



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2015-022

Schlumberger Canada Limited

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Wednesday, June 21, 2017*

**TABLE OF CONTENTS**

DECISION.....	i
STATEMENT OF REASONS .....	1
INTRODUCTION .....	1
PROCEDURAL HISTORY .....	1
GOODS IN ISSUE.....	2
CLASSIFICATION IN CHAPTERS 1 TO 97.....	3
Legal Framework.....	3
TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES .....	4
Relevant Classification Provisions Concerning Heading No. 84.79 .....	4
PRELIMINARY ISSUES .....	7
Burden of Proof in Appeals .....	7
Change in Schlumberger’s Argument .....	8
TRIBUNAL ANALYSIS.....	8
Is a Perforating Gun an Other Firearm or Similar Device That Operates by the Firing of an Explosive Charge? .....	9
Is a Perforating Gun an “Other Machine” of Heading No. 84.79? .....	12
Article With a Particular Use or Function .....	13
Combination of Stationary and Moving Parts.....	14
Production, Modification or Transmission of Force to an External Body.....	14
Are the Goods in Issue Eligible for Relief Under Chapter 99?.....	15
DECISION .....	16

IN THE MATTER OF an appeal heard on August 31, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF three decisions of the President of the Canada Border Services Agency, dated October 28, 2015, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**SCHLUMBERGER CANADA LIMITED**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed in part.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: August 31, 2016  
Tribunal Panel: Jason W. Downey, Presiding Member  
Support Staff: Rebecca Marshall-Pritchard, Counsel

**PARTICIPANTS:****Appellant**

Schlumberger Canada Limited

**Counsel/Representative**Michael Smith  
Sean Everden**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Thomas Finlay

**WITNESSES:**Trevor Hovey  
Perforation Shop Supervisor, Explosives  
E&P Wireline, Schlumberger CompanyCorale Ann Doyle  
Product Development Manager  
Danatec Educational Services Ltd.Stephen D. Butt  
Professor  
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## STATEMENT OF REASONS

### INTRODUCTION

1. This is an appeal filed by Schlumberger Canada Limited (Schlumberger) on November 5, 2015, pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from three decisions made on October 28, 2015, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to requests for re-determination of advance rulings on tariff classification.

2. The appeal first concerns the classification of a subset of the goods in issue (described below) in a heading of Chapters 1 to 97 of the schedule to the *Customs Tariff*.<sup>2</sup> The key question is whether that subset of the goods in issue is properly classified under tariff item No. 9305.99.10 as parts of other firearms and similar devices which operate by the firing of an explosive charge (parts and accessories of articles of headings No. 93.01 to 93.04), as determined by the CBSA, or should be classified under tariff item No. 8479.90.90 as parts of other machines and mechanical appliances having individual functions, not specified or included elsewhere, as argued by Schlumberger.

3. Second, the appeal raises the question whether the goods in issue may also be classified under tariff item No. 9910.00.00 as materials for use in the manufacture of goods of Section XVI and thereby benefit from duty-free treatment.

### PROCEDURAL HISTORY

4. Schlumberger requested advance rulings in respect of the goods in issue prior to September 2014.<sup>3</sup> The CBSA determined that the perforating gun parts should be classified as parts, prompting Schlumberger to request further re-determinations pursuant to subsection 60(1) of the *Act*. Schlumberger claimed that the perforating gun parts should be classified under subheading item No. 8479.89 and that the entirety of the goods in issue should qualify for duty relief under tariff item No. 9910.00.00 as materials for use in the manufacture of goods of Section XVI.

5. On October 28, 2015, pursuant to subsection 60(4) of the *Act*, the CBSA denied the requests for reconsideration with respect to the tariff classification of the perforating gun parts and further denied duty-free treatment of the entirety of the goods in issue under Chapter 99.

6. The Canadian International Trade Tribunal (the Tribunal) held a public hearing in Ottawa, Ontario, on August 31, 2016. Schlumberger called two witnesses it sought to qualify as experts: Mr. Trevor Hovey, Perforation Shop Supervisor at Schlumberger, and Ms. Corale Doyle, currently Product Development Manager at Danatec Educational Services Ltd., but formerly Canadian Regulatory Compliance Manager at Schlumberger.

7. The Tribunal was satisfied with Mr. Hovey's extensive experience in the assembly and operation of perforation guns and accepted his qualification in perforating guns for the purposes of these proceedings.<sup>4</sup> However, when considering the experience of Ms. Doyle in the regulation of the import and control of

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

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

3. Neither Schlumberger nor the CBSA filed the original advance ruling requests or initial decisions of the CBSA under subsection 59(2) of the *Act*.

