Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-078

Disco-Tech Industries, Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Thursday, August 11, 2011

Canada

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IN THE MATTER OF an appeal heard on April 11, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 11, 2010, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

DISCO-TECH INDUSTRIES, INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Vancouver, British Columbia
Date of Hearing:	April 11, 2011
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber Danielle Lussier-Meek
Research Director:	Audrey Chapman
Research Officer:	Jan Wojcik
Manager, Registrar Office:	Michel Parent
Senior Registrar Officer:	Sarah MacMillan

PARTICIPANTS:

Appellant	**Counsel/Representative**
Disco-Tech Industries, Inc.	Chris Youngson
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Paul Battin

WITNESSES:

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Managing Director
Disco-Tech Industries, Inc.

Murray A. Smith
Manager
Specialized Firearms Support Services
Firearms Investigative and Enforcement Services Directorate
Canadian Firearms Program
Royal Canadian Mounted Police

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Disco-Tech Industries, Inc. (Disco-Tech) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4).

2. The issue in this appeal is whether certain cartridge magazines (the goods in issue) are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*[2] as prohibited devices, as determined by the CBSA, or should be classified under tariff item No. 9305.29.90 as other parts and accessories of articles of heading Nos. 93.01 to 93.04, as claimed by Disco-Tech.

PROCEDURAL HISTORY

3. On September 23, 2009, the CBSA classified the goods in issue under tariff item No. 9898.00.00 as prohibited devices of subsection 84(1) of the *Criminal Code*.[3] It followed that they were detained in accordance with subsection 136(1) of the *Customs Tariff*, which prohibits the importation of goods of tariff item No. 9898.00.00.

4. On October 2, 2009, Disco-Tech requested a re-determination of the tariff classification of the goods in issue, pursuant to subsection 60(4) of the *Act*. On January 11, 2010, the CBSA confirmed the classification of the goods in issue.[4]

5. On February 25, 2010, Disco-Tech filed an appeal with the Tribunal. This matter had originally been set for a hearing by way of written submissions. However, after a review of the issues raised in this appeal and in another appeal also submitted by Disco-Tech (Appeal No. AP-2009-081), the Tribunal decided to hear both matters by way of oral hearings pursuant to paragraph 25(*a*) of the *Canadian International Trade Tribunal Rules*.[5]

6. On April 11, 2011, the Tribunal held a public hearing in Vancouver, British Columbia. Mr. Chris Youngson, Managing Director of Disco-Tech, testified on its behalf. Mr. Murray A. Smith, Manager, Specialized Firearms Support Services, Firearms Investigative and Enforcement Services Directorate, Canadian Firearms Program, Royal Canadian Mounted Police (RCMP), appeared as a witness for the CBSA. The Tribunal qualified him as an expert in the field of forensic science specializing in firearms.

GOODS IN ISSUE

7. The goods in issue are 5,000 cartridge magazines for holding ammunition. Each magazine has a capacity of 20 cartridges.

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1. R.S.C.1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. R.S.C. 1985, c. C-46.
4. Reference was made to Memorandum D19-13-2, "Importing and Exporting Firearms, Weapons and Devices" (23 June 2009).
5. S.O.R./91-499.

8. The goods in issue were each wrapped in a paper package with an adhesive label that reads as follows: "AIA M10 BOLT ACTION RIFLE, MADE IN KOREA".[6] These labels were applied on a printed package label that reads as follows: "M-14/M1A Magazine, 20 Rounds, NSN 1005-628-9048, Made in Korea". The goods in issue are made of metal, and at the base of each magazine is printed the following: "FOR AIA M10 BOLT ACTION RIFLES CALIBER .308 WIN - 20 ROUNDS".[7]

9. Disco-Tech filed a series of colour photographs as an exhibit to these proceedings. These photographs depict parts of cartridge magazines and rifles photographed from different angles.[8]

10. The CBSA filed the goods in issue as physical exhibits.[9]

LEGAL FRAMEWORK

11. The relevant legislative and regulatory provisions in this appeal are as follows.

12. Subsections 136(1) and (2) of the *Customs Tariff* provide as follows:

> **136**.(1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.
>
> (2) Subsection 10(1) does not apply in respect of goods referred to in subsection (1).[10]

13. The relevant provisions of the *Customs Tariff*, which the CBSA considers applicable to the goods in issue, are as follows:

Section XXI

WORKS OF ART, COLLECTORS' PIECES AND ANTIQUES

Chapter 98

SPECIAL CLASSIFICATION PROVISIONS - NON COMMERCIAL

. . .

