



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-081

Disco-Tech Industries, Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, July 7, 2011*

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 DECISION 12

IN THE MATTER OF an appeal heard on April 12 and 13 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 December 4, 2009, 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

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing: Vancouver, British Columbia
Dates of Hearing: April 12 and 13, 2011

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Respondent	Counsel/Representative
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WITNESSES:

Murray A. Smith	Manager Specialized Firearms Support Services Firearms Investigative and Enforcement Services Directorate Canadian Firearms Program Royal Canadian Mounted Police
Chris Youngson	Managing Director Disco-Tech Industries, Inc.

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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 of the President of the Canada Border Services Agency (CBSA), dated December 4, 2009, with respect to a request for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether 800 rifles (the firearms in issue) and 4,000 cartridge magazines (the magazines in issue), (together, the goods in issue), are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² as prohibited firearms and/or prohibited devices, respectively, as determined by the CBSA. Disco-Tech claims that the firearms in issue should be classified under tariff item No. 9303.30.90 as other rifles and that the magazines in issue 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.

PROCEDURAL HISTORY

3. On January 24, 2009, Disco-Tech reported and accounted for the goods in issue under tariff item No. 9303.30.90 as other rifles.

4. On March 31, 2009, the CBSA classified the goods in issue under tariff item No. 9898.00.00, having found that they were prohibited firearms or prohibited devices of subsection 84(1) of the *Criminal Code*.³ It followed that the CBSA detained the goods in issue in accordance with section 101 and subsection 136(1) of the *Customs Tariff*, which prohibit the importation of goods of tariff item No. 9898.00.00.

5. On June 12, 2009, Disco-Tech requested a re-determination of the tariff classification of the goods in issue, claiming that the firearms in issue should be classified under tariff item No. 9303.30.90 as other firearms and that the magazines in issue should be classified under tariff item No. 9305.29.90 as parts and accessories of articles of heading Nos. 93.01 to 93.04.

6. On December 4, 2009, the CBSA re-determined the tariff classification of the goods in issue pursuant to subsection 60(4) of the *Act* and maintained their classification and prohibition from importation into Canada with continued classification according to tariff item No. 9898.00.00 of the *Customs Tariff*.

7. On February 25, 2010, Disco-Tech filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

8. 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-2009-078), the Tribunal decided to hear both matters by way of oral hearings.⁴

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. Pursuant to paragraph 25(a) of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499 [*Rules*].

9. On January 5, 2011, Disco-Tech filed a notice of motion, pursuant to rule 24 of the *Rules*, for an order requesting that the CBSA produce information concerning the purported method by which the CBSA claimed that the firearms in issue could be converted to automatic fire. On January 13, 2011, the CBSA filed its response to that motion. On January 16, 2011, Disco-Tech filed reply submissions.

10. On January 18, 2011, the Tribunal wrote to the parties and indicated that it would reserve ruling on Disco-Tech's motion until after the CBSA filed an expert witness report in this matter. Accordingly, the Tribunal allowed Disco-Tech's motion to stand until the filing of the expert witness report, and the Tribunal indicated that Disco-Tech would then have to indicate whether it still wished to pursue its motion.

11. On March 10, 2011, the Tribunal requested submissions from both parties on the issue of whether the goods in issue should be classified separately or together.⁵ On March 16, 2011, Disco-Tech submitted its response. On March 24, 2011, the CBSA submitted its response. As indicated below, further submissions were made on this issue at the hearing, and the Tribunal reserved judgment at that time. The Tribunal rules on this issue below.

12. On April 12 and 13, 2011, the Tribunal held a public hearing in Vancouver, British Columbia.

13. Mr. Chris Youngson, Managing Director, 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 Mr. Smith as an expert in the field of forensic science specializing in firearms.

GOODS IN ISSUE

14. The goods in issue are 800 Type 97A rifles and 4,000 cartridge magazines. They were imported in 80 wooden cases, with each case containing 10 rifles and 50 cartridge magazines.⁶

15. According to the description on the CBSA Notice of Detention form K26 and the commercial invoice, the firearms in issue are Type 97A semi-automatic, 5.56 mm calibre rifles, exported by China North Industries Corporation, whose trade name is Norinco.⁷ The semi-automatic nature of the firearms is disputed by the CBSA, which believes that these rifles are easily convertible to fully automatic fire.

