



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2017-012

T. LaPlante

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Thursday, November 16, 2017*

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DECISION ..... 6

IN THE MATTER OF an appeal heard on November 9, 2017, 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, dated March 14, 2017, with respect to a request for re-determination pursuant to section 60 of the *Customs Act*.

**BETWEEN**

**T. LAPLANTE**

**Appellant**

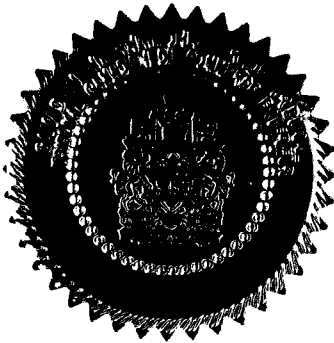
**AND**

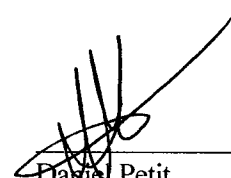
**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is dismissed.



  
\_\_\_\_\_  
Daniel Petit  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: November 9, 2017  
Tribunal Panel: Daniel Petit, Presiding Member  
Support Staff: Dustin Kenall, Counsel

**PARTICIPANTS:**

**Appellant**

T. LaPlante

**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Nancy Azzi

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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision, made on March 14, 2017, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).
2. The issue in this appeal is whether five Kershaw Skyline Model 1760 folding knives (the goods in issue) imported by T. LaPlante are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*<sup>2</sup> as prohibited weapons and, therefore, prohibited from importation into Canada pursuant to subsection 136(1) of the *Act*.

### PROCEDURAL HISTORY

3. The goods in issue arrived in Canada by mail on or around August 29, 2016, and were detained by the CBSA under section 101 of the *Act*.
4. On October 19, 2016, the CBSA informed the appellant by letter that the goods in issue 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*.
5. On December 5, 2016, the CBSA acknowledged receipt of the appellant's dispute notice filed the same day.
6. On March 14, 2017, the assigned appeals officer informed the appellant by letter that she had, on behalf of the President of the CBSA, considered the request for re-determination and denied it, finding that the knives in issue were prohibited weapons as each of them, upon examination, opened automatically by centrifugal force with a flick of the wrist.
7. On May 12, 2017, the appellant filed the present appeal before the Tribunal, pursuant to subsection 67(1) of the *Act*.
8. On July 12, 2017, the appellant filed its brief.<sup>3</sup>
9. On September 8, 2017, the CBSA filed its brief, in which it neither supported nor opposed the appeal, but rather sought the Tribunal's opinion on the proper test to apply. In its brief, the CBSA represented that it asked the appeals officer who denied the request for re-determination to retest each knife "by trying to open the blade with an arm and wrist motion, but without using the flipper on the blade". Although the CBSA did not explain what prompted the retesting, it did allege that while none of the knives has a torsion bar to assist in opening, they do have a "caged ball-bearing opening system" which, with use of the flipper, allows the knives to open with ease.<sup>4</sup> As a result of the retesting, one of the tested knives "opened repeatedly with the arm and wrist motion . . . [and] [t]he other four knives eventually opened with

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

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

3. Exhibit AP-2017-012-04, Vol. 1.

4. Exhibit-AP-2017-012-06A at paras. 14-15, Vol. 1.

the arm and wrist motion, but generally after more than one attempt”.<sup>5</sup> The CBSA reported that “[n]one of the knives opened by a *mere* flick of the wrist. They did so with a forceful arm and wrist motion”.<sup>6</sup>

10. The CBSA submitted that the Tribunal’s decisions apply the “flick of the wrist” test to determine whether a knife opens automatically by centrifugal force, but the decisions do not “provide many details as to what that test entails”. In light of the above, the CBSA sought the Tribunal’s “opinion, in the spirit of section 70 of the *Act*” on how to conduct the test to determine whether a knife opens automatically by centrifugal force, and advised that it would rely on the Tribunal’s own examination of the five knives as they are subjected to that test to determine their proper classification.

11. On October 6, 2017, the appellant filed a reply brief. The appellant denied that the goods in issue contain a caged ball-bearing opening system, submitting that the CBSA concluded that they did so on the basis of a misreading of online marketing material applicable to other models of knives. The appellant further submitted that the retesting results contradict the reported findings of the same appeals officer in her re-determination decision dated March 14, 2017. Finally, the appellant objected to the Tribunal broadening its test from a “flick of the wrist” to an “opening with an arm and wrist motion”.<sup>7</sup>

12. On October 25, 2017, on the basis of the new issues raised by the CBSA in its brief and pursuant to Rule 36 of the *Canadian International Trade Rules*,<sup>8</sup> the Tribunal ordered the CBSA to file further submissions on the following:

- (1) whether the CBSA is taking the position that the flipper of the knives at issue works with the caged ball bearings as an opening “device” for purposes of the definition of a “prohibited weapon”;
- (2) whether there is any evidence that the specific model (Kershaw Skyline) of the knives at issue in this appeal contains the “caged ball-bearing opening system”, as alleged at paragraph 14 of the respondent’s brief; and
- (3) whether there is any evidence, other than the Web site marketing printout found at page 41 in tab 5 of the index of annexes of the respondent’s brief, that the caged ball bearings operate as an assisted-opening device.<sup>9</sup>

13. On October 27, 2017, the CBSA responded to the Tribunal’s requested submissions. It stated that it was not taking the position that caged ball bearings act as a device and that the only question was whether the goods in issue can be opened by centrifugal force without having to manipulate the flipper. It further advised that it had not disassembled the knives to confirm whether they contained the ball bearing system as doing so might have affected their opening mechanism, but it argued that there was no indication that the online marketing material regarding the ball bearings did not apply to all manual opening knives manufactured by Kai USA-Ltd. It confirmed that there was no other evidence in the record that the goods in issue contained the ball-bearing system.<sup>10</sup>

14. On November 1, 2017, the appellant filed a reply. The appellant observed that the CBSA had combined two different sets of documents in tab 5 of its brief. The first three pages are the marketing

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5. *Ibid.* at paras. 17-19.

6. *Ibid.* at para. 20.

7. Exhibit AP-2017-012-09, Vol. 1.

8. SOR/91-499 [*Rules*].

9. Exhibit AP-2017-012-12, Vol. 1.

10. Exhibit AP-2017-012-13, Vol. 1.

materials for the specific model (Skyline) of the goods in issue, the last of which lists technical specifications, which notably do not identify the “KVT Ball-Bearing Opening System”. The remainder of tab 5 is a printout of the full 23 pages found under the “Technology” tab at the bottom of the general Web site of Kai USA-Ltd., i.e. not part of the page for the Skyline models. These list all the technologies for all models of knives manufactured by Kai USA-Ltd. The appellant also disputed the CBSA’s statement that there was no evidence that the goods in issue did not contain the ball-bearing system, referencing the appellant’s earlier reply brief that attached photographs of a disassembled Skyline Model 1760 knife, on which no ball bearings were visible.<sup>11</sup>

15. On November 9, 2017, the Tribunal heard the matter by way of written submissions, in accordance with Rules 25 and 25.1 of the *Rules*.<sup>12</sup> The goods in issue were made available and were examined by the Tribunal during the file hearing.

## GOODS IN ISSUE

16. The goods in issue are five Kershaw Skyline Model 1760 folding knives manufactured in the United States by Kai USA-Ltd.<sup>13</sup> They each weigh 70.9 grams and include a flipper, a liner lock, a pocket clip, a handle made of epoxy-filled woven-glass fibre, and a 7.9-cm steel blade.<sup>14</sup>

## LEGAL FRAMEWORK

17. 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.	L’importation des marchandises des n <sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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[Emphasis added]

18. Tariff item No. 9898.00.00 provides as follows:

Firearms, prohibited weapons, restricted weapons, <i>prohibited devices</i> , 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 . . . .	Armes à feu, armes prohibées, armes à autorisation restreinte, <i>dispositifs prohibés</i> , 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 [...].
...	[...]
For the purposes of this tariff item,	Pour l’application du présent numéro tarifaire :
...	[...]
(b) “automatic firearm”, “licence”, “prohibited ammunition”, “ <i>prohibited device</i> ”, “prohibited firearm”, <i>prohibited weapon</i> , restricted firearm and “restricted weapon” have the same	b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « <i>dispositif prohibé</i> », « munitions

11. Exhibit AP-2017-012-14, Vol. 1.

12. SOR/91-499.

13. Exhibit-AP-2017-012-06A, tab 5, Vol. 1.

14. *Ibid.*, tab 5 at p. 21.

meanings as in subsection 84(1) of the Criminal Code;      prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du Code criminel;

[Emphasis added]

19. 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*<sup>15</sup> 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 the said provision if the conditions and requirements thereof and of any applicable regulations are met”.

20. According to the *Customs Tariff*, a “prohibited device” includes any items defined as a “prohibited device” in subsection 84(1) of the *Criminal Code*.<sup>16</sup>

21. In accordance with subsection 84(1) of the *Criminal Code*, “prohibited weapon” means the following:

- |   |   |
|---|---|
| <p>(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</p> <p>(b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon;</p> | <p>a) Couteau dont la lame s'ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche;</p> <p>b) toute arme — qui n'est pas une arme à feu — désignée comme telle par règlement.</p> |
|---|---|

22. Thus, in order to determine whether the goods in issue are properly classified as a prohibited device 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 subsection 84(1) of the *Criminal Code*.

