



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-010

D. Josefowich

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, May 9, 2016*

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DECISION 9

IN THE MATTER OF an appeal heard on January 25, 2016, 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 Agency, dated April 17, 2015, with respect to a request for re-determination pursuant to section 60(4) of the *Customs Act*.

BETWEEN

D. JOSEFOWICH

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 25, 2016
Tribunal Member: Jason W. Downey, Presiding Member
Counsel for the Tribunal: Rebecca Marshall-Pritchard
Senior Registrar Officer: Julie Lescom

PARTICIPANTS:**Appellant**

D. Josefowich

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

PROCEDURAL HISTORY

1. This appeal is filed by Mr. D. Josefowich with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on April 17, 2015, of the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether the CBSA properly classified a “G&P Laser product SP System, M11A1 Steel Conversion Kit, item number GP766”² (the good in issue) as a prohibited firearm under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*³ and, therefore, as a good prohibited from importation into Canada by virtue of subsection 136(1).

3. The CBSA detained the good in issue upon importation on September 26, 2014. On October 8, 2014, Mr. Josefowich requested a re-determination of the tariff classification of the good in issue. Pursuant to subsection 60(4) of the *Act*, the CBSA confirmed that the good in issue was properly classified under tariff item No. 9898.00.00 as a prohibited firearm and that its importation into Canada was prohibited.

4. On June 22, 2015, Mr. Josefowich filed an appeal with the Tribunal.

5. The Tribunal held an oral hearing on January 25, 2016, in accordance with rule 25 of the *Canadian International Trade Tribunal Rules*.⁴

6. On August 26, 2015, Mr. Josefowich requested that his notice of appeal be considered his brief. The CBSA filed its brief in response on October 23, 2015. The CBSA also filed a report prepared by Mr. F.A. William Etter, Chief Firearms Technologist, Specialized Firearms Support Services, Firearms Investigative & Enforcement Services Directorate, Royal Canadian Mounted Police (RCMP), and asked the Tribunal to recognize Mr. Etter as an expert in the identification and classification of firearms. Mr. Etter’s qualifications as a firearms expert were not questioned by Mr. Josefowich. The Tribunal accepted Mr. Etter as an expert in the identification and classification of firearms.

7. During the oral hearing, Mr. Etter referred to an expert report presented with regard to the good in issue. At the outset of his testimony, it was revealed that Mr. Etter’s report was not based on the good in issue; rather, it follows the examination of an identical good, imported at some other time, by another person. The Tribunal had concerns about this discrepancy, but following reassurances by Mr. Etter that the good was absolutely identical and following consent by Mr. Josefowich, it agreed that the report was reliable and helpful nonetheless. While it would have been preferable for Mr. Josefowich’s report to have been based on the good in issue, the conclusions reached in this report were applicable to the good in issue *mutatis mutandis*.

GOOD IN ISSUE

8. The good in issue includes (1) a metal receiver, (2) a metal retractable stock, (3) a metal pin and (4) a metal flash hider. Also included in the kit is a “Madbull XG02 Propane Adapter ‘MADGAO-0002’.”⁵

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2015-010-06A, tab 1 at para. 2, Vol. 1.
3. S.C. 1997, c. 36.
4. S.O.R./91-499.
5. Exhibit AP-2015-010-06A, tab 1 at para. 2, Vol. 1.

The grip is made of metal and rubber. Of the various pieces of the kit, the receiver appeared to be at the centre of the parties' arguments.

9. The CBSA filed the following two physical exhibits for comparison purposes: the good in issue (including the metal receiver) and an authentic Ingram SM11A1 semi-automatic submachine gun (SM11A1).

10. Mr. Josefowich also filed a physical exhibit; his personal Airsoft gun. He imported the good in issue in order to modify his personal Airsoft gun to make it look like an SM11A1. During the hearing, he demonstrated for the Tribunal how the good in issue is designed to be mated with an Airsoft gun, in order to achieve the look of an SM11A1, but with the functioning inner components of a propane-driven Airsoft gun.