4. *Transcript of Public Hearing*, Vol. 1, 31 August 2016, at 35.

explosive goods, the Tribunal was satisfied that her testimony as a lay witness would suffice for the purposes of these proceedings. As such, the Tribunal did not qualify her as an expert in this field.<sup>5</sup>

8. The CBSA also called Dr. Stephen Butt, Professor, Memorial University of Newfoundland, as an expert witness, and the Tribunal qualified him as an expert in the area of well perforation and well fracturing practices in the exploration of oil and natural gas.<sup>6</sup>

9. Following the hearing, the Tribunal held a teleconference and discussed with the parties a decision of the U.S. Customs and Border Protection (USCBP) that dealt with a certain perforating gun part (i.e. carrier tube). Specifically, the Tribunal queried whether the perforating gun parts themselves should be classified in accordance with their constituent elements instead of as a group. Both parties declined to present submissions on the various elements of the individual perforating gun parts at issue in this appeal. Instead, they agreed that the perforating gun parts were just that—parts to be used to assemble a perforating gun. Despite additional probing by the Tribunal, both parties declined to further describe the goods; the Tribunal had little choice but to proceed on what was available to it on file.

## GOODS IN ISSUE

10. The goods in issue are various parts of what is known as a perforating gun. Although the parties referred to an illustrative list of perforating gun parts, they failed to specifically tell the Tribunal what the goods in issue actually were. For tariff classification purposes, the gun is to be seen as a whole, whereas its contents are asked to be classified as parts of a whole.

11. A perforating gun is used to create holes in oil and gas wells in preparation for oil and natural gas production, and operates by carrying explosive-shaped charges downhole that are detonated to create conduits for the reservoir fluids to flow from the formation into the well bore and up to the surface.

12. The perforating gun itself is a long cylindrical device, of any designed length, containing an inner framework/lattice to which explosive charges are attached and positioned in order to perforate an existing well casing and thus allow for oil from the ground to penetrate the well bore in order to be pumped to the surface. It is a self-contained unit which includes the charges, wiring and necessary electronics. Once downhole, it is detonated by computer-controlled processes occurring and operated in a command centre placed at a safe distance. The unit is mostly expended within the borehole upon discharge, and operators would typically only retrieve the skeletal remains of the detonated device.

13. There are three groups of goods in issue: (i) perforating gun parts, carrier tubes, cassettes and parts thereof (perforating gun parts); (ii) detonators, detonating cords, fuses boosters, excitors and igniter/detonator assemblies (detonators); and (iii) shaped explosive gun charges (shaped charges). The parties agree on the primary tariff classification of the detonators and shaped charges in Chapters 1 to 97. However, the parties disagree on the primary tariff classification of the perforating gun parts in Chapters 1 to 97 and disagree further on whether the totality of the goods should qualify for duty relief under Chapter 99.

14. A perforating gun cannot, by law, be imported in an assembled condition.<sup>7</sup> As such, those wishing to use a perforating gun in the exploration and discovery of natural gas and oil must import the parts of a perforating gun separately and build it domestically.

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5. *Ibid.* at 81.

6. *Ibid.* at 118-119.

7. *Explosives Act*, R.S.C., 1985, c. E-17; *Explosives Regulations*, 2013, SOR/2013-211.

15. The parties agree that the classification of the perforating gun parts will depend on the classification of the assembled perforating gun itself. Therefore, the Tribunal will begin its tariff classification exercise with the perforating gun, with the classification of the parts thereof being done afterwards.

## CLASSIFICATION IN CHAPTERS 1 TO 97

### Legal Framework

16. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).<sup>8</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and under tariff items.

17. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>9</sup> and the *Canadian Rules*<sup>10</sup> set out in the schedule.

18. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.<sup>11</sup>

19. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>12</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>13</sup> published by the WCO. While the classification opinions and the explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>14</sup>

20. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes.

21. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according

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8. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

9. S.C. 1997, c. 36, schedule [*General Rules*].

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

11. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

12. World Customs Organization, 2nd ed., Brussels, 2003.

13. World Customs Organization, 5th ed., Brussels, 2012.

14. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.

to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

22. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

## TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

### Relevant Classification Provisions Concerning Heading No. 84.79

23. The relevant tariff nomenclature concerning heading No. 84.79 provides as follows:

#### SECTION XVI

#### MACHINERY AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPMENT; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

#### Chapter 84

#### NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF

...

**84.79**            **Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.**

**8479.89**        **--Other**

8479.89.10     -- -Aircraft ground use continuous flow jet engine start units; Artificial fog or smoke generators; Automatic loaders for small arms ammunition; Automotive relay assembly lines; Box dumpers for use with fresh fruit or fresh vegetables; Cathode assembly systems; Coating plant with thermal waste gas purification plant; Coin control devices, of iron or steel, for apparatus, other than telephones, which vends merchandise, services or tickets; Condenser tube cleaning systems; Double-sided printed circuit board coating systems; Dry solder mask processing lines for printed circuit board production; Fishing tools or *well fracturing machines and appliances to be employed in the exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells* or for use in drilling machinery to be employed in the exploration, discovery, development or operation of potash or rock salt deposits; . . .

...

8479.89.90     -- -Other

...



**8479.90**        **-Parts**  
 ...  
 8479.90.90      -- -Other

[Italics added, bold in original]

24. The relevant legal notes for Section XVI provide as follows:

...

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:

(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings;

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17.

...

5. For the purposes of these Notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.

25. The relevant explanatory notes to Section XVI provide as follows:

#### **GENERAL**

##### **(I) GENERAL CONTENT OF THE SECTION**

(A) Subject to certain exclusions provided for in the Notes to this Section and to Chapters 84 and 85 and apart from goods covered more specifically in other Sections, this Section covers all mechanical or electrical machinery, plant, equipment, apparatus and appliances and parts thereof, together with certain apparatus and plant which is neither mechanical nor electrical (such as boilers and boiler house plant, filtering apparatus, etc.) and parts of such apparatus and plant.

