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BEFORE THE CANADIAN INTERNATIONAL TRADE TRIBUNAL

IN THE MATTER OF an appeal pursuant to subsection 67(1) of the Customs Act, R.S.C 1985, c.1 (2nd Supp), as amended

BETWEEN:

TROY LAPLANTE

Appellant

-and-

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

APPELLANT'S BRIEF

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Appellant

<p>CANADIAN INTERNATIONAL TRADE TRIBUNAL Exhibit No. <u>AP-2017-012-04</u> Pièce n° <u>AP-2017-012-04</u> TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR</p>

Description of Goods

1. This is an appeal under subsection 67(1) of the Customs Act from a re-determination made on behalf of the President of the Canada Border Services Agency ("CBSA") by a CBSA Appeals Officer under subsection 60(4) of the Customs Act. The Respondent has incorrectly classified the goods in issue as prohibited weapons under tariff item No. 9898.00.00.

Goods in Issue

2. The goods in issue are five Kershaw Skyline folding pocket knives.

Background

3. On August 1, 2016, The Appellant ordered five knives from Outfitter Country CA. The items were shipped from the United States. The knives never arrived and the Appellant subsequently learned that the property had been seized by Canadian Border Services Agency ("CBSA").
4. In a CBSA Notice of Detention, dated August 29, 2016, the Appellant was informed that the items would be held for further examination.
5. On October 24, 2017, the Appellant called CBSA to seek clarification. A Customs Officer, who would only identify himself as Badge 19858, stated that the knives were illegal because they had an assisted opening mechanism.
6. In a letter dated October 19, 2016, the Appellant was informed that the knives had been deemed "prohibited weapons and/or devices" and were inadmissible to the country under Section 58 of the Customs Act.
7. In a Dispute Notice, dated November 10, 2016, the Appellant showed that the goods in issue were not prohibited weapons and should be released by the CBSA.
8. In a letter dated March 14, 2017, Karen McCallum, CBSA Appeals Officer, stated the goods in issue were prohibited weapons and would not be released.
9. On March 29, 2017, the Appellant spoke with McCallum by phone and sought clarification of her examination. McCallum stated:
 - a. that the knives had arrived at CBSA in individually sealed factory packaging;
 - b. she had not touched any part of the blade in opening the knives. McCallum specifically stated that she had not used the "flipper" to open the knives and that all five knives had opened easily with centrifugal force with the flick of a wrist;
 - c. it did not matter if she had in fact used the "flipper" to open the knife as all such knives were also considered prohibited weapons.

10. The Appellant appealed to the Canadian International Trade Tribunal ("CITT).

Grounds for Appeal

11. At issue is whether the goods in issue are properly classified under tariff item No. 9898.00.00 of the schedule to the Customs Tariff as a "prohibited weapon" as defined under subsection 84(1) of the Criminal Code, and therefore, prohibited from importation into Canada pursuant to subsection 136(1) of the Customs Tariff.

Description of Goods

12. The goods in issue are five Kershaw Skyline folding pocket knives.

13. The Kershaw Skyline has the following dimensions:

Blade length of 3.1 inches;
Closed length of 4.25 inches;
Overall length of 7.4 inches, and
Weighs 2.5 ounces.

14. The Kershaw website¹ provides the following relevant information regarding the operation of the Skyline model:

Manual: "There is no mechanical assist, such as SpeedSafe, used to open the folding knife. It opens the classic, old-school way.", and;

Flipper: ..."The "flipper" is a protrusion on the back of the blade that the user can pull back on, or flip, in order to move the blade easily out of the handle."

15. Inspection of the Skyline model parts diagram and parts list² further confirms that the Kershaw Skyline contains no assisted opening or automatic opening mechanism.

Definition of Prohibited Weapon

16. The goods classified under tariff item 9898.00.00 are defined in section 2 and subsection 84(1) of the Criminal Code, which provide as follows:

Section 2: Definitions

weapon means any thing used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person and, without restricting the generality of the foregoing, includes a firearm and, for the purposes

¹ Attached Document A - "<https://kershaw.kaiusaltd.com/knives/knife/skyline>"

² Attached Document B - "Kershaw Skyline Parts Diagram and Parts List"

of sections 88, 267 and 272, any thing used, designed to be used or intended for use in binding or tying up a person against their will;

Subsection 84(1):

(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 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.

