 11-18.

⁸ Exhibit AP-2018-062-01, Vol. 1 at 14.

⁹ Exhibit AP-2018-062-01, Vol. 1 at 15.

¹⁰ Exhibit AP-2018-062-05A, Vol. 1 at 53-54.

¹¹ *T. LaPlante v. President of the Canada Border Services Agency* (16 November 2017), AP-2017-012 (CITT) [*LaPlante*].

8. Mr. Humber contended that the knife at issue in *LaPlante* featured a “flipper” tab which uses the mechanical principles of a lever to facilitate the opening of the knife with minimal physical effort and without the use of any other mechanism (i.e. springs, tension bars or friction bars) or the use of centrifugal force. As such, he argued that a “flipper tab” does not use centrifugal force. According to Mr. Humber, a “flipper design” features a “paddle” that is integral to the blade. It projects outwardly, tab-like, from the rear of the handle when the knife is in the closed position. The protruding paddle is analogous in function to a button which actuates a lever. When force is applied to the paddle, the blade is propelled through the handle, causing the knife to open for deployment. Mr. Humber stressed that the Rockstead Knife has no “flipper” mechanism and is completely dissimilar to the knife under consideration in the *LaPlante* case.

9. Although the thumb stud on the blade of the Rockstead Knife can assist with the opening of the knife, Mr. Humber contended that this knife cannot be opened using centrifugal force in the manner described or referenced by *LaPlante*. It would take considerable strength or pressure applied to the blade of the Rockstead Knife in order to overcome the detent of the knife, followed by a heavy or forceful wrist flick to cause the knife to open. Achievement of this result requires either special skills or considerable strength.

10. Mr. Humber states that he is a Red Seal chef and practiced in the use of knives. He asserts that a person having specialized expertise with knives would be able to open any folding knife using one hand. If this were the applicable test, Mr. Humber argued that all folding knives would consequently be deemed to be prohibited weapons, because an expert would be able to open the knife singlehandedly. In the absence of an objective testing standard, Mr. Humber submits that the criteria for prohibiting a knife is arbitrary and leads to an unfair result.

11. After considering Mr. Humber’s representations, the CBSA maintained the contested classification.¹²

12. Mr. Humber now appeals to the Tribunal pursuant to subsection 67(1) of the *Customs Act*.¹³

The CBSA’s Decision

13. The CBSA examined and tested the Rockstead Knife. As reported by the decision, “a flick of the wrist, without any additional manipulation, caused the knife’s blade to open automatically into a fully extended and locked position, in five out of five attempts.”¹⁴

14. In view of these test results, the CBSA held that the Rockstead Knife is opened by centrifugal force.

15. The CBSA acknowledged Mr. Humber’s argument that the Rockstead Knife does not open by centrifugal force but requires some manipulation, such as use of the thumb stud, expert skill or brute force. The CBSA disagreed that the thumb stud would be necessarily redundant if the knife is capable of being opened by way of centrifugal force.

16. In view of Mr. Humber’s arguments and his request that the Rockstead Knife be retested, the CBSA stated that its testing is performed by an officer having “some skill” but who does not use “excessive force”.¹⁵ The goods are examined and tested in their physical condition at the time of importation. On a

¹² Exhibit AP-2018-062-05A, Vol. 1 at 52-54.

¹³ R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

¹⁴ Exhibit AP-2018-062-05A, Vol. 1 at 52.

¹⁵ Exhibit AP-2018-062-05A, Vol. 1 at 53.

retesting, the CBSA found that the Rockstead Knife “opened to a fully open and locked position with a simple flick of the wrist, 5 out of 5 attempts. No other manipulation was necessary.”¹⁶

17. Accordingly, the CBSA held that the Rockstead Knife meets the definition of “prohibited weapon” in subsection 84(1) of the *Criminal Code* and should thus be classified under tariff item 9898.00.00 of the *Customs Tariff*.

18. Mr. Humber appealed the CBSA’s decision on February 1, 2019.¹⁷

Mr. Humber’s Appeal

19. In support of his appeal, Mr. Humber provided brief written submissions,¹⁸ and copies of his previous written correspondence with the CBSA.¹⁹ Mr. Humber did not file a formal brief but asked that the content and written representations in his notice of appeal be accepted in lieu of a brief.²⁰

20. The CBSA filed a brief in response to Mr. Humber. It comprised written submissions,²¹ copies of legislation and policy documents,²² documentation pertaining to the attempted importation of the Rockstead Knife and its seizure, and correspondence with Mr. Humber,²³ printouts of Rockstead product information obtained from the Internet,²⁴ and photographs of the Rockstead Knife.²⁵

21. Neither party filed any expert evidence.

22. The Tribunal held a hearing by way of written submissions, in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.²⁶ A notice to this effect was published in the *Canada Gazette*.²⁷ The hearing was held on July 30, 2019.