9898.00.00	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:
	. . .
	(b) prohibited goods imported by a business that holds a licence authorizing it to acquire and possess those goods, . . .
	. . .
	h) arms, ammunition, implements or munitions of war, army, naval or air stores and any articles deemed capable of being converted into any such things or made useful in the production of any such things, imported with a permit issued under section 8 of the Export and Import Permits Act;
	. . .

6. "AIA" stands for "Australian International Arms".
7. Tribunal Exhibit AP-2009-078-10A, tab 1.
8. Tribunal Exhibit AP-2009-078-36A.
9. Exhibits B-01 and B-02.
10. Subsection 10(1) of the *Customs Tariff* provides as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule."

> For the purposes of this tariff item,
>
> (a) "firearms" and "weapon" have the same meaning as in section 2 of the Criminal Code;
>
> (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;

. . .

14. The relevant note to Chapter 98 provides as follows:

> 1. The provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a). Goods which are described in any provision of this Chapter are classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

15. The relevant provisions of the *Criminal Code* provide as follows:

> **84.** (1) In this Part,
>
> . . .
>
> "cartridge magazine" means a device or container from which ammunition may be fed into the firing chamber of a firearm;
>
> . . .
>
> "prohibited device" means
>
> . . .
>
> (*d*) a cartridge magazine that is prescribed to be a prohibited device, or
>
> . . .

16. The relevant provisions of the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*[11] provide as follows:

> **5.** The components and parts of weapons, accessories, and cartridge magazines listed in Part 4 of the schedule are prohibited devices for the purposes of paragraphs (*a*) and (*d*) of the definition "prohibited device" in subsection 84(1) of the *Criminal Code*.
>
> . . .
>
> PART 4
>
> PROHIBITED DEVICES
>
> . . .
>
> Former Cartridge Magazine Control Regulations
>
> **3.** (1) Any cartridge magazine
>
> (*a*) that is capable of containing more than five cartridges of the type for which the magazine was originally designed and that is designed or manufactured for use in
>
> . . .
>
> (ii) a semi-automatic firearm other than a semi-automatic handgun,

11. S.O.R./98-462 [*Firearms Regulations*].

> (iii) an automatic firearm whether or not it has been altered to discharge only one projectile with one pressure of the trigger,
>
> . . .

17. The relevant provisions of the *Customs Tariff* that Disco-Tech claims should apply to the goods in issue provide as follows:

> **Section XIX**
>
> **ARMS AND AMMUNITION; PARTS AND ACCESSORIES THEREOF**
>
> **Chapter 93**
>
> **ARMS AND AMMUNITION; PARTS AND ACCESSORIES THEREOF**
>
> . . .
>
> **93.05 Parts and accessories of articles of headings 93.01 to 93.04.**
>
> . . .
>
> **-Of shotguns or rifles of heading 93.03**:
>
> . . .
>
> **9305.29 - -Other**
>
> . . .
>
> 9305.29.90 - - -Other
>
> . . .

18. There are no legal notes to Section XIX and Chapter 93 that are relevant to this appeal. The relevant *Explanatory Notes* to Chapter 93 provide as follows:

> Subject to a few **exceptions** (see the Explanatory Notes to headings 93.05 and 93.06), the Chapter also includes parts and accessories of arms and parts of ammunition.

19. The relevant *Explanatory Notes* to heading No. 93.05 provide as follows:

> The parts and accessories of this heading include:
>
> . . .
>
> (2) **Metal castings, stampings and forgings, for military small arms, sporting and target shooting guns, etc., revolvers and pistols**, e.g., barrels, breeches, locks, trigger guards, tumblers, levers, percussion hammers, cocking pieces, triggers, sears, extractors, ejectors, frames (of pistols), plates, butt plates, safety catches, cylinders (for revolvers), front and back sights, magazines.

POSITIONS OF THE PARTIES

20. Disco-Tech's position is that the goods in issue were not "designed or manufactured for use in" a semi-automatic rifle, but rather in a bolt action rifle, which, in this case, is the AIA M10 bolt action rifle. Consequently, they do not meet the definition of "prohibited device" set out in the *Criminal Code*. Disco-Tech argued that the goods in issue should therefore be considered parts and accessories of a rifle and be classified under tariff item No. 9305.29.90.

