

CANADIAN INTERNATIONAL TRADE TRIBUNAL

BETWEEN:

T. LAPLANTE

Appellant

- and -

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

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RESPONDENT'S BRIEF

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Québec Regional Office (Ottawa)  
284 Wellington Street, SAT-6  
Ottawa, Ontario K1A 0H8  
Fax: 613-946-2777

**Per: Luc Vaillancourt**

Telephone: 613-957-4658

Email: [luc.vaillancourt@justice.gc.ca](mailto:luc.vaillancourt@justice.gc.ca)

*Counsel for the Respondent*

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## I – NATURE OF PROCEEDINGS

1. T. LaPlante (“Appellant”) filed an appeal with the Canadian International Trade Tribunal (“Tribunal”) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup>, from a decision made by the President of the Canada Border Services Agency (“CBSA”) on March 14, 2017, pursuant to subsection 60(4) of the *Act*.
2. The Appellant challenges CBSA’s classification of five knives under tariff item No. 9898.00.00 of the Schedule of the *Customs Tariff*<sup>2</sup> as prohibited weapons and, therefore, prohibited from importation into Canada pursuant to subsection 136(1) of the *Act*.
3. CBSA is seeking the Tribunal’s opinion, in the spirit of section 70 of the *Act*, on how to conduct the test for determining whether knives are prohibited weapons, given the different results from the test conducted on the five knives in issue, which are *identical*, and the limited guidance found in the Tribunal’s decisions.

## II – PROCEDURAL BACKGROUND

4. On or about August 29, 2016, the five knives in issue arrived by mail from the United States and were detained by CBSA at the International Mail Processing Centre, pursuant to section 101 of the *Act*, in order to determine their admissibility into Canada.<sup>3</sup>

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<sup>1</sup> R.S.C., 1985, c. 1 (2nd Supp.) (“*Act*”).

<sup>2</sup> S.C. 1997, c. 36.

<sup>3</sup> Copy of CBSA’s Notice of Detention dated August 29, 2016 – Tab 1.

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5. On October 19, 2013, CBSA informed the Appellant by letter that, pursuant to subsection 58(1) of the *Act*, the knives were classified as prohibited weapons under tariff item No. 9898.00.00 and, as such, prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.<sup>4</sup>
  6. On December 5, 2016, CBSA acknowledged receipt of the Appellant's Dispute Notice concerning CBSA's classification determination of the knives.<sup>5</sup>
  7. On March 14, 2017, CBSA informed the Appellant by letter that, pursuant to subsection 60(4) of the *Act*, the knives were classified as prohibited weapons under tariff item No. 9898.00.00 and, therefore, prohibited from importation into Canada by virtue of subsection 136(1) of the *Customs Tariff*.<sup>6</sup>
  8. On May 12, 2017, the Appellant filed the present appeal before the Tribunal pursuant to subsection 67(1) of the *Act*.

### **III – DESCRIPTION OF THE KNIVES**

9. The goods in issue are five identical Kershaw Skyline Model 1760 folding knives, made in the United States by Kai USA-Ltd.<sup>7</sup>
10. Each knife measures approximately 19 centimetres when the blade is open and 11 centimetres when closed.
11. Each knife has a black textured handle and a steel plain edge blade.

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<sup>4</sup> Copy of CBSA's classification determination dated October 19, 2016 – Tab 2.

<sup>5</sup> Copy of CBSA's acknowledgment letter (unsigned) dated December 5, 2016 – Tab 3.

<sup>6</sup> Copy of CBSA's classification re-determination dated March 14, 2017 – Tab 4.

<sup>7</sup> Various printouts from Kai-USA Ltd.'s web site regarding the knives – Tab 5.

12. The blade has a flipper that assists the opening of the knife; when holding the knife in one hand and by pushing down on the flipper with the index finger of that hand, the blade moves out of the handle.
13. The blade has a liner lock that locks once the blade is fully open, preventing the knife from closing.
14. None of the knives has assisted opening, such as a torsion bar, but all of them have a caged ball bearing opening system that “makes manual opening as easy as assisted”.<sup>8</sup>
15. The caged ball bearing opening system is designed to prevent the blade from opening until “just a little extra pressure on the flipper overcomes the detent and the knife opens with ease”.<sup>9</sup>

#### **IV – TEST CONDUCTED ON THE KNIVES**

16. In preparing the Respondent’s Brief, CBSA further examined the five knives in issue to ensure their proper classification.
17. CBSA asked the Appeals Officer, Ms. K. M., who rendered the re-determination classification on behalf of CBSA, to test each knife by trying to open the blade with an arm and wrist motion, but without using the flipper on the blade.
18. One of the tested knives opened repeatedly with the arm and wrist motion: the blade came out rapidly, locked into position each time, and the knife was ready for use.

