



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal No. AP-2019-030

X. Peng

v.

President of the Canada Border
Services Agency

*Order and reasons issued
Tuesday, February 4, 2020*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 SUMMARY 1

 TRIBUNAL’S ANALYSIS 1

 The case to meet 2

 No reasonable prospect of success 2

CONCLUSION 3

IN THE MATTER OF an appeal submitted on October 11, 2019, 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*, SOR/91-499, submitted on December 2, 2019, that the Tribunal dismiss the appeal.

BETWEEN

X. PENG

Appellant

AND

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

Respondent

ORDER

The request is granted. The appeal is dismissed for failure to show a reasonable cause of action.

Rose Ann Ritcey

Rose Ann Ritcey
Presiding Member

STATEMENT OF REASONS

SUMMARY

[1] This appeal before the Canadian International Trade Tribunal concerns a Smith & Wesson MOD 910 handgun (the good in issue) imported by the appellant, Mr. X. Peng.

[2] On July 25, 2019, the Canadian Border Services Agency (CBSA) determined, pursuant to section 60 of the *Customs Act*,¹ that the good in issue was a “prohibited firearm” of tariff item No. 9898.00.00 and therefore prohibited from importation into Canada pursuant to section 136 of the *Customs Tariff*.²

[3] On October 11, 2019, Mr. Peng appealed the CBSA decision to this Tribunal, pursuant to subsection 67(1) of the *Act*.³

[4] On December 2, 2019, the CBSA filed a request pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*⁴ for an order dismissing the appeal on the basis that there is no reasonable cause of action. Mr. Peng submitted his response on December 6, 2019.

[5] For the reasons set out below, the Tribunal agrees with the CBSA and grants the request.

TRIBUNAL’S ANALYSIS

[6] The Tribunal has established that it has jurisdiction to dismiss an appeal on a preliminary motion, but will only do so when it is “plain and obvious” or “beyond doubt” that there is no case to be heard:

Rare are the circumstances in which it appears that it is “plain and obvious” or “beyond doubt” that a pleading discloses no reasonable cause of action. That said, from time to time, such cases do come before the Tribunal . . . When there is little doubt about the outcome of a case, it may well be appropriate to dispose of it before a full hearing is involved.⁵

[7] This is a very high threshold.⁶ In *GFT Mode*, the Tribunal noted that it can be met where no facts are in dispute and the legal arguments made by one or more of the parties have no chance of success.⁷

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

² S.C. 1997, c. 36.

³ In the same transaction, Mr. Peng had also imported two cartridge magazines. In its July 25, 2019, decision, the CBSA also determined that the cartridge magazines were “prohibited devices” of tariff item No. 9898.00.00 and therefore banned from importation. However, Mr. Peng’s submissions to the Tribunal in this appeal did not address the tariff classification of the cartridge magazines. At the request of the Tribunal, the parties clarified their positions on these products. Mr. Peng submitted that the magazines could be destroyed. The CBSA submitted that they were not in issue as Mr. Peng has not appealed their tariff classification to the Tribunal and that, in any event, he has raised no facts or arguments to contest their prohibited nature. Based on the parties’ submissions, the Tribunal agrees that the cartridge magazines are outside the scope of this appeal.

⁴ SOR/91-499.

⁵ *GFT Mode Canada Inc. v. The Deputy Minister of National Revenue* (18 May 2000), AP-96-046 and AP-96-074 (CIIT) [*GFT Mode*].

⁶ *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (order issued 19 November 2010), AP-2010-005 (CIIT) [*HBC*] at para. 9.

[8] Therefore, the question before the Tribunal in this motion is whether it is plain and obvious that Mr. Peng's submissions disclose no reasonable cause of action. In other words, is it beyond a doubt that Mr. Peng's appeal has no chance of success?