## TRIBUNAL ANALYSIS

23. Given that the CBSA has conceded that it is not claiming that the goods in issue open automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knives, the Tribunal finds the question of whether the goods in issue contain a caged ball bearing system to be moot.<sup>17</sup>

24. Therefore, this appeal raises only two questions:

- a. How should the test for determining whether a knife opens automatically by centrifugal force be conducted? And
- b. Based on that test and the Tribunal's own observations about the goods in issue, should the five knives be classified as prohibited weapons?

15. S.C. 1997, c. 36, schedule [*General Rules*].

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

17. To the extent that the question could be relevant, the Tribunal finds that the CBSA has not demonstrated on a balance of probabilities that the goods in issue contain a caged ball-bearing opening system. As noted above, the only evidence submitted is the online marketing printout. However, this printout is not associated with the Skyline model of knives and, contrary to the CBSA's assertions, there is no evidence that this technology is incorporated into all models of manual opening knives made by the manufacturer. In particular, the technical specifications pages for the Skyline model do not reference it, and no caged ball bearings appear in the photographs of the disassembled knife submitted by the appellant (which the CBSA did not challenge).



### Legal Test for Whether a Knife Opens Automatically by Centrifugal Force

25. The CBSA submitted that the test should be reworded to whether the knife fully opens “with an arm and wrist motion, which may involve some skill and manipulation, applying the force of a normal person”.<sup>18</sup> In support, it observed that the purpose of the prohibited weapon provision applicable to knives is to render illegal knives that can be carried or held concealed in the hand and automatically opened by centrifugal force, thereby making the knife available for use as a weapon.<sup>19</sup> It noted that nothing in the *Criminal Code* provides for how much force needs to be applied to open the knife.<sup>20</sup> It relied principally on *R. v. Vaughan*, in which the Supreme Court of Canada affirmed the Appeal Court of Québec’s decision in a criminal proceeding, that a knife is a prohibited weapon when the force of a normal person is applied to it, even if some skill and manipulation are required to open the blade.<sup>21</sup> The CBSA noted that the Tribunal has held, citing *Vaughan* in *La Sagesse de l’Eau*, that a knife still opens “automatically” even when additional manipulations are required.<sup>22</sup>

26. The appellant opposed a broadening of the test beyond the current description of the “flick of the wrist”, arguing that courts have not adopted a broader test, that one is not needed and, regardless, that the CBSA’s proposed test is poorly defined.

27. The Tribunal does not agree that the test for whether a knife opens automatically by centrifugal force needs to be revised or particularized further at this time. The Tribunal has repeatedly held that a knife opens automatically by centrifugal force when “a simple and brisk outwardly flick of the wrist releases the blade from the handle into the fully ejected and locked position”.<sup>23</sup> It has also repeatedly held, consistent with *Vaughan*, that a knife may still open automatically by centrifugal force even if it requires some manipulation or skill.<sup>24</sup> Finally, the Tribunal has recognized that the determination of whether a knife is a prohibited weapon should not turn on easily adjustable features of an individual knife (such as the tightness of a pivot screw) when the overall design of a model is to render such knives generally capable of opening with centrifugal force.<sup>25</sup>

28. The CBSA asked the Tribunal to particularize the force, body parts, skill and number of swings involved in such a test, but the Tribunal finds that doing so is unnecessary and, possibly, counterproductive. The current test has sufficed for over twenty years, with no evidence that importers or the CBSA officers have had difficulty applying it.<sup>26</sup> These subtle gradations and distinctions in terms of the testing the CBSA proposed in its brief are drawn from the criminal law context, where they have arisen as a result of the *mens rea* evidentiary requirement and the beyond-a-reasonable-doubt burden of proof. Neither of these concepts

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18. Exhibit-AP-2017-012-06A at para. 41, Vol. 1.

19. *R. v. Richard*, [1981] N.B.J. No. 274 (NB CA) at para. 7; *R. v. Archer*, [1983] O.J. No. 92 (ON CA) at para. 7.

20. *R. v. Vaughan*, [1990] R.J.Q. 2064 (QC CA), at para. 19.

21. *R. v. Vaughan*, [1991] 3 S.C.R. 691 (SCC) [*Vaughan*].

22. *La Sagesse de l’Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) [*La Sagesse de l’Eau*] at paras. 46 and 50.

23. *R. Christie v. President of the Canada Border Services Agency* (15 January 2014), AP-2012-072 (CITT) at para. 25.

24. See *Digital Canoe Inc. v. President of the Canada Border Services Agency* (12 July 2006), AP-2004-047 (CITT) [*Digital Canoe*] at paras. 12-15. See also *La Sagesse de l’Eau* at para. 46 (“the need for a minimum of manipulations does not necessarily negate the automaticity of the opening of the blade”).

