



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-016

G. Wilkie

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, January 20, 2014*

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DECISION 6

IN THE MATTER OF an appeal heard on December 4, 2013, 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 April 22, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

G. WILKIE

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Presiding Member

Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 4, 2013

Tribunal Member: Jason W. Downey, Presiding Member

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PARTICIPANTS:**Appellant**

G. Wilkie

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on April 22, 2013, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).
2. This matter concerns two pistols designed to replicate the “Death Dealer Pistols” carried by the protagonist Selene in the *Underworld* motion picture series. They are made of polyresin stone, which is a mixture of plastic resin and stone powder, and can be displayed on an *Underworld*-themed concrete base (the two Death Dealer Pistols together with the display base form the goods in issue). The Death Dealer Pistols have no moving parts and simply rest on the concrete base.²
3. Mr. G. Wilkie purchased the goods in issue online from a retailer in the United States. The goods in issue arrived in Canada by mail and were detained by the CBSA on March 18, 2013, on the basis of a determination that the Death Dealer Pistols are prohibited devices, specifically, that they are replicas of a Beretta 92FS pistol (Beretta 92FS) and, therefore are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*.³ Goods of tariff item No. 9898.00.00 are prohibited from importation into Canada pursuant to subsection 136(1) of the *Customs Tariff*.
4. On March 28, 2013, Mr. Wilkie submitted a request for re-determination pursuant to subsection 60(1) of the *Act*.⁴ On April 22, 2013, the CBSA confirmed its decision pursuant to subsection 60(4).⁵
5. On May 27, 2013, Mr. Wilkie filed the present appeal pursuant to section 67 of the *Act*.⁶ The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 9898.00.00.
6. The Tribunal decided to hear the matter by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁷ The hearing was held on December 4, 2013.
7. The CBSA filed a report prepared by Mr. Murray A. Smith of the Royal Canadian Mounted Police (the RCMP report) and asked the Tribunal to recognize Mr. Smith as an expert in the field of identification and classification of firearms.⁸ Mr. Wilkie did not object to this request.
8. The Tribunal examined the goods in issue, as well as a Beretta 92FS provided by the CBSA.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2013-016-06A, Vol. 1 at 2.
3. S.C. 1997, c. 36.
4. Exhibit AP-2013-016-06A, Vol. 1 at 43.
5. *Ibid.* at 46-47.
6. Exhibit AP-2013-016-01, Vol. 1.
7. S.O.R./91-499.
8. Exhibit AP-2013-016-06A, Vol. 1 at 20.

STATUTORY FRAMEWORK

9. Subsection 136(1) of the *Customs Tariff* provides as follows:

The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.	L'importation des marchandises des n ^{os} tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
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[Emphasis added]

10. Tariff item No. 9898.00.00 provides as follows:

Firearms, prohibited weapons, restricted weapons, <i>prohibited devices</i> , 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	Armes à feu, armes prohibées, armes à autorisation restreinte, <i>dispositifs prohibés</i> , 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 [...]
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For the purposes of this tariff item:

Pour l'application du présent numéro tarifaire :

. . .

[...]

(b) "automatic firearm", "licence", "prohibited ammunition", " <i>prohibited device</i> ", "prohibited firearm", prohibited weapon, restricted firearm and "restricted weapon" have the same meanings as in subsection 84(1) of the <i>Criminal Code</i>	b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « <i>dispositif prohibé</i> », « munitions prohibées » et « permis » s'entendent au sens du paragraphe 84(1) du Code criminel [...].
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[Emphasis added]

11. 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*⁹ do not apply. Furthermore, Note 1 to Chapter 98 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."

12. According to the *Customs Tariff*, a "prohibited device" includes a replica firearm, as defined in subsection 84(1) of the *Criminal Code*.¹⁰

9. S.C. 1997, c. 36, schedule.

10. R.S.C., 1985, c. C-46.

13. Subsection 84(1) of the *Criminal Code* defines “replica firearm” as follows:

<p>“replica firearm” means any device [requirement 1] that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and [requirement 2] that itself is not a firearm, [requirement 3] but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.</p>	<p>« réplique » Tout objet, [condition 2] qui n’est pas une arme à feu, [condition 1] 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 [condition 3] 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.</p>
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14. The word “firearm”, for the purpose of this tariff item, has the same meaning as “firearm” found in section 2 of the *Criminal Code*, that is:

<p>“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.</p>	<p>« 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.</p>
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15. Subsection 84(1) of the *Criminal Code* defines “antique firearm” as follows:

<p>“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.</p>	<p>« arme à feu historique » Toute arme à feu fabriquée avant 1898 qui n’a pas été conçue ni modifiée pour l’utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement.</p>
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16. Therefore, to be considered replica firearms, the Death Dealer Pistols must fulfill three requirements: (1) they must be designed or intended to exactly resemble, or to resemble with near precision, firearms; (2) they must not themselves be firearms; and (3) they must not be designed or intended to exactly resemble, or to resemble with near precision, antique firearms.