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<sup>8</sup> Printout from Kai-USA Ltd.’s web site regarding the technology involved in manufacturing the knives, at p. 20 – Tab 5.

<sup>9</sup> *Ibid.*, at pp. 20-21.

19. The other four knives eventually opened with the arm and wrist motion, but generally after more than one attempt, even though all knives are identical, *i.e.* the same model, from the same manufacturer.
20. None of the knives opened by a *mere* flick of the wrist. They did so with a forceful arm and wrist motion.
21. The Tribunal's decisions apply the "flick of the wrist" test to determine whether a knife is a prohibited weapon, or more specifically whether a knife opens automatically by centrifugal force. Those decisions do not, however, provide many details as to what that test entails.
22. In light of these different test results and the limited guidance found in those decisions, CBSA is seeking the Tribunal's opinion, in the spirit of section 70 of the *Act*, on how to conduct the test for determining whether a knife is a prohibited weapon.
23. CBSA will provide its views on how the test should be conducted, based on appellate court decisions, and will rely on Tribunal's own examination of the five knives in issue to determine their proper classification.

#### IV – ISSUES

24. How should the test for determining whether a knife is a prohibited weapon be conducted?
25. Based on that test and the Tribunal's own observations, should the five knives in issue be classified as prohibited weapons under tariff item No. 9898.00.00?

## V – LEGAL FRAMEWORK

26. Subsection 136(1) of the *Customs Tariff* provides that the importation of goods under tariff item No. 9898.00.00 is prohibited.
27. Subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System* and the *Canadian Rules* do not apply in respect of goods classified under tariff item No. 9898.00.00.
28. Tariff item No. 9898.00.00 includes “prohibited weapons” and specifies that they have the same meaning as in subsection 84(1) of the *Criminal Code*.<sup>10</sup>
29. Accordingly, in order to classify a knife as a prohibited weapon under tariff item No. 9898.00.00, the Tribunal must determine if the knife meets the definition of a “prohibited weapon” in subsection 84(1) of the *Criminal Code*.
30. Subsection 84(1) of the *Criminal Code*<sup>11</sup> defines a “prohibited weapon” as including the following:

[...]

“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

[...]

(Emphasis added)

<sup>10</sup> Tariff item No. 9898.00.00 – Tab 6.

<sup>11</sup> *Criminal Code*, R.S.C. 1985, c. C-46, subsection 84(1) – Tab 7.

## VI – CBSA'S VIEWS

31. The purpose of subsection 84(1) of the *Criminal Code* is to render illegal a knife that can be carried or held concealed in the hand and automatically opened, amongst others, by centrifugal force, thereby making the knife available for use as a weapon.<sup>12</sup>
32. While the prohibition applies to a knife that has a blade that opens automatically *by application of centrifugal force*<sup>13</sup>, nothing in the *Criminal Code* or related *Rules* provide any measurement of the force to be applied.<sup>14</sup>
33. The Tribunal has held on numerous occasions that a knife that can be opened by a “flick of the wrist” is a knife that has a blade that opens automatically by centrifugal force and, accordingly, is a prohibited weapon within the meaning of subsection 84(1) of the *Criminal Code*.<sup>15</sup>
34. CBSA agrees that such a knife is a prohibited weapon. CBSA queries whether the “flick of the wrist” test is too limited, if applied literally. CBSA proposes a broader test that, in its view, is closer to the purpose of the prohibition, relying on three Court of Appeal decisions, one of which was appealed to the Supreme Court of Canada, all of which were previously considered by the Tribunal.

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<sup>12</sup> *R. v. Richard*, [1981] N.B.J. No. 274 (NBCA), at para. 7 – Tab 8. *R. v. Archer*, [1983] O.J. No. 92 (ONCA), at para. 7 – Tab 9.

<sup>13</sup> *R. c. Vaughan* [1990] R.J.Q. 2064 (QCA), reasons given by Beaugard J.A., dissenting, at para. 7 – Tab 10. *R. v. Vaughan*, [1991] 3 S.C.R. 691 (SCC), appeal allowed for the reasons given by Beaugard J.A. – Tab 11.

<sup>14</sup> *R. c. Vaughan*, *supra* note 13, reasons given by Proulx J.A., for the majority of the Québec Court of Appeal, at para. 19.

<sup>15</sup> *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT), at pp. 2-3; *MilArm Co. Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (12 July 2006), AP-2002-114 (CITT), at para. 13; *Kenneth Lee v. President of the Canada Border Services Agency* (12 July 2006), AP-2003-054 (CITT), at para. 12; *Terry Shannon v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-059 (CITT), at para. 13; *R. Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CITT), at paras. 59 and 64; and *T. Lysyshyn v. President of the Canada Border Services Agency* (14 July 2014), AP-2013-047 (CITT), at para. 29.



