



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

---

## DECISION AND REASONS

Appeal No. AP-2012-023

J. Hains

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Friday, October 25, 2013*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS ..... 1

    BACKGROUND ..... 1

    PROCEDURAL HISTORY ..... 1

    GOODS IN ISSUE..... 2

    STATUTORY FRAMEWORK..... 2

    POSITIONS OF PARTIES ..... 4

    ANALYSIS..... 4

    DECISION ..... 7

IN THE MATTER OF an appeal heard on July 9, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated July 10 2012, with respect to a request for a further re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**J. HAINS**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Jason W. Downey

Jason W. Downey  
Presiding Member

Dominique Laporte

Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: July 9, 2013  
  
Tribunal Member: Jason W. Downey, Presiding Member  
  
Counsel for the Tribunal: Georges Bujold  
Anja Grabundzija  
  
Manager, Registrar Programs and Services: Michel Parent  
  
Registrar Officer: Ekaterina Pavlova

**PARTICIPANTS:****Appellant**

J. Hains

**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Luc Vaillancourt

Please address all communications to:

The Secretary  
Canadian International Trade Tribunal  
15th Floor  
333 Laurier Avenue West  
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a decision made by the President of the Canada Border Services Agency (CBSA) on July 10, 2012, pursuant to subsection 60(4).

2. The issue in this appeal is whether three lighters imported by Mr. J. Hains are properly classified under tariff item No. 9898.00.00 of the schedule to the *Customs Tariff*<sup>2</sup> as prohibited devices, namely, replica firearms, as determined by CBSA.

### PROCEDURAL HISTORY

3. The lighters were detained by the CBSA on March 28, 2012 when they entered Canada,<sup>3</sup> since the CBSA had determined that they were classified under tariff item No. 9898.00.00 as prohibited devices. On April 10, 2012, Mr. Hains requested a further re-determination of the tariff classification of the lighters, following which the CBSA confirmed, on July 10, 2012, under subsection 60(4) of the *Act*, that they were classified under tariff item No. 9898.00.00 as prohibited devices and that their importation into Canada was prohibited.

4. On August 16, 2012, Mr. Hains appealed that decision to the Tribunal.

5. Mr. Hains submitted the following devices as exhibits in support of his position: a cap pistol,<sup>4</sup> a “Sniper Musket” (made of plastic),<sup>5</sup> a plastic banana,<sup>6</sup> a plastic rifle<sup>7</sup> and a ProNature hunting and fishing store circular.<sup>8</sup>

6. The CBSA filed the revised report of the Science and Engineering Directorate of the CBSA,<sup>9</sup> supported by detailed photographic evidence representing both the lighters in issue and the real firearms that they resemble, for purposes of comparison.<sup>10</sup> The CBSA also filed the lighters in issue, as well as the five real firearms that served as the CBSA’s photographic evidence.<sup>11</sup>

---

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

3. Notice of Detention, Exhibit AP-2012-023-12A, tab 5.

4. Exhibit AP-2012-023-A-01.

5. Exhibit AP-2012-023-A-02.

6. Exhibit AP-2012-023-A-03.

7. Exhibit AP-2012-023-A-04.

8. Exhibit AP-2012-023-A-05.

9. Exhibit AP-2012-023-12A, tab 1.

10. Exhibit AP-2012-023-B-01.

11. The five real firearms are exhibits AP-2012-023-B-05 to AP-2012-023-B-09.

## GOODS IN ISSUE

7. The CBSA describes the lighters in issue as follows:<sup>12</sup>

[Lighter 1] *Beretta M9*

This lighter is made of plastic and metal components, grey and black in colour, bearing the following inscriptions on each side of the barrel: “U.S. 9mm M9 – P. Beretta PB” and “Pietro Beretta Mod.22FS CAL9, made in China M9 – P. ERETta” . . . , having the shape, size and general appearance of the Beretta M9 model;<sup>13</sup>

[Lighter 2] *Colt Python Magnum 357, short barrel*

This lighter is made of plastic and metal components, grey and black in colour, bearing the following inscriptions on each side of the barrel: “Python 357, 357 Magnum CTG.” and “Colts PT. F.A. Mfg. Co. [Hartford] Conn. U.S.A.” . . . having the shape, size and general appearance of the Colt Python Magnum 357, short barrel model.<sup>14</sup>

[Lighter 3] *Colt Python Magnum 357, long barrel*

This lighter is made of plastic and metal components, grey and black in colour, bearing the following inscriptions on each side of the barrel: “Python 357, 357 Magnum CTG.” and “Colts PT. F.A. Mfg. Co. [Hartford] Conn. U.S.A.” . . . having the shape, size and general appearance of the Colt Python Magnum 357, long barrel model.<sup>15</sup>

[Translation]

## STATUTORY FRAMEWORK

8. Subsection 136(1) of the *Act* 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 <sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.
---	---

9. Tariff item No. 9898.00.00 provides as follows:

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 . . .	Armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, 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, [...]
---	---

For the purposes of this tariff item,

Pour l'application du présent numéro tarifaire :

. . .

[...]