26. The supplementary note to Section XVI provides as follows:

1. In this Section the term “mechanically operated” refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

27. The relevant explanatory notes to heading No. 84.79 provide as follows:

**Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), the heading also covers parts of the machinery of this heading.**

...

This heading is **restricted to** machinery having individual functions, which :

- (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.
- and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.
- and (c) Cannot be classified in any other particular heading of this Chapter since :
  - (i) No other heading covers it by reference to its method of functioning, description or type.
  - and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.
  - or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).

28. The relevant tariff nomenclature concerning heading No. 93.03 provides as follows:

#### SECTION XIX

#### ARMS AND AMMUNITION; PARTS AND ACCESSORIES THEREOF

#### Chapter 93

#### ARMS AND AMMUNITION; PARTS AND ACCESSORIES THEREOF

...

**93.03 Other firearms and similar devices which operate by the firing of an explosive charge (for example, sporting shotguns and rifles, muzzle-loading firearms, Very pistols and other devices designed to project only signal flares, pistols and revolvers for firing blank ammunition, captive-bolt humane killers, line-throwing guns).**

29. The relevant explanatory notes to Chapter 93 provide as follows:

This Chapter covers:

- (1) Arms of all descriptions designed for ground, sea or air warfare, for use by military armed forces or by the police or other organised services (customs, frontier guards, etc.).
- (2) Arms for use by private persons for defence, hunting, target shooting (e.g., in miniature ranges, shooting galleries or fairground stands), etc.
- (3) Other devices which operate by the firing of an explosive charge (e.g., line-throwing guns and Very pistols).
- (4) Ammunition and missiles (other than articles of Chapter 36).

30. The relevant explanatory note to heading No. 93.03 provides as follows:

This heading includes all firearms **not covered by headings 93.01 and 93.02**; it includes some devices which are not weapons but which operate by the firing of an explosive charge.

31. The relevant tariff nomenclature concerning heading No. 93.05 provides as follows:

**93.05 Parts and accessories of articles of headings 93.01 to 93.04.**

...

**9305.99 --Other**

9305.99.90 -- -Other

32. The relevant explanatory note to heading No. 93.05 provides as follows:

The parts and accessories of this heading include:

...

(2) **Metal castings, stampings and forgings, for military small arms, sporting and target shooting guns, etc., revolvers and pistols**, e.g., barrels, breeches, locks, trigger guards, tumblers, levers, percussion hammers, cocking pieces, triggers, sears, extractors, ejectors, frames (of pistols), plates, butt plates, safety catches, cylinders (for revolvers), front and back sights, magazines.

33. Finally, the relevant tariff nomenclature concerning tariff item No. 9910.00.00 provides as follows:

Materials for use in the manufacture of goods of Section XVI, of Chapter 40, 73 or 90, or of heading 59.10 or 87.05 (excluding the motor vehicle chassis portion and parts thereof), such goods being used in the exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells up to and including the wellhead assembly or surface oil pumping unit.

## PRELIMINARY ISSUES

### Burden of Proof in Appeals

34. The Tribunal hears and decides appeals on a *de novo* basis and, accordingly, it is abundantly clear that the Tribunal can accept evidence and hear arguments that were not previously presented to the CBSA. That said, by virtue of subsection 152(3) of the *Act*, *the burden of proof in this appeal rests with the appellant*.<sup>15</sup> To meet its burden, an appellant is expected to submit evidence that establishes the basic facts supporting the tariff classification it argues. However, the Tribunal has also recognized in the past that while the appellant bears the initial onus of establishing its case on a *prima facie* basis, the onus then shifts to the respondent to rebut same.<sup>16</sup>

35. In this case, neither Schlumberger nor the CBSA provided detailed evidence as to the physical characteristics of the perforating gun parts subject to this appeal. Even after four rounds of written submissions by the parties, two teleconferences and an oral hearing, the parties still failed to establish basic facts regarding the specific composition of these parts. As a result, without this forthrightness, the tariff classification exercise that the Tribunal needed to perform was arduous.

36. On that note, the Tribunal wishes to comment on the role of the CBSA in tariff classification matters. It is clear that the burden in tariff classification appeals is on the appellant; however, the CBSA in this case was unhelpful. Even after the Tribunal made it clear during the hearing and the post-hearing teleconference that it was not satisfied that perforating gun parts could be classified as parts of “an other firearm or similar device”, the CBSA simply refrained from adducing further evidence or making new submissions. Instead, it chose to simply reiterate its original position and rely on Schlumberger to fail to satisfy its burden. Without going as far as stating that the CBSA has an active duty to help an appellant’s

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15. Since duty liability on imported goods depends upon their tariff classification, tariff classification is a question “relating to” the payment of duties on goods, within the meaning of paragraph 152(3)(c).