21. Disco-Tech submitted that the classification of a magazine should be determined according to the firearm for which it is designed, not for which it is used or could be used in.[12] Disco-Tech maintained that the goods in issue were specifically "designed or manufactured for use in" the manually operated bolt action rifle that is the AIA M10.[13] According to Disco-Tech, this assertion is confirmed by etchings on the package labelling of the goods in issue.

22. A labelling issue was identified by the CBSA in regard to the packaging of the goods in issue. Under the "AIA M10 BOLT ACTION RIFLE" label was another label that read as follows: "M-14/M1A Magazine, 20 Rounds, NSN 1005-628-9048". Disco-Tech argued that the manufacturer simply used the same paper packaging which it would have used for M-14-type magazines and applied an AIA M10 label over the M-14/M1A label because the goods in issue and M-14 cartridge magazines with a 20 round capacity are the same size.

23. Disco-Tech further argued that the goods in issue resemble the original magazines for the M-14 rifle, with the exception that they lack a front latching hole or catch slot.[14] According to Disco-Tech, while the goods in issue may fit in the M-14 automatic rifle, and the M1A and M305 semi-automatic rifles, they will not function correctly because of the absence of this front catch slot.[15] In support of this point, Disco-Tech relied on 1955 patent documents authored by the late John C. Garand and on U.S. military inspection documents that describe the necessity of a front catch slot (latching hole) for an M-14 magazine to fit adequately into an M-14 automatic rifle or any of its semi-automatic variants, such as the M305.[16]

24. Disco-Tech highlighted how the RCMP report confirms the ". . . absence of a [latching] hole on the front of the magazine and a different détente (sic) . . ." that differentiate bolt action rifle magazines, such as the goods in issue, from the original M-14 automatic and semi-automatic rifle magazines.[17]

25. The goods in issue were analyzed by the RCMP's Specialized Firearms Support Services. The RCMP found that the goods in issue were 20-round capacity magazines suitable for use in M-14 rifles and actually functioned to varying degrees in semi-automatic M1A and M305 rifles, but that they did not function properly when tested with the AIA M10 bolt action rifle.[18] In response to the RCMP's finding that the goods in issue do not function properly in AIA M10 rifles, Disco-Tech argued that it is common for cartridge magazines to require initial hand-fitting to fit and function in an AIA M10 rifle.[19]

26. The CBSA agreed with Disco-Tech's submission that the goods in issue resemble cartridge magazines for the M-14 rifle, with the one exception being the absence of a latching hole in the front of the magazine. On this issue, the CBSA referred to the Tribunal's decision in *Jencon Bits of Pieces v. Commissioner of the Canada Customs and Revenue Agency*[20] to argue that creating a latching hole in the goods in issue would enable improved attachment to an M-14 rifle.

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12. Tribunal Exhibit AP-2009-078-06 at 60.
13. *Ibid.* at 35.
14. *Ibid.* at 54-56.
15. *Ibid.* at 3.
16. *Ibid.* at 57-59.
17. *Ibid.* at 4. The parties agree however that the goods in issue are similar in design to the M-14 cartridge magazines except for the front catch slot. *Transcript of Public Hearing*, 11 April 2011, at 13, 28-31, 39, 41, 45, 47, 49, 51, 56, 59. See also Tribunal Exhibit AP-2009-078-10A at paras. 22, 27, 31.
18. Tribunal Exhibit AP-2009-078-19A at 11-13.
19. Tribunal Exhibit AP-2009-078-06 at 39-51.
20. (12 July 2006), AP-2003-009 (CITT). In this decision, the Tribunal states, at para. 14, as follows: "Upon examination, the Tribunal determined that the goods in issue could be converted to cartridge magazines in a relatively short period of time with relative ease. . . . Consequently, it is clear that the goods in issue are designed or intended to be assembled into cartridge magazines of various firearms. . . . Thus, the goods in issue satisfy the criteria of Part 4 of the schedule to the [*Firearms*] *Regulations*. Consequently, they meet the *Criminal Code* definition of 'prohibited device'."