12. Exhibit AP-2012-023-12A at para. 2.

13. Exhibit AP-2012-023-B-02.

14. Exhibit AP-2012-023-B-03.

15. Exhibit AP-2012-023-B-04.

(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* . . . .

b) « arme à autorisation restreinte », « arme à feu à autorisation restreinte », « arme à feu prohibée », « arme automatique », « arme prohibée », « dispositif prohibé », « munitions prohibées » et « permis » s’entendent au sens du paragraphe 84(1) du Code criminel [...]

10. Subsection 84(1) of the *Criminal Code* <sup>16</sup> provides that a prohibited device includes, in particular, 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.

« réplique » Tout objet, qui n’est pas une arme à feu, 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 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.

11. In order to determine whether the lighters in issue are properly classified under tariff item No. 9898.00.00, the Tribunal must determine whether they are covered by the definition of the term “replica firearm” under subsection 84(1) of the *Criminal Code*.

12. For a device to be considered a replica firearm under subsection 84(1) of the *Criminal Code*, the following three conditions must be met: (1) it is a device designed or intended to exactly resemble, or to resemble with near precision, a firearm; (2) it must not be a firearm; and (3) it is not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

13. In this regard, section 2 of the *Criminal Code* defines “firearm” 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.

« 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.

14. 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.

« 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.

---

16. R.S.C. 1985, c. 46.

## POSITIONS OF PARTIES

15. Mr. Hains submitted that the lighters in issue are not dangerous, since they are made of plastic and cannot shoot projectiles.<sup>17</sup> Mr. Hains submitted that the function of the lighters is decorative and utilitarian (for example, to light candles).<sup>18</sup> Thus, Mr. Hains submitted that they are comparable to children's toys.<sup>19</sup> Mr. Hains added that pellet guns that are more dangerous than these lighters are sold freely in Canada.<sup>20</sup> Finally, he added that he already has several lighters of the same kind in his possession and that only he has access to them.<sup>21</sup>

16. The CBSA submitted, for its part, that the lighters in issue meet the three conditions that define a replica firearm. It submitted that the lighters closely resemble the real firearms that they copy, due to their size, shape and general appearance. The CBSA added that the existence of minor differences—such as the size, which may differ by a few millimeters, and the colour, which may differ by a few shades—does not distinguish the lighters sufficiently from real firearms and that it is possible, at a distance, to identify the lighters by sight as real firearms. The CBSA added that the lighters cannot shoot projectiles and thus are not real firearms. The parties agreed on the fact that the lighters are not replicas of antique firearms.

17. Incidentally, the CBSA submitted that the arguments raised by Mr. Hains are irrelevant to determine whether the lighters in issue are replica firearms.

## ANALYSIS

18. The first issue is whether the lighters in issue are *devices designed or intended to exactly resemble, or to resemble with near precision, a firearm*. Therefore, the first criterion of the definition of a replica firearm requires a comparative examination of the replica firearms and the firearms that they copy.

19. According to the Tribunal's case law, this essentially requires a visual examination,<sup>22</sup> and the similarity may be considered sufficient despite the presence of minor differences between the replica firearm and the firearm.<sup>23</sup> Indeed, the principal consideration is whether the lighters can be mistaken for firearms, because "... 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."<sup>24</sup>

20. There is no doubt that the real Beretta M9, Colt Python Magnum 357 short barrel and Colt Python Magnum 357 long barrel pistols are firearms within the meaning of the *Criminal Code*. Mr. Hains does not dispute this.

21. In support of its evidence, the CBSA filed a copy of the reference records 25254 and 17532 from the Royal Canadian Mounted Police Firearms Reference Table, dated April 12, 2013, which respectively

---

17. Exhibit AP-2012-023-04 at para. B.

18. Exhibit AP-2012-023-14.

19. Exhibit AP-2012-023-04 at para. A.

20. Exhibit AP-2012-023-04A at para. E.

21. Exhibit AP-2012-023-04A at para. F.

22. *Don L. Smith v. the Commissioner of the Canada Customs and Revenue Agency* (26 September 2003), AP-2002-009 (CITT).

23. See, for example, *Scott Arthur v. the Commissioner of the Canada Customs and Revenue Agency* (30 January 2008), AP-2006-052 (CITT) at para. 16.

24. *Vito V. Servello v. the Commissioner of the Canada Customs and Revenue Agency* (19 June 2002), AP-2001-078 (CITT) at 4.

catalogue the Beretta M9 and Colt Python pistols.<sup>25</sup> The CBSA also filed excerpts from a firearms reference guide, which also includes these pistols.<sup>26</sup>

22. For the purposes of the inquiry, the Tribunal had access to the real Beretta M9 and Colt Python firearms, both with a stainless steel finish and with a black/bluish finish. The Tribunal had the opportunity to examine and compare the firearms and the lighters side by side and to handle them to have a clear understanding of their unique features.

23. In the Tribunal's opinion, the lighters in issue appear to be close, even quasi-exact reproductions of the original pistols. The reproduction is so precise that, during the hearing, the Tribunal even had to touch the items several times to ascertain whether an item was a real pistol or a lighter. Indeed, in the case of the short- and long-barrelled Colt Python Magnum 357s (lighters 2 and 3), it was only possible to distinguish the lighters (which are made of light plastic) from the originals (which are solid steel) by touching and handling the parts; the degree of replication is astonishing.

