



Ottawa, Wednesday, June 19, 2002

**Appeal No. AP-2001-078**

IN THE MATTER OF an appeal heard on May 23, 2002, under section 67 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 October 17, 2001, with respect to a request for redetermination under section 60 of the *Customs Act*.

**BETWEEN**

**VITO V. SERVELLO**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary



**UNOFFICIAL SUMMARY**

**Appeal No. AP-2001-078**

**VITO V. SERVELLO**

**Appellant**

**AND**

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

**Respondent**

The issue in this appeal is whether the Villa Parabellum Airsoft gun imported by the appellant on August 14, 2001, is properly classified under tariff item No. 9898.00.00, as determined by the respondent. The respondent found that the good in issue is “intended to exactly resemble, or to resemble with near precision, a firearm”, specifically identified by the respondent’s witness as resembling a Beretta handgun. Therefore, the good in issue was a “replica firearm” and, as a “prohibited device”, was classified under tariff item No. 9898.00.00.

The appellant argued that the good in issue did not resemble with near precision a Beretta firearm, as determined by the respondent. He argued that the good in issue is smaller than the Beretta, is made almost completely of plastic, as opposed to metal, and is a toy, not a replica firearm. Further, the good in issue uses compressed air, as opposed to gas, operates by way of a spring and is not electrically generated like the Beretta. In addition, he pointed out that the good in issue has a red piece of plastic on the outside of the peak of the barrel, which distinguishes it from a Beretta.

**HELD:** The appeal is dismissed. The good in issue is properly classified under tariff item No. 9898.00.00 as a prohibited device. The issue in this appeal is whether the good in issue resembles with near precision a firearm or whether it is a toy. In this regard, the Tribunal is of the view that only the visual features of the good in issue are relevant to this appeal. The Tribunal is satisfied that the good in issue resembles with near precision a firearm, that it is not a firearm and that it does not resemble with near precision an antique firearm.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: May 23, 2002  
Date of Decision: June 19, 2002

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: John Dodsworth

Clerk of the Tribunal: Margaret Fisher

Appearance: Lynne Marchildon, for the respondent



**Appeal No. AP-2001-078**

**VITO V. SERVELLO**

**Appellant**

**AND**

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

**Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

**REASONS FOR DECISION**

This is an appeal, under section 67 of the *Customs Act*,<sup>1</sup> from a decision of the Commissioner of the Canada Customs and Revenue Agency dated October 17, 2001. The issue in this appeal is whether the Villa Parabellum Airsoft gun imported by the appellant on August 14, 2001, is properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*,<sup>2</sup> as determined by the respondent. The appellant, who did not appear at the hearing, was served with all the documents on the record and was aware of the date of the hearing in the appeal. He informed the Tribunal that he would not appear and asked the Tribunal to consider, in its deliberations, the submissions contained in his brief dated March 13, 2002.

Mr. Deryk V.R. Penk, Forensic Laboratory Services Directorate of the Royal Canadian Mounted Police (RCMP), testified on behalf of the respondent. Mr. Penk was qualified by the Tribunal as an expert in firearms and toolmark identification. The good in issue was introduced as an exhibit, as was the Beretta 92F, the design of which the respondent alleged the good in issue was intended to replicate. Also entered into evidence as exhibits were photographs of the good in issue and of the Beretta 92F.

Mr. Penk referred to the forensic report that he prepared concerning the good in issue, which was introduced as evidence. He indicated that his tests determined that the good in issue discharged a projectile at 36 metres per second, such that it could not cause serious bodily injury or death to a person. He testified that a projectile would have to travel at a minimum velocity of 124 metres per second to cause serious bodily injury or death. With regard to the appearance of the good in issue, he testified that it resembles, or is intended to resemble, a Beretta 92F semi-automatic pistol. He further testified that it does not resemble an antique firearm, since all Beretta firearms were manufactured after 1898.

Mr. Penk testified that goods, such as the good in issue, are produced for target shooting on paper targets. He further testified that the red piece of plastic does not distinguish the good in issue from a real or replica firearm. According to Mr. Penk, police officers have been tricked by real weapons disguised as toys because the barrels of the real guns had been painted red or pink. Therefore, Canadian legislators have avoided referring to characteristics similar to the red piece of plastic to distinguish between real weapons and toys.

Mr. Penk further testified that the RCMP Forensic Laboratory considers an item to “resemble with near precision, a firearm” if it is possible for staff to determine by visual inspection, from a distance, the

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1. R.S.C. 1985 (2d Supp.), c. 1.  
2. S.C. 1997, c. 36.

make and model of the firearm that it is intended to resemble. In this case, he testified that there was no question in his mind that the good in issue looked like a Beretta 92F.

## ARGUMENT

In his brief, the appellant argued that the gun that he imported is a toy and does not resemble with near precision a Beretta firearm, as determined by the respondent. Therefore, he argued that the good in issue is not a replica firearm for the purposes of the *Customs Tariff*, that it is not properly classified under tariff item No. 9898.00.00 and that it should be returned to him. He referred to several characteristics of the good in issue that, in his view, distinguish it from a replica Beretta. Specifically, he argued that the good in issue is smaller than a Beretta and is made almost completely of plastic, whereas a Beretta is made of metal. Further, the good in issue is an air-compressed gun, while a replica Beretta is gas-operated. He also described a replica Beretta as being electrically generated, whereas the good in issue uses a spring mechanism. In addition, he pointed out that the good in issue has a red piece of plastic on the outside of the peak of the barrel, which distinguishes it from a real or replica Beretta.

