CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, January 29, 1990

Appeal Nos. 2957 and 2989

IN THE MATTER OF an appeal heard on July 18 and 19, 1989, pursuant to section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue for Customs and Excise dated February 19, 1987, and March 31, 1988, with respect to requests for a re-determination filed pursuant to section 63 of the *Customs Act*.

BETWEEN

STOCHEM INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal declares that the precipitated calcium carbonates coated with stearic acid should be classified under tariff item 92842-1 as "Carbonates and percabonates ... : Other than the following ... " rather than under tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following" as determined by the respondent.

W. Roy Hines
W. Roy Hines
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. 2957 and 2989

STOCHEM INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

Customs Act - Customs Tariff - Tariff classification - Whether the precipitated calcium carbonates coated with stearic acid should be classified under tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following" or under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following ... " - Meaning of the word "stabilizer" - Whether section 11 of the new Customs Tariff is a declaratory provision.

DECISION: *The appeal is allowed. The Tribunal finds that the stearic acid constitutes a stabilizer of the properties of the precipitated calcium carbonate. The addition of this stabilizer is necessary for the preservation of the properties of the product in issue and does not alter its substantial nature so as to become something other than precipitated calcium carbonate. Therefore, the product in issue should be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...." The Tribunal further finds that section 11 of the new Customs Tariff is not a declaratory provision and does not apply retroactively. This section applies to goods imported on or after January 1, 1988.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*July 18 and 19, 1989*
Date of Decision:	*January 29, 1990*
Panel Members:	*W. Roy Hines, Presiding Member* *Sidney A. Fraleigh, Member* *Kathleen E. Macmillan, Member*
Counsel for the Tribunal:	*Ginette Collin*
Clerk of the Tribunal:	*Molly C. Hay*
Appearances:	*Donald A. Petersen, for the appellant* *Michèle Joubert, for the respondent*
***Cases Cited**:*	*Omya, Inc. v. Deputy Minister of National Revenue for Customs and Excise (1986), 11 T.B.R. 550; Ener-Gard Energy Products Inc. v. Deputy Minister of National Revenue for Customs and Excise (1987), 12 T.B.R. 531; Dowell Schlumberger Canada Inc. v. Deputy Minister of National Revenue for Customs and Excise (1987), 12 T.B.R. 499; Gravel v. City of St-Léonard [1978], I*

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S.C.R. 660; Canadian General Electric Company Limited v. Deputy Minister of National Revenue for Customs and Excise (1988), 13 T.B.R. 15; Philips v. Eyre (1870), L.R. 6 Q.B.; BASF Canada Ltd. v. Deputy Minister of National Revenue for Customs and Excise (1974), 6 T.B.R. 41.

***Statutes and Regulations Cited**:* *Customs Act, R.S.C. 1985, c. 1 (2nd supp.), ss. 63 and 67; Customs Tariff, R.S.C. 1985, c. C-54, s. 40 and Schedule II, tariff items 92842-1 and 93819-1; Customs Tariff, R.S.C. 1985, c. 41 (3rd Supp.), ss. 10, 11, 136, 137 and 139; Chemical and Plastics Tariff Interpretation Rules, C.R.C. 1978, c. 518, subs. 9(1); Canadian International Trade Tribunal, S.C. 1988, c. 56, s. 60.*

***Dictionaries Cited**:* *Glossary of Chemical Terms, 2nd Edition, Van Nostrand Reinhold Company, New York; Dictionary of Scientific and Technical Terms, 4th Edition, McGraw-Hill Book Company; Hawley's Condensed Chemical Dictionary, 11th Edition, Van Nostrand Reinhold Company, New York; The Oxford English Dictionary, 2nd Edition, Vol. XVI, Clarendon Press, Oxford.*

***Author Cited**:* *Driedger, E.A., Construction of Statutes, [1983].*

***Report Cited**:* *Report by the Tariff Board Relative to the Inquiry Ordered by the Minister of Finance Respecting Chemicals, Vol. 4, Part II, General Considerations, Reference No. 120, 1967.*