24. The Tribunal proceeded with a painstaking examination of the lighters in issue in comparison with the original pistols and immediately recognized the degree to which the lighter manufacturer dwelled on reproducing the appearance of the original pistols in detail.

25. For lighters 2 and 3, the Tribunal was able to recognize the striking similarity with the original in the following cases:

- the design and general profile of the lighter (identical);
- the length of the barrel, the profile and the ventilated ribs;
- the design of the sights;
- the profile of the hammer;
- the barrel opening mechanism, including its design, unique to Colt;
- the profile of the barrel and the presence of six ammunition chambers;
- the "rampant horse" logo, Colt's trademark;
- the design of the butt, with insertion of a medallion with a rampant horse, Colt's trademark;
- annotations on the left and right sides of the barrels: "Colts PT. F.A. Mfg. Co. [Hartford] Conn. U.S.A." and "Python 357, 357 Magnum CTG";
- glossy stainless steel or bluish finish.

26. As for lighter 1, the only visual feature that could allow the Tribunal to distinguish the lighter from the real Beretta M9 pistol was the finish. The real Beretta M9 pistols made available to the Tribunal had a matt stainless steel or black finish, while lighter 1 had a glossy stainless steel finish; it is difficult to believe that a reasonably informed average person could make this distinction without the specialized comparative framework from which the Tribunal was able to benefit.

---

25. Exhibit AP-2012-023-12A, tab 2.

26. This is the *2013 Standard Catalog of Firearms, The Collector's Price & Reference Guide*, 23rd ed., excerpts of which are reproduced as Exhibit AP-2012-023-12A, tab 3.

27. The other features of lighter 1 were identical in every respect to those of the real pistol, particularly in the following cases:

- the design and general profile of the lighter (identical);
- the slide lock;
- the release;
- the safety catch;
- the trigger, as well as the trigger guard;
- the design of the sights;
- the butt, and the location of the screw on the butt;
- the inscriptions on the “Beretta M9” lighter, and the Beretta trademark, i.e. “PB” (meaning Pietro Beretta) inscribed in an oval.

28. In short, the lighters in issue imitate the original weapons so well that it is easy to be mistaken, even in an attentive and meticulous examination.

29. Considering that the definition of replica firearm, which seeks to prohibit devices that could be mistaken for real firearms, requires a much less attentive examination than the Tribunal had the leisure to perform in a serene environment, the Tribunal finds that the lighters in issue easily meet the first criterion of the definition, namely, that they are devices “designed or intended to exactly resemble, or to resemble with near precision, a firearm”.

30. Regarding the second and third criteria for defining a “replica firearm”, it is obvious, on the basis of the evidence, that the lighters in issue themselves are not “firearms”, since they cannot shoot projectiles, and that the real firearms that the lighters resemble are not “antique firearms”,<sup>27</sup> according to the definition of these terms in the *Criminal Code*.

31. The Tribunal notes that the other arguments raised by Mr. Hains, namely, the fact that the lighters in issue are not dangerous and are decorative, are not relevant to determining whether the importation of these devices is prohibited due to their *resemblance* to real firearms.

32. The same principle applies to Mr. Hains’s arguments that the lighters in issue are not prohibited replica firearms, because other replica firearms can be purchased from dealers in Canada, or because he already owns replica firearms similar to the lighters in issue. The Tribunal has determined on several occasions that such considerations are irrelevant for the purposes of the definition of “replica firearm” and the tariff classification. For example, in *Romain L. Klaasen v. President of the Canadian Border Services Agency*,<sup>28</sup> the Tribunal stated that “. . . that any previous shipments . . . were not intercepted by the CBSA or its predecessors is irrelevant. The administrative action, or inaction, of the CBSA cannot change the law.”<sup>29</sup>

33. This having been said, the Tribunal notes that it is surprising to learn of Exhibit AP-2012-023-A-05, the ProNature hunting and fishing store circular, advertising the sale of compressed air pistols similar in all

---

27. On this last point see the Royal Canadian Mounted Police Firearms Reference Table dated April 12, 2013, Exhibit AP-2012-023-12A, tab 2.

28. (18 October 2005), AP-2004-007 (CITT) [*Klaasen*].

29. *Klaasen* at para. 7.

respects to the pistols of the kind made available to the Tribunal for purposes of comparison in this case. Although this situation is irrelevant under the *Criminal Code* and the *Customs Tariff*, for the determination of the tariff classification of the lighters in issue, the Tribunal understands the degree to which the average citizen can be confused in such a situation, which gives reason to anticipate unequal administration of customs control and the *Criminal Code*. Whatever the case may be, this question is not for the Tribunal to resolve within the context of this case.

34. In view of the above, the lighters in issue meet the three criteria of the *Criminal Code* for the definition of replica firearm and are therefore properly classified under tariff item No. 9898.00.00.

## DECISION

35. For the foregoing reasons, the appeal is dismissed.

Jason W. Downey

Jason W. Downey  
Presiding Member