



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-034

M. Perron

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, June 7, 2018*

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DECISION 6

IN THE MATTER OF an appeal heard on May 15, 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 September 20, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

M. PERRON

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 15, 2018
Tribunal Panel: Jean Bédard, Presiding Member
Support Staff: Eric Wildhaber, Counsel
Michael Carfagnini, Student-at-Law

PARTICIPANTS:**Appellant**

M. Perron

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed with the Canadian International Trade Tribunal (the Tribunal) by Mr. M. Perron, pursuant to subsection 67(1) of the *Customs Act*,¹ from a decision rendered on September 20, 2017, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The question at issue in this appeal involves the tariff classification of a King Arms M79 Airsoft Grenade Launcher (the good in issue) imported by Mr. Perron. The Tribunal must determine whether the good in issue 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 30, 2017, Mr. Perron attempted to import the good in issue into Canada; however, it was detained by the CBSA, in accordance with section 101 of the *Act*.³

4. On June 30, 2017, the CBSA rendered a decision classifying the good in issue under tariff item No. 9898.00.00 as a prohibited device, having determined that it is a replica firearm, and that, as such, it is prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*.⁴

5. On July 11, 2017, Mr. Perron requested a re-determination of the tariff classification, in accordance with subsection 60(1) of the *Act*.⁵

6. On September 20, 2017, the CBSA confirmed its classification of the good in issue under tariff item No. 9898.00.00 pursuant to subsection 60(4) of the *Act*.⁶

7. On October 11, 2017, Mr. Perron filed a notice of appeal with the Tribunal, indicating his intention to appeal the CBSA's decision made on September 20, 2017.⁷

8. On December 11, 2017, Mr. Perron filed his brief with the Tribunal.⁸

9. The Tribunal heard the matter by way of written submissions in Ottawa, on May 15, 2018, in accordance with Rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁹ The good in issue was made available to the Tribunal, which examined it.

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

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

3. Exhibit AP-2017-034-09A at 20, Vol. 1A.

4. *Ibid.* at 22.

5. *Ibid.* at 25.

6. *Ibid.* at 30.

7. Exhibit AP-2017-034-01 at 1, Vol. 1; Exhibit AP-2017-034-09A at 35, Vol. 1A.

8. Exhibit AP-2017-034-05 at 1, Vol. 1; Exhibit AP-2017-034-09A at 39, Vol. 1A.

9. S.O.R./91-499.

DESCRIPTION OF THE GOOD IN ISSUE

10. The good in issue is an “airsoft”-type rifle made of metal and wood, manufactured by King Arms. The rifle is powered by green gas; the gas is inserted in a cartridge, which was not imported with the good in issue. The butt of the rifle is placed against one’s shoulder. The 40 mm gas cartridges can shoot many types of projectiles, including 6 mm BB bullets. The rifle is marketed as a replica M79 grenade launcher originally manufactured in the early sixties for the United States Army.

LEGAL FRAMEWORK

11. Subsection 136(1) of the *Customs Tariff* reads as follows:

The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.	L’importation des marchandises des n ^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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12. Tariff item No. 9898.00.00 reads 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, but does not include the following: . . .	Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions prohibées et éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l’assemblage d’armes automatiques, désignés comme « marchandises prohibées » au présent numéro tarifaire, sauf : [...]
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For the purposes of this tariff item,

Pour l’application du présent numéro tarifaire :

. . .

[...]

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

a) « arme » et « arme à feu » s’entendent au sens de l’article 2 du Code criminel;

(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

b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « dispositif prohibé », « munitions prohibées » et « permis » s’entendent au sens du paragraphe 84(1) du Code criminel [...]

13. 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 » Tout objet, qui n’est pas une arme à feu, conçu de façon à en avoir l’apparence exacte – ou à la reproduire le plus fidèlement possible – ou auquel on a voulu donner cette apparence. La présente définition exclut tout objet conçu de façon à avoir l’apparence exacte d’une arme à feu historique – ou à la reproduire le plus fidèlement possible – ou auquel on a voulu donner cette apparence.