23. At the request of the Tribunal, the CBSA delivered the Rockstead Knife to the Tribunal for inspection at the hearing. The Rockstead Knife was thereafter returned to the CBSA’s custody.

POSITIONS OF THE PARTIES ON APPEAL

Mr. Humber

24. Mr. Humber asserts that the Rockstead Knife is a conventional folding knife that is outside the scope of the definition of “prohibited weapon”. It has no mechanical springs, tension bars, or flippers. The blade is retained in the handle by a detent. In this respect, Mr. Humber asserts that the Rockstead Knife is functionally equivalent to a Swiss army knife.

¹⁶ Exhibit AP-2018-062-05A, Vol. 1 at 53.

¹⁷ Exhibit AP-2018-062-01, Vol. 1 at 1-7.

¹⁸ Exhibit AP-2018-062-01, Vol. 1 at 6, 8-10.

¹⁹ Exhibit AP-2018-062-01, Vol. 1 at 11-18.

²⁰ Exhibit AP-2018-062-03.

²¹ Exhibit AP-2018-062-05A, Vol. 1 at 4-11.

²² Exhibit AP-2018-062-05A, Vol. 1 at 13-40.

²³ Exhibit AP-2018-062-05A, Vol. 1 at 41-54.

²⁴ Exhibit AP-2018-062-05A, Vol. 1 at 55-63.

²⁵ Exhibit AP-2018-062-05A, Vol. 1 at 66-69.

²⁶ SOR/91-499 [*Rules*].

²⁷ *Canada Gazette*, Part I, Volume 153, Number 26, June 19, 2019.

25. He further argues that any inherent danger created by a knife to either a user or others arises from the blade itself, regardless of whether the knife folds or the speed at which a folded knife may be opened from a closed position. In this respect, Mr. Humber contends that the risk of harm posed by a folding knife is also present with other items that are not prohibited, such as kitchen knives, hunting knives, box cutters, and straight razors.

26. Mr. Humber disputes the results of the reported CBSA test results. He argues that the Rockstead Knife is being characterized as being operationally similar to a “butterfly knife” or a “Bali song”, which do not have a detent in the handle to lock or retain the blade, unlike the Rockstead Knife. In order to open the Rockstead Knife, the blade must be engaged or manipulated in order to overcome the detent.

27. Otherwise, Mr. Humber relies on the representations that he made to the CBSA at first instance for the purposes of this appeal.

CBSA

28. The CBSA describes the Rockstead Knife as having a stainless steel blade with thumb studs on both sides of the blade. The item is manufactured in Japan. The blade measures 90 millimetres. When open, the knife measures 214 millimetres. A frame lock serves to lock the blade into position when the knife is open.

29. After summarizing the procedural history of this matter, the CBSA defines the issue on appeal as being whether the Rockstead Knife “opens automatically by centrifugal force.”²⁸ It asserts that two CBSA officers were each able to open the Rockstead Knife using a flick of the wrist in five out of five attempts.

30. The CBSA then sets out the relevant statutory framework and refers to previous Tribunal decisions holding that a knife is a prohibited weapon where a “flick of the wrist” causes the knife to open automatically by centrifugal force. It asserts that the Tribunal extended the scope of this test in *LaPlante* by concluding that a knife opens automatically by centrifugal force if the “flick of the wrist” is accompanied by “minimal manipulation” of “non-edged parts of the blade”, including thumb studs.²⁹

31. As a consequence of the Tribunal’s finding in *LaPlante*, the CBSA states that it published Customs Notice 18-01 to inform importers that prohibited weapons include:

1. a knife [that] has a blade that opens by centrifugal force, when the blade is released from the handle into the fully ejected and locked position with a simple and brisk outwardly flick of the wrist; and
2. knives that require some preliminary or simultaneous minimal manipulation of either a flipper or other non-edged parts of the blade.³⁰

32. The CBSA asserts that Mr. Humber has conceded that the Rockstead Knife opens with “manipulation of the blade in conjunction of a ‘wrist flick’ [*sic*]”.³¹

33. In its rebuttal to Mr. Humber’s arguments, the CBSA states that Mr. Humber bears the legal burden of proving that the knife is not a prohibited weapon and that he has not discharged this onus.

²⁸ Exhibit AP-2018-062-05A, Vol. 1 at 4.

²⁹ *LaPlante* at para. 29.

³⁰ Exhibit AP-2018-062-05A, p. 38-40

³¹ Exhibit AP-2018-062-05A, Vol. 1 at 8.