27. Regardless of the etching or label that identifies the goods in issue as being for an AIA M10 rifle, the CBSA submitted that, upon testing by the RCMP, the goods in issue operated in M-14 rifles and their variants, even without the presence of a latching hole, and simply did not operate in AIA M10 rifles.

28. The CBSA submitted, as an alternative argument, that the goods in issue are dual-purpose magazines for use in both AIA M10 bolt action and M-14 (and variants) automatic or semi-automatic rifles. It is uncontested that the goods in issue hold 20 cartridges and that cartridge magazines (for automatic or semi-automatic rifles) that hold more than 5 cartridges are prohibited devices. The CBSA contended that, since the goods in issue resemble cartridge magazines for use in automatic or semi-automatic rifles, are designed for use in either automatic, semi-automatic or bolt action rifles, and only fit into and function in automatic and semi-automatic rifles, the goods in issue meet the definitions of prohibited devices contained in subsection 84(1) of the *Criminal Code* and the *Firearms Regulations*.

ANALYSIS

Discussion of the Law

29. The Tribunal heard arguments regarding the applicability, to this appeal, of the rule developed by the Supreme Court of Canada in *R. v. Hasselwander*.[21] In fact, both parties referred to this decision to different ends, in an attempt to either prove or disprove its applicability to the present case.

30. Both parties addressed this issue as being central to the classification of the goods in issue. On the one hand, Disco-Tech argued that the goods in issue were parts and accessories of rifles or shotguns and that the *Hasselwander* test had to be "relativized" according to the teachings of the Supreme Court of Canada. For its part, the CBSA argued that, in *Hasselwander*, the Supreme Court of Canada clearly illustrated that the threshold of capability of conversion of a specific item was low and specifically referred to the purposive approach of entitling the community to protection from prohibited devices.

31. The Tribunal finds that *Hasselwander* is not perfectly germane to this appeal. Indeed, *Hasselwander*, when decided upon, dealt with legislative provisions that are different from the regulatory ones that are engaged in this appeal.

32. More specifically, the use of the word "capable" in the regulatory provision in issue in this appeal is not used in the same context as it is found in the legislative provision that was in issue in *Hasselwander*. An examination of *Hasselwander* and a contrasting of those provisions serve nevertheless as a starting point for the analysis upon which the Tribunal embarked to reach its conclusion.

33. *Hasselwander* dealt with the interpretation of the word "capable" as found in the definition of "prohibited weapon" in paragraph 84(1)(*c*) of the *Criminal Code*, which, at the time of that decision, provided as follows: "any firearm, not being a restricted weapon described in paragraph (*c*) of the definition of that expression in this subsection, that is <u>*capable*</u> of firing projectiles in rapid succession during one pressure of the trigger . . . ." [Italics added for emphasis]

34. In contrast, the regulatory provision that is before the Tribunal in this matter concerns "prohibited devices" and, most importantly, uses the word "capable" in a similar but significantly different context. As indicated above, paragraph 3(1)(*a*) of the *Firearms Regulations* provides as follows:

> PART 4
>
> PROHIBITED DEVICES
>
> . . .
>
> Former Cartridge Magazine Control Regulations
>
> **3.** (1) Any cartridge magazine

21. [1993] 2 S.C.R. 398 [*Hasselwander*].

> (*a*) that is capable of containing more than five cartridges of the type for which the magazine was originally designed and that is designed or manufactured for use in
>
> . . .
>
> (ii) a semi-automatic firearm other than a semi-automatic handgun,
>
> (iii) an automatic firearm whether or not it has been altered to discharge only one projectile with one pressure of the trigger,
>
> . . .

35. In *Hasselwander*, the word "capable" and the underlying notion of *capability* dealt with ease and speed of conversion into an automatic weapon.[22]

36. In the regulatory provision at issue in this appeal, the word "capable" refers only to whether or not a magazine is "capable" of containing more than five cartridges (the first requirement).

