Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2019-007

J. Byrne

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, July 17, 2023

Corrigendum issued
Wednesday, August 16, 2023

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IN THE MATTER OF an appeal heard on March 20, 2023, pursuant to subsection 67(1) of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated December 19, 2018, made pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. BYRNE **Appellant**

AND

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

DECISION

The appeal is dismissed.

Eric Wildhaber

Eric Wildhaber
Presiding Member

IN THE MATTER OF an appeal heard on March 20, 2023, pursuant to subsection 67(1) of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated December 19, 2018, made pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. BYRNE **Appellant**

AND

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

CORRIGENDUM

The third sentence of footnote 17 should read as follows:

The Tribunal notes, however, that testing conducted by L. J. Hendrikse in Buffalo showed velocities of between 272 and 313 fps; trials 3 and 4 of J. Byrne's expert report show that the "identical good" is capable of shooting a 0.2 g 6 mm plastic pellet at a velocity between 402 and 413 fps with the addition of a barrel extension and a replacement slide, and between 329 and 392 fps with the addition of a barrel extension, a replacement slide and a replacement magazine.

By order of the Tribunal,

Eric Wildhaber

Eric Wildhaber
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 20, 2023
Tribunal Panel:	Eric Wildhaber, Presiding Member
Tribunal Secretariat Staff:	Zachary Shaver, Counsel Isaac Turner, Counsel Geneviève Bruneau, Registrar Officer

PARTICIPANTS:

Appellant

J. Byrne

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Yamen Fadel Christian Halt

WITNESSES:

Liam Hendrickse Consultant Forensic Scientist – Firearms & Ballistics	Murray A. Smith (Retired) Manager, Specialized Firearms Support Services, Royal Canadian Mounted Police Firearms Program

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
Email: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] (the Act) from a decision, made on December 19, 2018, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the Act.

[2] In 2017, J. Byrne attempted to import an F Series 226 (F226) Rail Gas Blowback airsoft pistol by WE Model Co., Ltd. (the good in issue).[2] The good in issue is a complete, full-metal airsoft semi-automatic pistol. "Semi-automatic" means that each discharge of a projectile requires activation of the finger-actioned trigger mechanism. The good in issue fires 6 mm airsoft pellets.

[3] The good in issue was detained by the CBSA while in transit to J. Byrne on the basis that it is a prohibited device of tariff item 9898.00.00 of the schedule to the *Customs Tariff*[3] and consequently prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*. The CBSA found that the good in issue resembles with near precision the firearm known as the SIG Sauer model P226 MK25 pistol (the firearm of reference). J. Byrne disagrees with the CBSA's decision. However, none of the evidence or arguments submitted by J. Byrne in these proceedings supported the Tribunal taking a position different from what the CBSA took in its decision. Consequently, as explained in greater detail below, the appeal is dismissed.

BACKGROUND

[4] J. Byrne ordered the good in issue from an online merchant on August 24, 2017. It shipped from abroad, arriving at a Canada Post mail centre on September 19, 2017, at which time it was detained for further inspection by the CBSA. On October 11, 2017, the CBSA made an initial classification decision that the good in issue was a prohibited device. It has been detained by the CBSA since that time, pending the outcome of subsequent administrative proceedings and the current proceeding.[4]

[5] On November 30, 2017, J. Byrne requested a re-determination of the CBSA's decision of October 11, 2017. The CBSA confirmed its original decision in a re-determination decision dated December 19, 2018.[5]

[6] For reasons unknown, it appears that the CBSA's decision of December 19, 2018, was not immediately communicated to J. Byrne. Indeed, the postmark on the envelope transmitting the CBSA's decision of December 19, 2018, to J. Byrne is stamped February 18, 2019,[6] or 61 days after

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1 R.S.C., 1985, c. 1 (2nd Supp.).

2 Some documents refer to the pistol, while others refer only to the lower receiver (or frame) of the pistol. In this respect, the Tribunal has previously indicated that, since section 2 of the *Criminal Code* explicitly includes receivers in the definition of "firearm", a replica of such a frame or receiver will also logically constitute a replica firearm. *Y. Gosselin v. President of the Canada Border Services Agency* (9 June 2016), AP-2015-013 (CITT) [*Y. Gosselin*] at para. 25; *P. Matheson* (21 September 2015), AP-2014-039 (CITT) at para. 22, citing *L. Lavoie* (6 September 2013), AP-2012-055 (CITT) [*L. Lavoie*] at para. 33.

3 S.C. 1997, c. 36.

4 Exhibit AP-2019-007-001 at 3–4.

5 *Ibid.* at 7–9.

6 *Ibid.* at 5–6.

the CBSA's decision of December 19, 2018. J. Byrne received that letter by regular mail on or about February 26, 2019 (or 69 days after the CBSA's decision of December 19, 2018). J. Byrne tried to file an appeal of that decision on March 20, 2019,[7] but by that time 91 days had lapsed since the CBSA's decision of December 19, 2018 (but only 22 days since the receipt of the CBSA's decision by mail). The time frame to appeal the decision is 90 days after the time notice of the decision was given, as stated in subsection 67(1) of the Act. Because J. Byrne's appeal was filed one day late if he was understood to have received notice on the date of the CBSA's decision, the Tribunal asked J. Byrne to explain the reasons why the appeal ought to be allowed to proceed (this is referred to as an "extension of time proceeding" under section 67.1 of the Act). On March 25, 2019, J. Byrne filed submissions seeking an order extending the time to file his appeal.[8] The CBSA stated that it took no position regarding the application. The Tribunal granted the request on May 22, 2019.[9] The current proceeding went forward as of that date.

[7] J. Byrne filed a brief on July 18, 2019.[10] The CBSA filed a brief on September 11, 2019.[11] J. Byrne filed a reply to the respondent's brief on October 11, 2019.[12]

[8] J. Byrne sought access to the good in issue so that he could have it examined by an expert. The CBSA offered to be the party to file its expert report first, so that J. Byrne therefore might be able to assess whether he would still need an expert to assess the good in issue. On its own initiative, the CBSA filed an expert report on August 16, 2019; Murray A. (M. A.) Smith authored that report.[13]

[9] As was his right, J. Byrne decided to pursue the examination of the good in issue by an expert of his own. The manner in which and location where J. Byrne could have his expert examine the good in issue was necessarily dictated by certain practicalities, chief among them the requisite security measures required of locations where such a good can be handled and discharged. J. Byrne asked that it be made available to him at a location near to his residence in Hamilton, Ontario. The CBSA denied this request. Tribunal intervention was required to ensure that the CBSA would take reasonable steps, considering the nature of the good in issue, to make it available to J. Byrne for examination by his expert.[14] The CBSA set out a protocol making the good in issue available to J. Byrne in Ottawa, Ontario. However, it appears that J. Byrne decided, on his own initiative, and without seeking further guidance from the Tribunal, that the conditions set by the CBSA were not convenient because he ultimately decided not to take the CBSA up on its offer. The Tribunal remarks that the conditions set by the CBSA, although somewhat constraining, were proportionate and reasonable given the nature of the good in issue, and not nearly impossible to meet as J. Byrne seemed to suggest during the course of this proceeding.[15]

[10] The record shows that, on his own initiative, J. Byrne decided instead to have his expert examine a purportedly identical good in Buffalo, New York. On November 26, 2019, J. Byrne filed

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7 *Ibid.* at 1–2.
8 Exhibit AP-2019-007-002.
9 *J. Byrne* (22 May 2019), EP-2018-004 (CITT). See Exhibit AP-2019-007-003.
10 Exhibit AP-2019-007-023.
11 Exhibit AP-2019-007-033.
12 Exhibit AP-2019-007-038.
13 Exhibit AP-2019-007-025A.
14 Exhibit AP-2019-007-008; Exhibit AP-2019-007-031.
15 Exhibit AP-2019-007-056 at 3; Exhibit AP-2019-007-058 at 1; Exhibit AP-2019-007-094 at 1.

an expert report prepared by L. J. Hendrikse based on the device examined in Buffalo. L. J. Hendrikse is a consultant in forensic sciences and has expertise in firearms and ballistics.[16]

[11] The Tribunal notes that Buffalo is approximately a 1.5-hour drive from Hamilton but requires the crossing of the Canada-United States border; Ottawa is nevertheless a 3.5-hour drive further from Hamilton than Buffalo is (Ottawa being a total of approximately 5 hours from Hamilton by motor vehicle). The Tribunal makes these remarks to make it clear that the good in issue was made available by the CBSA to J. Byrne, in Ottawa. To be sure, the Ottawa viewing location was clearly perceived by J. Byrne as inconvenient, but the Tribunal is satisfied that the CBSA took reasonable steps to make the good in issue available and that it was incumbent upon J. Byrne to overcome any perceived or real inconveniences to examine it.

[12] As it turned out, the good examined by L. J. Hendrikse in Buffalo was *not* identical to the good in issue. On that basis alone, the Hendrikse expert report on the good examined in Buffalo is for all intents and purposes unhelpful to this appeal.[17] J. Byrne ought to have made the arrangements necessary to have the good in issue examined by L. J. Hendrikse in Ottawa rather than another good elsewhere. Had J. Byrne insisted on wanting to examine the good in issue otherwise than how the CBSA had proposed, he could have addressed submissions to the Tribunal. Or at least it was incumbent upon J. Byrne to ensure that the good that he was submitting to his expert in Buffalo was truly identical to the good in issue. J. Byrne's failure to do any of the above is unexplained and in itself was of little or no assistance to overcome the burden that was his in this appeal. It is important to also mention that the good that was examined in Buffalo was not filed with the Tribunal. This being the case, it was not available for examination by the CBSA, let alone by the Tribunal.

[13] On March 21, 2020, J. Byrne filed additional materials.[18]

[14] On April 15, 2020, the CBSA filed a rebuttal expert report.[19] On April 20, 2020, J. Byrne objected to the admissibility of that report and requested that his expert be allowed to file a rebuttal report of his own to address certain issues in the CBSA's rebuttal expert report.[20] On May 1, 2020, the Tribunal allowed the CBSA's rebuttal expert report to remain on the record and indicated that parties' experts would be able to address the contents of their own reports and those of the other party's expert at the hearing.[21]

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16 Exhibit AP-2019-007-066.

17 The Tribunal remarks that, in any event, the good tested in Buffalo, when in its unaltered original state, was unable to attain a muzzle velocity at or above the speed of 325 feet per second (fps) suggested by J. Byrne's expert to be the minimum threshold required to cause serious bodily harm. The importance of "muzzle velocity" in the analysis of whether a good is a firearm is discussed later in these reasons. The Tribunal notes, however, that testing conducted by L. J. Hendrikse in Buffalo showed velocities of 272 and 313 fps; trials 3 and 4 of J. Byrne's expert report show that the "identical good" is capable of shooting a 0.2 g 6 mm plastic pellet at a velocity between 402 and 413 fps with the addition of a barrel extension and a replacement slide, and between 329 and 392 fps with the addition of a barrel extension, a replacement slide and a replacement magazine. Exhibit AP-2019-007-066 at 9–11; *Transcript of Public Hearing* at 15, 17–19. The irrelevance of testing a good that is modified by adding to it other components not presented with the good at the time of importation is also examined later in these reasons.

18 Exhibit AP-2019-007-084.

19 Exhibit AP-2019-007-086A.

20 Exhibit AP-2019-007-088.

21 Exhibit AP-2019-007-091.

[15] An oral in-person hearing of the matter had been scheduled for April 26, 2020. The COVID-19 pandemic did not allow for an in-person oral hearing to take place at that time, so it was cancelled. The Tribunal offered various hearing options to J. Byrne, including a hearing by videoconference. J. Byrne opted for, and insisted on, an in-person oral hearing and clearly indicated his willingness to wait for a time when the public health situation would again permit for that type of hearing format to take place. He was entirely within his right to express this preference and, in exercising its discretion to decide on the appropriate type of hearing, the Tribunal ultimately decided to proceed by way of in-person oral hearing. The case was for all intents and purposes inactive from the spring of 2020 until the easing of public health restrictions during the latter part of 2022, when the Tribunal initiated contact with the parties to set an oral hearing date for early 2023.

[16] On January 26, 2023, J. Byrne requested that the Tribunal disregard any views and eventual testimony of M. A. Smith in their entirety on the basis that he made statements that were "not factual" during an appearance at a standing committee of the House of Commons. J. Byrne felt that those statements contained inaccuracies that ought to disqualify M. A. Smith from acting as an expert for the CBSA.[22] The Tribunal notes that these allegations were not pursued at the hearing and are in any event unfounded. The allegations amount to nothing more than an expression of J. Byrne's disagreement with certain views expressed by M. A. Smith in another context. The allegations do not constitute a basis to disqualify M. A. Smith from acting as an expert in these proceedings because they do not impugn M. A. Smith's ability to uphold his duty to the Tribunal in his role as an expert.

[17] Various correspondence between the parties and the Tribunal during late January and early February 2023 raised issues as to the proper and orderly conduct of the oral hearing, notably regarding the availability and handling of the good in issue and the firearm of reference. These matters were addressed and resolved during a pre-hearing conference that took place by videoconference on February 14, 2023.

[18] An in-person oral hearing took place at the Tribunal's premises in Ottawa on March 20, 2023. On that occasion, L. J. Hendrikse testified to his report and expressed views on the expert reports filed by the CBSA. Similarly, M. A. Smith testified for the CBSA on the basis of his expert reports and expressed views on the contents of L. J. Hendrikse's expert report.

[19] At the hearing, neither party objected to the qualification of each other's proposed expert.[23] The Tribunal was satisfied of the expertise advanced for L. J. Hendrikse based on his curriculum vitae. The Tribunal knows that M. A. Smith has been previously qualified as an expert in his field by the Tribunal in several cases in the past.[24] The Tribunal ascertained that M. A. Smith is now retired from the Royal Canadian Mounted Police, but the fact that he has maintained his expertise despite his retirement is unquestionable, be it only on the basis of the fact that his retirement is so recent.[25] Additionally, both individuals affirmed their understanding and commitment to their duties as

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22 Exhibit AP-2019-007-118.

23 *Transcript of Public Hearing* at 11, 32.

24 M. A. Smith previously occupied the position of Manager, Specialized Firearms Support Services, Royal Canadian Mounted Police Firearms Program. Cases where M. A. Smith has been qualified as an expert in his field by the Tribunal previously include: *N. Valente v. President of the Canada Border Services Agency* (19 November 2020), AP-2019-037 (CITT); *R. McLeod v. President of the Canada Border Services Agency* (10 July 2018), AP-2017-042 (CITT) [*R. McLeod*]; and *Disco-Tech Industries Inc. v. President of the Canada Border Services Agency* (11 August 2011), AP-2009-078 (CITT).

25 *Transcript of Public Hearing* at 29–30.

experts, and the Tribunal had no reason to doubt their undertakings. Accordingly, both individuals were qualified as experts in firearms and ballistics.

[20] The good in issue and the firearm of reference were made available by the CBSA at the hearing.[26] The Tribunal observed and manipulated both. The parties' experts referred to both as well during their testimonies.

[21] In his written pleadings and at the hearing, J. Byrne made comprehensive arguments to the Tribunal which can be summarized in two points. His first contention is that the good in issue is not a "replica firearm" under the *Criminal Code* based on his view that the good, and its internal components in particular, is *not* an almost exact copy of the firearm of reference and that it therefore does not resemble, or resemble with near precision, a firearm. His second contention is that the good in issue is in fact a firearm and one that would be eligible for importation into Canada as an uncontrolled firearm.[27]

[22] The CBSA provided comprehensive evidence and arguments in support of its position both in its written materials and at the hearing. The CBSA asserts that the good in issue is a prohibited device, as it meets the requirements to be considered a replica firearm. The constitutive elements of a replica firearm are set out below.

LEGAL FRAMEWORK

[23] Subsection 136(1) of the *Customs Tariff* provides that the importation of goods of tariff item 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.

[24] Tariff item 9898.00.00 reads as follows:[28]

> 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:
>
> …
>
> (d) any weapon that, under subsection 84(3) of the Criminal Code, is deemed not to be a firearm;

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26 Exhibit AP-2019-007-B-01; Exhibit AP-2019-007-B-02.

27 According to CBSA Memorandum D19-13-2, an "uncontrolled" (or "unregulated") firearm is a device that, although falling within the definition of a firearm in the *Criminal Code*, is exempt from specific legal requirements of the *Firearms Act* and its regulations, as well as other legislative provisions. It further indicates that such devices do not fall under tariff item 9898.00.00 and are generally admissible into Canada. See Exhibit AP-2019-007-023 at 23 (para. 73).

28 When dealing with the classification of goods under tariff item 9898.00.00, subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System* do not apply. Furthermore, Note 1 to Chapter 98 of the schedule to the *Customs Tariff* provides that "[g]oods which are described in any provision of this Chapter are classifiable in the said provision if the conditions and requirements thereof and of any applicable regulations are met."

…

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;

…

[25] 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*)

[26] Subsection 84(1) of the *Criminal Code* defines "antique firearm" as follows:

> ***antique firearm*** means
>
> > **(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; (*arme à feu historique*)

[27] 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*)

[28] Accordingly, to determine whether the good in issue is properly classified as a prohibited device under tariff item 9898.00.00 and therefore prohibited from importation into Canada, the Tribunal must determine whether the good in issue meets the definition of a "replica firearm" in subsection 84(1) of the *Criminal Code*.

[29] To be considered a replica firearm, a device must fulfill the following three criteria:

(i) It *must be* designed or intended to exactly resemble, or to resemble with near precision, a firearm (the "resemblance test");

(ii) It must *not* be a firearm (the "firearm exception"); and

(iii) It must *not* be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm (the "antique firearm exception").

[30] Subsection 84(3) of the *Criminal Code* provides a list of items that would otherwise meet the definition of a "firearm" but have been exempted. The provision reads as follows:

> **Certain weapons deemed not to be firearms**
>
> **(3)** For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be firearms:
>
> **(a)** any antique firearm;
>
> …
>
> **(d)** any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
>
> **(i)** a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second[29] or at a muzzle energy exceeding 5.7 Joules, or
>
> **(ii)** a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

[31] Pursuant to subsection 152(3) of the Act and section 12 of the *Customs Tariff*, the appellant bears the burden of proving that the good in issue is *not* a "prohibited device".[30] The standard of proof is the balance of probabilities.

ANALYSIS

[32] At the conclusion of the analysis mandated by the legal framework described above, the Tribunal determined that the good in issue is a replica firearm because (i) it is designed or intended to exactly resemble, or to resemble with near precision, a firearm; (ii) it is not, itself, a firearm; and (iii) it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. In the paragraphs that follow, the Tribunal examines those issues in reverse order, but the order of narration of these reasons is of no importance because the Tribunal could have examined the issues in any order and arrived at the same conclusion.

The antique firearm exception is not applicable

[33] According to the *Criminal Code*, a firearm is an "antique firearm" if it was manufactured prior to the end of the 19th century or, precisely, prior to 1898. Manufacturing of the firearm of reference began no earlier than the early 1980s, or at least 82 years *after* 1898.[31] Because of that fact, the firearm of reference can therefore *not* be considered as, and consequently is *not*, an "antique firearm".

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29 Note that a muzzle velocity of 152.4 m per second is equivalent to 500 fps.

30 *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21.

31 Exhibit AP-2019-007-025A at 3, 9 (paras. 7, 24).

[34] A firearm can also gain the status of an "antique firearm" if it is prescribed as such by regulation, but in this instance there is no doubt that the firearm of reference was never the subject of such a prescription.

[35] It follows that the good in issue was not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. In short, the antique firearm exception does not apply to the good in issue. It is important to remark, too, that nothing in the parties' submissions to the Tribunal sought a different conclusion than the Tribunal's finding here.

The good in issue is not a firearm

[36] The premise advanced by J. Byrne in support of his view that the good in issue is a firearm is that it *can be* modified, post importation, so that discharged ammunition can reach muzzle velocities at which serious bodily harm is caused.[32] With respect, that premise is irrelevant for the purposes of customs classification.

[37] A good must be examined, *as is*, as it presents itself at the time of importation. As such, whether a good is capable of being modified into something other than it is at the time of importation is irrelevant for the purposes of customs classification. This is a long-standing principle of customs classification that is regularly reaffirmed.[33]

[38] Therefore, the Tribunal has no reason to be concerned with any of the evidence tendered by J. Byrne as to what the good in issue may be capable of becoming post importation if it is modified by adjoining to it another device (as L. J. Hendrikse did at J. Byrne's request) such as a barrel extender and/or a replacement slide or a replacement magazine. The Tribunal's only concern is in respect of what the good in issue is at the very precise moment that someone is attempting to import it into Canada. At that moment, it is either a prohibited device in and of itself, or it is not. That it purportedly may become a firearm post importation by the addition of certain components that modify the at-import state of the good in issue is beyond the scope of the Tribunal's mandate under the Act.[34]

[39] According to the materials provided by J. Byrne, the good in issue, in its unmodified state at the time of importation, has a muzzle velocity of between 280 and 300 fps.[35] According to the

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32 A barrelled weapon or device that discharges projectiles becomes a "firearm" if it is capable of causing serious bodily injury. The appellant's expert report suggests that airsoft guns achieving a velocity in excess of 325 fps could cause serious bodily injury, whereas the respondent's expert report suggests that this threshold is 366 fps. Exhibit AP-2019-007-025A at 4; Exhibit AP-2019-007-066 at 5; Exhibit AP-2019-007-086A at 7–8. Having considered the matter, the Tribunal will refrain from commenting on this issue because, on the facts of this case, it is sufficient for the Tribunal to consider the minimum threshold to be 325 fps. In addition, the Tribunal notes that above whatever threshold is contemplated for the velocity at which serious bodily injury occurs (be it in excess of 325 fps or 366 fps), it is foreseeable that a device may be captured by the exception provided for at subsection 84(3) of the *Criminal Code*; however, as the evidence is that the good in issue is not able to attain even the minimum threshold of 325 fps, subsection 84(3) need not be considered in this case.

33 *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366; *Tiffany Woodworth* (11 September 2007), AP-2006-035 (CITT) at para. 21; *L. Lavoie* at para. 29; *Y. Gosselin* at paras. 31–41; *T. Meunier* (3 November 2017), AP-2016-009 (CITT) [*T. Meunier*] at para. 48.

34 *T. Meunier* at paras. 47–48.

35 Exhibit AP-2019-007-023 at 108–109. In J. Byrne's written submissions, he noted that the good in issue has a designed muzzle velocity of a maximum of 86.868 metres per second (285 fps in the manufacturer's specifications). Exhibit AP-2019-007-023 at 5 (para. 6).

evidence presented by the CBSA in the report and testimony of M. A. Smith, the good in issue, again in its original unmodified form, was not capable of discharging a projectile beyond 308.4 fps.[36] That velocity aligns with the advertised muzzle velocity of 310 fps, as stated in M. A. Smith's report.[37] The minimum velocity considered to be necessary to cause serious bodily injury is 325 fps. Because there is no evidence that the good in issue is capable of attaining that velocity, the Tribunal finds that the good in issue is not capable of causing serious bodily injury and is therefore not a firearm.[38]

There is striking resemblance to the firearm of reference – the good in issue is a replica firearm

[40] J. Byrne made extensive arguments disputing the very notion of what a "replica firearm" is, or how to determine whether a given device is one. In essence, he disagrees with the long-standing caselaw of the Tribunal and the courts that the determination is one based on the external visual comparison between an alleged replica firearm and the firearm that it is intended to mimic, exactly or with near precision. In short, J. Byrne contends that the comparison must extend to the internal non-immediately visible components of the alleged replica, and if they do not match those of the firearm that the replica is intended to mimic, that the alleged replica would not meet the test of being a replica firearm.

[41] Again, with the utmost respect to the efforts that J. Byrne has invested in devising his position and pursuing this appeal, the Tribunal cannot adopt the analysis he advances. His position presupposes a logic that finds no basis whatsoever in the intention of Parliament when it enacted the "replica firearm" category of goods.

[42] Parliament's intentions vis-à-vis replica firearms have been extensively examined in various decisions over the years.[39] The Tribunal need not recall those intentions here at any length; the reader can ascertain what they are in the decisions themselves. Importantly, none of these decisions have ever removed a good from the ambit of the "replica firearm" category of goods because of internal non-visible mechanisms that failed to mimic, perfectly or with near precision, those of a "real" firearm. This makes sense and is likely sufficient to set aside J. Byrne's contentions because a good whose internal mechanisms mimic, perfectly or with near precision, those of a firearm would itself be either a firearm or a deactivated firearm.[40] When the surface of his argument is scratched, at its

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36 Exhibit AP-2019-007-086A at 11.

37 Exhibit AP-2019-007-025A at 3–4 (para. 10). The Tribunal notes that there are also materials on the record from retailers' websites which indicate that the good is "[a]ble to shoot 330-350 fps …" and that the good's "initial speed" is 260–270 fps. See Exhibit AP-2019-007-33 at 91, 95. However, these velocities were not established in the testing of the good. In these proceedings, what is most important is the results from the testing of the good at the state of importation and the velocity achieved therein.

38 See remarks at footnote 32.

39 See, e.g., *R. McLeod* at para. 30; *Bryce Rollins and the Commissioner of the Canada Customs and Revenue Agency* (21 December 2001), AP-2000-020 (CITT); *Don L. Smith and the Commissioner of the Canada Customs and Revenue Agency* (28 October 2003), AP-2002-009 (CITT); *Vito V. Servello and the Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) [*Servello*]; *MILARM Co. Ltd and the Commissioner of the Canada Customs and Revenue Agency* (15 August 2006), AP-2001-075 (CITT), which focused on the visual characteristics of air guns when determining whether they should be classified as replica firearms; *R. v. Dunn*, 2013 ONCA 539 at para. 56; *R. v. Eyre*, 2018 BCSC 1596 at paras. 73, 78–79; *R. v. Tickell*, 2013 BCSC 368 at para. 61; *R. v. Scott*, 2000 BCCA 220 (CanLII) at paras. 39–40, confirmed in *R. v. Scott*, 2001 SCC 73.

40 i.e., a device that was a firearm but has been disabled.

simplest, J. Byrne is in fact contending that there is no such thing as a "replica firearm".[41] However, that, of course, is not true. As stated above, a replica firearm is a good that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, that is not itself a firearm, and that is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. At the very least, J. Byrne's contentions would seriously limit, if not curtail altogether, the possibility of a good falling into the "replica firearm" category of goods.

[43] If adopted, J. Byrne's position would obviously frustrate or create an improper blockage to Parliament's clear intention to forbid goods that look like firearms (but that are not firearms) from entering the Canadian marketplace. Section 12 of the *Interpretation Act* provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[42] J. Byrne's position is irreconcilable with Parliament's enactments vis-à-vis replica firearms examined through the lens of section 12 of the *Interpretation Act*.

[44] The Tribunal, and the courts, have determined that the resemblance test is one of external visual appraisal.[43] The Tribunal is bound by that approach and has applied it to the good in issue. When assessing whether a device is designed or intended to exactly resemble or to resemble with near precision a firearm, the Tribunal:

> … compares the size, shape and general appearance of a replica firearm with the firearm that it reproduces, and it is understood that the definition of "replica firearm" allows for minor differences. The issue before the Tribunal is whether the good in issue could be mistaken for a real firearm, since "the prohibition on the importation of replica firearms logically stems from the concern that they can be mistaken for firearms due to their physical appearance."[44]
>
> [Footnotes omitted]

[45] There are certain characteristics that differentiate the good in issue from the firearm of reference, but the Tribunal finds those differences to be minor: the magazine base contour and the hammer are not identical;[45] the good in issue does not have a visible serial number; and the good in issue has a sticker identifying it as "Made in Taiwan".[46] The good in issue and the firearm of reference are also made of different materials,[47] but their difference in weight is less than 5%.[48]

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41 J. Byrne contends that a "replica firearm" "must be an exactly equivalent, or a nearly exactly equivalent, that is tantamount to being an identical, copy of the device it replicates, including its structure and materials, to a degree of precision which is so close to the original as to have no easily detectable difference." Exhibit AP-2019-007-23 at 17 (para. 56).

42 R.S.C., 1985, c. I-21.

43 *P. Matheson* (21 September 2015), AP-2014-039 (CITT) at para. 24; *Servello* at para. 16; *Y. Gosselin* at para. 19; *L. Lavoie* at para. 28.

44 *M. Perron* (29 June 2018), AP-2017-034 (CITT) at para. 26.

45 Exhibit AP-2019-007-025A at 4–6; Exhibit AP-2019-007-066 at 5–6. In his expert testimony, M. A. Smith further said that, in respect of the magazine base contour, "… the difference is in the two magazines, and not in the actual firearm", as well as that, in regard to the hammer, "… there is actually no substantial difference between the … shapes of the two hammers; it's just the way they sit in the two devices as a result of the way the hammer is connected to the internal mechanism". *Transcript of Public Hearing* at 50–51.

46 Exhibit AP-2019-007-066 at 4.

47 *Ibid.* at 4–5.

48 Exhibit AP-2019-007-086A at 4–5.

[46] However, the good in issue and the firearm of reference are otherwise strikingly identical or nearly identical to each other at first glance as well as upon closer examination. There was agreement between L. J. Hendrikse and M. A. Smith that they have almost identical exterior dimensions.[49] The side-by-side comparisons that the Tribunal undertook confirms the assessment made by M. A. Smith: the good in issue was designed to approximate the distinguishing features of the SIG Sauer model P226 MK25 pistol, including the markings, screw placement and texture on the handgrip, the shape of the trigger guard, and the texturized markings on the slide.[50] The gas blowback recoil, visible markings, and the "blued" metal finish[51] are all designed to make the good in issue more realistic in the eyes of the user (or victims of criminal activity).[52] The advertising materials for the good in issue boast of this close physical and visual resemblance; they are "realistic [in] weight and feel" and are "similar [in] weight to the original pistol".[53]

[47] The Tribunal finds that the elements described above demonstrate that the good in issue meets the resemblance test vis-à-vis the firearm of reference.

[48] As such, the Tribunal finds that the good in issue is a replica firearm and is therefore a prohibited device of subsection 84(1) of the *Criminal Code* classifiable under tariff item 9898.00.00, and it is consequently prohibited from importation into Canada under subsection 136(1) of the *Customs Tariff*.

[49] The Tribunal wishes to assure J. Byrne that it heard the grievances he has in respect of certain choices made by Parliament in the establishment of the regime pertaining to the good in issue and other barrelled devices. However, the Tribunal is not a legislator—it is charged with applying the law as it stands at the time of importation. The Tribunal notes that the laws governing this issue have changed over time and are always subject to amendment. J. Byrne may wish to contact his representatives in Parliament to discuss his concerns or any proposed changes.

DECISION

[50] The appeal is dismissed.

Eric Wildhaber

Eric Wildhaber
Presiding Member

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49 Exhibit AP-2019-007-066 at 4; Exhibit AP-2019-007-25A at 4–8.

50 Exhibit AP-2019-007-25A at 8 shows points of similarity and difference between a SIG Sauer model P226 MK25 pistol and the good in issue. Exhibit AP-2019-007-025A at 3–8.

51 Exhibit AP-2019-007-023 at 108.

52 See, e.g., *R. v. Tickell*, 2013 BCSC 368 at para. 61 (seemingly unreported but available at Exhibit AP-2019-007-033 at 123–136): "[T]here is good reason for the characterization of airsoft guns as replica firearms. The airsoft guns are manufactured to look and feel real. … [A]irsoft guns can be used by people who are not airsoft gun enthusiasts but, rather, criminals that wish their victims to believe these imitation guns are real." The Tribunal notes that this was a sentencing hearing where the issue of the classification of the good was not in issue.

53 Exhibit AP-2019-007-023 at 108; Exhibit AP-2019-007-33 at 88, 95, 99. While not determinative on its own, the Tribunal notes the advertising materials for the good in issue also explicitly refer to the good in issue as being a "replica". See Exhibit AP-2019-007-023 at 108; Exhibit AP-2019-007-033 at 88, 91, 95, 99.