***Memorandum Cited**:* *D10-12-6.*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. 2957 and 2989

STOCHEM INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
SIDNEY A. FRALEIGH, Member
KATHLEEN E. MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

This is an appeal pursuant to section 67 of the *Customs Act*[1] (the Act) concerning the tariff classification of the precipitated calcium carbonates Ultra-Pflex and Super-Pflex 200 imported into Canada from the United States on December 11, 1986, and the precipitated calcium carbonates Super-Pflex 200, Ultra-Pflex and Multifex SC imported into Canada from the United States on December 15, 1986, May 14, 1987, and May 28, 1987. The appellant seeks a declaration that the calcium carbonates be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...." The respondent has classified the goods under tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following."

The issue in this appeal is whether the precipitated calcium carbonates coated with stearic acid are separate chemically defined compounds with an added stabilizer necessary for their preservation or transport. If so, they will not be excluded from Chapter 928 of Group XII of the *Customs Tariff* by virtue of subsection 9(1) of the Chemical and Plastics Tariff Interpretation Rules[2] (the Interpretation Rules).

The appeal is allowed. Dictionary definitions of the word "stabilizer" as well as the evidence at the hearing indicate that the stearic acid constitutes a stabilizer of the properties of the precipitated calcium carbonate. The Canadian International Trade Tribunal (the Tribunal) considers that the addition of the stearic acid is necessary to preserve the free-flowing and moisture-free properties of the product in issue. In the Tribunal's view, this addition does not change the products in issue so as to become something other than precipitated calcium carbonate and, therefore, the products should be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...."

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. C.R.C. 1978, c. 518.

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As to the respondent's contention that section 11 of the new *Customs Tariff* is a declaratory section that applies retroactively, the Tribunal declares that section 11 cannot and was not meant to be applied retroactively. The new *Customs Tariff* applies only to the future and to goods imported on or after January 1, 1988.

THE LEGISLATION

The statutory provisions relevant to this appeal are as follows :

Customs Tariff[3]

Tariff Items

92842 - Carbonates and percarbonates; commercial ammonium carbonate containing ammonium carbamate:

92842-1 Other than the following

...

93819 - Chemical products and preparations of the chemical or allied industries (not including those consisting of mixtures of natural products other than compounded extenders for paints), n.o.p.; residual products of the chemical or allied industries, n.o.p.; not including soap, nor pharmaceutical, flavouring, perfumery, cosmetic or toilet preparations:

93819-1 Other than the following

Customs Tariff[4]

40(1) The Governor in Council, on the recommendation of the Minister, may by regulation prescribe rules for, and explanatory notes to assist in resolving conflicts or doubts respecting, the interpretation of the several descriptions of goods in Group XII of Schedule II, set out under the group designation "Products of the Chemical, Plastics and Allied Industries."

3. R.S.C. 1985, c. C-54, Schedule II.
4. R.S.C. 1985, c. C-54.

Chemical and Plastics Tariff Interpretation Rules

Chapter 928

Inorganic Chemicals; Organic and Inorganic Compounds of Precious Metals, of Rare Earth Metals, of Radio-Active Elements and Isotopes

9(1) Except where the context otherwise requires, the headings of chapter 928 apply only in respect of the following:

(a) separate chemical elements and separate chemically defined compounds, whether or not containing impurities;
(b) the goods mentioned in paragraph (a) dissolved in water;
(c) the goods mentioned in paragraph (a) dissolved in solvents other than water if the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and if the solvent does not render the product particularly suitable for specific uses rather than for general use; and
(d) the goods mentioned in paragraph (a), (b) or (c) with an added stabilizer necessary for their preservation or transport.