11. The Tribunal carefully examined all three physical exhibits during the oral hearing and benefitted from the actual handling, physical comparison and demonstrations of their respective functioning.

STATUTORY FRAMEWORK

12. The following are excerpts of the relevant legislative and regulatory provisions in this appeal.

13. Subsection 136(1) of the *Customs Tariff* reads 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 ^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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14. Tariff Item 9898.00.00 reads 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 [...]
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For the purposes of this tariff item:

Pour l'application du présent numéro tarifaire :

. . .

[...]

(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

b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « *dispositif prohibé* », « munitions prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du Code criminel [...].

15. Thus, in order to determine whether the good in issue is properly classified under tariff item No. 9898.00.00, the Tribunal must first determine if it meets the definition of a "prohibited firearm", in that

it can be used as a receiver/frame for an SM11A1 or, alternatively, the definition of a “prohibited device”, in that it is a replica firearm pursuant to subsection 84(1) of the *Criminal Code*.⁶

16. Subsection 84(1) of the *Criminal Code* provides that a prohibited firearm must meet certain requirements related to barrel length or size of the cartridge that it is designed to discharge. It also includes automatic firearms and any firearm prescribed to be a prohibited firearm. It provides as follows:

prohibited firearm means	arme à feu prohibée
...	...
(d) any firearm that is prescribed to be a prohibited firearm	d) arme à feu désignée comme telle par règlement.

17. Subsection 84(1) of the *Criminal Code* provides that a prohibited device includes, among other things, a replica firearm, which is defined as follows:

replica firearm means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm	réplique Tout objet, qui n’est pas une arme à feu, conçu de façon à en avoir l’apparence exacte — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence. La présente définition exclut tout objet conçu de façon à avoir l’apparence exacte d’une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence.
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18. Section 2 of the *Criminal Code* defines “firearm” as follows:

firearm means a barrelled 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	arme à feu Toute arme susceptible, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, d’infliger des lésions corporelles graves ou la mort à une personne, y compris une carcasse ou une boîte de culasse d’une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.
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19. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

antique firearm means	arme à feu historique Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement.
(a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or	
(b) any firearm that is prescribed to be an antique firearm	

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

20. The *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*.⁷ The firearms listed in Part 1 of the schedule to the *Prohibited Firearms Regulations* are prohibited firearms for the purposes of paragraph (d) of the definition “prohibited firearm” in subsection 84(1) of the *Criminal Code*. Subsection 61 of Part 1 of the schedule to the *Prohibited Firearms Regulations* lists the following firearms:

The firearms of the designs commonly known as the Ingram M10 and M11 pistols, and any variants or modified versions of them, including the Cobray M10 and M11 pistols, the RPB M10, M11, SM10 and SM11 pistols and the SWD M10, M11, SM10 and SM11 pistols.

Les armes à feu des modèles communément appelés pistolets Ingram M10 et M11, ainsi que les armes à feu des mêmes modèles qui comportent des variantes ou qui ont subi des modifications, y compris les pistolets Cobray M10 et M11, les pistolets RPB M10, M11, SM10 et SM11 et les pistolets SWD M10, M11, SM10 et SM11.

POSITIONS OF PARTIES

Mr. Josefowich

21. Mr. Josefowich submitted that the good in issue was not a receiver, as it did not have the bolt, trigger, barrel and follower mechanism to discharge a projectile; it was essentially just the frame without the mechanics required to make it a functioning firearm. Further, Mr. Josefowich argued that he imported the good in issue in order to add realism to his Airsoft gun and that he had no intention of using the good in issue in a criminal manner.⁸ Mr. Josefowich further submitted that replica firearms similar to the good in issue are already sold legally by various retailers in Canada. He claimed that some of these replica firearms available for sale in Canada resemble even more closely real firearms than the good in issue, as they are made entirely of metal and do not have a red plastic tip at the end of the barrel. Finally, Mr. Josefowich submitted that these replica firearms available for sale in Canada are more harmful than the good in issue.

