



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Friday, September 26, 2003

Appeal No. AP-2002-009

IN THE MATTER OF an appeal heard on February 26, 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 April 17, 2002,
with respect to a request for redetermination under
subsection 60(4) of the *Customs Act*.

BETWEEN

DON L. SMITH

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-2002-009

DON L. SMITH

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 April 17, 2002, made under subsection 60(4) of the *Customs Act*. The issue in this appeal is whether the device in issue is properly classified under tariff item No. 9898.00.00 as a prohibited device, as determined by the Commissioner.

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

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 26, 2003
Date of Decision:	September 26, 2003
Tribunal Member:	James A. Ogilvy, Presiding Member
Counsel for the Tribunal:	Dominique Laporte
Clerk of the Tribunal:	Margaret Fisher
Appearance:	Elizabeth Richards, for the respondent



DON L. SMITH

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*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) dated April 17, 2002, made under subsection 60(4) of the *Act*.

The issue in this appeal is whether the device in issue is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*² 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*³ 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.

EVIDENCE

The Commissioner filed the device in issue as an exhibit. It was described as being an Airsoft UA-312 replica of a silenced submachine gun. It is made of black hard plastic, and the muzzle tip has an orange red tip. The device in issue is made in Taiwan.

Mr. Dean B. Dahlstrom, who is employed as a firearms and toolmark examiner with the Royal Canadian Mounted Police (RCMP) at the Forensic Laboratory, Firearms Section, in Regina, Saskatchewan, appeared on the Commissioner’s behalf. He was qualified by the Tribunal 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 was not a firearm, given that the projectiles that it discharges are not capable of causing serious bodily injury or death to a person. Mr. Dahlstrom explained that the combined weight and velocity of the projectiles fired by the device in issue were not high enough to penetrate the eye, which is the way in which the capacity to inflict serious bodily injury is measured. He indicated that the highest muzzle velocity achieved by the device in issue was 75 metres per second.

Mr. Dahlstrom further testified that the device in issue was designed to resemble with near precision the Heckler and Koch model MP5SDA3, a firearm that is used, for example, by RCMP special weapons and tactics teams. When asked by the Tribunal about the significance of the orange or red marking on the device in issue, he stated that, in his view, it was not significant, given that orange is a colour that sometimes appears on firearms, and that it does not preclude the device in issue from looking like a firearm.

ARGUMENT

In his written submission, Mr. Don L. Smith, who described himself as an independent filmmaker, indicated that the device in issue was ordered from a retailer in Texas. He submitted that the device in issue was not made to resemble a firearm with precision, or with near precision, any more than are other BB guns sold throughout Canada, which are more dangerous and, in some cases, more real looking. As to the issue of whether it meets the definition of a replica firearm, Mr. Smith’s argument can be summarized as follows: the device in issue is made of lightweight plastic and is much lighter than a real firearm; it does not have a working bolt or a chamber or an imitation bolt; it has orange markings on the muzzle and above the muzzle, which a real firearm does not have; it fires plastic BB pellets at 220 feet per second;⁴ and it does not have a metal barrel. Mr. Smith further submitted that the standard of quality of the device in issue was lower than

4. Approximately 67 metres per second.

that of a real gun. For the above reasons, it was Mr. Smith's submission that the device in issue is a toy gun and does not resemble with precision, or with near precision, a real firearm.

Mr. Smith stated that a customs officer with the Canada Customs and Revenue Agency had assured him that the device in issue could be shipped to Canada, as long as its muzzle velocity did not exceed 500 feet per second.⁵ He also argued that he was a responsible firearm owner with a licence to possess a firearm and that it made no sense for him to have the right to possess real firearms, but not BB guns.