34. Further, the CBSA submits that Mr. Humber's reliance on *LaPlante* is misplaced. Although the Rockstead Knife does not have a "flipper design", the CBSA argues that this is irrelevant because *LaPlante* also stands for the proposition that a knife is a prohibited weapon if it opens by manipulation of a thumb stud coupled with a flick of the wrist.

35. The CBSA also argues that Mr. Humber's complaint that the CBSA is unfairly targeting folding knives for enforcement is irrelevant, as is the assertion that the Rockstead Knife poses no greater danger to public safety than other articles having a sharp edge or blade. The CBSA asserts that such issues are beyond the Tribunal's jurisdiction.

36. In light of the foregoing, the CBSA submits that the Rockstead Knife has been properly classified under tariff item 9898.00.00 and urges the dismissal of Mr. Humber's appeal.

ANALYSIS

Legislative Framework

37. The *Act* and the *Customs Tariff* govern the importation of goods into Canada. Goods are classified in accordance with criteria and directions prescribed by the *Customs Tariff* and its Schedule.

38. The *Customs Tariff* is premised on an international system, the Harmonized Commodity Description and Coding System (the Harmonized System). The objective of the classification system is to rationalize and harmonize the classification of goods and commodities which are the subject of international trade.³²

39. The Harmonized System comprises a progressive eight-digit system for tariff classifications. The system proceeds from the general to the more specific, by way of chapters, headings, subheadings and tariff items, which is incorporated within the Schedule to the *Customs Tariff*.

40. At issue in this appeal is whether the CBSA has properly classified the Rockstead Knife under tariff item 9898.00.00.

41. Mr. Humber's appeal from the CBSA's decision is brought pursuant to subsection 67(1) of the *Act*. It is undisputed that Mr. Humber is a "person aggrieved" by the CBSA's decision. He asserts ownership of the Rockstead Knife and the right to import the item into Canada.

42. The *Rules* prescribe the procedure to be followed on appeals brought under section 67 of the *Act*. On appeal, both the appellant and respondent may file additional materials, including physical exhibits that were not before the CBSA at first instance. The parties may also present evidence of fact and/or expert witnesses.³³

43. Appeals to the Tribunal are determined *de novo*.³⁴ This means that the Tribunal is not limited to reviewing the CBSA's decision for clear error or unreasonableness. The appeal is a new proceeding where the Tribunal must reach its own decision concerning the correct tariff classification for the goods.

³² *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 4-5.

³³ Part II of the *Rules*.

³⁴ *Digital Canoe Inc.* (22 August 2016), AP-2015-026 (CITT) [*Digital Canoe*] at para. 15; *Danson Décor Inc. v. President of the Canada Border Services Agency* (6 September 2019) AP-2018-043 (CITT) [*Danson Décor*] at paras. 82-93.

44. In doing so, the Tribunal owes no deference to the CBSA's decision. It is free to assess the record, up to and including the reweighing of evidence placed before the CBSA, and giving consideration to any new evidence or submissions that may be presented on appeal.³⁵

45. When conducting this analysis, the Tribunal must identify, as a question of law, the test or criteria that must be met in order for an item to be classified under tariff item 9898.00.00. The Tribunal must then determine, as a question of fact, whether the evidence demonstrates that the legal test has been met. The appellant bears the legal burden of showing that the classification of the goods is incorrect.³⁶

46. Section 10 of the *Customs Tariff* mandates that classification of goods shall be determined, unless otherwise provided, in accordance with the *General Rules for the Interpretation of the Harmonized System and the Canadian Rules*, as set out in the schedule to the *Customs Tariff* [*General Rules*]. General Rule 1 requires that classification must be determined initially only with reference to the headings within a chapter, as well as any relevant section or chapter notes.

47. However, subsection 136(2) of the *Customs Tariff* provides that the *General Rules* do not apply with respect to the classification of goods under tariff item 9898.00.00. As such, there are no section or chapter notes that are relevant to the classification at issue. Likewise, there are no relevant WCO classification opinions or explanatory notes that the Tribunal is required to consider.

48. Subsection 136(1) of the *Customs Tariff* prohibits the importation into Canada of goods that are classified under tariff item 9898.00.00, which includes "prohibited weapons".

49. Tariff item 9898.00.00 prescribes that "prohibited weapon" has the same meaning as in subsection 84(1) of the *Criminal Code*, which defines "prohibited weapon" as follows:

prohibited weapon means

(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

(b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon; (*arme prohibée*)

50. For the purposes of this appeal, only the provisions of paragraph 84(1)(a) are in issue.

51. It is settled law that a knife is a "prohibited weapon" within the meaning of paragraph 84(1)(a) of the *Criminal Code* where the knife blade opens automatically in one of two ways: (1) by gravity or centrifugal force, or (2) by hand pressure applied to a button, spring or other device in or attached to the handle of the knife.³⁷ The requirement that the knife open "automatically" modifies both categories of described mechanisms for opening of the knife.