16. Disco-Tech claimed that the magazines in issue have a 5-round capacity. This claim is also disputed by the CBSA, which takes the position that certain components found in the magazines in issue (spacers and springs) can be altered after importation so as to increase their capacity to 30 rounds.

5. Tribunal Exhibit AP-2009-081-31.

6. Tribunal Exhibit AP-2009-081-01A; Tribunal Exhibit AP-2009-081-17A, tab 4.

7. Tribunal Exhibit AP-2009-081-01A; Tribunal Exhibit AP-2009-081-17A, tab 6. Type 97 firearms are part of a wider family of firearms that have as origin the Chinese Type 95 rifle. The Chinese Type 95 rifles are modern, fully automatic assault rifles developed by the People's Republic of China for its armed forces. Whereas the Type 95 rifles use a proprietary Chinese military calibre, the Type 97 rifles use a NATO 5.56-mm calibre (0.223 Remington in North America). Apart from these calibre changes, the Type 95 and Type 97 firearms are identical.

17. Disco Tech filed 28 photographs as exhibits that depict rifles, parts of cartridge magazines and cartridge magazines photographed from different angles.⁸

18. The CBSA filed four exhibits.⁹ The Tribunal examined the goods in issue during the hearing and benefitted from actual demonstrations of their respective functioning.

LEGAL FRAMEWORK

19. The relevant legislative and regulatory provisions are as follows.

20. Subsection 136(1) of the *Customs Tariff* provides as follows:

PART 5

PROHIBITED GOODS

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

21. The relevant provisions of the schedule to the *Customs Tariff* are as follows:

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;

...

For the purposes of this tariff item,

(a) “firearms” and “weapon” have the same meaning as in section 2 of the Criminal Code;

8. Tribunal Exhibit AP-2009-081-41.

9. Exhibit B-01—Norinco T 97A, No. 08000567; Exhibit B-02—Norinco T 97A (in packaging), No. 08000687; Exhibit B-03—ammunition magazine; Exhibit B-04—ammunition magazine (in packaging).

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.”

(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;

...

22. The relevant chapter 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.

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

2. In this Act,

...

“firearm” means a barreled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

...

“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;

...

84. (1) In this Part,

...

“automatic firearm” means a firearm that is capable of, or assembled or designed and manufactured with the capability of, discharging projectiles in rapid succession during one pressure of the trigger;

...

“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

...

“prohibited firearm” means

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

...

24. 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:

1. In these Regulations, “semi-automatic”, in respect of a firearm, means a firearm that is equipped with a mechanism that, following the discharge of a cartridge, automatically operates to complete any part of the reloading cycle necessary to prepare for the discharge of the next cartridge.

...

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,

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

...

POSITIONS OF THE PARTIES

Firearms in Issue

25. Disco-Tech submitted that the firearms in issue are semi-automatic rifles (i.e. they fire only one shot with each pull of the trigger as opposed to automatics, which will continue to fire round after round while the trigger is depressed or until the magazine empties),¹² the importation of which is not prohibited. Disco-Tech relied on a letter from the manufacturer of the firearms in issue in which it is claimed that they were specifically made as semi-automatic weapons.¹³

26. In response to the CBSA’s position as to the actual nature of the firearms in issue, Disco-Tech submitted that the Supreme Court of Canada’s decision in *R. v. Hasselwander*¹⁴ set out three conditions that must be met in determining whether a semi-automatic firearm is capable of conversion to a fully automatic weapon within the meaning of subsection 84(1) of the *Criminal Code*. Those conditions are as follows:

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

12. Tribunal Exhibit A-2009-081-12A.

13. Tribunal Exhibit AP-2009-081-01A; Tribunal Exhibit AP-2009-081-12A; Tribunal Exhibit AP-2009-081-37A, tab D.

14. [1993] 2 S.C.R. 398 [*Hasselwander*].

