



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2021-035

J. Scherrer

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, November 2, 2022*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 PROCEDURAL HISTORY 1

 DESCRIPTION OF THE GOODS IN ISSUE 2

 LEGAL FRAMEWORK 2

 PARTIES’ POSITIONS 3

 J. Scherrer..... 3

 CBSA 3

ANALYSIS..... 4

 The considerations presented by Mr. Scherrer are not relevant for classification purposes 6

DECISION 7

IN THE MATTER OF an appeal heard on August 16, 2022, pursuant to subsection 67(1) of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 15, 2021, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. SCHERRER

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Georges Bujold

Georges Bujold
Presiding Member

Place of Hearing:	Ottawa, Ontario (file hearing)
Date of Hearing:	August 16, 2022
Tribunal Panel:	Georges Bujold, Presiding Member
Tribunal Secretariat Staff:	Rigers Alliu, Counsel Charlotte Saintonge, Student-at-law Morgan Oda, Registrar Officer

PARTICIPANTS:**Appellant**

J. Scherrer

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

[1] This is an appeal filed by Mr. J. Scherrer with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act* (Act)¹ from a decision made on November 15, 2021, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the Act.

[2] At issue is whether ten (10) knives, comprising various models of MTech and Tac-Force folding knives (the goods in issue), imported by Mr. Scherrer 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] On or around July 23, 2021, the goods in issue arrived in Canada by mail and were detained by the CBSA for further examination.³

[4] On that same day, the CBSA determined that the goods in issue were prohibited weapons within the meaning of tariff item 9898.00.00 and denied their importation into Canada.⁴

[5] On August 20, 2021, the CBSA received Mr. Scherrer's request for a re-determination, pursuant to subsection 60(1) of the Act.⁵

[6] On November 15, 2021, the CBSA issued a further re-determination pursuant to subsection 60(4) of the Act, maintaining its original determination that the goods in issue were properly classified under tariff item 9898.00.00 as prohibited weapons.⁶

[7] On February 9, 2022, Mr. Scherrer filed the present appeal under subsection 67(1) of the Act.⁷

[8] On August 16, 2022, 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*.⁸ The goods in issue were made available and were examined by the Tribunal during the file hearing.⁹

¹ R.S.C., 1985, c. 1 (2nd Supp.).

² S.C. 1997, c. 36.

³ Exhibit AP-2021-035-07 at 19–20.

⁴ *Ibid.* at 24.

⁵ *Ibid.* at 22.

⁶ *Ibid.* at 32–34.

⁷ Exhibit AP-2021-035-01.

⁸ SOR/91-499.

⁹ Exhibit AP-2021-035-10; Exhibit AP-2021-035-B-01; Exhibit AP-2021-035-B-02.

DESCRIPTION OF THE GOODS IN ISSUE

[9] The goods in issue comprise various models of folding knives from two different brands, namely MTech folding blade knives (model TF-428) and Tac-Force spring assisted folding knives (model MT-A906).¹⁰

[10] The goods in issue vary in size and colour but are similar in all material respects. Most importantly, they all feature a protrusion or flipper. When the blades are in the closed position, the application of hand or finger pressure to the flippers causes the blades to open to a fully extended and locked position.¹¹

LEGAL FRAMEWORK

[11] 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.”

[12] Tariff item No. 9898.00.00 provides as follows, in relevant parts:

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* . . .

[13] 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*¹² 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 said provision if the conditions and requirements thereof and of any applicable regulations are met.”

[14] The question of whether the goods in issue are properly classified under tariff item No. 9898.00.00 must therefore be determined according to the terms of that tariff item and the applicable provisions of the *Criminal Code*.

[15] According to the *Customs Tariff*, a “prohibited weapon” includes any items defined as a “prohibited weapon” in subsection 84(1) of the *Criminal Code*. Subsection 84(1) of the *Criminal Code* defines “prohibited weapon” as follows:

prohibited weapon means

¹⁰ Exhibit AP-2021-035-07 at 5–6; Exhibit AP-2021-035-07.A; Exhibit AP-2021-035-B-01; Exhibit AP-2021-035-B-02.

¹¹ *Ibid.*

¹² S.C. 1997, c. 36, schedule.

(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*)

[16] In sum, to determine whether the goods in issue are properly classified as prohibited weapons 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 paragraph 84(1)(a) of the *Criminal Code*.

PARTIES' POSITIONS

J. Scherrer

[17] Mr. Scherrer submitted that knives identical or similar to the goods in issue are being sold online and in Canadian retail outlet stores. Mr. Scherrer stressed that, while Canadian retailers were allowed to import these knives for sale, he was not allowed to do the same.¹³

[18] Mr. Scherrer further submitted that the goods in issue were not intended to be sold, but rather, to be received as a Christmas present.¹⁴

[19] Lastly, Mr. Scherrer claimed that law enforcement agencies do not consider these types of knives to be prohibited weapons, as it would have been incumbent upon them to seize and lay charges for any sale or distribution of such weapons.¹⁵ Mr. Scherrer also claimed that the CBSA “is acting alone in their determination of these knives being prohibited weapons under the *Criminal Code*”.¹⁶