52. It is not alleged that the Rockstead Knife is equipped with a "button, spring or other device in or attached to the handle of the knife" that operates to cause automatic opening of the knife when subjected to minimal manipulation.

³⁵ *Danson Décor* at paras. 82-93.

³⁶ *Digital Canoe* at para. 15; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) [*Costco*] at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 [*Miner*].

³⁷ E.g. *Digital Canoe* at para. 16; *Knife & Key Corner Ltd. v. President of the Canada Border Services Agency* (14 September 2015), AP-2014-030 (CITT) [*Knife & Key*] at para. 20.

53. Accordingly, the question before the Tribunal is limited to the first branch of the definition of “prohibited weapon” set forth in paragraph 84(1)(a) of the *Criminal Code*, namely, whether the Rockstead Knife opens “automatically” by way of gravity or centrifugal force.

54. Although the word “automatically” is not defined therein, the purpose of paragraph 84(1)(a) of the *Criminal Code* has been interpreted as prohibiting the possession and use of a knife that can be rapidly opened for deployment as a weapon:

In our view, the purpose of proscribing the possession of knives that have a blade that can be opened by centrifugal force was to suppress the possession of knives having a blade which, by pressure on a button or by a flicking of the knife, is immediately opened thereby making the knife available for use as a weapon.³⁸

55. In the context of paragraph 84(1)(a) of the *Criminal Code*, the Tribunal has previously interpreted “automatically” to mean “largely or wholly involuntarily”, but also recognized that the term may include some degree of human intervention:

46. The Tribunal accepts that, in the context of subsection 84(1) of the *Criminal Code*, “automatically” means “largely or wholly involuntarily”, as suggested by the CBSA. Thus, the Tribunal finds that the need for a minimum of manipulations does not necessarily negate the automaticity of the opening of the blade.

47. According to the Tribunal, that “automatically” cannot mean completely without human intervention is plain from a reading of the provision itself. The provision contemplates a knife with a blade that opens “automatically” *as a result of hand pressure*. This necessarily implies a degree of human intervention.

48. This conclusion is consistent with the decision of the Supreme Court of Canada in *R. v. Vaughan*, which stands for the proposition that some extra manipulations will not preclude a knife from being a “prohibited weapon”. In that case, the Supreme Court accepted that a knife that opened by centrifugal force, but also required the user to remove the safety switch and to change his hold of the knife with a certain dexterity, constituted a “prohibited weapon” within the meaning of subsection 84(1) of the *Criminal Code*.³⁹

[Footnotes omitted]

56. Previous Tribunal cases have determined that “centrifugal force” includes quick wrist movement (such as flicking of the wrist) that causes the knife to open automatically.⁴⁰ As noted above, a knife will open “automatically” where the blade becomes exposed and available for immediate use as the inevitable consequence of simple physics initiated by minimal human action or manipulation.⁴¹ It should also be noted that many of these cases dealt with knives equipped with a button, spring or other devices that operate, in

³⁸ *R. v. Archer*, (1983) 1983 CanLII 3510 (ON CA), 6 C.C.C. (3d) 129 at p. 132, as quoted in *R. v. Vaughan*, 1990 CanLII 3059 (QC CA); affd [1991] 3 SCR 691 (S.C.C.).

³⁹ *La Sagesse de l'Eau v. President of the Canada Border Services Agency* (13 November 2012), AP 2011-040 (CIIT) [*La Sagesse*] at paras. 46-48.

⁴⁰ See e.g. *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CIIT) [*Ericksen*] and *R. Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CIIT) at para. 59.

⁴¹ *LaPlante* at paras. 25-31.

conjunction with the knife handle, to actuate or leverage the rapid release of the knife blade from a retained or locked position.⁴²

57. Ultimately, a finding as to whether any particular knife opens “automatically” is a fact-based determination. Paragraph 84(1)(a) does not uniformly prohibit knives or folding knives *per se*.

58. The evidential record on this appeal is somewhat lean. The Tribunal is faced with diametrically opposed written descriptions of the mechanics relevant to the opening of the Rockstead Knife. Neither party filed an expert report or other illustrative evidence demonstrating operation of the Rockstead Knife that would supplement their respective written descriptions.

59. The Tribunal conducted its own examination and testing of the item. The Rockstead Knife is a folding knife comprising a blade portion and a handle portion. The handle portion is hingedly connected by screws to one end of the blade portion. The underside of the handle portion has a slot-like cavity which is adapted to receive the blade and provide a casing to retain the blade when the knife is closed. The knife is also equipped with a belt clip.