(i) the goods must be capable of conversion with relative ease, (ii) in a relatively short period of time, and (iii) the parts required for conversion must be readily available (i.e. the *Hasselwander* test).¹⁵ Disco-Tech argued that the CBSA did not demonstrate that the firearms in issue met the *Hasselwander* test.¹⁶

27. Generally, Disco-Tech argued that the CBSA failed to demonstrate that the firearms in issue met the *Hasselwander* test.¹⁷

28. Disco-Tech also argued that the *Hasselwander* test must be assessed against a person with reasonable skill (as opposed to exceptional skill), expertise and resources. Disco-Tech alleged that the RCMP firearms laboratory and technicians fell into the latter category; conversely a person with reasonable skill would not be capable of converting the firearms in issue with relative ease because such a person would not have knowledge of expert conversion techniques.¹⁸

29. Disco-Tech submitted that it took approximately one month¹⁹ for the RCMP to convert the firearms in issue from semi-automatic to automatic, which would run contrary to the *Hasselwander* requirement that conversion should be possible “in a relatively short period of time”. Disco-Tech relied on case law in support of this position.²⁰

30. The CBSA argued that the manner in which the firearms in issue can be converted meets the requirements of the *Hasselwander* test.²¹ The CBSA referred to Mr. Smith’s report and testimony that the firearms in issue can be very quickly converted into automatic firearms using existing parts and a small spring, a paper clip, a Popsicle stick or a straw. The report did not however specifically indicate how this conversion could take place.

15. *Hasselwander* at 23-24: “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. There can be no doubt that on the findings of the Provincial Court judge, which are well supported by the evidence, this weapon comes within that definition.”

16. Tribunal Exhibit AP-2009-081-12A at 2-4; *Transcript of Public Hearing*, 13 April 2011, at 162-71. *Hasselwander* at 14, 23-24: “Constable Soley’s evidence also indicated that alternate parts were readily available from various sources and notwithstanding the restricted aspect of some manufacturers parts supplies it does appear that the adaptability of fully automatic parts to this weapon remains an easy exercise. . . . 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. There can be no doubt that on the findings of the Provincial Court judge, which are well supported by the evidence, this weapon comes within that definition.”

17. Tribunal Exhibit AP-2009-081-12A at 2-4; *Transcript of Public Hearing*, 13 April 2011, at 162-71.

18. *Ibid.*

19. Disco-Tech estimates the time period from February 11, 2009, when the CBSA shipped the goods in issue to the RCMP for testing, to March 16, 2009, when the RCMP issued its report.

20. *Special Missions Group Limited v. Deputy M.N.R.* (13 February 1996), AP-89-284 (CITT); *Douglas Anderson and Creed Evans v. Deputy M.N.R.C.E.* (6 April 1992), AP-89-234 (CITT); *Daniel Spiess v. Deputy M.N.R.* (27 October 1995), AP-94-256 (CITT); *Martin Lechasseur v. Deputy M.N.R.* (6 March 1996), AP-94-172 (CITT).

21. The CBSA also referred to the recent application of the *Hasselwander* test in *R. v. Cancade* 2008 BCPC 0336 (CanLII) and *R. v. Cancade* 2011 BCCA 105 (CanLII); *Transcript of Public Hearing*, 13 April 2011, at 199-201.

31. The CBSA submitted that the firearms in issue were manufactured as automatic weapons and only subsequently made into semi-automatic weapons following an internal re-arranging of certain parts. In support of this view, the CBSA referred to the RCMP Firearms Reference Table Report No. 129257, which describes the firearms in issue as Norinco Type 97A REM automatic rifles. This description was confirmed by Mr. Smith.²²

32. The CBSA argued that the *Hasselwander* test does not involve “a person of reasonable but not exceptional skill” as argued by Disco-Tech and that, therefore, to consider such a parameter would be to add a new criterion to the *Hasselwander* test.

33. The CBSA further submitted that the purpose of the legislative and regulatory provisions in issue is the protection of the public from weapons and that the Tribunal should interpret those provisions accordingly.