CBSA

22. For its part, the CBSA submitted that the good in issue is properly classified under tariff item No. 98.98.00.00 as a prohibited firearm pursuant to subsection 84(1) of the *Criminal Code* because it is specifically prescribed as an SM11A1 which is a prohibited firearm under section 61 of Part 1 of the schedule to the *Prohibited Firearms Regulations*.⁹

23. The CBSA relied on Mr. Etter’s report which concludes that the good in issue is a firearm, in and of itself, given that the lower receiver is fully functional and is interchangeable with the receiver of an SM11A1.¹⁰ Specifically, Mr. Etter’s report stated that, “[e]ven . . . without a trigger mechanism or magazine . . . this firearm can be fired as a single shot firearm (slam firing) by loading a round into the

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

8. *Transcript of Public Hearing*, Vol. 1, January 25, 2016, at 70, 83.

9. Exhibit AP-2015-010-06A, tab 8 at 47, Vol. 1. The CBSA filed an Ingram SM11A1 as a comparator firearm and used that model for the preparation of its expert report. The CBSA also filed supporting documentation which explained that Ingram was sold to Military Armanment Corporation (MAC) in the early 1970s, which in turn sold the rights to produce M10 and M11 firearms to RPB Industries Inc. later in the 1970s. As such, the Tribunal is satisfied that the SM11A1 is included in the list of firearms set out in section 61 of the *Prohibited Firearms Regulations*.

10. Exhibit AP-2015-010-06A, tab 3, Vol. 1.

chamber and releasing the bolt.”¹¹ Mr. Etter’s report goes on to say that “[i]t is believed that a G&P Airsoft trigger mechanism from the plastic G&P M11A1 version of the item will work for an unknown length of time [until] the metal breech block shears the plastic sear-off and the firearm ceases to function.”¹²

24. Moreover, Mr. Etter’s report stated that, “. . . the entire ‘family’ of firearms into which this receiver/frame can be assembled . . . is listed as prohibited in section 61 of the *Prohibited Firearms Regulations*.”¹³ As such, the CBSA argued that, because the definition of a firearm in section 2 of the *Criminal Code* includes a receiver, the good in issue is hence a prescribed prohibited firearm.¹⁴

25. Finally, during his testimony, Mr. Etter demonstrated, through manipulation of the good in issue and the SM11A1, that the barrelled upper section of the firearm (including the barrel, follower and receiver) is not what is considered by the RCMP to be the firearm itself, but rather the frame/receiver portion of the firearm, in this case categorized as the lower part of the good in issue.¹⁵ He went on to physically disassemble the upper receiver from the lower part of the SM11A1 and explained the importance of the lower receiver/frame in supporting the actual mechanical, functioning upper section. Mr. Etter insisted that the lower receiver/frame is considered a firearm, in and of itself, because any appropriate barrel/follower can be mated to the frame. He also explained that the lower frame/receiver was the part of the firearm that contained the trigger mechanism required to action the upper follower.¹⁶

26. In the alternative, the CBSA submitted that, if the Tribunal concludes that the good in issue is not a prohibited firearm, it should be classified as a replica firearm and, therefore, a prohibited device that is designed or intended to exactly resemble, or to resemble with near precision, a real firearm, namely, the SM11A1.

27. Regarding Mr. Josefowich’s submission, the CBSA submitted that the burden of proof lies with Mr. Josefowich to demonstrate that the classification of the good in issue is incorrect, and the CBSA argues that Mr. Josefowich has not discharged his burden of proof.

28. The Tribunal notes that Mr. Josefowich was not represented at the hearing and that greater latitude was given to him in order to ensure that he understood the CBSA’s arguments fully and could respond to them satisfactorily.