37. As a matter of statutory construction, the word "capable" in the first requirement of paragraph 3(1)(*a*) of the *Firearms Regulations* does not affect the second requirement of that paragraph, namely, whether the cartridge being examined is also "designed or manufactured for use in" a

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22. In *Hassselwander* at 414-15, 416, the Supreme Court of Canada stated as follows:

> "Let us consider for a moment the nature of automatic weapons, that is to say, those weapons that are capable of firing rounds in rapid succession during one pressure of the trigger. These guns are designed to kill and maim a large number of people rapidly and effectively. They serve no other purpose. They are not designed for hunting any animal but man. They are not designed to test the skill and accuracy of a marksman. Their sole function is to kill people. These weapons are of no value for the hunter, or the marksman. They should then be used only by the Armed Forces and, in some circumstances, by the police forces. There can be no doubt that they pose such a threat that they constitute a real and present danger to all Canadians. There is good reason to prohibit their use in light of the threat which they pose and the limited use to which they can be put. Their prohibition ensures a safer society.
>
> . . .
>
> "This Court, in R. v. Covin, [1983] 1 S.C.R. 725, determined that a purposive approach should be taken in interpreting the definition of 'firearm'. In that case, the issue was whether a pellet gun from which several essential parts were missing could be considered a firearm within the meaning of s. 83 (now s. 85) and s. 82 (now s. 84) of the Criminal Code. The definition of 'firearm' in s. 84(1) includes 'anything that can be adapted for use as a firearm'. In deciding whether the instrument in question fell within the definition of a 'firearm', Lamer J., as he then was, employed the purposive approach to determine the acceptable amount of adaptation required in order for something to be considered a firearm. At page 729 of that case Lamer J. stated:
>
> > In my view the acceptable amount of adaptation and the time required therefore for something to still remain within the definition is dependent upon the nature of the offence where the definition is involved. The purpose of each section should be identified and the amount, nature and the time span for adaptation determined so as to support Parliament's endeavour when enacting that given section.
>
> It is equally appropriate to utilize the purposive approach in order to determine the meaning of the phrase 'capable of firing bullets in rapid succession during one pressure of the trigger'.
>
> . . .
>
> "What then, should 'capable' mean as it is used in the s. 84(1) definition of prohibited weapon? It should not be restricted to the narrow meaning of immediately capable. Such a definition would mean that the simple removal of a part which could be replaced in seconds would take the weapon outside the definition. This surely could not have been the intention of Parliament. If it were, the danger from automatic weapons would continue to exist just as strongly as it did before the prohibition was enacted.
>
> . . .
>
> "Yet, that potential aspect must be given some reasonable restriction. It is the proper role of the court to define the meaning of "capable" as it is used in the definition of "prohibited weapon" in s. 84(1). In my view, it should mean capable of conversion to an automatic weapon in a relatively short period of time with relative ease."

semi-automatic or automatic firearm (the second requirement). This is because the word "capable" is found and fully contained in the first requirement, which is separated by the word "and" from the second requirement, which is itself also a fully self-containing segment of a phrase.

38. The Tribunal stresses this point because it understood the CBSA to have argued that the word "capable" in paragraph 3(1)(*a*) of the *Firearms Regulations* also effected the second requirement. As indicated above, it does not. That being said, the Tribunal is nevertheless of the view that the second requirement of paragraph 3(1)(*a*) does indeed contain a fundamental element akin to the notion of *capability*. But the source of this *capability* is not the word "capable" *per se*. Rather, it finds its source in Parliament's use of the words "designed or manufactured *for use in*" [emphasis added]. Indeed, if something can be "used in" an automatic or semi-automatic firearm, it follows that it is necessarily *capable* of said use in that firearm.

39. In studying this piece of legislation, the Tribunal considered the application of the modern rule of statutory interpretation. As such, the Tribunal believes that this interpretation is grounded in the grammatical and ordinary meaning of the verb "to use",[23] which is also consonant with the meaning of the verb "*servir*"[24] that was used by Parliament in the corresponding French version of the *Firearms Regulations.* The Court of Appeal of British Columbia examined the very meaning of those words in *R. v. Cancade* and gave a very enlightening analysis to this end.[25] The Tribunal notes the CBSA's argument to the effect that a

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23. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "use": "**2** : to put into action or service . . . ***syn*** USE, EMPLOY, UTILIZE mean to put into service esp. to attain an end. USE implies availing oneself of something as a means or instrument to an end . . . .

24. *Le Petit Robert*, 2011, *s.v.* "*servir*": **II** . . . **1** *Aider en étant utile ou utilisé.* . . . **2** . . . *être utile, utilisé à..., pour* . . . .