THE FACTS

This is an appeal pursuant to section 67 of the Act from two decisions of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), dated respectively February 19, 1987, and March 31, 1988, as to the classification of certain products imported by the appellant. These products known as Ultra-Pflex, Super-Pflex 200 and Multifex SC, which are precipitated calcium carbonates coated with stearic acid (the goods in issue), were classified by the respondent under tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following." The appellant seeks a declaration from the Tribunal that the goods in issue be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...."

The appeal was originally commenced before the Tariff Board. However, pursuant to section 60 of the *Canadian International Trade Tribunal Act*,[5] the appeal is taken up and continued by the Tribunal.

The goods in issue were imported by the appellant, Stochem Inc. (Stochem) of Dorval, Quebec, from Pfizer Inc. (Pfizer) of Adams, Massachusetts, United States, on December 11, 1986, under entry number H104601, on December 15, 1986, under entry number A214389, on May 14, 1987, under entry number A034277 and on May 28, 1987, under entry number A047491.

5. S.C. 1988, c. 56.

At the time of entry, the appellant claimed tariff item 93819-1. Pursuant to section 63 of the Act, the appellant requested, on February 17, 1987, and on November 4, 1987, a re-determination of the tariff classification from tariff item 93819-1 to tariff item 92842-1 (forms KM09164, KH338C, KH340C and KH337C). Pursuant to section 63 of the Act, the Deputy Minister made decisions, on February 19, 1987, and March 31, 1988, classifying the goods in issue under tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following." In the Deputy Minister's determinations, it is stated:

> *These products contain stearic acid which is a deliberate admixture and therefore are excluded from Chapter 928 of Group XII by virtue of rule 9(1)(a) of that chapter. These goods are classified under tariff item 93819-1.*
>
> *Rule 9(1)(a) for the Chemical and Plastics Tariff Interpretation Rules - allow separate chemically defined compounds of Chapter 928 with an added stabilizer necessary for their preservation and transport. The points which were presented to the Deputy Minister's Review Committee are noted, however, calcium carbonate is by Chemical Dictionary definition one of the most stable, common and widely dispersed materials. The addition of stearic acid is considered to be a deliberate admixture, and not necessary for transport or preservation.*
>
> *It is noted further, that calcium carbonate provided in heading 28.36 of the Harmonized System is excluded when in powder form, the particles of which are coated with a water-repellent film of fatty acids (e.g. stearic acid).*

On March 9, 1988 (Appeal No. 2957), and April 14, 1988 (Appeal No. 2989), the appellant filed Notices of Appeal pursuant to section 67 of the Act. The appellant contends that the goods in issue should be classified under tariff item 92842-1. Both appeals were heard concurrently as the goods in issue were regarded as being similar.

At the hearing, counsel for the appellant called four witnesses. The first witness was Mr. David J. Stock, the founder, owner and president of Stochem, a sales and marketing organization involved in the distribution of industrial chemicals, specialty chemicals and minerals to manufacturers of paint, printing ink, plastics and rubber adhesives and to paper converting industries. According to his evidence, the precipitated calcium carbonates result from natural calcium carbonate, usually calcite, chalk or limestone, which is first mined. Through a precipitation process, a substantially finer particle size is produced. It is the fine particle, which has an average particle size of 0.07 microns, that is treated with stearic acid. The surface treatment prevents the attraction of moisture from the air, renders the particles anticaking and free-flowing and stabilizes the particles to its form immediately after processing. The particle size differentiates the properties that are imparted to the paint or ink or plastic compound in which it is used.

The witness explained that the appellant sold natural ground and precipitated calcium carbonates, both treated and untreated, to industry. In cross-examination, he admitted that the treated product commanded a higher price than the non-treated product and that some clients

bought treated calcium carbonates with specific properties in mind. The Tribunal questioned the witness about the physical characteristics of the product before it is treated. Mr. Stock said that when it is first produced, it is an exceedingly fine, dry, fluffy, free-flowing powder, but later on it takes on moisture and agglomerates together.