Magazines in Issue

34. The parties agreed that, according to paragraph 3(1)(a) of the *Firearms Regulations*, the only legally permissible cartridge magazines for semi-automatic weapons are those that are limited to five cartridges of the designated calibre.

35. Disco-Tech submitted that, even though the magazines in issue were of a 30-round type, they could no longer hold the 30 rounds for which they were originally designed. Disco-Tech claimed that their capacity had been limited to only five rounds as a result of the addition of a metal spacer. Disco-Tech submitted that the spacer would have been welded to the base plate of the retainer. According to Disco-Tech, this modification purportedly prevents the insertion of more than five cartridges.

36. Disco-Tech also submitted that the spring used in the magazines in issue is shorter than the one found in the 30-round capacity version and that this too contributes to limiting capacity to 5 rounds.

37. Disco-Tech noted that Memorandum D19-13-2²³ accepts riveting as suitable for blocking magazines, but argued that a spot weld is stronger than a rivet. In support of this position, Disco-Tech submitted that the removal of a spot weld requires grinding and filing, whereas a rivet can be easily drilled out. Furthermore, Disco-Tech submitted that unmodified parts are not readily available to replace the modified parts in the magazines in issue in order to convert them to full capacity.

38. The CBSA submitted that the magazines in issue can be easily modified by simply removing the spacer in the magazine, thus increasing the magazine’s capacity to its original 30 -rounds.²⁴ Consequently, the CBSA argued that the magazines in issue meet the definition of prohibited devices in subsection 84(1) of the *Criminal Code*.

22. Tribunal Exhibit AP-2009-081-17A, tabs 5, 6; Tribunal Exhibit AP-2009-081-01A.

23. “Importing and Exporting Firearms, Weapons and Devices” (23 June 2009).

24. Tribunal Exhibit AP-2009-081-37A, tab 1 at 5-6.

ANALYSIS

Preliminary Matters

Classification of the Goods in Issue as One or Two Goods

39. The CBSA took the position that the goods in issue should be classified together because they were imported together. In support of this position, the CBSA cited Tribunal case law²⁵ and the fact that the goods in issue were imported together in the same shipment. Disco-Tech took the position that the firearms in issue and the magazines in issue should be classified separately, given that the *Criminal Code* treats them differently.

40. There was some confusion at the hearing and in the documents on record regarding the actual condition of the goods in issue at the time of importation,²⁶ as well as with respect to the name of the importer of record.²⁷ In the end, the Tribunal is satisfied that it has before it an appeal regarding a shipment of 80 wooden crates, each containing 10 firearms and 50 magazines, for a total of 800 firearms and 4,000 cartridge magazines.²⁸

41. There are well established rules that govern the classification of different goods packaged together for retail sale.²⁹ In such cases, the Tribunal has, in the past, under certain conditions, accepted goods as being classifiable together. However, there is no indication in the record that the goods in issue were out-of-the-crate and on-to-the-shelf kits consisting of a firearm and one or more cartridge magazines destined for retail sale, in the original packaging, without further repackaging.

42. Rather, the wooden crates and any packaging in which the firearms in issue and magazines in issue came to Canada clearly appear to have been used for conveyance purposes only.³⁰ As such, the Tribunal finds that the goods in issue do not form goods put up in sets for retail sale and, therefore, that the firearms in issue and magazines in issue must be considered separately for classification purposes.

Request by CBSA for in Camera Expert Testimony

43. The day of the hearing, the CBSA requested that Mr. Smith be able to give part of his testimony *in camera*. The CBSA indicated that it did not want Mr. Smith to discuss publicly the techniques that could allegedly be used to convert the firearms in issue to fully automatic mode, because to do so would provide the general public with information that could compromise public safety. Mr. Youngson objected to the introduction of *in camera* testimony.

25. Tribunal Exhibit AP-2009-081-17A, tab A at 7-8.

26. *Transcript of Public Hearing*, 12 April 2011, at 4-19.

27. *Ibid.* at 11.