CBSA

[20] The CBSA submitted that Mr. Scherrer failed to satisfy his legal burden. In that respect, the CBSA contended, among other things, that Mr. Scherrer failed to provide a basis upon which the Tribunal could determine that the CBSA’s classification was incorrect and, as a result, failed to establish a *prima facie* case.¹⁷

[21] The CBSA submitted, in the alternative, that the classification of the goods in issue is consistent with the applicable statutory framework as well as previous decisions of the Tribunal. Specifically, the CBSA contended that the goods in issue meet the definition of “prohibited weapon”, because the knives have blades that open “automatically” by hand pressure being applied to a “device” that is “in or attached to the handle of the knife”.¹⁸

¹³ Mr. Scherrer relied mainly on an “a[d] from Cabelas Bass Pro” in support of his contention. Exhibit AP-2021-035-04 at 1–2; Exhibit AP-2021-035-11.

¹⁴ Exhibit AP-2021-035-04 at 1.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Exhibit AP-2021-035-07 at paras. 25–27.

¹⁸ *Ibid.* at paras. 27–28.

[22] In support of its position, the CBSA made two main arguments. First, it argued that the goods in issue have blades that open “automatically” in accordance with the jurisprudence established by the Tribunal. In particular, it submitted that, by applying pressure on the flipper with the index finger, the blades quickly and inevitably disengage and open into a fully extended and locked position. It further submitted that the opening of the blades involves easy manipulation thus enabling rapid deployment, and that the knife blades open using one hand and do not require a sequence of steps. Second, the CBSA relies on the Tribunal’s decision in *M. Abbas*¹⁹ to argue that similar knives with a tab-like protrusion or flipper, integral to the rest of the blade, had been found by the Tribunal to meet the second part of the definition of “prohibited weapon”.²⁰

[23] The CBSA further submitted that the Tribunal has consistently held that considerations with respect to the sale of similar goods within Canada are irrelevant for purposes of classification under tariff item 9898.00.00. Likewise, the CBSA submitted that whether similar or identical knives were seized by the CBSA is immaterial for classification purposes.²¹

[24] Lastly, the CBSA submitted that the Tribunal has consistently held that the intended use of goods has no bearing on the determination of whether knives are properly classified as prohibited weapons under tariff item No. 9898.00.00, such determination being strictly limited to an evaluation of the physical characteristics of knives at the time of importation into Canada.²²

ANALYSIS

The goods in issue are prohibited weapons

[25] Subsection 152(3) of the Act imposes a legal burden on Mr. Scherrer to demonstrate that the goods in issue are incorrectly classified under tariff item No. 9898.00.00 as prohibited weapons.²³ For the reasons that follow, the Tribunal finds that Mr. Scherrer has not met this burden.

[26] To determine whether the goods in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00, the Tribunal must consider the characteristics, properties, and operation of the goods to determine, on the facts, whether the goods in issue meet the definition of “prohibited weapon” in paragraph 84(1)(a) of the *Criminal Code*. Namely, the Tribunal must determine whether the goods in issue have blades that open “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.

[27] With respect to automaticity, the Tribunal has held that “automatically”, within the context of paragraph 84(1)(a) of the *Criminal Code*, means “largely or wholly involuntarily”, and that minimal manipulation does not negate the automaticity of the opening of the blade.²⁴ In other

¹⁹ *M. Abbas v. President of the Canada Border Services Agency* (13 November 2019), AP-2018-060 (CITT) [*M. Abbas*].

²⁰ Exhibit AP-2021-035-07 at paras. 28–36.

²¹ *Ibid.* at paras. 37–39.

²² *Ibid.* at paras. 40–41.

²³ *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 at paras. 7, 21; *J. Humber* (13 December 2019), AP-2018-062 (CITT) [*J. Humber*] at para. 83, citing *Digital Canoe Inc.* (22 August 2016), AP-2015-026 (CITT) at para. 15.

²⁴ *M. Abbas* at para. 53, citing *La Sagesse de l'Eau* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) [*La Sagesse de l'Eau*] at paras. 46–48.

words, “automatically” does not mean completely without human intervention. The Tribunal has also held that “[i]f [the] 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, [then] the knife opens automatically.”²⁵

[28] With respect to whether a knife blade opens “by hand pressure applied to a button, spring or other device in or attached to the handle of the knife”, the term “device” has been broadly defined in the Tribunal’s jurisprudence.²⁶ The Tribunal has also previously affirmed that considerations regarding the automaticity of a knife remain critical in determining whether a knife features a “button, spring or other device in or attached to the handle”.²⁷

[29] In the matter at hand, having considered the entirety of the evidence placed in the record, the Tribunal is of the view that Mr. Scherrer failed to provide sufficient evidence to convince it that the CBSA’s classification was incorrect. Rather, the evidence before the Tribunal demonstrates on a balance of probabilities that the goods in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00, as determined by the CBSA.

[30] The Tribunal had the opportunity to carefully examine the goods in issue during the file hearing and is satisfied that they meet the definition of “prohibited weapon” as provided in the *Criminal Code*.