16. *BSH Home Appliance Ltd. v. President of Canada Border Services Agency* (27 October 2014), AP-2013-057 (CITT) at para. 29; *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336; *Smith v. Nevins*, 1924 CanLII 70 (SCC), [1925] S.C.R. 619; *Les Produits Laitiers Advidia Inc. v. President of the Canada Border Services Agency* (20 April 2004), AP-2003-040 (CITT) at paras. 13-14.

case, as in certain other fields of law, its passive stance in the face of its own deficient classification position, was, in this case, remarkable.

### Change in Schlumberger's Argument

37. In its original submissions and two subsequent submissions prior to the hearing, Schlumberger argued that the perforating gun parts are properly classified in tariff item No. 8479.89.90 as parts of well fracturing machines of tariff item No. 8479.89.10. However, at the hearing, Schlumberger acknowledged that the perforating guns were, in fact, *not* well fracturing machines, referencing Dr. Butt's expert report (wherein he makes an explicit distinction between the concept of fracturing and perforating).<sup>17</sup> Changing its argument, Schlumberger then submitted that the perforating gun should be classified in tariff item No. 8479.89.90 as other machines or mechanical appliances, with the classification of the perforating gun parts continuing to be in tariff item No. 8479.90.90 as "other parts" of heading No. 84.79.

38. Although the CBSA was given an opportunity to object to the change in argument, it did not do so. Nevertheless, in the interest of fairness, the Tribunal provided both parties the opportunity to make any post-hearing submissions they felt necessary relating to Schlumberger's new arguments.

39. Both parties made written submissions. Schlumberger presented a further nuanced position. In addition to the submission made at the hearing that the goods are classified as other machines of heading No. 84.79, in the alternative, it submitted that the perforating guns are classified as electrical machinery and equipment of heading No. 85.43. Schlumberger; however, failed to adduce any evidence in respect of its alternative argument aside from arguing that the perforating gun is remotely detonated electronically from a computer on site.

40. For its part, the CBSA relied on the explanatory notes to heading No. 85.43, which state in part that "[m]ost of the appliances of this heading consist of an assembly of electrical goods or parts . . . operating wholly electronically. However, the heading also includes electrical goods incorporating mechanical features **provided** that such features are subsidiary to the electrical function of the machine or appliance." In the CBSA's view, Schlumberger has not presented any compelling evidence to support the argument that a perforating gun operates wholly electronically. Moreover, the CBSA submits that the mechanical features of the perforating gun parts, the detonator and the shaped charges are not subsidiary to the electrical function of those goods. The CBSA submits that the detonation of the perforating gun from a computer is not sufficient to make the entirety of a perforating gun classifiable in heading No. 85.43. It thus maintained its original classification position of heading No. 93.03.

### TRIBUNAL ANALYSIS

41. The Tribunal finds that the perforating guns are not "other firearms or similar devices that operate by the firing of an explosive charge".

42. The wording of heading No. 93.03 provides an illustrative list of goods to be included in that heading, such as sporting shotguns and rifles, muzzle-loading firearms, Very pistols and other devices designed to project only signal flares, pistols and revolvers for firing blank ammunition, captive-bolt humane killers, line-throwing guns. To be sure, a perforating gun does not resemble, nor does it have any relation to, any of these examples.

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17. *Transcript of Public Hearing*, Vol. 1, 31 August 2015, at 5.

43. As mentioned above, the Tribunal undertook the tariff classification exercise by first classifying the perforating gun as a whole, with the classification of the perforating gun parts flowing from that classification.

44. For the reasons that follow, the Tribunal finds that an assembled perforating gun is properly classified as “other machines or mechanical appliances” in tariff item No. 8479.89.90. Accordingly, the perforating gun parts in issue are properly classified in tariff item No. 8479.90.90 as “other parts of other machines and mechanical appliances”.

45. The parties agree on the primary tariff classification of the detonators and shaped charges in Chapters 1 to 97 of the *Customs Tariff*. The parties disagree, however, on the primary tariff classification of the perforating gun parts in Chapters 1 to 97. The CBSA argues that the perforating gun parts should be classified in heading No. 93.05 as parts of other firearms or similar devices. For its part, Schlumberger argues that the perforating gun parts should be classified in heading No. 84.79 or, alternatively, heading No. 85.43. In addition, the parties disagree on whether the goods in issue are eligible for the conditional duty relief under tariff item No. 9910.00.00.

46. The issue in this appeal is therefore twofold. First, the Tribunal must determine the tariff classification of the perforating gun itself (not the goods in issue) in Chapters 1 to 97 of the *Customs Tariff*, which will determine the proper classification of the perforating gun parts. Second, the Tribunal will assess whether the goods in issue qualify for duty relief under Chapter 99.

47. The explanatory notes to both Section XVI and heading No. 84.79, in particular, exclude goods covered more specifically in other sections and headings of the *Customs Tariff*. The Tribunal will therefore first consider whether classification under heading No. 93.03 is applicable. Only if it determines that the perforating gun should not be classified in that heading will it then analyze whether it is properly classified in headings No. 84.79 or 85.43.

48. The Tribunal has made it clear throughout the course of this appeal that it was skeptical, on the basis of the evidence on the record, including the expert evidence and testimony, whether a perforating gun could be properly classified in heading No. 93.03 as “other firearms or similar devices”. That same reasoning extends to the perforating gun parts being classified as “parts of other firearms or similar devices”.