60. The upper portion of the blade has a matte-like finish with a nail nick or groove adjacent to the top dull edge of the blade. A ridged finger rest is also present. A small rounded stud projects laterally from each side of the upper portion of the blade, proximate to the hinged end of the handle. The lower portion of the blade comprises the sharp cutting edge. It has a highly polished, mirror-like finish.

61. In the closed position, the blade is nested, edge side down, within the handle casing. When the knife is closed, the blade is retained within the casing. When the detent is overcome, the blade is adapted to rotate around the hinge defined by the screws from a closed to an open position. As the Rockstead Knife is opened, the sharp edge of the blade becomes exposed for use. When the blade is fully extended, locking means are engaged to securely retain the blade in the open position. To close the knife, pressure is applied to move the blade (through the hinge) towards the open casing of the handle portion.

62. The Rockstead Knife is packaged with a hex key (Allen wrench)⁴³ and an instruction sheet for maintenance (cleaning). The instruction sheet indicates that the blade is made of high carbon steel, is very sharp and should not be subjected to a power grinding wheel. The user is cautioned that the blade should be wiped after use and that exposure to water should be managed to avoid risk of rust formation, which will damage the blade. It would appear that the hex key is provided to facilitate disassembly during cleaning.

63. The Tribunal observes that the instruction sheet is consistent with the online product information submitted as part of the CBSA’s brief.⁴⁴ There is no description, or marketing focus, of an automatic opening mechanism. Both the instruction sheet and online information place some emphasis on the sharpness of the blade and the importance of proper cleaning to avoid damaging the blade.⁴⁵ A product review touts the usefulness of the knife in food preparation and for the gutting of fish and game.⁴⁶ However, the intended use of the product is irrelevant to the tariff classification of the item.⁴⁷

⁴² See e.g. *Digital Canoe*.

⁴³ Exhibit AP-2018-062-05A, Vol. 1 at 66.

⁴⁴ Exhibit AP-2018-062-05A, Vol. 1 at 56-63.

⁴⁵ Exhibit AP-2018-062-05A, Vol. 1 at 56-57.

⁴⁶ Exhibit AP-2018-062-05A, Vol. 1 at 56, 60.

⁴⁷ *Woodworth v. Canada (Border Services Agency)* (11 September 2007), AP-2006-035 (CITT) at para. 20.

64. The online material also suggests that the Rockstead Knife is an artisanal product that is now out of production.⁴⁸ The invoice which accompanied the item at the time of importation indicates a selling price of \$900.⁴⁹

65. Although these materials include photographs of the Rockstead Knife, in the absence of instructions or a description of the opening mechanism of the knife, they are of little assistance in resolving the appeal.

66. The Tribunal performed several tests in order to assess whether the Rockstead Knife opens “automatically” by way of gravity or centrifugal force.

67. In a first test, the closed knife was held in one hand, with the closed (nested) blade perpendicular to a table. A flick of the wrist did not overcome the detent or dislodge the blade from the nested (closed) position on any of five attempts. This test was repeated in a variety of both sitting and standing positions. The knife was held in one hand with the blade in varying orientations relative to both the body of the user and the horizontal. The detent of the knife was not overcome by a flick of the wrist.

68. In a further test, the knife was grasped in the right hand. A forceful, downwardly accelerating whip-like motion was not only insufficient to overcome the detent, it caused the closed knife to leave the user’s hand.

69. Downward pressure applied to the finger rest of the Rockstead Knife caused the blade of the closed knife to “unlock”, but the blade only moved a nominal distance. In order for a knife to open automatically for deployment, the tip of the blade needs to rotate through an arc of approximately 180 degrees, or substantially that distance. When the detent of the Rockstead Knife was overcome using pressure applied to the finger rest, the tip of the knife emerged from its nested position within the handle, but only moved approximately 40-60 degrees. By grasping the released blade with the other hand, the blade could be pivoted through the remaining portion of the arc and locked into an open position.

70. The detent could also be overcome by holding the knife in one hand, grasping the protruding blade studs and unfolding the blade from its retained (locked) position within the handle and pivoting the blade into an open and locked position.

71. In both instances, it is significant that no spring-like or other force was generated that would serve to cause the blade to accelerate and move automatically to either a position that is either fully open or substantially open where completion of the rotation could be actuated by minimal manipulation, such as a simple flick of the wrist. Nor is there a spring or other mechanism in the handle that operates to accelerate the blade to an open, extended and locked position. The orientation of the blade studs and finger rest relative to the handle does not define a lever, or other device, having sufficient mechanical advantage that would drive the blade to open automatically from the handle.