25. 2011 BCCA 105 (CanLII) at paras. 15-17, 21:

> "[15] . . . The appellant notes the French definition of 'cartridge magazine' reads '«chargeur» Tout dispositif ou contenant servant à charger la chambre d'une arme à feu'. Stress is laid on the word 'servant', said to be the present participle of the verb 'servir'. It is argued that the present tense of that verb implies only a present capacity: 'to be of use to', 'to be used for', 'to serve as'. The appellant submits that trial judge erred in her task of interpreting the definition section when she found that the word 'may' in the English version of the definition section speaks to not only a present capacity but also a future capacity.
>
> "[16] The Crown respondent joins issue with the appellant on this argument. Although the Crown acknowledges that the trial judge was not invited to consider this linguistic submission, it argues that had she been so asked, no different result would have obtained. In her written argument, counsel for the Crown says this:
>
> > 27. The Respondent submits the following translation, facilitated through the Larousse online translation service (www.larousse.com/en/dictionaries/translator) is more consistent with the meaning of 'servir' in this particular context and with other sections of the *Code*:
> >
> > Any device or container <u>used</u> to load the chamber of a firearm. [Respondent's emphasis]
> >
> > 28. 'Servir' has a variety of meanings and uses. A simple definition can be found in *Le Traducteur Instantané:*
> >
> > **Servir** avail, <u>to be of use</u>
> > **Servir à qqch** <u>to come in useful for sth</u>
> > Denis Frechette, *Le Traduct[eu]r Instantané*, (Montréal: Les Éditions Olographes, 1997). [Respondent's emphasis]
> >
> > 29. A more detailed definition appears in other French dictionaries, for example in the Robert-Collins Dictionnaire (Don Mills: Collins, 1984) one of the definitions is 'to be of use', 'help to', 'to be of use in, be useful for'.
>
> "[17] The Crown respondent submits that if one takes the meaning 'used to load' as a proper translation of the French version of the definition, such is sufficiently similar to the English version to support the conclusion of the trial judge that the definition can encompass a future ability of the device to be rendered easily serviceable to feed bullets into a firearm.
>
> . . .
>
> "[21] I am in general agreement with the submission of the respondent that there is no particular discordance between the French and English versions of the definition of cartridge magazine in the *Criminal Code* and the Regulations."

purposive approach to interpreting paragraph 3(1)(*a*) of the *Firearms Regulations* would also be warranted in the present case (i.e. to serve the purpose of the *Firearms Regulations* in not allowing high-capacity magazines to be available in Canada for reasons of public safety). The Tribunal however believes that this purposive approach was not required, as the application of the modern rule of statutory interpretation sufficed in resolving this issue.

Discussion of the Facts

40. Disco-Tech indicated that the goods in issue do not have the square front cut-out hole (latching hole or slot) that is found in the original M-14 magazines. According to Disco-Tech, that feature allows positive latching of the magazine at the front end of the firearm and prevents the magazine from camming, which describes the tilting of a magazine outside of its fully engaged or normal position in the magazine well or magazine port of the firearm.

41. According to Disco-Tech, the absence of this cut-out hole is a principal distinguishing factor between the goods in issue and M-14 magazines. In fact, Mr. Youngson testified to the effect that, when ordering the magazines from the manufacturer, he specifically requested that this front cut-out hole not be included in the final product in order to differentiate it from a typical M-14 magazine.

42. Disco-Tech also indicated that a number of pistol magazines with a capacity in excess of five rounds are readily available in the Canadian market and that such magazines can also be used alternatively in certain semi-automatic rifles. According to Disco-Tech, this situation is tolerated by the CBSA and police authorities, which means that there is a double standard between the treatment of such magazines and the goods in issue which the CBSA is seeking to have classified as prohibited.

43. Disco-Tech essentially takes the position that the goods in issue were specifically designed for the AIA M10 bolt action rifle and not the M-14 rifle (or any of its variants), specifically because of the absence of the front catch slot, and that, as such, cannot be caught by the prohibition.

44. The CBSA challenged Disco-Tech's claim that the goods in issue were designed and manufactured for the AIA M10 bolt action rifle by reference to Mr. Smith's expert opinion that they do not properly function in them, that is, if they function at all.

45. On that issue, Disco-Tech replied that any type of aftermarket magazines, such as the goods in issue, often require minor fitting adjustments.