28. *Ibid.*

29. Rule 3 (b) of the *General Rules* provides as follows: “3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: . . . (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” The *Explanatory Notes* to Rule 3 (b) of the *General Rules* provides as follows: “(X) For the purposes of this Rule, the term ‘goods put up in sets for retail sale’ shall be taken to mean goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).”

30. Tribunal Exhibit AP-2009-081-01A; Tribunal Exhibit AP-2009-081-17A, tab 6 at para. 8.

44. The Tribunal ruled from the bench that it would not hear *in camera* testimony from Mr. Smith, as no confidential expert report had been filed with the Tribunal and that to do otherwise would be contrary to Mr. Youngson's procedural rights.

45. The Tribunal indicated that it understood the important objective of protecting public safety. The Tribunal found, however, that the CBSA had only filed a public expert witness report and, as such, that there was no reason that the examination of Mr. Smith be conducted other than during public testimony.

46. In addition, any *in camera* evidence, even if it were possible for Mr. Youngson to hear it (see discussion below), would have been new evidence and therefore likely to take Mr. Youngson by surprise. The Tribunal ruled that this would be procedurally unfair.

47. Under certain circumstances, the Tribunal can hear *in camera* testimony in the presence of the following persons only: witnesses, Tribunal staff (including stenographers) and counsel that have signed a confidentiality undertaking. Mr. Youngson is not a lawyer and, therefore, is not eligible to offer the guarantees against divulgence of confidential information that are found in the Tribunal's confidentiality undertaking form.³¹ Accordingly, any *in camera* session would necessarily have taken place without Mr. Youngson in the room.³² This would have placed Mr. Youngson in the unenviable situation of having no means whatsoever to assess some potentially important evidence that was being presented against Disco-Tech.

48. The Tribunal explained that, if the CBSA had wanted to examine Mr. Smith *in camera*, it could have filed a confidential expert witness report with the Tribunal at an earlier date. In such a scenario, Mr. Youngson would have had the opportunity to retain counsel who could have consequently filed a confidentiality undertaking for the purposes of having access to such a report.

49. To be sure, such counsel would not have been able to discuss any confidential information with Mr. Youngson, but his procedural rights would have been protected. Indeed, through his counsel, Mr. Youngson would have had the opportunity to cross-examine Mr. Smith on any confidential expert testimony and perhaps call an expert witness of his own. But the CBSA's late request would not have allowed the Tribunal to afford Mr. Youngson the guarantee of this important aspect of his procedural rights and was therefore denied on that basis.³³

Classification of the Firearms in Issue

50. It is commonly said that a picture is worth a thousand words. In this matter, the same rang true for a demonstration which was made during the course of the hearing. Indeed, Mr. Smith demonstrated, to the Tribunal's satisfaction, the very elementary step that can be performed in a mere instant in order to convert the firearms in issue to fully automatic mode.³⁴ The demonstration was extremely telling of how very simple it is to achieve the conversion. So simple, in fact, that it was frankly bemusing.

31. Form III, Declaration and Undertaking; guideline, *Designation, Protection, Use and Transmission of Confidential Information*.

32. The CBSA did not provide any suggestion as to how an *in camera* session could have taken place with Mr. Youngson in the room. Had one been proposed, the Tribunal would have required that any novel undertaking arrangement be in keeping with sections 43 to 49 of the *Canadian International Trade Tribunal Act* and the guideline, *Designation, Protection, Use and Transmission of Confidential Information*.

33. *Transcript of Public Hearing*, 12 April 2011, at 19-29.

34. *Ibid.* at 67-69.

51. In the “Positions of Parties” section above, the Tribunal noted Disco-Tech’s argument that it took the RCMP approximately one month to convert the firearms in issue to fully automatic firearms and that, therefore, the “relatively short period of time” requirement of the *Hasselwander* test had not been met.

52. The Tribunal finds that argument simplistic to say the least. There is no evidence on file to support Disco-Tech’s position. Certainly, after Mr. Smith’s demonstration, the Tribunal gives no credence whatsoever to the idea that the RCMP would have been labouring night and day for a month to figure out the very simple technique that the Tribunal was shown at the hearing.

