



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2019-037

N. Valente

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, November 19, 2020*

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IN THE MATTER OF an appeal heard on October 1, 2020, 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 September 19, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

N. VALENTE

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

Place of Hearing:	Ottawa, Ontario (file hearing)
Date of Hearing:	October 1, 2020
Tribunal Panel:	Randolph W. Heggart, Presiding Member
Support Staff:	Jessye Kilburn, Counsel

PARTICIPANTS:**Appellant**

N. Valente

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

OVERVIEW

[1] The issue in this appeal is whether a “kit” of airsoft gun components is properly classified as a prohibited device¹ which may not be imported into Canada.²

[2] The President of the Canada Border Services Agency (CBSA) determined that the airsoft kit was a replica firearm, which is a prohibited device.³

[3] Mr. Valente has appealed the CBSA’s decision to the Canadian International Trade Tribunal.⁴ He argued that the airsoft kit cannot be classified using the legal definitions of both a firearm and a replica firearm. He also contended that the airsoft kit is solely cosmetic and cannot be held to the import standards regarding projectile velocity of an entire airsoft model.

[4] For the reasons below, the appeal is dismissed. The Tribunal finds that the airsoft kit is a replica firearm, and is therefore a prohibited device which may not be imported into Canada.

THE GOOD IN ISSUE

[5] The good in issue is an airsoft kit designed for use in a “WE/Cybergun M1A1 Thompson Gas Blowback” model of airsoft gun. The airsoft kit includes the barrel, upper receiver and lower receiver of the gun, as well as a few small parts.

PROCEDURAL HISTORY

[6] On September 19, 2019, the CBSA determined⁵ that the good in issue was a replica firearm and therefore prohibited from importation.

[7] Mr. Valente filed the present appeal on November 22, 2019, and his appellant’s brief on January 22, 2020.

[8] The CBSA requested two extensions of time to file its brief, as public health measures related to the COVID-19 pandemic made it impossible to test the good at that time. The Tribunal granted these requests, and the CBSA eventually filed its brief on June 22, 2020.

[9] Mr. Valente filed his reply on July 21, 2020, and the CBSA filed an expert report on August 26, 2020.

[10] The Tribunal gave parties the opportunity⁶ to file any additional documents by September 11, 2020, but neither party made additional submissions.

[11] On September 22, 2020, the CBSA filed the good in issue as a physical exhibit.

¹ Under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36.

² Pursuant to subsection 136(1) of the *Customs Tariff*, which prohibits importation of goods classified under tariff item No. 9898.00.00.

³ As defined in subsection 84(1) of the *Criminal Code*, R.S.C., 1985, c. C-46.

⁴ Pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.).

⁵ Pursuant to section 60 of the *Customs Act*.

⁶ Pursuant to paragraph 34(3)(a) of the *Canadian International Trade Tribunal Rules*, SOR/91-499.

[12] The Tribunal held a file hearing, without the presence of the parties, on October 1, 2020.

STATUTORY FRAMEWORK

[13] The relevant provisions are included in the annex to these reasons.

TRIBUNAL'S ANALYSIS

Preliminary issue: expert witness

[14] The CBSA requested that the Tribunal recognize Mr. Murray Smith as an expert in firearms and related devices.⁷ Mr. Smith was responsible for preparing the CBSA's expert report on behalf of the Royal Canadian Mounted Police (the RCMP Report).

[15] The Tribunal finds that Mr. Smith is qualified as an expert witness in firearms. Mr. Smith's résumé includes extensive firearms-related experience, including as the manager responsible for maintaining the RCMP's Firearms Reference Table, as well as experience as a witness before courts and tribunals.⁸ Mr. Valente has not contested Mr. Smith's expertise.

The good is a replica firearm

[16] The central issue of this appeal is whether the good meets the definition of "replica firearm" in subsection 84(1) of the *Criminal Code*. A replica firearm is a "prohibited device" as defined in subsection 84(1) of the *Criminal Code*, and prohibited devices may not be imported into Canada by virtue of tariff item No. 9898.00.00 of the schedule to the *Customs Tariff* and subsection 136(1) of the *Customs Tariff*. As the appellant, Mr. Valente bears the burden of proving that the importation of the airsoft kit is not prohibited.⁹

[17] The Tribunal has previously broken down the definition of "replica firearm" into a three-part test. A replica firearm must (i) be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (ii) not itself be a firearm; and (iii) not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.¹⁰

(i) The good is designed to resemble a firearm

[18] This first part of the test involves a comparison of the good in issue with the genuine firearm that it is alleged to resemble, considering the size, shape, and general appearance of the good, while allowing for minor differences.¹¹ The good meets this part of the test if it is designed or intended to resemble a genuine firearm, exactly or with near precision.

[19] As the definition of "firearm" includes a frame or receiver,¹² the relevant comparison is whether the good resembles the receiver and/or frame of a genuine firearm.

⁷ The CBSA initially requested the qualification of a different expert, but clarified on August 27, 2020, that its request pertained to Mr. Murray Smith.

⁸ Exhibit AP-2019-037-017 at 18-26.

⁹ See paragraph 152(3)(d) of the *Customs Act*.

¹⁰ *Scott Arthur v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-052 (CITT) at para. 14.

¹¹ *T. Meunier v. President of the Canada Border Services Agency* (12 October 2017), AP-2016-009 (CITT) at para. 25 [*T. Meunier*].

¹² See section 2 of the *Criminal Code*.

[20] The RCMP Report concluded that the good is designed to resemble with near precision a conventional Thompson submachine gun M1 or M1A1.¹³ The CBSA also noted that the good is advertised as “the most realistic Thompson on the market to date”.¹⁴

[21] The Tribunal notes that the applicable regulations list the Thompson submachine gun and any variation of it as a “prohibited firearm”.¹⁵ The Tribunal has examined the images in the RCMP Report, which compares photos of the good in issue alongside photos of a genuine Thompson submachine gun.¹⁶ The Tribunal has also examined the good itself, in person. The physical resemblance between the two devices is evident, despite small differences. The Tribunal therefore finds that the good resembles a prohibited firearm with near precision.

[22] Mr. Valente did not dispute the visual similarities between his airsoft kit and a genuine Thompson submachine gun. However, he did allege an inconsistency between the use of the definition of “firearm” (which, as noted above, includes a frame or receiver) alongside the classification of the good as “not a firearm” in the second part of the test.

[23] In response to Mr. Valente’s argument, the Tribunal wishes to clarify its use of the word “firearm” in this first part of the test. In relying on one part of the definition of “firearm”, the Tribunal’s purpose is to determine which part of the genuine firearm the airsoft components must resemble in order to be considered a replica firearm. As the definition of “firearm” tells us that the frame and receiver are the relevant components, the Tribunal has compared the airsoft frame/receiver to a genuine Thompson submachine frame/receiver. This does not mean that the airsoft kit *is* a firearm, because (as will be explained below) it is not capable of causing serious bodily injury or death to a person and therefore does not fulfil the whole definition of “firearm” in the *Criminal Code*.

(ii) The good is not a firearm

[24] To be considered a replica firearm, the good must not be a firearm itself. According to the *Criminal Code*, a firearm is capable of causing serious bodily injury or death to a person.¹⁷

[25] The RCMP Report states that an airsoft gun is capable of causing serious bodily injury if it can fire a 6 mm, 0.20 gram plastic pellet at a minimum muzzle velocity of 366 feet per second (ft/s).¹⁸ Previous Tribunal jurisprudence has adopted the same threshold¹⁹ (or a similar threshold²⁰).

¹³ Exhibit AP-2019-037-017 at 9-15.

¹⁴ Exhibit AP-2019-037-012 at 13.

¹⁵ *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*, SOR/98-462, section 86.

¹⁶ Exhibit AP-2019-037-017 at 9-15.

¹⁷ See section 2 of the *Criminal Code*.

¹⁸ Exhibit AP-2019-037-017 at 6.

¹⁹ *T. Meunier* at para. 36; *Y. Gosselin v. President of the Canada Border Services Agency* (9 June 2016), AP-2015-013 (CITT) at para. 33; *M. Olson v. President of the Canada Border Services Agency* (22 November 2013), AP-2012-069 (CITT) at para. 21.

²⁰ The Tribunal has also used a threshold of 407 ft/s (see *Asia Pacific Enterprises Corporation v. Commissioner of the Canada Customs and Revenue Agency* [12 July 2006], AP-2000-014 [CITT] at para. 19) or inconclusively considered a threshold of 500 ft/s (see *L. Lavoie v. President of the Canada Border Services Agency* [6 September 2013], AP-2012-055 [CITT] at paras. 24-25 [*L. Lavoie*]). Nonetheless, as outlined below, the good in issue does not appear to meet even the lowest of the three thresholds, meaning that any issue of which threshold to employ is not relevant in this case.

[26] The RCMP Report found that the good in issue discharged an airsoft projectile at an average velocity of 313 ft/s²¹ when it was tested in a fully assembled airsoft gun, using only the additional parts with which the good was designed to be used.²² The RCMP Report also notes that the advertised muzzle velocity is 339 ft/s.²³

[27] Mr. Valente argued that it is not the receiver which determines the muzzle velocity of the airsoft gun, but rather a combination of the pressure of gas in the internal tank, the nozzle, the inner barrel, and the projectiles being used. He added that the velocity can also be affected by the amount and type of gas used, as well as the ambient temperature of the environment. He concluded that, therefore, the muzzle velocity of the airsoft kit cannot be conclusively measured.

[28] The Tribunal notes that the testing outlined in the RCMP Report was conducted using the components and projectiles with which the airsoft kit was designed to be used. Although it may be conceivable that the muzzle velocity of an airsoft gun could be adjusted through tinkering with various components, the tested velocity of 313 ft/s is the most accurate measurement based on how the airsoft kit was presented at the time of importation and how it was designed to be used. This approach is supported by past cases involving an incomplete airsoft gun, in which the Tribunal considered the velocity of the full airsoft gun with which the imported good was intended to be used.²⁴

[29] Furthermore, in *L. Lavoie*, the Tribunal considered an airsoft receiver that appeared to be able to shoot projectiles either above or below the 366 ft/s threshold, depending on the model of airgun into which it was integrated. The Tribunal nonetheless found that the good was a replica firearm, noting the following:

At most, this evidence establishes that the goods in issue can either be integrated into air guns that are firearms or into air guns that are *not* firearms . . .

Therefore, the Tribunal is not convinced that the goods in issue are firearms and not replica firearms. It is well established that the tariff classification according to the *Customs Tariff* is determined at the time of importation of the goods. In this case, the evidence shows that, at the time of importation, the goods in issue were designed to be used as parts of devices which are not firearms under the *Criminal Code*. The fact that they can also be used with other devices that might qualify as firearms, in view of their muzzle velocity, takes nothing away from this conclusion.²⁵

[Italics in original, footnotes omitted]

[30] Based on the above, the Tribunal will rely on the average tested velocity of 313 ft/s in the RCMP Report and the advertised velocity of 339 ft/s. A muzzle velocity range of 313-339 ft/s leads the Tribunal to conclude that the airsoft kit is not capable of causing serious bodily injury or death to a person.

²¹ Exhibit AP-2019-037-017 at 6.

²² In other words, it was assembled into a full WE/Cybergun M1A1 Thompson Gas Blowback model of airsoft gun.

²³ Exhibit AP-2019-037-017 at 6.

²⁴ *T. Meunier* at paras. 43-48; *L. Lavoie* at paras. 27-29.

²⁵ *L. Lavoie* at paras. 27-28.

[31] Mr. Valente argued that if “any and all cosmetic/non-velocity-altering airsoft model parts are to be held to the velocity standards of the OEM model they are designed for, then various models of rails, handguards, grips, sights, stocks, receivers, and even small internal parts like springs and screws would have to be considered prohibited devices”.²⁶ The Tribunal would like to clarify that although small parts such as springs or screws may meet the second part of the test for a replica firearm (i.e. not be considered a firearm) these small parts would not meet the first part of the test (i.e. resemble a firearm).

[32] In responding to Mr. Valente’s argument that the receiver does not control velocity, the CBSA’s decision reasoned that a receiver is treated as if it were the complete firearm because section 2 of the *Criminal Code* includes a receiver in the definition of “firearm”. In response, Mr. Valente argued that this reasoning is illogical because it involves classifying the good as simultaneously a firearm and not a firearm. In response, the Tribunal wishes to carefully distinguish the following two issues:

- a) If the airsoft receiver does not have sufficient muzzle velocity to cause serious bodily injury, it does not fully meet the definition of “firearm” and therefore is not a firearm—however, this does not mean that the other parts of the definition of “firearm” are not relevant for other parts of the test.
- b) Another part of the definition of “firearm”—i.e. that a firearm includes a receiver—is used to determine that the airsoft receiver is the relevant component for comparison to a genuine firearm receiver in order to determine if it is a replica. In other words, the receiver of an airsoft gun is treated as the controlled part of a replica firearm because it *resembles* the receiver of a genuine firearm—however, this does not mean that there is a legal finding that the airsoft receiver *is* a firearm.

[33] In sum, the Tribunal finds that the airsoft kit is not capable of causing serious bodily injury or death to a person, based on the average tested velocity of 313 ft/s in the RCMP Report and the advertised velocity of 339 ft/s. Therefore, the airsoft kit is not a firearm.

(iii) The good is not designed to resemble an antique firearm

[34] According to subsection 84(1) of the *Criminal Code*, an antique firearm was manufactured before 1898.

[35] The RCMP Report states that a Thompson M1A1 submachine gun is a firearm manufactured after 1919 and is therefore not an antique firearm. Mr. Valente does not contest this finding.

[36] Therefore, the Tribunal finds that the airsoft kit is not designed to resemble an antique firearm.

CONCLUSION

[37] The Tribunal finds that the airsoft kit meets all three criteria to be considered a replica firearm. It is therefore a prohibited device, classified under tariff item No. 9898.00.00, and may not be imported into Canada.

²⁶ Exhibit AP-2019-037-05 at 5.

DECISION

[38] The appeal is dismissed.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

ANNEX: STATUTORY FRAMEWORK

[1] Subsection 136(1) of the *Customs Tariff* prohibits the importation of goods under tariff item No. 9898.00.00.

[2] When dealing with the classification of goods under tariff item No. 9898.00.00, subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System*²⁷ do not apply.

[3] Tariff item No. 9898.00.00 includes the following:

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 . . .

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; . . .

Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, 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 [...]

Pour l’application du présent numéro tarifaire :

a) « arme » et « arme à feu » s’entendent au sens de l’article 2 du Code criminel;

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; [...]

[4] Subsection 84(1) of the *Criminal Code* provides as follows:

antique firearm means

(a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or

arme à feu historique

Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de

²⁷ S.C. 1997, c. 36, schedule.

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; (*arme à feu historique*)

prohibited device means . . .

(e) a replica firearm (*dispositif prohibé*)

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*)

munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement. (*antique firearm*)

dispositif prohibé [...]

e) réplique (*prohibited device*)

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. (*replica firearm*)

[5] 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*)

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. (*firearm*)

[6] Paragraph 152(3)(d) of the *Customs Act* establishes that the appellant bears the onus of establishing that the goods in issue are not prohibited weapons as follows:

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any

(3) Sous réserve du paragraphe (4), dans toute procédure engagée sous le régime de la présente loi, la charge de la preuve incombe,

question relating to

...

(d) the compliance with any of the provisions of this Act or the regulations in respect of any goods lies on the person, other than Her Majesty, who is a party to the proceeding or the person who is accused of an offence, and not on Her Majesty.

non à Sa Majesté, mais à l'autre partie à la procédure ou à l'inculpé pour toute question relative, pour ce qui est de marchandises :

[...]

d) à l'observation, à leur égard, de la présente loi ou de ses règlements.