The case to meet

[9] As noted above, the CBSA determined that the good in issue is classified in tariff item No. 9898.00.00, which provides *inter alia* as follows:

9898.00.00 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) . . . "prohibited firearm" . . . [has] the same meaning as in subsection 84(1) of the *Criminal Code*.

[10] Subsection 84(1) of the *Criminal Code* defines a prohibited firearm as, *inter alia*, "a handgun that has a barrel equal to or less than 105 mm in length". The CBSA determined that the good in issue has a barrel length of 101.6 mm and is therefore a prohibited firearm as prescribed by subsection 84(1) of the *Criminal Code*.

[11] In appeals to the Tribunal, the appellant bears the burden of proving that the tariff classification determined by the CBSA is incorrect.⁸ In the present case, Mr. Peng therefore has the burden of establishing that the handgun is not a prohibited firearm.

No reasonable prospect of success

[12] In the Tribunal's view, Mr. Peng's submissions in this appeal amount to an explanation of the various steps he took to ensure that the handgun would be allowed into Canada.⁹ He submitted that when the good was detained at the border, he was informed that it was a prohibited firearm and banned from importation. Mr. Peng acknowledged in his submissions that he realized that the good in issue was prohibited because the length of the barrel is shorter than 105 mm.¹⁰ On this basis, the CBSA argued that Mr. Peng has conceded that the good in issue is a prohibited firearm.

⁷ *GFT Mode*. See also *HBC* at para. 10.

⁸ Subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*.

⁹ Mr. Peng submits that he was advised by the RCMP to register the handgun, which he originally owned in Kenya, and bring it with him into Canada, where it would be held by at the airport until the registration was complete. Once the registration was processed, the handgun could be released. Mr. Peng submits that despite following these directions, the goods were detained by the CBSA as a prohibited firearm on his entry into Canada. He submits that he was subsequently directed to the "Chief Firearm Office", which suggested that the manufacturer modify the handgun so it may be permitted for importation. According to Mr. Peng, the RCMP then advised him to have the manufacturer register the handgun under a prohibited business licence, which it did, so that it could be released to the company for the necessary modifications. However, the CBSA noted in its decision that the handgun cannot be released to anyone other than the importer of record, i.e. Mr. Peng.

¹⁰ See Public Notice of Appeal at pp. 7-8.

[13] In the Tribunal's view, Mr. Peng has acknowledged that the good is a prohibited firearm due to its barrel length, and he has made no submissions to contest the CBSA's decision.¹¹ Mr. Peng does not dispute the barrel length of the good in issue or any other aspect of the CBSA's determination. Simply put, there are no facts in dispute in this appeal.

[14] Furthermore, the remedy sought by Mr. Peng is based on his understanding and acceptance that the good in issue is a prohibited firearm. Mr. Peng seeks to have the good released to the manufacturer to modify the barrel length so that the good can be imported into Canada. In this regard, the CBSA argued that Mr. Peng's intention to modify the handgun is not relevant to tariff classification.

[15] It is well established that tariff classification is to be determined on the basis of an examination of the goods, as a whole, as presented at the time of their importation into Canada.¹² As such, Mr. Peng's intentions to modify the good, no matter how well intentioned, cannot be a relevant consideration for the purposes of tariff classification.

[16] On careful consideration of the above, the Tribunal finds that it is plain and obvious that this appeal discloses no reasonable cause of action.

CONCLUSION

[17] The request is granted. The appeal is dismissed for failure to show a reasonable cause of action.

Rose Ann Ritcey

Rose Ann Ritcey

Presiding Member

¹¹ The Tribunal notes that Mr. Peng did not raise new facts or arguments in response to the CBSA's request for dismissal. Mr. Peng only reiterated the remedy he sought, which was the release of the handgun to the manufacturer so that it may be modified for importation into Canada.

¹² For example, see the second last paragraph of *Wayne Ericksen v. The Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT); *T. Brown v. President of the Canada Border Services Agency* (17 June 2019), AP-2018-020 (CITT) at paras. 27-28.