ANALYSIS

17. As a preliminary matter, the Tribunal notes that it was asked to qualify Mr. Smith as an expert witness and to receive the RCMP report as expert testimony. Although Mr. Smith has been qualified as an expert by the Tribunal in the past,¹¹ this does not warrant his automatic qualification as such within the confines of the present case, especially in the case of a file hearing where the appellant is unrepresented. Having considered Mr. Smith’s résumé filed with the RCMP report, the unique facts and circumstances of this case, and noting that no objection was made to either his expertise or the RCMP report, the Tribunal recognizes Mr. Smith as an expert in the functioning of firearms.

11. For example, Mr. Smith was recognized as an expert in *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (CITT).

18. However, it is well established that it is the Tribunal's exclusive mandate to determine the legal classification of the Death Dealer Pistols, i.e. whether they are properly classified as prohibited devices under tariff item No. 9898.00.00, within the confines of the present proceedings.¹² Therefore, the opinions expressed by Mr. Smith to the effect that *he* believes the goods to be prohibited devices are of very little value because of this condition; no consideration was given to that determinative part of his testimony.

Is the Death Dealer Pistol Designed or Intended to Exactly Resemble, or to Resemble With Near Precision, a Firearm?

19. Mr. Wilkie argued that a Death Dealer Pistol does not sufficiently resemble a Beretta 92FS to meet the definition of a "replica firearm". In particular, he argued that a Death Dealer Pistol has different dimensions from a Beretta 92FS or a Walther P99, and bears no markings identifying it as either of these two types of firearms.¹³ Specifically, Mr. Wilkie submitted that a Death Dealer Pistol weighs 16 ounces, and has a total length of 10.25 inches and a barrel length of 6.25 inches each, whereas a Beretta 92FS weighs 34 ounces and measures 8.5 inches in length (with a barrel length of 4.9 inches), and a Walther P99 weighs 22 ounces and is 7.1 inches in length (with a barrel length of 4 inches).

20. The CBSA submitted that the Death Dealer Pistols were properly classified under tariff item No. 9898.00.00, as they both resemble with near precision a Beretta 92FS and, therefore, meet the definition of "replica firearm". The RCMP report identifies numerous points of similarity between a Beretta 92FS and the Death Dealer Pistols and concludes that they are both nearly identical in shape and appearance to a Beretta 92FS.

21. The CBSA submitted that the presence or absence of markings is not an important part of the appropriate test for determining whether a device resembles a firearm with near precision, which is based primarily on visual examination from a distance.¹⁴ The CBSA further submitted that the differences in weight between a Death Dealer Pistol and a Beretta 92FS are not apparent on visual examination of their respective shapes, sizes and appearances, and the differences in barrel length between the Death Dealer Pistol and a Beretta 92FS are visually negligible when held in the hand.¹⁵

22. The Tribunal would first like to recognize that, although the Death Dealer Pistols were presented as resting on the stone-like base, in the Tribunal's view, that component is nothing more than a display accessory for the Death Dealer Pistols, which can be readily removed from the base and held individually in the hand.

23. On the basis of its side-by-side comparison of the Death Dealer Pistol and the Beretta 92FS, the Tribunal finds that, upon initial and immediate observation, it is evident that the former is nearly identical to the latter.

12. *La Sagesse de l'Eau v. President of the Canada Border Services Agency* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) at para. 35.

13. Exhibit AP-2013-016-04, Vol. 1 at 1.

14. Exhibit AP-2013-016-06A, Vol. 1 at 12-13. The CBSA argued that the adoption of this test is consistent with the Tribunal's decision in *Vito V. Servello v. Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) at 3-4, where the Tribunal found that visual examination from a distance confirmed that the good in issue in that case resembled a Beretta 92F, despite differences in size, weight and appearance.