Appellant's Position

17. The goods in issue do not meet the definition of weapon in Section 2 of the Criminal Code. Pocket knives are tools carried and used by numerous law abiding Canadian citizens on a daily basis. Furthermore, the Respondent has made no attempt to show that the goods in issue are a weapon under Section 2 of the Criminal Code.

Does Not Open with Centrifugal Force

18. However, the Respondent has alleged that the goods in issue are prohibited weapons under Subsection 84(1) of the Criminal Code. In her letter³, dated March 14, 2016, Karen McCallum, CBSA Appeals Officer, states:

"I examined the knives. I held the handle of each knife and with the flick of my wrist the blade of each opened to the fully extended position. This is considered to be opening automatically by centrifugal force."

19. On March 29, 2017, the Appellant spoke to McCallum by phone and sought clarification of her examination. McCallum stated:

- a. that the knives had arrived at CBSA in individually sealed factory packaging;
- b. she had not touched any part of the blade in opening the knives. McCallum specifically stated that she had not used the "flipper" to open the knives and that all five knives had opened easily with centrifugal force with the flick of a wrist;
- c. that it did not matter if she had in fact used the "flipper" to open the knife as all such knives were also considered prohibited weapons.

20. Should the knives open with centrifugal force alone they would be prohibited weapons as defined by the criminal code. However, the Appellant has examined numerous Skyline knives. Based on the

³ Attached Document C - "CBSA Appeals Officer Letter, Dated March 14, 2016"

design of the knife, in the condition the knife arrives from the factory, it is impossible to open the knife by centrifugal force. This should be easily determined by anyone who attempts to open the knife with a flick of the wrist and without touching any part of the blade including the “flipper”.

21. The Appellant challenges the Respondent’s examination and believes that the Respondent has misrepresented the situation. These knives **do not** open with centrifugal force.

Does Not Open Automatically

22. The CITT has previously ruled, in *La Sagesse De L’eau vs President of the the Canada Border Services Agency*⁴, that:

45. With respect to the OTS knife, the Tribunal finds that the “finger actuator” is a “device” within the meaning of subsection 84(1) of the Criminal Code. The finger actuator on the OTS knife protrudes from the handle. **It allows to push against the blade and thus activate the assisted-opening mechanism of the knife.** [sic] As such, it falls within the definition of “device” retained above. The Tribunal is further satisfied that the finger actuator is located “in or attached to the handle of the knife”. Since hand pressure is applied to the finger actuator, the Tribunal is satisfied that the blade of the OTS knife opens by “hand pressure applied to . . . [an] other device in or attached to the handle of the knife”;

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, and;

51. On the basis of the video evidence filed by the parties, as well as the Tribunal’s own examination of the knives in issue, the Tribunal is satisfied that pressure on the relevant device in the handle of the knives rapidly releases the blades. The manipulations required from the user to activate the assisted-opening mechanisms of the knives in issue appear to be altogether minimal. The Tribunal notes that, **once the user pushes on the device, almost all of the travel of the blade is achieved by the internal mechanism and not through hand pressure. In addition, in the case of both knives, once the blade is put into motion as a result of the initial pressure, the blades do not stop before they are fully opened; no further manipulation by the user is required.** [emphasis added]

23. Unlike in the *La Sagesse De L’eau* matter, the goods in issue:

Have no assisted-opening mechanism of the knife;

Do not open “automatically” meaning “largely or wholly involuntarily”; and

⁴ Attached Document D – “CITT Appeals No. AP-2011-040 and AP-2011-041”

Once the blade is put into motion as a result of the initial pressure, the blade does stop before they are fully opened; and further manipulation is required by the user.

24. Furthermore, the CITT has previously ruled, in *Knife & Key Corner Ltd. vs President of the Canada Border Services Agency*⁵, that:

The Tribunal's own examination of the goods in issue confirmed that all of them (not only the Zero Tolerance knives) open in the manner described above; i.e. that minimal hand pressure to the protrusion on the blade causes each of them to open rapidly into a fully open and locked position, through engagement of the assisted-opening system. Therefore, minimal manipulation is required to open the goods in issue.

Through its careful examination of the goods in issue, the Tribunal determined that pressing on the protrusion engages the torsion bar or spring system, which is integrated into the handle. Accordingly, it can be said that the knives open by pressing a device attached to the handle, as the protrusion must be attached to the spring or torsion bar mechanism in order to activate it.

Alternatively, if the torsion bar or spring system is itself considered to be the "device", then the evidence clearly shows that it is located within the handle. [emphasis added]

25. Unlike the *Knife & Key Corner Ltd.* matter, the goods in issue:

Do not have a spring or torsion bar mechanism or any other sort of assisted opening system;

Do not have a device attached to a spring or torsion bar mechanism or any other device that can be construed as part of a mechanism.

