



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

Ottawa, Tuesday, August 5, 2003

**Appeal No. AP-2002-092**

IN THE MATTER OF an appeal heard on February 20, 2003,  
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 July 3, 2002,  
with respect to a request for redetermination under  
subsection 60(4) of the *Customs Act*.

**BETWEEN**

**RICHARD RUSYN**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

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## UNOFFICIAL SUMMARY

### Appeal No. AP-2002-092

**RICHARD RUSYN**

**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 (the Commissioner) dated July 3, 2002, made under subsection 60(4) of the *Customs Act*. The issue in this appeal is whether a replica of an 1873 Colt Peacemaker .45 calibre revolver is properly classified under tariff item No. 9898.00.00 as a prohibited device, as determined by the Commissioner.

**HELD:** The appeal is dismissed. The device in issue is “designed or intended” to resemble a firearm, and it is not itself a firearm. It is designed to resemble an original firearm model that continued to be produced into the 1940s and is currently being manufactured again. In the Tribunal’s view, the device in issue resembles with near precision a firearm model that is not an antique. Therefore, it qualifies as a “replica firearm” and is a “prohibited device”, which is properly classified under tariff item No. 9898.00.00.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 20, 2003
Date of Decision:	August 5, 2003
Tribunal Member:	James A. Ogilvy, Presiding Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Margaret Fisher
Appearance:	Catherine A. Lawrence, for the respondent



**Appeal No. AP-2002-092**

**RICHARD RUSYN**

**Appellant**

**AND**

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

**Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member

**REASONS FOR DECISION**

**INTRODUCTION**

This is an appeal under subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) dated July 3, 2002, made under subsection 60(4) of the *Act*. The issue in this appeal is whether a replica of an 1873 Colt Peacemaker .45 calibre revolver is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*<sup>2</sup> as a prohibited device, as determined by the Commissioner.

Tariff item No. 9898.00.00 reads, in part, 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 . . .

For the purposes of this tariff item,

(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*.

Subsection 84(1) of the *Criminal Code*<sup>3</sup> 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.

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1. R.S.C. 1985 (2d Supp.), c. 1[*Act*].  
2. S.C. 1997, c. 36.  
3. R.S.C. 1985, c. C-46.

“Firearm” and “antique firearm” are defined in 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, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

“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.

## PRELIMINARY ISSUE

As a preliminary issue, the Commissioner referred to the fact that Mr. Richard Rusyn did not appear at the hearing of the appeal and argued that the onus is on Mr. Rusyn to prove that the device in issue was not properly classified. He therefore asked whether the Tribunal would proceed with the hearing based on the written material on the file.

The Tribunal decided to proceed with the hearing. The Tribunal was of the view that, although Mr. Rusyn’s brief outlined several arguments that are irrelevant to the issue in this appeal, it also challenged the Commissioner’s finding that the device in issue resembles with near precision a firearm. Given that the Commissioner’s witness was available to testify regarding his report on the device in issue, the Tribunal was of the view that there was sufficient basis on which to address the substantive issue in this appeal.

## EVIDENCE

In his brief, Mr. Rusyn identified several distinctions between the device in issue and the firearm on which it is modelled. These include the facts that the device in issue is made of pot metal as opposed to cast iron and that the hammer is cut off so that it cannot fire a projectile. Mr. Rusyn also pointed out that the device in issue weighs less than the real item and cannot make a “firing” sound.

The Commissioner’s witness was Mr. Dean Barclay Dahlstrom, who is employed as a firearms and toolmark examiner with the Royal Canadian Mounted Police at the Forensic Laboratory, Firearms Identification Section in Regina, Saskatchewan. At the hearing, Mr. Dahlstrom was qualified as an expert in firearms and toolmark identification.

Mr. Dahlstrom testified regarding his examination of the device in issue and his report that was submitted by the Commissioner. He testified that the device in issue cannot discharge a projectile, since it is made of pot metal, not carbon steel, and has a seam, since it is not made from a single piece. Further, the device in issue does not have a firing pin, there is nothing on the hammer to discharge the primer of a cartridge, and the “bore” contains a plug, such that a bullet could not pass through.