15. Exhibit AP-2013-016-06A, Vol. 1 at 13.

24. Upon closer inspection, the Tribunal was able to observe the extent to which the designers and manufacturers of the Death Dealer Pistol were intent on seeking visual replication of the Beretta 92F:

- The Death Dealer Pistol is nearly identical in size and dimensions (excluding the barrel extension, which is discussed below) to a Beretta 92FS.
- The pistol grips are almost identical in design and cut-out on both.
- In particular, there is an insert on the grips of the Death Dealer Pistol that, while not identical, is designed to visually replicate the Pietro Beretta insignia found on a Beretta 92FS. In addition, the inserts and screws on the pistol grips on the Death Dealer Pistol are placed at the exact same location as on a Beretta 92FS.
- The trigger guards are of identical shape and design, with equivalent front trigger grips present on both the Death Dealer Pistol and a Beretta 92FS.
- The slides, actuators, buttons and magazine release on the Death Dealer Pistol are all identical in shape, size and location to those of a Beretta 92FS.
- The very slight magazine extension that protrudes from the bottom of the handle on a Beretta 92FS has been reproduced exactly on the Death Dealer Pistol.
- The muzzles, barrels (again, excluding the extension, which is discussed below), slides, ejection ports and barrel grips of the Death Dealer Pistol are identical to those found on a Beretta 92FS.
- The placement and dimensions of the sights on the Death Dealer Pistol are identical to those found on a Beretta 92FS.
- The safety actuators on the Death Dealer Pistol are identical to those found on a Beretta 92FS; on the Death Dealer Pistol, they are set in the “fire” position, with a red dot that perfectly replicates the same one that is found on a Beretta 92FS when placed in the fire-ready position.
- The hammers and rear safety grips on the Death Dealer Pistol are identical to those found on a Beretta 92FS.

25. As indicated above, the only readily observable distinguishing element of the Death Dealer Pistol is a 1.5-inch (approximately 38 mm) barrel extension of grey-colored material that is perfectly mated to the barrel. This barrel block extension is not found on a Beretta 92FS.

26. Mr. Wilkie is correct in arguing that the length of the Death Dealer Pistol differs from the length of a Beretta 92FS; however, the Tribunal notes that this difference is based solely on the existence of the extension piece. In all other respects and as noted above, in a side-by-side comparison, a Beretta 92FS and the Death Dealer Pistols are nearly identical in appearance.

27. The Tribunal notes that the barrel block extension was *added* to the Death Dealer Pistols, as it is not moulded into the frames of the goods as are the other above-mentioned components. Further, the Tribunal observed that there are two recessed pins or possible Allen screws on the underside of the barrel block extension. It was not immediately evident to the Tribunal, without any form of tampering, whether these apparent fastener-type components could be actuated, but their presence, and the fact that the barrel block extension does not seem to be part of the initial casting of the goods in issue, caused the Tribunal to consider that the removal of this barrel block from the Death Dealer Pistols was a true possibility.

28. If the barrel block extension is removed, the Death Dealer Pistol would then have the same length as a Beretta 92FS, and the two would therefore become nearly indistinguishable in all regards. Alternatively,

this barrel extension could simply be painted black, like the rest of the Death Dealer Pistol, making it increasingly difficult to differentiate a Death Dealer Pistol from a Beretta 92FS, save through expert eyes or meticulous inspection.

29. For all of these reasons, the Tribunal finds that the Death Dealer Pistols are both designed and intended to exactly resemble, or to resemble with near precision, a Beretta 92FS.

Is the Death Dealer Pistol a Firearm?

30. In order to meet the definition of a “replica firearm”, the Death Dealer Pistol must not be a firearm. As noted above, a “firearm” is defined in section 2 of the *Criminal Code*. To paraphrase, a firearm must be able to, or be able to be adapted to, discharge projectiles capable of causing serious bodily harm or death.

31. The parties agree that the goods in issue are inert and that they cannot be adapted to discharge a projectile.¹⁶ The Tribunal finds that the Death Dealer Pistol is not a firearm since it has no moving parts and could not fire a projectile, nor could it be adapted to do so.

Is the Death Dealer Pistol Designed or Intended to Exactly Resemble, or Resemble With Near Precision, an Antique Firearm?

32. As noted above, an antique firearm is defined as a firearm manufactured before 1898. The evidence before the Tribunal shows that the Beretta 92 series was first manufactured in 1976¹⁷ and that the Beretta 92FS was first introduced into the market in 1984.¹⁸ Therefore, the Tribunal finds that the Beretta 92FS is not an antique firearm and that, given the above conclusion that the Death Dealer Pistol is designed to resemble a Beretta 92FS, it follows that the Death Dealer Pistol was not designed or intended to resemble an antique firearm.

33. The Death Dealer Pistols are replica firearms of tariff item No. 9898.00.00.

DECISION

34. The appeal is dismissed.

Jason W. Downey
Presiding Member

16. Exhibit AP-2013-016-04, Vol. 1 at 1; *ibid.* at 15.

17. Exhibit AP-2013-016-06A, Vol. 1 at 31.

18. *Ibid.* at 112.