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. He further referred to Mr. Dahlstrom's testimony that the device in issue is not capable of piercing an eye and, therefore, does not meet the criterion of being capable of causing serious bodily injury or death to a person and is not considered a firearm under the *Criminal Code*. As to the issue of whether or not the device in issue is designed to resemble or to resemble with near precision a firearm, the Commissioner argued that, based on the comparative photographs and Mr. Dahlstrom's expert testimony, it was clear that the device in issue is designed to resemble the Heckler and Koch submachine gun. Regarding the fact that the device in issue has an orange tip, the Commissioner noted the expert testimony, as well as the Tribunal's decision in *Vito V. Servello v. The Commissioner of the Canada Customs and Revenue Agency*,⁶ and submitted that it was not determinative and that nothing could be derived from this characteristic. Finally, the Commissioner noted that Mr. Smith did not appear at the hearing and submitted that the latter had the onus of proving that the Commissioner's classification is incorrect.

DECISION

Although Mr. Smith was not present at the hearing, the Tribunal decided to proceed with this matter. It was of the view that Mr. Smith's brief outlined several arguments challenging 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.

The Tribunal must decide whether the device in issue is properly classified under tariff item No. 9898.00.00. In order to do so, it must determine if the device in issue meets the definition of "replica firearm" under subsection 84(1) of the *Criminal Code*. For the device in issue to meet this definition, it must fulfil three conditions: (1) it must be designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not itself be a firearm; and (3) it must not be designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

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 with the real gun after which it was modelled reveals a close resemblance in size, shape and general appearance. It is clear from the photographic evidence submitted by the Commissioner that the device in issue is "designed or intended to exactly resemble, or to resemble with near precision, a firearm" and more specifically the Heckler and Koch model MP5SDA3. The Tribunal is also of the view that the device in issue is not a firearm. Indeed, according to the expert witness, although it is designed to discharge a projectile, it is not capable of causing serious bodily injury or death.

5. Approximately 152.4 metres per second.

6. (19 June 2002), AP-2001-078 (CITT) [*Servello*].

The Tribunal understands that the firearm model that the device in issue is designed to resemble is a current model, not an antique (defined, *inter alia*, as a firearm manufactured before 1898). The fact that this replica resembles with near precision a firearm model that is not an antique satisfies the third prong of the test.

One question that arose in the course of the hearing was whether the device in issue is excluded from tariff item No. 9898.00.00, under which an exclusion is provided for “(d) any weapon that, under subsection 84(3) of the Criminal Code, is deemed not to be a firearm”. Paragraph 84(3)(d) of the *Criminal Code* reads as follows:

(3) . . . the following weapons are deemed not to be firearms:

(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, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.

As a general principle of legal interpretation, exclusions must be interpreted strictly. Accordingly, goods that are explicitly listed as being included cannot be excluded by a broader exclusion that does not specifically cover those goods. Given that replica firearms are specifically listed as prohibited devices in subsection 84(1) of the *Criminal Code* and “prohibited devices” are explicitly included under tariff item No. 9898.00.00, the exclusion of any weapon that, under subsection 84(3), is deemed not to be a firearm cannot be construed as covering replica firearms. Moreover, in light of their express inclusion under tariff item No. 9898.00.00, it cannot be reasonably assumed that Parliament intended, by virtue of the exclusions under this tariff item, to allow the free importation of devices such as the one in issue.

Mr. Smith also raised other arguments that centre more on equity. The first one is in respect of the assurance received from a customs officer that the device in issue could be shipped to Canada, as long as its muzzle velocity did not exceed 500 feet per second. Secondly, Mr. Smith argued that he is a responsible firearm owner who has a firearm possession licence and further submitted that other BB guns, which are more dangerous and, in some cases, more real looking, are readily available in the Canadian marketplace. However, the Tribunal is not a court of equity, and its jurisdiction is limited to the tariff classification of the device in issue. These submissions do not constitute a basis upon which the Tribunal can found its classification of the device in issue, and the Tribunal can therefore not take them into account.

The Tribunal finds that the device in issue satisfies the three-part test for a replica firearm and, therefore, that it is properly classified under tariff item No. 9898.00.00 as a prohibited device.

For the above reasons, the appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member