26. The CITT previously ruled, in *Digital Canoe Inc. vs President of the Canada Border Services Agency*⁶, that:

In this case, the user applies manual pressure to the protrusion, located on the blade, thereby overcoming the inertial resistance of the spring mechanism located within the handle. In light of the above, the Tribunal finds that the good in issue opens "automatically" through indirect hand pressure applied to a spring via the protrusion. [emphasis added]

27. Unlike the *Digital Canoe Inc.* matter, the goods in issue:

Do not open automatically through indirect hand pressure applied to a spring or any other assisted opening mechanism.

⁵ Attached Document E – "CITT Appeal No. AP-2014-030"

⁶ Attached Document F – "CITT Appeal No. AP-2016-004"

28. The current goods in issue are fundamentally different from the goods in issue in the previous appeals involving automatic opening knives as the current goods in issue do not have any assisted or automatic opening mechanism.

No Device In or On the Handle

29. In the Ontario Court of Justice, in the matter of Her Majesty the Queen vs Hero Army Surplus,⁷ the Honourable Justice J. Halikowski ruled that “flippers” are not devices in or attached to the handle of the knife:

The Category 3 items constitute items 462 to 489 and can be described as knives which can be opened with one hand by applying pressure with one’s thumb or finger onto a metal stud located on or integral to the blade. Once this pressure moves the blade into a position about 20 degrees from the handle, a spring device accelerates the blade forward until it locks in the open position. Again, the question remains as to whether or not this means of opening the device falls within the prohibited definition under s. 84(1) of the Code. The Court finds that it does not. On an ordinary reading of the legislation the blade does not open automatically by gravity or centrifugal force. Hand pressure is applied to a device on or integral to the blade. Hand pressure is not applied to a device in the handle or on it.

Other Considerations

30. In the Ontario Court of Justice, in the matter of Her Majesty the Queen vs Hero Army Surplus,⁸ the Honourable Justice J. Halikowski stated:

When interpreting the governing legislation in cases where a citizen’s liberty or property may be jeopardized by state intervention, a strict and ordinary reading and interpretation of that legislation is necessary to ensure that the public can understand and predict with a high degree of certainty what is expected of it in the conduct of its day-to-day personal and business affairs.

31. It is incumbent upon the CITT to make a strict and ordinary reading and interpretation of the legislation. Subsection 84(1)(a) makes no specification as to the minimum number of hands a user must employ to open a knife. Furthermore, Subsection 84(1)(a) makes no mention of the minimum amount of time a user must take to open the knife. These factors are not criteria that should be factored into the determination of a prohibited weapon as defined by the Criminal Code.
32. The goods in issue are similar to other models of manually opening, folding, pocket knives; employing a “flipper”, thumb stud, finger hole, or nail nic. After being partially opened manually these knives can be fully extended through a snap of the wrist.⁹ Even a knife with a plain blade can be partially opened with a thumb and forefinger and then snapped into the fully opened. Ruling that

⁷ Attached Document G – “Ontario Court of Justice Nos. 06-04612-00 – Page 7”

⁸ Attached Document G – “Ontario Court of Justice Nos. 06-04612-00 – Page 5”

⁹ Attached Document H – “Manually Opening Knives”

the goods in issue are prohibited weapons will result in numerous other manually opening knives also being subject to reclassification.

33. An ever shifting definition will result in the public being unable to understand or understand with any degree of certainty what is expected of it in the conduct of its day-to-day personal and business affairs.
34. Significant changes and or additions would have to be made to Subsection 84(1)(a) of the Criminal Code for the goods in issue to be determined prohibited weapons. Such changes are Parliaments domain and the Appellant respectfully requests that the Tribunal apply the law as it is written.

Conclusion

35. The CBSA has misinterpreted the Criminal Code definition of a prohibited weapon and previous CITT rulings and in an attempt to have the goods in issue classified under tariff item No. 9898.00.00.
36. However, the goods in issue do not open with centrifugal force and the goods in question are different that the assisted opening knives the CITT has dealt with in previous appeals. In fact, there is no basis under previous CITT rulings or in Subsection 84(1)(a) of the Criminal Code to support the CBSA position.
37. Manually opening, folding, pocket knives are, and should remain, legal in Canada. The goods in issue do not warrant classification as a prohibited weapon and the appeal should be allowed.