53. Rather, in all likelihood, it is probably more plausible to assume that the approximate one-month period was simply the time that it took for the RCMP to perform its analysis of the file relating to the firearms in issue after their detention. Accordingly, the Tribunal gives no weight to that argument.

54. Having viewed this demonstration, the Tribunal understands the CBSA’s reticence towards spelling out the conversion procedure in its expert witness report and, further, its request for the *in camera* portion of the hearing. As discussed above, this request was denied by reason of procedural issues.

55. By having Mr. Smith testify publicly as he did, the CBSA successfully walked the very thin line between making its case on the balance of probabilities and putting forward a “how-to” manual describing the conversion process that would then have been available to the general public; this is stated with further emphasis on the simplicity with which these firearms can be converted to fully automatic fire.

56. The Tribunal notes that Mr. Youngson was standing beside Mr. Smith during the demonstration (precisely, he was positioned between the presiding member and Mr. Smith). In fact, Mr. Youngson even assisted Mr. Smith during the demonstration by depressing the trigger.³⁵ He therefore viewed Mr. Smith’s demonstration and he did not question it.

57. The Tribunal underscores the fact that the conversion of the firearms in issue to fully automatic mode can take place, quite literally, in an instant. The conversion requires no tool, no grinding, no cutting and no metal work. The Tribunal is satisfied that the use of a common Popsicle stick or paperclip, as described in Mr. Smith’s expert witness report, is all that is required to reconfigure the existing operating parts of the firearms in issue to achieve fully automatic mode. Mr. Smith’s description of this simple technique in his expert witness report would have led any reader to doubt that such a simple manipulation could have such a result. But his demonstration of how the conversion is done immediately gives it complete credibility.

58. In the present reasons, it is to be understood that the Tribunal will, quite intentionally, not discuss in detail the specific procedures used to convert these firearms back to fully automatic mode. Again, the sheer simplicity behind the procedure and the fact that it is not desirable that this information be found in the public domain unfortunately warrant this approach.

59. The Tribunal notes that the only expert evidence adduced on file is that of Mr. Smith. Disco-Tech chose not to call an expert of its own to counter Mr. Smith’s opinions. In fact, Mr. Youngson did not contest the expert evidence in his testimony nor did he object to it as it was produced.

60. Rather, Disco-Tech produced extensive publicly available information (primarily from the Internet) that purportedly demonstrates how to convert other semi-automatic firearms, such as the SKS and the Ruger 10/22, to fully automatic mode.

35. *Ibid.* at 55-63.

61. On the basis of that information, Disco-Tech essentially took the position that the firearms in issue should not be singled out for prohibition when, according to Disco-Tech, the CBSA and the RCMP are currently tolerating the presence of SKSs, Ruger 10/22s and other semi-automatic firearms in Canada that can also be converted to fully automatic firearms using widely available information.

62. The Tribunal remarks that this appeal is limited to the firearms in issue³⁶ and, therefore, that the properties, real or alleged, of other firearms are of little or no concern in this matter.

63. If anything, however, the evidence brought forward by Disco-Tech as to the ease of conversion and wide availability of information (i.e. on the Internet) concerning the procedures used to convert other firearms to fully automatic mode underscores the CBSA's cautionary approach to guard itself against contributing to what appears to be widely available knowledge of conversion techniques.

64. Of interest, nonetheless, according to the uncontroverted testimony of Mr. Smith, is the fact that the SKS and Ruger 10/22 identified by Disco-Tech were originally designed as semi-automatic firearms (that can nevertheless be converted to automatic mode, but only by way of significant modification or substitution of parts).

65. Conversely, the firearms in issue were originally designed as automatic firearms and simply temporarily restricted to semi-automatic mode. Of course, as indicated above, the conversion technique that can restore fully automatic mode is so elementary as to allow the Tribunal to conclude that the firearms in issue are nothing more than fully automatic firearms purporting to be semi-automatic ones.