72. When determining whether a knife is (or is not) a prohibited weapon, the first question to be answered is whether the knife opens automatically. “Automatic” opening is a key feature which distinguishes a prohibited weapon from a permissible folding knife. If opening of the knife is triggered by simple mechanics or minimal hand manipulation causing the blade to move *quickly and inevitably* to an open and locked position, the knife opens automatically.

⁴⁸ Exhibit AP-2018-062-05A, Vol. 1 at 56.

⁴⁹ Exhibit AP-2018-062-05A, Vol. 1 at 45.

73. In contrast, where a series of steps or co-ordinated movement is required to open a folding knife, the Tribunal has previously concluded that the knife is not a “prohibited weapon”.⁵⁰ The steps to open a conventional folding knife may be relatively simple. However, this factor alone does not place a knife within the scope of paragraph 84(1)(a) of the *Criminal Code*, if easy manipulation does not cause the knife to open automatically into an open and locked position, thus enabling rapid deployment.

74. Based on its inspection and testing of the Rockstead Knife, the Tribunal concludes that this knife does not open automatically by way of gravity or centrifugal force. It functions as a conventional folding knife that requires either a sequence of steps or two-handed operation in order to open.

75. In this regard, operation of the Rockstead Knife is analogous to the knives that were at issue in *Goldrich* and *Cowan*, and is distinguishable on the facts from the knife at issue in *LaPlante*.

76. In *Cowan*, the knife was designed to enable the user to control the extent and speed of the unfolding of the blade from its closed and nested position within the handle, and the Tribunal found that the stud was “not specifically intended to activate an opening mechanism, but rather assists in a controlled deployment of the blade by the user.”⁵¹

77. Controlled deployment is the antithesis of automatic opening.

78. Although the Tribunal concluded that the knife in *LaPlante* could be opened by a “flip of the wrist”, it should be noted that the instructions accompanying the *LaPlante* knife included a specific direction that opening of the knife could be facilitated by a flick of the wrist. This suggests that the knife was designed and intended for rapid deployment.

79. Paragraph 84(1)(a) of the *Criminal Code* does not prohibit all folding knives. Only knives that open “automatically” fall within the statutory definition of “prohibited weapon”. In order for a knife to open automatically to a fully extended and locked position, a sufficient degree of centrifugal force must be readily generated in accordance with the intended and usual method of operation of the knife. The variables relevant to the creation of that force for any given knife are dependent upon the physical properties and engineering design of the knife at issue. Each case falls to be decided on its own facts.

80. The Tribunal notes the CBSA’s reliance on Customs Notice 18-01,⁵² which refers to *LaPlante*. As noted in *Digital Canoe*,⁵³ administrative policy documents are not binding on the Tribunal with respect to the interpretation and application of the relevant law.

81. The Tribunal now turns to the CBSA’s rebuttal argument that the appellant (Mr. Humber) has not discharged the burden of proving that the Rockstead Knife is incorrectly classified as a prohibited weapon.

82. The burden of proof applicable to matters arising under the *Act* is defined by section 152 of the *Act*. The provisions relevant to appeals brought under subsection 67(1) of the *Act* are reproduced below:

⁵⁰ E.g. *Abraham I. Goldrich v. The Commissioner of the Canada Customs and Revenue Agency* (17 October 2001), AP-2000-035 (CITT) [*Goldrich*]; *A. Cowan v. President of the Canada Border Services Agency* (22 August 2017), AP-2016-046 (CITT) [*Cowan*].

⁵¹ *Cowan* at para. 32.

⁵² Exhibit AP-2018-062-05A, Vol. 1 at 38-39.

⁵³ At para. 25.

152(1) In any proceeding under this Act relating to the importation or exportation of goods, the burden of proof of the importation or exportation of the goods lies on Her Majesty.

...

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any question relating to

...

(d) the compliance with any of the provisions of this Act or the regulations in respect of any goods

lies on the person, other than Her Majesty, who is a party to the proceeding or the person who is accused of an offence, and not on Her Majesty.

83. The classification of an item, such as the Rockstead Knife, as a prohibited weapon is a matter “relating to” the importation of goods. As such, paragraph 152(3)(d) of the *Act* imposes a legal burden on the appellant (Mr. Humber) to show that the goods are incorrectly classified under tariff item 9898.00.00 as a prohibited weapon.⁵⁴ That burden must be discharged on the usual civil standard, namely, the balance of probabilities.⁵⁵ After assessment of the evidence, if there is residual doubt, the onus has not been discharged and the appeal must fail.⁵⁶

84. In subsection 67(1) appeals, the Tribunal applies⁵⁷ the test laid down by the Supreme Court of Canada in *Hickman Motors Ltd. v. Canada*.⁵⁸ In *Hickman*, the Supreme Court noted that varying degrees of proof may apply in order to discharge a burden of proof. According to the test in *Hickman*, an appellant may meet its burden, at least initially, by putting forward a *prima facie* case.