11. Exhibit AP-2015-010-06A, tab 3 at 4, Vol. 1. It is important to note here that the “chamber” which is mentioned in this part of the report is not part of the good in issue and that the conclusion which Mr. Etter reaches is based on the premise that someone would need to find a chamber, barrel and a follower mechanism and load it into the good in issue before proceeding to such a “slam fire” sequence.

12. Exhibit AP-2015-010-06A, tab 3 at 5, Vol. 1.

13. *Ibid.*, tab 1 at para. 22.

14. *Ibid.*

15. *Transcript of Public Hearing*, 25 January 2016, at 25.

16. *Ibid.* at 26. It is important to note here, as will be explained in more detail below, that the good in issue does not include a trigger mechanism.

ANALYSIS

Is the Good in Issue a Prohibited Firearm?

29. It is well established that appeals to the Tribunal under subsection 67(1) of the *Act* are heard *de novo*.¹⁷ The objective is to determine the correct tariff classification applicable to the good in issue. The Tribunal can accept new evidence and hear new arguments; however, this does not change the fact that the Tribunal “. . . is not a court of equity and must apply the law as it is”¹⁸ Moreover, in that context, Mr. Josefowich bears the burden to demonstrate that the CBSA’s decision on the tariff classification of the good in issue was somehow incorrect.¹⁹

30. The Tribunal will first address the issue of whether the good in issue is a prohibited firearm.

31. The CBSA argued, supported by Mr. Etter’s expert report, that the good in issue, while designed for use with an Airsoft gun, is a firearm, in and of itself, because its lower receiver is a fully functional receiver/frame for MAC, COBRAY, INGRAM, RPB and SWD Model M11-A1 firearms. Part of this argument also lies in the CBSA’s submission that the good in issue is a firearm, in and of itself, because, with the further assembly with additional parts, it could be made to “slam-fire”; a mechanical actioning of the bolt whereby a fixed firing pin, present on the bolt face, is manually “slammed” onto a round resting in the chamber and, therefore detonating it. This sequence was not tested by the expert and lies in his understanding of the mechanics of an SM11A1, especially the fixed firing pin built into the bolt face. In fact, Mr. Etter testified that he would himself be reluctant to slam-fire the good in issue for safety reasons.²⁰

32. This position held by the CBSA and Mr. Etter is problematic, in that it presumes that an upper section of an SM11A1 (barrel, follower, receiver and bolt/firing pin assembly) would somehow be independently available and subsequently mated to the good at issue for the conduct of such a slam-fire sequence. The good in issue, even if the Tribunal were to accept and qualify it as a receiver *per se*, does not include this entire mechanical/barrelled upper section; essentially, half the firearm is missing. This renders the slam-fire discussion somewhat speculative.

33. Following its own examination of the SM11A1 and the good in issue, the Tribunal notes that the good in issue is also lacking the entire trigger mechanism that is found in the authentic SM11A1 receiver. In the genuine firearm, this trigger mechanism is both welded to and integrally built-in as part of the lower frame portion; this trigger mechanism (and any component thereof) is completely absent from the good in issue.

34. This further means that the trigger group is neither mobile nor interchangeable from another SM11A1. Even after the demonstration provided by Mr. Etter, it was difficult to see how a trigger mechanism could somehow be added to the good in issue in order to make it either compatible or functional with an upper receiver, in order to make it a functional firearm. Visually, the trigger mechanism in the genuine SM11A1 presented specialized weldings, incorporated technically bent steel plates and appeared to

17. *Cargill Inc. v. President of the Canada Border Services Agency* (23 May 2014), AP-2012-070 (CITT) at para. 36; *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at para. 8; *Smith v. Minister of National Revenue*, [1965] S.C.R. 582, 1965 CanLII 59 (SCC); *Canada (Minister of National Revenue) v. Rollins Machinery Ltd.*, 1999 CanLII 8763 (FCA).

18. *Jockey Canada Company v. President of the Canada Border Services Agency* (20 December 2012), AP-2011-008 (CITT) at para. 292.