Mr. Dahlstrom testified that, in his opinion, the device in issue is designed to resemble with near precision a Colt single-action army revolver. He testified that the prototype was manufactured between 1873 and 1941 and that its general appearance remained relatively constant over that period. Mr. Dahlstrom testified that the prototype may be considered to be both an antique firearm and not an antique firearm,

depending upon the calibre. He further testified that the prototype discharged rim-fire or centre-fire ammunition.

## ARGUMENT

The Commissioner referred to the three-part test for determining whether an item is a “replica firearm” for the purposes of tariff item No. 9898.00.00: first, it is designed or intended to exactly resemble, or to resemble with near precision, a firearm; second, it is not itself a firearm; and, third, it does not resemble an antique firearm.<sup>4</sup>

The Commissioner referred to Mr. Dahlstrom’s evidence that the device in issue is designed to resemble a firearm, specifically, a Colt single-action 1873 model Peacemaker. He argued that the device in issue need not necessarily be identical to a firearm, but that it is sufficient for the device to resemble “with near precision” a firearm. The Commissioner argued that what is relevant is the appearance of the device and that differences between the device in issue and the actual firearm on which it is modelled that were identified by Mr. Rusyn do not have an impact on the physical appearance of the device in issue. He also argued that the device in issue is not itself a firearm.

The Commissioner argued that the device in issue is not an antique firearm. Although the device in issue can be said to resemble both antique and non-antique firearms, he referred to the Tribunal’s decision in Appeal No. AP-2001-064<sup>5</sup> as standing for the proposition that devices are not excluded from the definition of “replica firearm” in such circumstances.

## DECISION

The Tribunal is of the view that the determination of whether the device in issue is “designed or intended to exactly resemble, or to resemble with near precision, a firearm” is primarily a visual exercise, as noted previously in *Servello*. In the Tribunal’s view, a visual comparison of the device in issue and the firearm after which it was modelled reveals a close resemblance in size, shape and general appearance. As it is identified as a replica of a particular model, it was clearly “designed or intended” to resemble the original.

The Tribunal is also of the view that the device in issue is clearly not a firearm. The device in issue is not designed to discharge a projectile, and there is expert testimony that it is not capable of functioning as a firearm in its present condition. According to the expert witness, the barrel is obstructed, the device in issue lacks a firing pin, and the hammer is not equipped to discharge the primer of a cartridge.

The evidence indicates that the device in issue is designed to resemble an original firearm model that, in some instances, is an antique; its manufacture began before 1898, and the *Regulations Prescribing Antique Firearms*<sup>6</sup> prescribe certain calibres of this model produced before that date as antique firearms. However, the device in issue is designed to resemble, and resembles with near precision, a model of firearm that, according to the expert witness, continued to be produced into the 1940s and is currently being manufactured again. The expert witness testified that the “1873” designation, though it applied to the first year of design or sale of the model, is also a model designation that does not limit its year of manufacture.

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4. See *Vito Servello v. The Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) [*Servello*].

5. *Terry Thompson v. The Commissioner of the Canada Customs and Revenue Agency* (14 January 2003) (CITT).

6. S.O.R./98-464.

Further, the expert witness testified that the original firearm was designed to discharge rim-fire or centre-fire ammunition.

For these reasons, in the Tribunal's view, the device in issue resembles with near precision a firearm model that is not an antique for the purposes of this test. The third prong of the test is therefore satisfied.

The device in issue therefore satisfies the three-part test for a replica firearm, which, under the *Criminal Code*, is a prohibited device and falls under tariff item No. 9898.00.00. Mr. Rusyn's evidence and argument were insufficient to convince the Tribunal that the device in issue was not properly classified. Therefore, the Tribunal finds that the device in issue is properly classified under tariff item No. 9898.00.00 as a prohibited device.

Therefore, the appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member