### **Is a Perforating Gun an Other Firearm or Similar Device That Operates by the Firing of an Explosive Charge?**

49. The CBSA argued that a perforating gun is properly classified in heading No. 93.03 as “other firearms and similar devices which operate by the firing of an explosive charge”. Therefore, it argues, the perforating gun parts, carrier tubes, cassettes, etc. are properly classified in heading No. 93.05 as “parts and accessories of articles of headings 93.01 to 93.04.”

50. The CBSA relies primarily on the words of heading No. 93.03 itself as the basis for the classification position of a perforating gun. As mentioned above, heading No. 93.03 includes an illustrative list of goods (namely, shotguns and rifles, muzzle-loading firearms, Very pistols and other devices designed to project only signal flares, pistols and revolvers for firing blank ammunition, captive-bolt humane killers, line-throwing guns) which do not necessarily relate to a perforating gun.

51. However, the CBSA also relies on the explanatory notes to heading No. 93.03, which, for their part, state that the heading “includes some devices which are not weapons but which operate by the firing of an

explosive charge.” It is principally on this basis that the CBSA argues that a perforating gun need not be a weapon such as those described in the enumerative heading list to be classified in heading No. 93.03.

52. Schlumberger argued that a perforating gun should not be classified in heading No. 93.03 because it is neither akin to a firearm nor to a similar device. In Schlumberger’s view, a perforating gun is not a firearm, does not have the characteristics of a firearm, nor does it resemble any of the goods provided as examples of similar devices.

#### Is a Perforating Gun a Firearm?

53. Neither Chapter 93 nor heading No. 93.03 includes a definition of the word “firearm”. As such, the CBSA relies on the *Concise Oxford English Dictionary* definition of “firearm” as “a rifle, pistol, or other portable gun” and on its definition of “gun” as “**2** a device for discharging something (e.g. grease) in a required direction.”<sup>18</sup>

54. Schlumberger relied on two definitions of “firearm”. The first, from section 2 of the *Criminal Code of Canada*, states that a firearm is “a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing 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”. The second,<sup>19</sup> taken from *The Free Dictionary by Farlex*, defines a “firearm” as “[a] weapon, especially a pistol or rifle, capable of firing a projectile and use an explosive charge as a propellant.”<sup>20</sup>

55. The Tribunal notes that while the term “firearm” is not defined for the purposes of heading No. 93.03 of the *Customs Tariff*, tariff item No. 9898.00.00 expressly adopts the definition of firearm used in section 2 of the *Criminal Code*.

56. Giving words the same meaning throughout a statute is a principle of statutory interpretation.<sup>21</sup> Thus, to the extent that the term “firearm” is defined with reference to section 2 of the *Criminal Code* for the purposes of classification under Chapter 98, it is reasonable for the Tribunal to look to section 2 of the *Criminal Code* in considering a definition of that term under heading No. 93.03.

57. To begin, for the purposes of the *Criminal Code*, a firearm is specifically considered a *weapon*.

58. The Tribunal heard testimony, and Schlumberger filed documentary evidence, describing how the original perforating gun, used in the early 1900s did actually involve the use of firearm.<sup>22</sup> In the infancy of oil well extraction, once a well bore had been drilled and cased, oil workers would discharge a gun-barrelled weapon down-bore to perforate the well casing in order to access the oil beyond it. The Tribunal heard evidence that these early procedures were risky and dangerous; such archaic procedures would never be permitted in oil extraction today.<sup>23</sup>

59. Both Schlumberger’s submissions and Mr. Hovey’s testimony confirmed that the technology has evolved significantly since then. The present day perforating “gun” is a sophisticated device, built to exacting specifications, which is lowered downhole and perforates the well casing with designed precision

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18. Exhibit AP-2015-022-06A at para. 6, Vol. 1A.

19. *Ibid.*, tab 8. Also available online at: <http://www.thefreedictionary.com/firearm>.

20. Exhibit AP-2015-022-04A at paras. 24-26, Vol. 1.

21. *R. v. Zeolkowski*, [1989] 1 SCR 1378, citing Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 93.

22. *Transcript of Public Hearing*, Vol. 1, 31 August 2015, at 36-39, 42. Exhibit AP-2015-022-04A, tab 12, Vol. 1.

23. *Transcript of Public Hearing*, Vol. 1, 31 August 2015, at 37.

using the science of shaped charges. The charges are uniquely arranged according to well requirements. They are also specifically focused and controlled in order to maximize perforation and minimize debris in the well. The perforating “gun” is discharged remotely from a specially outfitted truck that contains sophisticated computerized equipment and which provides for a plethora of security measures.<sup>24</sup>

60. The use of the word “gun” in the term “perforating gun” is therefore a misnomer and solely a historic holdover from a foregone era. Despite the use of the term “gun” in its title, the Tribunal is satisfied that a perforating gun is not a weapon. Accordingly, it is not considered a firearm for the purposes of heading No. 93.03.

61. As is contemplated by the explanatory note to heading No. 93.03, this heading includes devices which are not weapons but which operate by the firing of an explosive charge. The Tribunal is of the view that such non-weapons would not be considered firearms per se, but rather would fall under the purview of a “similar device” that operates by the firing of an explosive charge. The Tribunal will now assess whether the perforating guns are “similar devices” in this context.