85. When assessing whether an evidentiary burden has been discharged, a court or tribunal considers the relevant information and opportunity possessed by a party in terms of its ability to lead evidence in order to prove a particular fact.⁵⁹ A party will be expected to prove those facts falling squarely within its knowledge or means of knowledge, especially where the requisite facts or information are not within the power, possession or control of the opposing party.⁶⁰

86. Where goods are seized and detained by the CBSA on the premise that they are prohibited weapons, the goods are not delivered to the importer, but instead remain in the custody of the CBSA until (and if) they are found to be incorrectly classified under tariff item 9898.00.00. The contested item is not filed with the Tribunal registry, but is delivered by the CBSA for the Tribunal’s inspection on the day of the file hearing and is retrieved immediately thereafter.

87. In such circumstances, the importer has no access to the goods for the purpose of conducting tests or experiments, if context indicates that such testing would be relevant or useful in order to demonstrate

⁵⁴ *Digital Canoe* at para. 15; *Miner* at paras. 7, 21.

⁵⁵ See *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII).

⁵⁶ *Christian Dior, S.A. v. Dion Neckwear Ltd.*, 2002 FCA 29 at paras. 10, 13; *Miner* at para. 21.

⁵⁷ E.g. *Schlumberger Canada Limited* (21 June 2017), AP-2015-022 (CITT) at para. 34; *BSH Home Appliance Ltd.* (27 October 2014), AP-2013-057 (CITT) at para. 29.

⁵⁸ [1997] 2 S.C.R. 336 [*Hickman*].

⁵⁹ See e.g. *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 SCR 311 [*Snell*]; *Canadian Northern Quebec R. Co. v. Pleet*, 1921 CanLII 518 (ON CA), 50 O.L.R. 223, affd 1921 CanLII 564 (SCC), [1923] 4 DLR 1112; *Hoffmann-La Roche Ltd. v. Apotex Inc.* (1984), 1984 CanLII 1883 (ON CA), 47 O.R. (2d) 287 at p. 288.

⁶⁰ *Ibid.* Also see e.g. *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 at paras. 35-36.

whether or not the item is a prohibited weapon. This does not change or negate the presence of the legal onus that falls upon the appellant. However, it is a relevant factor when assessing the nature of the evidence reasonably available to an appellant, in the context of assessing whether the appellant has made out a *prima facie* case, according to the test in *Hickman*.

88. In the present case, Mr. Humber argues that he owns other models of Rockstead brand knives and that the knife at issue is no different, in terms of its mechanics and method of opening. This is irrelevant. The sale, availability or presence of similar goods within Canada has no bearing on whether the Rockstead Knife is a prohibited weapon and barred from importation into Canada.⁶¹

89. Mr. Humber does provide a written description of how the Rockstead Knife opens.⁶² As he has no access to the actual item under detention, the Tribunal considers that the written description is sufficient to meet the onus of showing a *prima facie* case.

90. Once a *prima facie* case is made out by the appellant, the respondent (CBSA) is presented with the opportunity to tender its own evidence, which has been variously described in the jurisprudence as a shifting of an evidential onus⁶³ or the creation of a “tactical burden”⁶⁴ which, depending on how it is dealt with, may lead to the drawing of adverse inferences when all of the evidence is considered.⁶⁵ In order to decide the appeal, the Tribunal must consider all of the evidence in order to determine whether the appellant has met his legal burden to show that the goods have been classified incorrectly.

91. The evidential record provided by the CBSA is essentially limited to its assertion of the test results said to have been obtained during internal testing, as stated both in the decision under appeal and the written submissions filed before the Tribunal in support of the CBSA’s decision. As noted above, the website materials included with the CBSA’s brief sheds no light on the key factual issue, namely, the opening mechanism for the Rockstead Knife.

92. In most of the previous cases cited by the CBSA’s written argument, the evidential record before the Tribunal included either an expert report or demonstrative evidence directed to the features of the item at issue and its method of operation.⁶⁶ The present case is distinguishable in that no such demonstrative evidence concerning the opening of the Rockstead Knife has been tendered here.

93. In *Miner*, the Federal Court of Appeal held that the Tribunal had erred by reversing the burden of proof in assessing whether a device was a Yaqua blowgun, and thus a prohibited weapon.⁶⁷ At issue was a device comprising two hollow tubes. The CBSA had not submitted any forensic evidence demonstrating that the device was actually operable as a blowgun. Mr. Miner submitted some information describing a Yaqua blowgun as a weapon used by the Yaqua tribe of Peru capable of propelling ammunition at high

⁶¹ *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at para. 30, citing *Romain L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT) at paras. 6-7.