66. In fact, the avowed objective of Disco-Tech is to circumvent the prohibition against the fully automatic version of the firearms in issue by asking the manufacturer to make certain modifications in order to make these firearms fire in semi-automatic mode only. The problem, however, lies with the fact that the manufacturer has taken very little away from the original nature of the firearms in issue in the process and such nature can be restored in a matter of seconds.

67. The manufacturer did include in the firearms in issue a notch selector which, from the outside only, allows for semi-automatic firing only, whereas the original QBZ97 Chinese military model, in addition to the semi-automatic and fully automatic modes, also contains a 3-round "burst fire" mode. However, considering the very simple internal manipulations required to convert these firearms to fully automatic fire, the Tribunal finds that differences found in the selector switch, and its operation, are not determinative.

68. In actual fact, the firearms in issue never cease to be fully automatic firearms. They still contain the internal sears for fully automatic mode, as found in the original QBZ97 model. In other words, the firearms in issue contain a fully automatic firing mechanism, which can be easily re-engaged as described above. The notch selector mechanism in the firearms in issue can be easily and rapidly overridden so as to permit fully automatic firing, as it was originally designed to function.

69. As such, the Tribunal finds that the firearms in issue meet the *Hasselwander* test. Consequently, they are properly classified under tariff item No. 9898.00.00.

Classification of the Magazines in Issue

70. The original version of the type of cartridge magazine that is before the Tribunal was designed to contain 30 cartridges and had a long spring attached to the base plate. The magazines in issue use a spacer (attached to the base plate) and a shortened spring (attached to the spacer), which is an attempt to limit their capacity to 5 rounds.³⁷

36. Tribunal Exhibit AP-2009-081-12A at 1; Tribunal Exhibit AP-2009-081-17A at para. 9.

37. Tribunal Exhibit AP-2009-081-37A, tab 1 at 5; Tribunal Exhibit AP-2009-081-17A, tab A.

71. Relying on Mr. Smith's expert witness report and testimony, the CBSA submitted that the magazines in issue can be assembled without that spacer. The removal of the spacer allows for the loading of 30 cartridges. Once the magazines in issue, loaded in that manner, are placed into the firearms in issue, they will function properly, except that the final five cartridges would possibly fail to feed upwards into the firearms in issue as a result of the shorter spring not being able to expand sufficiently to feed the last few cartridges.

72. As indicated above, Disco-Tech had initially submitted that the spacer was welded to the base plate in at least two points and that the removal of those welds therefore complicated the modification of the magazines in issue. Mr. Smith's expert report and testimony made no mention of any welding whatsoever that would join the spacer with the base plate. In questioning at the hearing Mr. Youngson agreed that the magazines in issue contained no such welds.³⁸

73. Mr. Smith demonstrated how the spacer can be removed from the magazines in issue in a matter of seconds. This was a very simple operation. During his testimony, Mr. Smith used nothing but the tip of a pen to remove the base plate. The spacer and spring were removed with his bare hands.³⁹

74. The Tribunal finds that, as soon as the spacer is removed, the magazines in issue are automatically converted to a capacity of 30 cartridges, at least 25 of which will feed into the firearms in issue.⁴⁰

75. The Tribunal notes that, aside from the spacer and shorter spring, the magazine body and base plate of the magazines in issue are identical to their original 30-round capacity version. Any purported modification that is achieved by the spacer and shorter spring is anything but permanent and provides no permanent bar or other device, incorporated into the body of the magazine itself, that would prevent the magazines in issue from containing more than 5 rounds.

76. As such, the Tribunal finds that the magazines in issue meet the requirements of subparagraph 3(1)(a)(iii) of the *Firearms Regulations*. Consequently, they are properly classified under tariff item No. 9898.00.00.

DECISION

77. The appeal is dismissed.

Jason W. Downey

Jason W. Downey
Presiding Member

38. *Transcript of Public Hearing*, 13 April 2011, at 172.

39. *Transcript of Public Hearing*, 12 April 2011, at 136-38.

40. Mr. Smith indicated that a simple extension of the spring that could be achieved by pulling on both ends would probably eliminate the feeding problem for the last 5 or so cartridges.