14. Accordingly, in order to determine whether the good in issue is properly classified under tariff item No. 9898.00.00, the Tribunal must determine whether it meets the definition of “replica firearm” pursuant to subsection 84(1) of the *Criminal Code*.¹⁰

15. To be considered a replica firearm, a device must fulfill the three following conditions: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not itself be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

16. 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 » Toute arme susceptible, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, d’infliger des lésions corporelles graves ou la mort à une personne, y compris une carcasse ou une boîte de culasse d’une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.
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17. 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 » Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement.
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18. According to subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*, Mr. Perron bears the burden of proving that the good in issue is *not* a prohibited device.¹¹

POSITIONS OF PARTIES

Mr. Perron

19. Mr. Perron’s submissions are very brief. He claims that he collects “airsoft”-type weapons, which are sold in his area, to safely practise “airsoft” (a sport) in wooded areas and on his property.¹²

20. Mr. Perron claims that the good in issue does not sufficiently resemble a firearm to be considered a “replica” within the meaning of subsection 84(1) of the *Criminal Code*.

21. Finally, Mr. Perron claims that goods similar to the good in issue are sold in Canada and that he already owns such goods.¹³

10. R.S.C. 1985, c. C-46.

11. As reaffirmed by the Federal Court of Appeal in *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII), at paras. 21-22.

12. Exhibit AP-2017-034-05 at para. 1, Vol. 1.

13. *Ibid.* at para. 6.

CBSA

22. The CBSA alleges that the good in issue is a “prohibited device”, as it meets the three conditions of the term “replica firearm” set out in subsection 84(1) of the *Criminal Code*, that it is properly classified under tariff item No. 9898.00.00 and that, as such, it is prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

TRIBUNAL’S ANALYSIS

Burden of Proof

23. The CBSA is correct that the importer bears the burden of proving that the good in issue is not a “replica firearm”, in accordance with the principles stated in subsection 152(3) of the *Act* and section 12 of the *Customs Tariff*.

Classification as a “Replica Firearm” Pursuant to Subsection 84(1) of the *Criminal Code*

24. The CBSA alleges that the good in issue is a replica M79 grenade launcher, that it is a “prohibited weapon” within the meaning of subsection 84(1) of the *Criminal Code*, and that it is properly classified under tariff item No. 9898.00.00 of the *Customs Tariff*. The CBSA submits that the good in issue is thus prohibited from importation into Canada in accordance with subsection 136(1) of the *Customs Tariff*.

25. In light of subsection 84(1) of the *Criminal Code*, the Tribunal must determine if the good in issue fulfills the following three conditions to be considered a “replica firearm”:

- 1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm;
- 2) it must not itself be a firearm; and
- 3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

Is the device designed or intended to exactly resemble, or to resemble with near precision, a firearm?

26. Normally, the Tribunal compares the size, shape and general appearance of a replica firearm with the firearm that it reproduces,¹⁴ and it is understood that the definition of “replica firearm” allows for minor differences.¹⁵ The issue before the Tribunal is whether the good in issue could be mistaken for a real firearm, since “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.”¹⁶

14. *T. Meunier v. President of the Canada Border Services Agency* (12 October 2017), AP-2016-009 (CITT) at para. 25; *Don L. Smith v. Commissioner of the Canada Customs and Revenue Agency* (23 September 2003), AP-2002-009 (CITT) at 3.

15. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) [*Scott Arthur*] at paras. 15-16.

16. *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) at 3.

27. The Tribunal accepts the CBSA's uncontested evidence that a real M79 grenade launcher comprises a barrel through which projectiles can be discharged and that it can inflict serious bodily injury or death to a person,¹⁷ and that, as such, it is a firearm within the meaning of section 2 of the *Criminal Code*.

28. The CBSA noted that, on King Arms' (the manufacturer) Web site, the good in issue is described as follows: "M79 Genade Launcher".¹⁸ The CBSA submitted that the marketing of the good using the original name of the weapon illustrates the manufacturer's intention to market a replica of the original weapon.