Is a Perforating Gun a “Similar Device” That Operates by the Firing of an Explosive Charge?

62. It is beyond dispute that a perforating gun operates by the firing of an explosive charge, the force of which is controlled by the size and placement of the charges and directed to perforate the oil and gas wells. However, not every device that operates by the firing of an explosive charge is covered in heading No. 93.03 of the *Customs Tariff*.

63. In order to be classified in this heading, the good must be either a firearm (which the Tribunal has already concluded above that the good in issue is not) or it must be a “similar device”. If it were the case that all devices operating with an explosive charge were to be covered by this heading, the word “similar” would be superfluous. By choosing this terminology, Parliament clearly intended that only devices that are similar to firearms and that operate by the firing of an explosive charge be covered in this heading.

64. Moreover, the wording of heading No. 93.03 provides an illustrative list of goods to be included in that heading; these include the following: sporting shotguns and rifles; muzzle-loading firearms; Very pistols and other devices designed to project only signal flares; pistols and revolvers for firing blank ammunition; captive-bolt humane killers; and, line-throwing guns. In addition, the explanatory notes to both Chapter 93 and heading No. 93.03<sup>25</sup> outline examples of what constitutes an “other firearm or similar device”. A perforating gun does not resemble any of these goods. Acknowledging that this is an illustrative list and not an exhaustive one, the Tribunal concludes that a perforating gun has little in common with these examples.

65. Perforating guns are more complex than the examples of other similar devices of heading No. 93.03 (e.g. hail cannons). They are technologically sophisticated with a system of computerized switches, detonators, and undergo a rigorous safety regime before being detonated. The importation of perforating gun parts, detonators and shaped charges is tightly regulated, but as explosives and not as firearms.

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24. Exhibit AP-2015-022-04A, tab 12, Vol 1.

25. The relevant explanatory note to heading No. 93.03 provides a series of ten examples which give a good idea as to the nature of the “guns” included in this heading. Again, these examples have very little in common with a perforating gun as they all have a function to fire, propel or project (or simulate as such in the case of blanks), whereas a perforating gun is certainly more akin to explosives used in mining and exploration.

66. Unlike most of the goods included as examples of “similar devices” (e.g. a Very pistol) in heading No. 93.03, a perforating gun does not have a trigger mechanism. It is detonated remotely from a computer housed in a vehicle on site.

67. The size of the device is also to be considered. The examples provided in heading No. 93.03 are either easily portable devices (such as a sporting gun, a rifle, a carbine or a pistol) or appear to be relatively manageable in size (duck cannons/punt guns, line-throwing guns, harpoon guns, hail cannons). As for a perforating gun, it can range in size from 30 centimetres to 6 metres<sup>26</sup> and is usually lowered downhole with a cable attached to a truck.

68. Moreover, each perforating gun is unique and is designed based on detailed customer specifications for a particular well. As such, each perforating gun can only be used for the particular location for which it is intended.

69. Finally, a perforating gun can only be used once. Once detonated, it becomes a piece of junk steel that is removed from the downhole and recycled as scrap metal.<sup>27</sup> For all these reasons, the Tribunal concludes that a perforating gun is not a device similar to a firearm, irrespective of the fact that it operates by the firing of an explosive charge.

70. As such, the Tribunal finds that a perforating gun is not properly classifiable in heading No. 93.03. Accordingly, the perforating gun parts at issue are not properly classifiable in heading No. 93.05 as parts of goods in heading No. 93.03.

#### **Is a Perforating Gun an “Other Machine” of Heading No. 84.79?**

71. Having determined that a perforating gun does not fall under heading No. 93.03 and, thus, that the goods in issue do not fall under heading 93.05, the Tribunal will now consider whether a perforating gun is a machine of heading No. 84.79.

72. For the purposes of this tariff heading, Schlumberger relied on the specific criteria outlined by the Tribunal in its *P.L. Light Systems*<sup>28</sup> decision with regard to the definition of a machine:

[It is a] . . . manufactured object, generally complex . . . used to transform energy . . . and to utilize that energy. . . . Any system that has a specific connection between input energy or information and output energy or information; any system that uses energy to transform, execute, and is controlled by an operator or another system.

73. In Schlumberger’s view, complete perforating guns are manufactured objects which are generally complex and generate energy that perforates well casings in order for oil and gas to flow into wells for production. Further, Schlumberger argues that since these systems are controlled by an operator or another system they therefore meet the definition of a machine or mechanical appliance set out in Note 5 to Schedule XVI.

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26. *Transcript of Public Hearing*, Vol. 1, 31 August 2016, at 66. Mr. Hovey testified that a perforating gun could range in size “from one foot to 6 metres”. The measurement of one foot has been changed to 30 centimetres for consistency in the unit of measurement.

27. *Transcript of Public Hearing*, Vol. 1, 31 August 2016, at 50.

28. *P.L. Light Systems Canada Inc. v. President of the Canada Border Services Agency* (19 September 2009), AP-2008-012 (CITT) [*P.L. Light Systems*].