19. Paragraph 153(3)(d) of the *Act*; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at para. 21.

20. *Transcript of Public Hearing*, 25 January 2016 at 61.

be mechanically pressed into the frame itself. As such, it was clear to the Tribunal that the process to include a trigger mechanism in the good in issue would require specialized equipment and a definite expertise which, *prima facie*, would tend to lie in the hands of an actual firearms manufacturer. In Mr. Etter's report, he did not determinatively address the actual addition or potential interchangeability of such a trigger mechanism, nor did he provide any comment/conclusion on the very noticeable characteristics of the trigger mechanism mentioned above.

35. It was also clear to the Tribunal from Mr. Etter's demonstration during the hearing that a magazine from an SM11A1 could not be functionally mated with the good in issue. This means that the good in issue could not be easily converted to a fully functional SM11A1. The Tribunal also notes Mr. Etter's argument that a user *could* modify the magazine opening with a dremel tool or a hand file, so that it *could* possibly accept .380 auto caliber cartridge magazines from an M11A1 or SM11A1.²¹ However, Mr. Etter acknowledged that, even if a magazine managed to be inserted into the handle, the requisite retaining clip to hold that magazine in place and properly feed any rounds would still be absent, rendering the entire exercise ineffectual.²² This retaining mechanism is in fact part of the trigger mechanism itself, which, as discussed, the Tribunal has already determined to be absent in the good in issue.

36. It is well established that the tariff classification according to the *Customs Tariff* must be determined at the time of importation of the goods. The specific or intended use by an importer with regard to an imported good, including any possible modifications available to it, is not always under the CBSA's control and, in this case, is irrelevant to the application of the *Customs Tariff*.²³ Here, the evidence shows that, at the time of importation, the good in issue, while certainly arresting in appearance, was clearly designed to be used as a part to modify an Airsoft gun, which is not a firearm under the *Criminal Code* and/or related legislation. Independently and as importantly, the good in issue does not present the requisite characteristics of a firearm and, more specifically, those necessary to associate it to the prohibited SM11A1 or family of firearms thereof. As such, the Tribunal is not convinced that the good in issue is a firearm. The fact that it is conceivably capable of slam-fire, in a one-off manner, following the inclusion and assembly of a multitude of missing parts, takes nothing away from this conclusion.

37. The Tribunal is therefore satisfied that the good in issue is not a prohibited firearm.

Is the Good in Issue a Prohibited Device?

38. Having already found that the good in issue is not a prohibited firearm, the Tribunal will turn to the CBSA's alternative argument that the good in issue is a replica firearm.

39. As set out in subsection 84(1) of the *Criminal Code*, to be considered a replica firearm, a good must fulfill the following three conditions: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not itself be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

40. Since the Tribunal has already concluded that the good in issue is not a firearm itself, it therefore meets the second condition of the definition of "replica firearm" in this case.

21. Exhibit AP-2015-010-06A, tab 3 at 23, Vol. 1.

22. *Transcript of Public Hearing*, 25 January 2016, at 35-36.

23. This of course precludes those devices that can easily be modified, at the time of importation, to operate as a prohibited device. See, for example, *Disco-Tech Industries, Inc. v. President of the Canada Border Services Agency* (7 July 2011), AP-2009-081 (CITT) at para. 57.

41. The Tribunal must then consider conditions 1 and 3 of the definition of “replica firearm”. With regard to condition 3, it is clear that the good in issue is not an antique firearm, since it was not manufactured before 1898, the cut-off year in the *Criminal Code* for the definition of antique firearms. In fact, the evidence shows that the M11/SM11A1 family of firearms was developed in the 1960s by Ingram and further developed in the 1970s by Military Armament Corporation.²⁴

42. With regard to condition 1, the Tribunal has no difficulty concluding that the good in issue meets the requirements of being designed to exactly resemble, or to resemble with near precision, a firearm that is not an antique firearm. Indeed, Mr. Josefowich did not challenge the conclusion or evidence filed by the CBSA to this effect.