46. The Tribunal is nonetheless faced with uncontradicted expert evidence from Mr. Smith, who concluded that the goods in issue are essentially defective for use in AIA M10 bolt action rifles, as they will fall out once the action is cycled.

47. Aside from Mr. Youngson's assertions that some aftermarket fitting or adjustments may be required, Disco-Tech did not provide any evidence that would indicate that the goods in issue actually *do* fit or function in the AIA M10 bolt action rifle.

48. On that point, the CBSA claimed that the goods in issue function in an automatic M-14 rifle and many of its semi-automatic variants.

49. Again, that claim was also supported by expert testimony from Mr. Smith, who ran various tests on the goods in issue in the RCMP's forensic laboratory. Those tests showed that the goods in issue did indeed function in M-14 rifles and different semi-automatic variants, albeit with varying degrees of success, but that

they did function nonetheless. Relying on that evidence, the CBSA took the position that, if the goods in issue functioned in an M-14 rifle, it must be that they were designed and manufactured for use in such a rifle.

50. This expert evidence was neither challenged nor rebutted through any independent or otherwise adduced evidence by Disco-Tech.

51. The Tribunal also notes that neither party provided any technical specifications (such as technical drawings) for the goods in issue, whether original or aftermarket AIA M10 magazines, or for the AIA M10 rifles themselves, in order to compare the goods in issue with actual M-14-type magazines or to find out how the magazines would or would not fit into the rifles. Essentially, the CBSA rests its position entirely on Mr. Smith's expert opinion.

52. The Tribunal's findings of fact are therefore as follows.

53. First, the goods in issue contain more than five rounds.

54. Second, the uncontested expert testimony on record shows that the goods in issue function in semi-automatic or automatic firearms, notably the M-14 and its variants, including the M305 semi-automatic rifle. Mr. Smith also testified that the absence of the spring rod latching hole does not affect the supply of cartridges to the firing mechanism.[26] The Tribunal adopts these findings of fact.

55. Third, the uncontested expert testimony on record shows that the goods in issue, because of their size and design, can be immediately placed in a semi-automatic or automatic firearm, such as the M-14 or its variants, and can function in those firearms. As such, the Tribunal finds that the goods in issue can be easily made to fit into such firearms as they are presented, i.e. without any conversion whatsoever.

56. The Tribunal notes that it has no reason to question Mr. Youngson's testimony to the effect that Disco-Tech asked its manufacturer to provide it with magazines that were designed for the AIA M10 bolt action rifle. However, as a matter of fact, merely setting out to design and/or manufacture a magazine that is intended for a bolt action rifle, no matter how *bona fide* that intention may be, does not preclude that magazine from happening to be designed or manufactured "for use in" a semi-automatic or automatic firearm, if that magazine is effectively shown to have the capacity to function in such a weapon. To find otherwise would lead to the absurd result that mere intent in design and manufacture (an easy proposition to make and perhaps impossible to disprove) would suffice as a shield against the prohibition even in cases, such as this one, where in fact a magazine works in a semi-automatic or automatic firearm.

57. In the circumstances of this appeal, however, the only expert testimony on record is to the effect that the goods in issue do *not* function in the AIA M10 bolt action rifle for which they were purportedly designed to fit. In the absence of any expert testimony on behalf of Disco-Tech, the Tribunal gives no weight to Mr. Youngson's assertion that the goods in issue can fit the AIA M10 bolt action riffle upon minor "fitting" adjustments.

Application of the Law to the Facts

58. The Tribunal recalls its analysis, as discussed above, relative to the expression "for use in", as it appears in the *Firearms Regulations*. The Tribunal also recalls the following findings of fact: (1) the goods in issue contain more than five rounds; and (2) they can clearly be put into action or service in a

26. *Transcript of Public Hearing,* 11 April 2011, at 80-81, 85.

semi-automatic or automatic firearm. As such, the goods in issue are therefore "for use in" such firearms. On the basis of the foregoing analysis and considering the Tribunal's findings of fact, the Tribunal finds that the goods in issue meet the definition of "prohibited device" of paragraph 3(1)(*a*) of the *Firearms Regulations*.

59. Consequently, the goods in issue are properly classified under tariff item No. 9898.00.00 as prohibited devices and are therefore prohibited from importation into Canada.

DECISION

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

Jason W. Downey
Jason W. Downey
Presiding Member