25. *Kenneth Lee v. President of the Canada Border Services Agency* (12 July 2006), AP-2003-054 (CITT) at para. 12.

26. See *R. Gustas v. Deputy M.N.R.* (14 January 1997), AP-96-006 (CITT).

is relevant to determining whether a knife is a prohibited weapon for purposes of barring its importation in an administrative law (non-criminal) proceeding.

### Whether the Goods in Issue Open Automatically by Centrifugal Force

29. The Tribunal closely examined and tested the goods in issue at the file hearing of this matter. This included reviewing their packaging material and instructions, as well as opening and closing the knives repeatedly. When fully closed, the knives have a tendency to stay closed and do not open automatically with a mere flick of the wrist. However, they do open automatically when a flick of the wrist is accompanied with minimal manipulation by the thumb of either the flipper or other non-edged parts of the blade, such as the nail nick, to overcome the initial resistance. In fact, the instructions include directions on opening the blade without using the flipper, requiring only that the user “push gently outwards on the thumbstud”, referring to a part of the blade directly under the thumb when held in the closed position.<sup>27</sup>

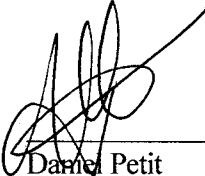
30. Once the blade is barely ajar, it easily, swiftly and readily swings into a fully opened and locked position with a simple, “slight flip of the wrist” as the instructions themselves confirm.<sup>28</sup> All of this can be accomplished in one simultaneous, single-handed movement with the wrist, thumb and forefinger.

31. The Tribunal has ruled in prior cases that a knife may still open automatically by centrifugal force even if it requires some preliminary or simultaneous manipulation of a flipper or part of the blade.<sup>29</sup> In recent cases, it has also ruled that a knife may be a prohibited weapon if the flipper works in combination with a device, such as a torsion bar, to enable the knife to open automatically.<sup>30</sup> As found above, there is no such device (in the form of caged ball bearings) in these knives. However, the Tribunal has never ruled, and subsection 84(1) of the *Criminal Code* does not provide, that a knife only opens automatically by centrifugal force when no manipulation is required of any part of the knife. The swiftness and ease with which the goods in issue open is in no way inferior to that of other knives that do not start in a locked position. The Tribunal does not believe that Parliament would have intended, or that the text of the statute commands, that the former be treated any differently than the latter.

### DECISION

32. The Tribunal therefore finds that the goods in issue are properly classified under tariff item No. 9898.00.00 as prohibited weapons, in accordance with the requirements of paragraph 84(1)(a) of the *Criminal Code*, as the goods in issue open automatically by centrifugal force.

33. Accordingly, the appeal is dismissed.



Daniel Petit  
Presiding Member

27. Exhibit AP-2017-012-B-01.

28. *Ibid.* The instructions include the following advice under the heading “Opening a Kershaw Manual Folder”: “If you have trouble moving the blade fully out of the handle, add a slight flip of the wrist.”

29. *Digital Canoe* at paras. 13-15.

30. *R.S. Abrams v. President of the Canada Border Services Agency* (21 December 2016), AP-2016-004 (CITT) at paras. 21-22.





**BY ELECTRONIC MAIL**

November 16, 2017

Mr. Troy LaPlante  
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- and -

Ms. Nancy Azzi  
Department of Justice Canada  
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Montréal, Québec H2Z 1X4

Dear Mr. LaPlante and Ms. Azzi:

**Subject: Appeal No. AP-2017-012**  
**T. LaPlante (*Customs Act*)**

Enclosed is a copy of the Decision and Reasons of the Canadian International Trade Tribunal, in English only, in respect of the above-noted appeal.

This decision can be appealed to the Federal Court of Appeal within 90 days of the date of the Tribunal's decision in accordance with section 68(1) of the *Customs Act*. If you decide to appeal this decision, please contact your local Federal Court of Canada office for more details and kindly advise the Tribunal.

Yours sincerely,

Michel Parent  
Registrar

Enclosure

c.c.: Ms. Sylvie Renaud  
Canada Border Services Agency

## **Bruneau, Geneviève**

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**From:** CITT-TCCE  
**Sent:** November-16-17 4:58 PM  
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**Cc:** Sylvie.Renaud@cbsa-asfc.gc.ca  
**Subject:** AP-2017-012 / T. LaPlante / Tribunal letter transmitting Decision and Reasons  
**Attachments:** Tribunal letter transmitting Decision and Reasons.pdf; Decision and Reasons (E).pdf

Regarding the above-mentioned matter, please see the attached correspondence.

**Michel Parent**

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