74. However, in its post-hearing submission, Schlumberger stated that “it appears to the Appellant that during the expert testimony [of Mr. Hovey], *it was found* that the perforating guns themselves have no real moving parts, as the charges are detonated electronically and the operation of the perforating gun systems is controlled via computer and operator” [emphasis added]. For purposes of clarity, the Tribunal made no such finding during the course of the hearing and can only now assume that this is a further conclusion reached by Schlumberger itself.

75. The CBSA argues that Schlumberger has led no evidence or argument to support the classification of a perforating gun as a machine or mechanical appliance. For its part, the CBSA simply relied on the burden being placed upon Schlumberger to prove that the CBSA erred in its original tariff classification.

76. Indeed, the CBSA directed the Tribunal to the testimony of Mr. Hovey (referenced in paragraph 74) as evidence that the expert witness called by Schlumberger characterized the goods as electrical in nature. However, Mr. Hovey was not qualified as an expert in tariff classification and did not opine on the tariff classification of the goods in issue. Moreover, it would be inappropriate for the Tribunal to qualify someone as an expert in tariff classification given that this is an issue to be ultimately determined by the trier of fact. As such, the parties should not rely on any statements made by a witness with regard to any tariff classification matter itself.

77. In the past, the Tribunal has found the terms “machinery” and “mechanical appliances” to be analogous.<sup>29</sup> In *Canper Industrial Products*,<sup>30</sup> the Tribunal noted that “one of the main meanings ordinarily ascribed to the word ‘mechanical,’ as found in dictionaries, is that of ‘having to do with machinery.’” It also found that “the words ‘machines’ and ‘mechanical appliances’ are closely related in terms of the nature of the goods falling within their ambit and, therefore, falling in heading No. 84.79.”

78. In *Cross Country Parts Distribution Ltd.*,<sup>31</sup> the Tribunal described the test for goods to be considered as mechanical appliances, commenting:

30. . . . the Tribunal applied the following criteria for “mechanical appliance”:

- the good must be an article, instrument, device or apparatus designed to fulfill a particular use or function;
- the good must be comprised of a more or less complex combination of stationary and moving parts (whether or not hand-operated); and
- the good, as a whole, must do work through the production, modification or transmission of force to an external body.

### **Article With a Particular Use or Function**

79. The term “article” is not defined for the purposes of heading No. 84.79. However, the Tribunal has considered the term “article” in the past. In *Prins Greenhouses Ltd.*,<sup>32</sup> the Tribunal defined “article” as “. . . any finished or semi-finished product which is not considered to be a material.”

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29. *Canper Industrial Products Ltd. v. Deputy M.N.R.* (24 January 1995), AP-94-034 (CITT) [*Canper Industrial Products*].

30. *Canper Industrial Products* at 4.

31. *Cross Country Parts Distribution Ltd. v. President of the Canada Border Services Agency* (19 August 2016), AP-2012-052R (CITT) [*Cross Country*].

32. *Prins Greenhouses Ltd. v. Deputy M.N.R.* (9 April 2001), AP-99-045 (CITT) at note 3 [*Prins Greenhouses*].

80. The Tribunal is satisfied that the perforating gun is a finished product which is not considered to be a material and therefore meets the definition of an article.

### **Combination of Stationary and Moving Parts**

81. The evidence shows that a perforating gun consists of a number of stationary parts, namely, a detonator, detonating cord, shaped charges, a skeletal frame and the carrier tube. Once the electrical charge is initiated, the detonator is ignited sending the current along the detonating cord to the shaped charges to create a focused explosion, destroying the carrier tube and perforating the well. The parts therefore operate together and become movable at that time.

82. Mr. Hovey testified how the various parts of a perforating gun fit together and how the perforating gun would not function without the presence of all of those parts.<sup>33</sup> As a perforating gun possesses some of the characteristics of a machine, as set out in *P.L. Light Systems* mentioned above, the Tribunal concludes that a complete perforating gun is an article that is complex and generates energy to perforate well casings in order for oil and gas to flow into wells for production.<sup>34</sup>

83. The Tribunal finds that the combination of the parts that make up the goods in issue operate together to perform work and, therefore, that a perforating gun satisfies the second criterion for “mechanical appliances”.

### **Production, Modification or Transmission of Force to an External Body**

84. In applying the third criterion, the Tribunal must determine whether a perforating gun does work through the production, modification or transmission of force to an external body.

85. A perforating gun is designed to explode and create very precise perforations in a well casing. By definition, such a mechanism clearly exerts force on an external body (in this case the well casing and substrate beyond it). The detonating cord, detonator and shaped charges act together to initiate the explosions, which, in turn, exert high pressure and temperatures into the borehole in order to create designed permeations in the well. The Tribunal is therefore satisfied that the goods in issue exert force on an external body.

86. As a perforating gun meets all the necessary criteria, the Tribunal is satisfied that a perforating gun meets the definition of a mechanical appliance and that it is therefore properly classified in heading No. 84.79.

87. At the subheading level, a perforating gun does not fit within any of the other subheadings listed; therefore, it is properly classified in subheading No. 8479.89 as “other”.