The respondent submitted that Customs officials did not err in classifying the good in issue as a prohibited device. He referred to the fact that “prohibited device” for the purposes of tariff item No. 9898.00.00 has the same meaning as that of “prohibited device” which is found in subsection 84(1) of the *Criminal Code*<sup>3</sup> and includes “a replica firearm”.

The *Criminal Code* provides three conditions for a device to be classified as a “replica firearm”: first, it is designed to resemble with near precision a firearm; second, it is not itself a firearm; and, third, it does not resemble an antique firearm. The respondent argued that there was really no question that the good in issue does not resemble an antique firearm, given Mr. Penk’s uncontraverted testimony that all Beretta firearms were manufactured after 1898.

The respondent referred to Mr. Penk’s testimony that the device, in his view, is almost an exact replica of a Beretta 92F. He argued that the material from which the device is made is irrelevant to whether or not it resembles a firearm and that the use to which a device is put is also irrelevant to the determination of whether the good in issue is a “replica firearm”. The issue is only with respect to its appearance — whether or not the good in issue resembles a firearm.

The respondent also argued that the appellant has not discharged the onus of establishing that the gun issue is not properly classified under tariff item No. 9898.00.00. He referred to Note 1 to Chapter 98, which establishes the proper rules for the classification of items under tariff item No. 9898.00.00. He argued that, in this case, there was uncontradicted evidence that the two key requirements in the definition of “replica firearm” have been met and that the appeal should therefore be dismissed.

## TRIBUNAL’S DECISION

In this appeal, the Tribunal must determine whether the good in issue is properly classified under tariff item No. 9898.00.00, which provides:

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, . . .

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

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*<sup>4</sup> do not apply. Furthermore, 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.”

Therefore, whether the good in issue is properly classified under tariff item No. 9898.00.00 must be determined not according to the General Rules but in accordance with the applicable provisions of the *Customs Tariff* and the *Criminal Code*. According to the *Customs Tariff*, a “prohibited device” includes a replica firearm, as found in subsection 84(1) of the *Criminal Code*. “Replica firearm” is further defined in subsection 84(1) 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.

For the purposes of the appeal, the Tribunal determined whether the good in issue is a “replica firearm” as defined in the *Criminal Code*. The Tribunal eliminated the possibility that the good in issue is a firearm. 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:

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.

In this regard, the Tribunal accepts the uncontested testimony of Mr. Penk on behalf of the respondent that the testing that he performed indicated that the velocity of projectiles discharged from the good in issue was 36 metres per second, which cannot cause serious bodily injury or death to a person. He testified that a projectile discharged from a firearm would have to travel at a minimum velocity of 124 metres per second to cause serious bodily injury or death. Further, the Tribunal also accepts Mr. Penk’s testimony that the good in issue does not resemble an antique firearm, as the Beretta 92F was manufactured after 1898.

The remaining issue in this appeal is whether the good in issue is “designed or intended to exactly resemble, or to resemble with near precision, a firearm”. The appellant argues that the good in issue is essentially a toy, which does not resemble a firearm, while the respondent argues that it does. Some of the characteristics of the good in issue identified by the appellant that distinguish it from a firearm, such as the fact that it uses air-compression and a spring mechanism and is made of plastic, are not readily visible. The definition of the word “resemble” in *The Canadian Oxford Dictionary*<sup>5</sup> includes the words “features in common” and “or the same appearance”. Further, 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. This indicates to the Tribunal that features of the good in issue that are not visible are not relevant to its classification.

The Tribunal is of the view that the key physical feature of the good in issue that is not found on the Beretta firearm upon which it is modelled is the red piece of plastic found on its barrel. In this regard, the

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4. *Supra* note 2, schedule [hereinafter General Rules].

5. 1998, s.v. “resemble”.

Tribunal notes that some of Mr. Penk's testimony actually supports, to some degree, the appellant's position that this piece of plastic distinguishes the good in issue from a Beretta firearm. Specifically, Mr. Penk testified that police officers have been tricked into believing that firearms with red barrels were toys. If a red barrel on a firearm creates the potential for police officers to mistake it for a toy, then a replica firearm that has a red piece of plastic on the barrel could also be mistaken for a toy. Conversely, since the barrel of a firearm can be and has been painted red, a red barrel is not a distinguishing feature of firearms. Mr. Penk also reinforced the appellant's position that the good in issue is a toy, in that he testified that it was used for "fun" target practice. However, the function of the gun is not the issue; rather, it is its resemblance to a firearm that the Tribunal must assess.

The Tribunal is of the view that, on balance, the good in issue is "intended to exactly resemble, or to resemble with near precision, a firearm". It is clear that the good in issue is designed to resemble a Beretta firearm and that both share many of the same apparent features. The Tribunal also notes Mr. Penk's evidence that, at a distance, he could visually identify the good in issue as a Beretta 92F and that this is the test used by the RCMP to determine the morphology of a replica.

In light of the foregoing, the appeal is dismissed. In the Tribunal's view, the good in issue is designed or intended to exactly resemble, or to resemble with near precision, a firearm; it is not itself a firearm; and it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm. As a replica firearm is included under the definition of "prohibited device" found in subsection 84(1) of the *Criminal Code*, the Tribunal is of the opinion that the respondent properly classified the good in issue under tariff item No. 9898.00.00.

Patricia M. Close  
Patricia M. Close  
Presiding Member