The second witness to testify on the appellant's behalf was Mr. Jeffrey Whalen, a project engineer in the pneumatic conveying portion of the Research Department of Fuller Company, a company located in Bethlehem, Pennsylvania, United States. He testified that Fuller Company was approached by Pfizer to conduct a test on two materials: the first was Albaglos, a precipitated calcium carbonate, and the second was Super-Pflex, a precipitated calcium carbonate with added stearic acid. He was asked to do several tests on these materials to determine their flow characteristics. The conclusions he drew from the tests read as follows on page 8 of his report, dated November 7, 1988, and entered as Exhibit A-4:

> *The tests confirmed that the Super Pflex (R) does handle better that the Albaglos (R) in a fluidized state. The Super Pflex withdrew slightly over 5 times faster from the test vessel without bridging and the need for poking. The Airslide tests confirmed this, since the Albaglos (R) did not convey at all.*

In cross-examination, the witness stated that the Super-Pflex flowed better than the Albaglos during the tests because the stearic acid was added as a coating. He said that he would consider the treatment as an anti-agglomeration agent.

The appellant's third witness was Mr. Saul Gobstein, a chemical engineer and a fellow of the Society of Plastic Engineers who is employed by Sa-Go Associates, his own consulting and teaching company. He has approximately 40 years experience in the plastics industry. He testified that calcium carbonate coated with stearic acid was used in the manufacture of plastisol and flexible and rigid polyvinyl chloride (PVC) primarily to improve the physical properties of the product, such as impact strength. He pointed out that, besides the PVC and the plastisol industries, there are other industries in which calcium carbonate coated with stearic acid is used, such as the food industry and the cosmetics industry. In his view, the stearic acid is employed only for one purpose - to keep the small particles separated. Even if calcium carbonate is coated with stearic acid, it is still calcium carbonate, a separate chemically defined compound. The witness was of the opinion that the stearic acid maintains the calcium carbonate in the same physical state as it was immediately after processing. He stated that if it were possible to use the calcium carbonate immediately after processing, it would not be necessary to add the stearic acid in order to achieve the desired results.

The appellant's last witness was Dr. Toomas Kilp, a doctor in physical chemistry who is currently employed by Ortech International, Canada's largest independent contract research and development organization. Dr. Kilp is responsible for three areas of research and development: polymer chemistry, electron microscopy and laser applications.

The witness testified that the free-flowing characteristic of the calcium carbonate was of paramount importance in modern processing technologies. He offered the following explanation concerning the different flow properties of the two precipitated calcium carbonate products tested by Mr. Whalen: the differences measured by Mr. Whalen relate, on a microscopic scale, to three-dimensional network structures that get set up between the particles because of attraction between them and moisture content. In order to get the powder flowing, these structures have to be broken down, which is accomplished by coating the particles with stearic acid.

Dr. Kilp further stated that stearic acid and calcium stearate are chemically separate entities which have their own set of physical and chemical properties. When asked whether the calcium carbonate and the stearic acid chemically reacted together to produce calcium stearate, he replied that there was absolutely no available experimental and scientific evidence to support that there was any sort of chemical reaction between them.

The witness described a test known as X-ray diffraction that he performed on both the coated and the uncoated calcium carbonates. He submitted in evidence, as exhibit A-6, a report entitled "X-Ray Diffraction of Calcium Carbonates." On the basis of this test, he concluded that there was no difference between the coated and the uncoated material, in regard to the chemical fingerprint. In regard to the physical or chemical properties of both calcium carbonates, he pointed out that there is only one difference: as a result of the addition of a stearic acid coating, the surface of calcium carbonate becomes hydrophobic. The witness explained that the hydrophobicity prevents the absorption of atmospheric moisture, thereby maintaining and stabilizing a material, as a free-flowing powder, in that condition in which it existed immediately after manufacture. In his view, the calcium carbonate needs to be coated for preservation or transport because, if it remains uncoated, it will absorb atmospheric moisture and the particles, which were originally free-flowing and divided, will begin to agglomerate and lead to caking which, therefore, reduces its processability.