35. In *R. v. Archer*, the Ontario Court of Appeal found that a knife that had a blade that opened “with a forceful downward motion of [the] arm and wrist” was a prohibited weapon.<sup>16</sup> The Court quashed the conviction of possession of a prohibited weapon because the appellant lacked the knowledge or the recklessness regarding the characteristics that rendered the knife a prohibited weapon.<sup>17</sup>
36. In *R. c. Vaughan*, the majority of the Québec Court of Appeal, quoting with approval a previous decision from that Court, found that a knife is a prohibited weapon when normal centrifugal force is applied to the blade, *i.e.* the force of a normal person.<sup>18</sup>
37. The majority also found that the butterfly knife at issue did not open automatically because some skill and practice were required to open the blade.<sup>19</sup> Beauregard J.A., dissenting, disagreed with the majority on that second finding, concluding instead that the knife was a prohibited weapon, even though some skill and manipulation were required to open the blade.<sup>20</sup>

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<sup>16</sup> *R. v. Archer*, *supra* note 12, at paras. 2, 3, 5, and 10.

<sup>17</sup> *Ibid.*, at paras. 8 to 11.

<sup>18</sup> *R. c. Vaughan*, *supra* note 13, reasons given by Proulx J.A., for the majority of the Québec Court of Appeal, at para. 19:

*Notre cour, dans un arrêt inédit (R. c. Côté, C.A.Q. no 200-10-000099-817, 10 mai 1984) a précisé ce qu'il faut entendre par le caractère "automatique" de l'ouverture de la lame. C'est mon collègue le juge Nichols, au nom de la cour, qui écrit:*

[...]

*En définitive, je crois qu'on peut dire qu'un couteau est hors de toute (sic) doute raisonnable une arme prohibée au sens du Code criminel quand la lame s'ouvre automatiquement en lui imprimant une force centrifuge normale. Pas celle d'un athlète olympique, ni celle d'un enfant en bas âge. Je prendrais modèle sur la notion de l'homme raisonnable en matière civile pour dire que le résultat automatique doit se produire par la notion de l'homme moyen, de l'homme de la rue.*

[...]

<sup>19</sup> *Ibid.*, at paras. 19 and 20.

<sup>20</sup> *Ibid.*, at paras. 5 and 8.

38. The Supreme Court of Canada allowed the appeal for the reasons given by Beauregard J.A., dissenting,<sup>21</sup> but did not overturn the majority's first finding regarding the application of normal centrifugal force to the blade. This finding was recently followed by the Court of Québec (Criminal and Penal Division).<sup>22</sup>
39. By adopting Beauregard J.A.'s dissenting reasons, the Supreme Court of Canada agreed that, even if some skill and manipulation (such as disabling a safety lock) may be required to open the blade by centrifugal force, the blade nonetheless opens automatically and the knife falls within the definition of a prohibited weapon. Citing the highest court's decision, the Tribunal found in *La Sagesse de l'Eau* that the automaticity of the opening of the blade was not negated by the need for additional manipulations.<sup>23</sup>
40. In *R. v. Richard*, the New Brunswick Court of Appeal, in considering the purpose of the prohibition, found that a knife is "open" as defined in subsection 84(1) of the *Criminal Code* when the blade is fully open, with the capacity for use as a weapon.<sup>24</sup>
41. Considering these appellate court decisions, CBSA submits that a knife that has a blade that fully opens with an arm and wrist motion, which may involve some skill and manipulation, applying the force of a normal person, falls within the definition of a prohibited weapon as provided in subsection 84(1) of the *Criminal Code*.

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<sup>21</sup> *R. v. Vaughan*, *supra* note 13.

<sup>22</sup> *R. c. Herpin*, 2013 QCCQ 6416 (QC), at para. 16 – Tab 12.

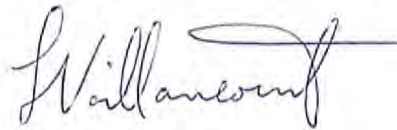
<sup>23</sup> *La Sagesse de l'Eau v President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT), at paras. 46 and 50.

<sup>24</sup> *R. v. Richard*, *supra* note 12, at para. 7.

### VIII – CONCLUSION

42. CBSA respectfully requests that the Tribunal exercise its discretion, in the spirit of section 70 of the *Act*, and render an opinion on how to conduct a test for determining whether a knife is a prohibited weapon.
  
43. CBSA also respectfully requests that the Tribunal determine the tariff classification of the five knives in issue based on CBSA's proposed test and its own observations.

**Dated September 8, 2017.**



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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Québec Regional Office (Ottawa)  
284 Wellington Street, SAT-6  
Ottawa, Ontario K1A 0H8  
Fax: 613-946-2777

**Per: Luc Vaillancourt**

Tel.: 613-957-4658

Email: [luc.vaillancourt@justice.gc.ca](mailto:luc.vaillancourt@justice.gc.ca)

*Counsel for the Respondent*