[31] The Tribunal’s own examination of the goods in issue and the evidence placed on the record²⁸ reveal that the application of minimal hand or finger pressure to the flipper on the goods in issue causes the rapid opening of the blades to a fully extended and locked position. During the Tribunal’s examination, the undersigned manipulated the goods in issue and observed that once the opening of the blades was initiated by applying minimal pressure with one hand or finger, the knives in issue would not enable the user to control the extent and the speed to which the blades rapidly unfold into an open locked position.

[32] As noted by the CBSA, the purpose of paragraph 84(1)(a) of the *Criminal Code* has been interpreted by the jurisprudence as prohibiting the use of knives that can be easily concealed and rapidly opened, such as those in issue, making them readily available for use as a weapon.²⁹ The Tribunal is therefore satisfied that the goods in issue open “automatically”.

[33] The Tribunal is also satisfied, consistent with Tribunal’s precedents³⁰, that the goods in issue have blades that open “by hand pressure applied to a device in or attached to the handle of the knife”. As noted by the CBSA, the goods in issue are similar to the knife that was at issue in *M. Abbas*, wherein the Tribunal found that the knife opened automatically as a result of hand pressure being applied to a button, spring or other device. In that case, the Tribunal found that a tab-like protrusion

²⁵ J. Humber at para. 72.

²⁶ *M. Abbas* at para. 55, citing *La Sagesse de l’Eau* at paras. 41-42; *Knife & Key Corner Ltd.* (14 September 2015), AP-2014-030 [CITT] at para. 30).

²⁷ *M. Abbas* at para. 78; *D. Liu v. President of the Canada Border Services Agency* (22 November 2019), AP-2018-058 (CITT) at para. 77.

²⁸ See the video attachments of tests being performed by the CBSA (Exhibit AP-2021-035-07.A).

²⁹ *M. Abbas* at para. 77, citing *La Sagesse de l’Eau* at para. 54.

³⁰ *M. Abbas*; *B. Shaw v. The President of the Canada Border Services Agency* (7 September 2021), AP-2020-022 (CITT).

or flipper, such as the one on each of the goods in issue, constituted a device that was in or attached to the handle of the knife.³¹

[34] Moreover, the Tribunal's examination and manipulation of the goods in issue clearly demonstrate that the purpose of the flipper on the knives is to enable the quick and automatic opening of the blades. As discussed above, once pressure is applied to the flipper, the blade is released and opens automatically.

[35] In light of the above, the Tribunal finds that the goods in issue are prohibited weapons within the meaning of subsection 84(1) of the *Criminal Code*. Accordingly, the goods in issue are properly classified as prohibited weapons under tariff item No. 9898.00.00.

The considerations presented by Mr. Scherrer are not relevant for classification purposes

[36] In view of the requirements of the Act and following Tribunal's precedents, the arguments raised by Mr. Scherrer in this appeal cannot succeed.

[37] The Tribunal has consistently held that the sale, availability, or presence of similar goods or knives within Canada has no bearing on its determination of whether goods are prohibited weapons and barred from importation into Canada.³² Similarly, the Tribunal has consistently held that the criteria for the prohibition of certain types of knives are referable only to the characteristics of the knife at issue and are not contingent or dependent on the intent or good faith of the person seeking to import the knife.³³

[38] As such, considerations raised by Mr. Scherrer with respect to similar knives being made available for purchase across Canada or the fact that the goods in issue were intended to be received as a Christmas present have no bearing and are not relevant for classification purposes under the *Customs Tariff*.

[39] Finally, while it is Mr. Scherrer's claim that law enforcement agencies do not consider the goods in issue to be prohibited weapons, as it would have been incumbent upon them to seize and lay charges for any sale or distribution of such weapons, the Tribunal also finds that considerations of the sort have no bearing and are not relevant for classification purposes.

[40] The Tribunal has held that the administrative action or inaction of the CBSA cannot change the law.³⁴ It has also held that the fact that shipments were not seized or intercepted by the CBSA is irrelevant for classification purposes.³⁵ The Tribunal finds, similarly, that the action or inaction of

³¹ *M. Abbas* at paras. 70–83.

³² *J. Humber* at para. 88, citing *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) at para. 30; *Romain L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT) at paras. 6–7).

³³ *M. Abbas* at para. 56; See also, for example, *T. Brown v. President of the Canada Border Services Agency* (17 June 2019), AP-2018-020 (CITT) at paras. 27–28; *T. Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 20; *R. Joschko v. President of the Canada Border Services Agency* (14 December 2011), AP-2011-012 (CITT) [*R. Joschko*] at para. 28.

³⁴ See, for example, *R. Joschko* at para. 27, citing *Romain L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT) at 2 and *Wayne Ericksen v. President of the Canada Border Services Agency* (3 January 2002), AP-2000-059 (CITT) at 3.

³⁵ *Ibid.*

law enforcement agencies other than the CBSA, such as the police, or law enforcement activities for that matter, have no bearing and are not relevant for the purposes of the classification of imported goods under the *Customs Tariff*.

DECISION

[41] For the reasons above, the appeal is dismissed.

Georges Bujold
Georges Bujold
Presiding Member