⁶² Exhibit AP-2018-062-01, Vol. 1 at 8-10, 14-18.

⁶³ E.g. *Hickman* at paras. 92-95; *Eli Lilly and Co. v. Nu-Pharm Inc.*, 1996 CanLII 4073 (FCA), [1997] 1 FC 3; *House v. Canada*, 2011 FCA 234 at paras. 30-31.

⁶⁴ *Snell* at para. 32.

⁶⁵ *Snell* at para. 32.

⁶⁶ *Eriksen; Lee v. President of the Canada Border Services Agency* (12 July 2006), AP 2003-054 (CITT) at para. 8; *Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CITT) at paras. 40-41; *Shannon v. President of the Canada Border Services Agency* (30 January 2008), AP 2006-059 (CITT) at para. 9; *La Sagesse* at para. 7; *MilArm Co. Ltd. v. Canada (Customs and Revenue)* (12 July 2006), AP-2002-114 (CITT) at para. 9.

⁶⁷ *Miner* at para. 21.

force. The Tribunal's physical inspection of the device at issue was inconclusive as to whether the item was adapted or designed for the purpose of shooting arrows or darts by mouth. As Mr. Miner bore the legal onus of showing that the device was *not* a Yaqua blowgun, the Federal Court of Appeal found that the Tribunal had erred in allowing Mr. Miner's appeal in circumstances where it could not conclusively determine whether or not the device in fact was a Yaqua blowgun or similar device falling within the scope of the regulatory prohibition. To the extent that the Tribunal required additional information, it had the option of using rule 25.1 to obtain it.

94. Unlike *Miner*, this is not a situation where the Tribunal's examination and testing of the item yielded ambiguous or indeterminate results.

95. Despite multiple attempts, the Tribunal was unable to replicate the test results asserted by the CBSA. The record on this appeal was essentially confined to contradictory descriptions of how the Rockstead Knife is opened. The outcome of the Tribunal's examination and testing demonstrated that the opening of the Rockstead Knife was consistent with the description provided by Mr. Humber, and not that of the CBSA. Indeed, the CBSA's decision stated that the Tribunal might undertake its own testing, as part of a *de novo* review.⁶⁸ This suggests that the CBSA was well cognizant of the role that the Tribunal's own tests could play, up to and including being dispositive of the appeal.

96. Unlike a Yaqua blowgun, which is a prohibited weapon *per se* having no alternative benign use or function, not all knives are prohibited weapons. As discussed above, paragraph 84(1)(a) has been construed as being targeted to those knives that are designed or adapted for rapid deployment as a weapon, as a consequence of automatic opening of the blade. Although hardly conclusive or dispositive, there is some evidence that the Rockstead Knife (unlike the Yaqua blowgun in *Miner*) has utility for relatively mundane activities, such as food preparation, hunting and fishing.⁶⁹

97. As noted in *Miner*, the Tribunal does have discretion under rule 25.1 to request either party to provide additional information. However, discretion conferred on the Tribunal must be exercised judicially.⁷⁰ In exercising discretion under rule 25.1, the Tribunal must be mindful of and balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.⁷¹

98. In these circumstances, the Tribunal considers that recourse to rule 25.1 would be inappropriate. Rule 25.1 is not an evidentiary or tactical backstop for the Tribunal to direct a party on how to put its best foot forward, in terms of advancing its case. Unless the Tribunal requires clarification or the evidence is evenly balanced or indeterminate, as was the situation in *Miner*,⁷² rule 25.1 should not be used by the Tribunal to requisition additional materials in order to identify and remedy gaps in the evidence or case put forward by either party. This would be incompatible with the role of the Tribunal as an impartial adjudicator.

99. In view of the foregoing, and after assessing and weighing all of the evidence on record, the Tribunal finds that the appellant's burden of proof has been discharged. The Tribunal finds that the Rockstead Knife is not a "prohibited weapon" within the meaning of paragraph 84(1)(a) of the *Criminal Code*. Consequently, the Rockstead Knife is incorrectly classified under tariff item 9898.00.00 of the *Customs Tariff*.

⁶⁸ Exhibit AP-2018-062-05A, Vol. 1 at 54.

⁶⁹ See para. 63 above.

⁷⁰ *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 at para. 30.

⁷¹ E.g. *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44.

⁷² *Miner* at paras. 20-21.

DECISION

100. The appeal is allowed.

Susan D. Beaubien
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Presiding Member