88. Similarly, at the tariff item level, a perforating gun does not fit within any of the other tariff items listed; therefore, it is properly classified in tariff item No. 8479.89.90 as “other”.

89. Accordingly, the perforating gun parts at issue in this appeal are properly classified as other parts of other machines in tariff item No. 8479.90.90.

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33. *Transcript of Public Hearing*, Vol. 1, 31 August 2016, at 59.

34. Exhibit AP-2015-022-04A, tab 12, Vol. 1.

90. Having concluded that a perforating gun is a mechanical appliance, and that the perforating gun parts are parts thereof, the Tribunal need not address the alternative argument of Schlumberger that the goods may be classified in heading No. 85.43.

### **Are the Goods in Issue Eligible for Relief Under Chapter 99?**

91. For the purpose of the analysis of whether the goods in issue qualify for duty relief under Chapter 99, the Tribunal shifted its analysis from the hypothetical exercise of classifying a complete perforating gun to the goods in issue themselves, including the following: (i) detonators; (ii) shaped charges; and (iii) perforating gun parts.

92. Tariff item No. 9910.00.00 specifically provides duty relief for “materials” for use in the manufacture of goods of Section XVI, *inter alia*, which includes goods of Chapter 84, where those goods are being used in the “exploration, discovery, development, maintenance, testing, depletion or production of oil or natural gas wells . . . .”

93. The *Customs Tariff* does not define the term “materials”.

94. Schlumberger argued that the word “materials” conveys a broad coverage of inputs to be used in the manufacture of goods—in this case, goods that are ultimately destined for oil and gas production. There is a certain appeal to this argument given previous cases in which the Tribunal has interpreted the term “materials”, based on its ordinary meaning, as “. . . the elements, constituents, or substances of which something is composed or can be made . . . .”<sup>35</sup> Accordingly, the Tribunal has considered “materials” to be inputs in the manufacture of a good.<sup>36</sup>

95. However, the jurisprudence indicates that there is a distinction between the terms “article” and “material”. For example, in *Grodan*, the Tribunal clarified that a material goes into the production of an article.<sup>37</sup>

96. Considered with reference to the many other provisions of the *Customs Tariff* that refer to *both* articles and materials,<sup>38</sup> including tariff item No. 9910.00.00, and the presumption against tautology,<sup>39</sup> the Tribunal cannot conflate these two concepts by interpreting “materials” as referring to all possible inputs into a manufactured good. Accordingly, the Tribunal cannot agree with Schlumberger that all inputs into a manufactured good will necessarily be considered materials.

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35. *Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “material”. See also *Grodan Inc. v. President of the Canada Border Services Agency* (7 June 2012), AP-2011-030 (CITT) [*Grodan*] at para. 26; *Panini Canada Ltd. v. M.N.R.* (28 October 1991), AP-90-167 and AP-90-168 (CITT) [*Panini*]; *Xerox Canada Ltd. v. President of the Canada Border Services Agency* (25 February 2014), AP-2013-015 (CITT) at para. 40.

36. *Grodan* at para. 26; *Panini*.

37. *Grodan* at para. 25.

38. For example, tariff item No. 9901.00.00 covers “articles and materials” for use in the manufacture of certain listed items to be employed in commercial fishing, etc.; tariff item No. 9903.00.00 covers “articles and materials” that enter into the cost of manufacture or repair of certain agricultural machinery; tariff item No. 9926.00.00 covers “articles and materials” for use in the manufacture of certain lawn mowers; tariff item No. 9927.00.00 covers “articles and materials” for use by printers, etc.

39. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 at para. 45, citing R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159.

97. The Tribunal extensively solicited views from the parties on the composition of the perforating gun parts in issue. However, notwithstanding its efforts, which included two teleconferences, lengthy discussions during the hearing and a letter to the parties post-hearing on the interpretation of a carrier tube (i.e. one of many perforating gun parts) by the USCBP, followed by another round of submissions, the parties were less than forthcoming when it came to describing the constituent nature of the perforating gun parts at issue. Throughout this case, the Tribunal has been at a loss to understand why the parties, given the extent of the opportunities provided, did not bring forward a more detailed description of the perforating gun parts that they were seeking to classify. In maintaining this course of action throughout, the parties did themselves a disservice and ultimately protracted the tariff classification exercise.

98. In a general sense, the goods in issue may well be *inputs* into perforating guns; however, without specific information on what the goods in issue *actually are*, the Tribunal is left in a position where it is unable, based on the evidence before it, to discern whether these inputs are “articles” or whether they are “materials”.

99. Having failed to establish this essential element of its case for duty relief, it is not necessary for the Tribunal to consider the other elements of Schlumberger’s arguments with respect to tariff item No. 9901.00.00.

100. Accordingly, the Tribunal is left with no other choice but to find that a case for duty relief under tariff item No. 9910.00.00 has not been established.

## **DECISION**

101. For the foregoing reasons, the Tribunal concludes that the perforating gun parts in issue are parts of machines or mechanical appliances.

102. Moreover, Schlumberger has failed to meet its burden of proof on any of the relevant factors in order to be granted duty relief under Chapter 99 for any of the goods in issue.

103. Consequently, the appeal is allowed in part.

Jason W. Downey  
Jason W. Downey  
Presiding Member