29. The CBSA filed pictures of the good in issue and of the original M79 grenade launcher,¹⁹ and submits that the good in issue bears a strong resemblance to the original grenade launcher in terms of its size, shape and overall look. Given the similarities with regard to these three factors, the CBSA submits that this resemblance points to the fact that the good in issue was designed to resemble with near precision a firearm.

30. Mr. Perron does not dispute that the real M79 grenade launcher is a firearm, but he submits that the good in issue does not sufficiently resemble a firearm to constitute a "replica" within the meaning of subsection 84(1) of the *Criminal Code*. He submits that the good in issue is made of aluminum, painted black, with a softwood butt, that it is 720 mm long and weighs 2 kg. By comparison, an actual M79 grenade launcher is made of blackened steel, with a hardwood butt, that is 731 mm long and weighs 2.7 kg.

31. Because the Tribunal did not have a physical exhibit representative of the real firearm, it relied on pictures filed by the CBSA of the good in issue and of the original M79 grenade launcher. In the Tribunal's view, the differences raised by Mr. Perron between the original weapon and the good in issue are sufficiently minor to be encompassed within the definition of a "replica firearm", as stated above.

32. The Tribunal finds that the good in issue is designed to resemble with near precision a real M79 grenade launcher and that it could easily be mistaken for a real firearm.

Is the good in issue itself a firearm?

33. The CBSA submits that there is an enormous price difference between a real M79 grenade launcher, which has a price tag of \$8,500 USD online, and the King Arms M79 Airsoft grenade launcher, which is sold for \$280 USD.²⁰

34. Moreover, both parties agree that the King Arms M79 Airsoft grenade launcher is designed and marketed as an "airsoft" device and not as a firearm, and that it shoots gas grenades, paint balls, rubber balls or "airsoft" pellets rather than real explosives.

35. In light of the undisputed evidence above, and since no contrary evidence was raised, the Tribunal finds that the good in issue is not a firearm.

17. Exhibit AP-2017-034-09A at 10-11, 120-129, Vol. 1A.

18. *Ibid.* at 131-134.

19. *Ibid.* at 118.

20. *Ibid.* at 136, 150.

Is the device designed or intended to exactly resemble, or to resemble with near precision, an antique firearm?

36. As per subsection 84(1) of the *Criminal Code*, to be considered as an antique firearm, the weapon must have been manufactured before 1898.

37. Mr. Perron does not allege that the King Arms M79 Airsoft grenade launcher is a replica of an antique firearm.

38. The CBSA indicates that the M79 grenade launcher was designed in 1961 and manufactured between 1961 and 1971.²¹

39. In light of the aforementioned undisputed evidence, the Tribunal finds that the M79 grenade launcher is not an antique firearm. As such, the good in issue is not a replica of an antique firearm.

Other Arguments Raised by Mr. Perron

40. Mr. Perron claims that goods similar to the goods in issue are sold in Canada and that he already owns such goods. As submitted by the CBSA, this type of consideration is irrelevant with regard to the definition of a “replica firearm” and tariff classification.²² Moreover, the Tribunal has previously stated 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”²³

41. M. Perron also claims that, as an experienced practitioner of the “airsoft” sport and long-time collector of such items, he will safely use the good in issue. As previously determined by the Tribunal and as submitted by the CBSA, claiming to be able or intending to safely use the good in issue is not a relevant consideration for the purpose of determining tariff classification.²⁴

Conclusion

42. As the good in issue meets the three conditions of the term “replica firearm” set out in subsection 84(1) of the *Criminal Code*, the Tribunal concludes that it is a prohibited device. Accordingly, the good in issue is properly classified under tariff item No. 9898.00.00 and, thus, prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

DECISION

43. For the foregoing reasons, the appeal is dismissed.

Jean Bédard.
Jean Bédard, Q.C.
Presiding Member

21. Exhibit AP-2017-034-09A at 153-155, Vol. 1A.

22. *J. Hains v. President of the Canada Border Services Agency* (25 October 2013), AP-2012-023 (CIIT) at para. 32.

23. *Scott Arthur* at para. 21.

24. *Ibid.* at para. 22.