43. As noted above, the Tribunal carefully examined the good in issue and the SM11A1 filed by the CBSA, individually and side by side. The Tribunal also considered Mr. Etter’s expert report. The Tribunal was thus able to ascertain that the good in issue can easily be confused for the Ingram M11A1 submachine gun. Despite very minor, not readily discernable differences, the appearance of the good in issue and the SM1A11 that it imitates are nearly identical. It is apparent from this comparison that the good in issue was created to perfectly replicate the appearance of an SM1A11.

44. The Tribunal observed that the physical characteristics of the good in issue (dimension, construction, materials used and placement of hardware, sights, buttons and levers) are nearly identical to an SM1A11. Physical handling of the good in issue and the SM11A1 is generally the same, and there was no discernible weight difference between the two. In addition, the COBRAY logo appears on the right side of the receiver/frame portion of the good in issue. These markings are indicative that the good in issue was either designed to perfectly mimic an SM1A11 or even potentially manufactured by a genuine firearms manufacturer, but without the internal functioning components which would qualify it as a firearm under the legislation. In this regard, the Tribunal accepts that, for the purposes of the application of tariff item No. 9898.00.00, the good in issue, once assembled, meets those conditions of a replica firearm.

45. Regarding Mr. Josefowich’s submission that he is a law-abiding citizen and that there was no intention to use the good in issue to modify his personal Airsoft gun for a nefarious purpose, the Tribunal is of the view that this is not a relevant consideration for the purpose of determining the proper tariff classification of the good in issue.²⁵ The Tribunal genuinely believes Mr. Josefowich that the good in issue was designed to be fitted to an Airsoft gun in order to only give it the appearance of an SM11A1. But that is the very concern at play. The good in issue was so perfectly designed for that very purpose that it is covered by the covenants of a prohibited “replica” firearm under the *Criminal Code*.

46. With respect to Mr. Josefowich’s arguments that replica firearms, which are identical or similar to the good in issue, are available for purchase from other retailers in Canada, the Tribunal refers to its decision in *Romain L. Klaasen v. President of the Canada Border Services Agency*,²⁶ where the Tribunal stated that “. . . any previous shipments . . . not interpreted by the CBSA or its predecessors is irrelevant. The administrative action, or inaction, of the CBSA cannot change the law.”²⁷ The CBSA did not dispute Mr. Josefowich’s argument that goods similar to the good in issue may be acquired in Canada; this dichotomy in the marketplace propagates an uncomfortable confusion for the general public. On the one hand, similar goods are readily available on the shelves of many large retailers, while, on the other hand, the

24. Exhibit AP-2015-010-06A, tab 8 at 47, Vol. 1.

25. *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT).

26. (18 October 2005), AP-2004-007 (CITT).

27. *Ibid.* at para. 7.

CBSA is litigating cases such as this one against individual importers, albeit through an alternative argument. There is little direction to be ascertained from this approach.

47. However, as has been consistently held by the Tribunal in the past, the Tribunal must apply the law as it is. Therefore, as the Tribunal has concluded that the good in issue is a prohibited device for the purposes of the *Prohibited Firearms Regulations*, the availability of similar goods in Canada is, unfortunately for Mr. Josefowich, not a relevant consideration to the Tribunal's determination of whether the good in issue is a prohibited device for importation into Canada.²⁸

48. Given that the good in issue meets the three conditions of the definition of "replica firearm" set out in subsection 84(1) of the *Criminal Code*, the Tribunal can only conclude that it is a prohibited device. Therefore, the good in issue is properly classified under tariff item No. 9898.00.00, so that its importation into Canada is prohibited under subsection 136(1) of the *Customs Tariff*.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member

28. See, for example, *D. Morgan v. President of the Canada Border Services Agency* (4 December 2014), AP-2014-006 (CITT) at para. 21; *KA Wong v. President of the Canada Border Services Agency* (18 July 2006), AP-2005-036 (CITT) at para. 18.; *Wayne Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT).