



Ottawa, Tuesday, January 14, 2003

Appeal No. AP-2001-064

IN THE MATTER OF an appeal heard on September 17, 2002,
under subsection 67(1) of the *Customs Act*, R.S.C. 1985
(2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the
Canada Customs and Revenue Agency dated September 13, 2001,
with respect to a request for redetermination under
subsection 60(4) of the *Customs Act*.

BETWEEN

TERRY THOMPSON

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-064

TERRY THOMPSON

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency made under subsection 60(4) of the *Customs Act* on September 13, 2001. This matter was heard by way of written submissions in accordance with rule 36.1 of the *Canadian International Trade Tribunal Rules*. The issue in this appeal is whether certain revolver-like devices are properly classified under tariff item No. 9898.00.00 as prohibited devices, as determined by the respondent. The parties later agreed on a statement of facts and issued a joint submission confirming their agreement that the goods in issue should be classified under tariff item No. 7907.00.90 as other articles of zinc.

HELD: The appeal is dismissed. In order to determine whether the goods in issue are properly classified under tariff item No. 9898.00.00, the Tribunal must determine if the goods in issue meet the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*. For the goods in issue to meet this definition, they must fulfil three conditions: (1) they must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) they must not be themselves firearms; and (3) they must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. The Tribunal finds that the goods in issue meet the definition of “replica firearm” found in subsection 84(1). As a replica firearm is included under the definition of “prohibited device” found in subsection 84(1), the Tribunal is of the opinion that the goods in issue are properly classified under tariff item No. 9898.00.00.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 17, 2002
Date of Decision:	January 14, 2003
Tribunal Members:	Richard Lafontaine, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Dominique Laporte
Parties:	Terry Thompson, for the appellant Michael Roach, for the respondent



Appeal No. AP-2001-064

TERRY THOMPSON

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal under subsection 67(1) of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency made under subsection 60(4) of the Act on September 13, 2001. This matter was heard by way of written submissions in accordance with rule 36.1 of the *Canadian International Trade Tribunal Rules*.² The issue in this appeal is whether certain revolver-like devices (the goods in issue) are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*³ as prohibited devices, as determined by the respondent. The appellant imported the goods in issue into Canada on July 29, 2001.

In a letter to the Tribunal dated March 11, 2002, the respondent stated that he initially classified the goods in issue as replica firearms under tariff item No. 9898.00.00. However, after having received an expert report from the Royal Canadian Mounted Police (RCMP) indicating that the goods in issue were not replica firearms, the respondent stated that he now agreed that tariff item No. 9898.00.00 was inapplicable. The parties later agreed on a statement of facts and issued a joint submission confirming their agreement that the goods in issue should be classified under tariff item No. 7907.00.90 as other articles of zinc.

The relevant tariff nomenclature reads, in part, as follows:

7907.00	Other articles of zinc.
7907.00.10	---Anodes for electroplating
7907.00.20	---Discs or slugs, containing by weight 90% or more of zinc; Gutters, roof capping, skylight frames and other fabricated building components
7907.00.90	---Other
9898.00.00	Firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms, in this tariff item referred to as prohibited goods, but does not include the following.

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. S.O.R./91-499.
3. S.C. 1997, c. 36.

The text of the agreed statement of facts reads as follows:

The Appellant and the Respondent (the "Parties"), for the purposes of this appeal only, agree to the facts set out in paragraphs 1 to 12 herein, as if those facts had been established in evidence.

1. The Appellant, Terry Thompson, is representing himself in his appeal to the Canadian International Trade Tribunal (the "Tribunal").
2. The Respondent is the Commissioner of Canada Customs and Revenue Agency.
3. On July 29, 2001, the Appellant imported the goods at issue into Canada.
4. Pursuant to subsection 60(4) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the "*Act*"), the Respondent classified the goods at issue under tariff item 9898.00.00.
5. On October 10, 2001, pursuant to subsection 67(1) of the *Act*, the Appellant appealed the decision of the Respondent to the Tribunal.
6. On January 17, 2002, Deryk Penk, a forensic analyst at the R.C.M.P., submitted to the Respondent an Expert Report in respect of the goods at issue. The Expert Report, dated January 17, 2002, is attached as Exhibit "A" to this Agreed Statement of Facts.
7. For ease of reference, the Parties will refer to the goods at issue as they are described in the Expert Report:
 - Ex-1: One (1) revolver-like device of unidentified make or model, and not bearing a serial number.
 - Ex-2: One (1) revolver-like device of unidentified make or model, and not bearing a serial number.
8. As stated in the Expert Report, the devices identified as Ex-1 and Ex-2 do not conform to the definition of "replica firearm" as described in section 84 of the Criminal Code.
9. The Parties agree the devices should be classified by their constituent material.
10. The devices have been analyzed by the Laboratory and Scientific Services Directorate of the Respondent. The laboratory determined that the metal parts of the devices are composed of a zinc-aluminum alloy (approximately 95% zinc, by weight), which have been lightly coated with a nickel-based coating. A few minor components, such as the screws, are composed of steel.
11. Based on the above, the Parties now agree that the devices identified as Ex-1 and Ex-2 should be classified under tariff item 7907.00.90, as other articles of zinc, other.

EVIDENCE

The respondent filed the goods in issue as physical exhibits. They can be described as follows:

Exhibit B-1: One revolver-like device of a silver colour.

Exhibit B-2: One revolver-like device resembling a colt .45 Army Revolver, contained in a box.

A forensic laboratory report written by Mr. Deryk V.R. Penk, of the Firearms Section of the RCMP, reads, in part, as follows:

RESULTS:

1. Both devices, Exhibits Ex-1 and Ex-2, contain barrels. However, the barrels are only partially bored and the breech ends of both barrels are solid.
2. Both devices, Exhibits Ex-1 and Ex-2, contain cylinders which each contain six (6) chambers. However, all of the chambers have been undercut in such a manner as to compromise the support of ammunition cartridges.

3. Neither device bears any identification marking indicative of make, model, or calibre.

CONCLUSIONS:

1. The devices, Exhibits Ex-1 and Ex-2, are not capable of discharging a projectile.
2. The devices, Exhibits Ex-1 and Ex-2, resemble with near precision, the COLT, Model 1873, "Single Action Army" revolver which is a barreled weapon from which a bullet can be discharged and that is capable of causing serious bodily injury or death to a person.
3. The production of the COLT, Model 1873, "Single Action Army" revolvers began prior to 1898 and continued after 1898. These revolvers were manufactured in various calibres. Depending on calibre, some of these COLT revolvers manufactured prior to 1898 are deemed to be antique firearms while others are not. These COLT revolvers in any caliber manufactured in or after 1898 are not deemed to be antique firearms.
4. The devices, Exhibits Ex-1 and Ex-2, resemble with near precision, BOTH the COLT, Model 1873, "Single Action Army" revolvers which are deemed to be antique firearms and those which are not (i.e.: it does resemble with near precision an antique firearm).
5. Neither Exhibit Ex-1 nor Exhibit Ex-2 conforms to the definition "replica firearm" as described in Section 84 of the Criminal Code.

In addition, the respondent filed a report from Mr. Allan Granville, Chemist, Organic and Inorganic Products Section, Laboratory and Scientific Services Directorate of the Canada Customs and Revenue Agency. With respect to Exhibit B-1, the report states that the "metal parts of this article have a decorative design and are composed of a zinc-aluminium alloy that has been lightly plated with nickel." With respect to Exhibit B-2, the report indicates that the "metal parts of this article are composed of a zinc-aluminium alloy which has been lightly coated with a nickel-based coating." For both Exhibits B-1 and B-2, the report provides that a few minor components, such as the screws, are composed of steel.

POSITION OF PARTIES

The appellant and the respondent's position is mostly set out in the agreed statement of facts reproduced earlier. On June 12, 2002, the respondent filed written representations with the Tribunal. Among other things, the respondent submitted that the parties agree that the devices should be classified according to their constituent material. Based on the reports of Mr. Penk and Mr. Granville, the parties stated that they agreed that the goods in issue should be classified under tariff item No. 7907.00.90 as other articles of zinc. The respondent further submitted that neither heading No. 93.03 (other firearms) nor heading No. 97.06 (antiques) nor heading No. 95.03 (other toys) was a heading under which the goods in issue could be classified. Relying on Note 5(a) to Section XV, which states that "[a]n alloy of base metals is to be classified as an alloy of the metal which predominates by weight over each of the other metals", the respondent submitted that, given that the devices are composed of an alloy that is 95 percent zinc, by weight, the goods in issue are articles of zinc, classifiable under tariff item No. 7907.00.90.

DECISION

The relevant tariff item and provisions of the *Customs Tariff* and the *Criminal Code* read as follows:

- 9898.00.00 Firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and components or parts designed exclusively for use in the manufacture of or assembly into automatic firearms, in this tariff item referred to as prohibited goods, but does not include the following:

For the purposes of this tariff item,

(b) . . . “prohibited device” . . . [has] the same [meaning] as in subsection 84(1) of the Criminal Code.

Subsection 84(1) of the *Criminal Code* provides that “prohibited device” means, among other things, a “replica firearm”. The term “replica firearm” is further 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.

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.

The Tribunal must first determine whether the goods in issue are properly classified under tariff item No. 9898.00.00.

In order to determine whether the goods in issue are classifiable under tariff item No. 9898.00.00, the Tribunal must determine if the goods in issue meet the definition of “replica firearm” under subsection 84(1) of the *Criminal Code*. In order for the goods in issue to meet this definition, they must fulfil three conditions: (1) they must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) they must not be themselves firearms; and (3) they must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

Mr. Penk’s report states that the goods in issue “resemble with near precision, the COLT, Model 1873, ‘Single Action Army’ revolver which is a barreled weapon from which a bullet can be discharged and that is capable of causing serious bodily injury or death to a person.” Based on the definition of “firearm” found in section 2 of the *Criminal Code*,⁴ the Tribunal is satisfied that the goods in issue meet the first condition of the definition of a “replica firearm”, i.e. they are designed or intended to exactly resemble, or to resemble with near precision, a firearm. In addition, as the report states that the goods in issue “are not capable of discharging a projectile”, the Tribunal is satisfied that the second condition of the definition is met, i.e. the goods in issue are not themselves firearms.

With respect to the third condition of the definition, Mr. Penk’s report states that the goods in issue “resemble with near precision, BOTH the COLT, Model 1873, ‘Single Action Army’ revolvers which are deemed to be antique firearms and those which are not (i.e.: it does resemble with near precision an antique firearm).” The Tribunal is of the view that, if the goods in issue are designed to resemble with near precision both revolvers that are deemed to be antique firearms and those that are not, they cannot be excluded from the definition of “replica firearm” solely on the basis that they are designed to resemble revolvers that are deemed to be antique firearms. Such reasoning would negate the very important fact that the goods in issue also resemble revolvers that are not antique firearms. The Tribunal does not consider the “resemblance” of a device to an antique firearm to be sufficient to disqualify that device as a “replica firearm”, if the device also resembles a firearm that is not antique. The evidence indicates that this particular model of firearm was

4. “Firearm” is defined, in part, under section 2 of the *Criminal Code* 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”.

manufactured until 1950—in other words, it was produced for 52 years after the last year of production of “antique firearms”. It cannot be reasonably assumed that Parliament intended to allow the free circulation of replicas of this firearm simply because it also resembles revolvers that were manufactured prior to 1898.

The Tribunal also notes that the box containing Exhibit B-2 had the mention “replica” written on it, which indicates that this device was sold as a replica firearm.

In light of the above, the Tribunal finds that the goods in issue are included in the definition of “replica firearm” found in subsection 84(1) of the *Criminal Code*. As a replica firearm is included in the definition of “prohibited device” of subsection 84(1), the Tribunal is of the opinion that the goods in issue are properly classified under tariff item No. 9898.00.00.

With respect to classification in heading No. 79.07 as proposed by the parties, the Tribunal notes that subsection 136(2) of the *Customs Tariff* provides that the *General Rules for the Interpretation of the Harmonized System*⁵ do not apply when classifying goods under tariff item No. 9898.00.00. In addition, as already stated, Note 1 to Chapter 98 provides that “[t]he provisions of this Chapter are not subject to the rule of specificity in General Interpretative Rule 3 (a). Goods which are described in any provision of this Chapter are classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.” Given these mandatory provisions, as the Tribunal finds that the goods in issue meet the requirements of tariff item No. 9898.00.00, they cannot be classified elsewhere in the tariff nomenclature, and it is consequently unnecessary to examine whether they can be classified according to their constituent material in heading No. 79.07.

Finally, the Tribunal notes that the agreed statement of facts filed in this case contains statements dealing with the classification of the goods that are legal conclusions rather than factual statements. Such statements can be seen as arguments in support of the classification sought by the parties, but they do not constitute evidence. When an agreed statement of facts is filed, the Tribunal must determine whether the facts set out lead to the classification sought by the parties. In this case, they fall short of doing so.

In light of the foregoing, the appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

5. Supra note 3, schedule.