Counsel for the respondent called three witnesses. The first, Mr. Louis L'heureux, a chemist employed since 1972 by the Department of National Revenue for Customs and Excise (the Department), Laboratory and Scientific Services Directorate, and now head of the Inorganic Section, explained the history of the Canadian Tariff prior to January 1, 1988, and more particularly Group XII of the *Customs Tariff*, which relates to products of the chemical plastics and allied industry. He said that Chapter 928, with which the present case deals, applies to pure inorganic chemicals, otherwise called "separate chemically defined compounds and elements." According to the witness, all molecules must be identical in a product. However, no product is 100 percent pure. Therefore, there are always certain things that are allowed, such as manufacturing impurities, water, organic solvent, if it is necessary, and stabilizers necessary for the preservation or transport of the product. These are allowed under subsection 9(1) of the Interpretation Rules.

Because the witness was of the opinion that the literature was not very clear on the meaning of "stabilizer," he referred the Tribunal to Memorandum D10-12-6, issued by the Department on July 1, 1982, to get a better idea of what is meant by "stabilizer." This Memorandum outlines and explains section 9 of the Interpretation Rules. According to the witness, paragraph 2(a)(4) of the Explanatory Notes contained in this memorandum reflects his understanding of a stabilizer in the context of Chapter 928. This paragraph reads as follows :

> *(4) Products added to certain chemicals to keep them in their original physical state are also to be regarded as stabilisers, provided that the quantity added in no case exceeds that necessary to achieve the desired result and that the addition does not alter the character of the basic product and render it particularly suitable for some types of use rather than for general use. By application of these provisions anti-caking agents may be added to the products of this chapter. Such products with added water-repellents are, on the other hand, excluded since such agents modify the original characteristics of the products.*

In cross-examination, the witness stated that the addition of stearic acid to calcium carbonate changes the character of the basic product and is more than a stabilizer. In his opinion, the polar nature of the product was completely changed with regard to surface interaction. The centre of the particle is unchanged, but the surface, which represents one to three percent by weight of the total product, and the way it interacts have changed. The witness stated that there is a chemical reaction between the stearic acid and the calcium carbonate on the surface of the particle that has the effect of rendering the product hydrophobic and, therefore, alters its basic character.

The next witness for the respondent was Dr. Alfred Rudin, who holds a doctorate in chemistry and is currently a professor at the University of Waterloo in the Department of Chemistry and Chemical Engineering. He is also an associate director of the Institute for Polymer Research at the University of Waterloo and a principal investigator in the Ontario Centre for Materials Research.

The witness commented on the description of the goods in issue based on the technical data sheets issued by Pfizer. Based on the characteristics of the products, he concluded that they were designed for particular uses in industry. He explained that, because these products are hydrophobic, it was uneconomical to use them in mixtures in which hydrophilic properties are required, for instance in water-based paints. He was also of the opinion that the treatment with stearic acid was not necessary for the preservation and the transport of the calcium carbonate. He said that if the calcium carbonates were packaged in polyethylene bags instead of kraft bags, it would prevent moisture uptake.

The respondent's last witness was Dr. Pierre Bataille, a doctor in physical chemistry, specializing in the polymer field. He is currently a professor at l'École Polytechnique of l'Université de Montréal and gives courses in physical chemistry, polymer chemistry and polymer engineering. He corroborated Mr. L'heureux's testimony that the stearic acid forms a monolayer of stearate on the surface of the calcium carbonate and is permanently bound to it, indicating that a chemical reaction had occurred. He also concurred with the opinions of the previous two witnesses that the treatment of the calcium carbonate with stearic acid was not made to stabilize it for preservation or for transport. In his view, the treatment was done in order to increase the level of the filler put into the final product and to decrease the amount of energy required to force the mixture. He finally added that, in his experience, there were certain types of products that require the use of treated calcium carbonate for impact resistance and for economic reasons.

THE ISSUE

The issue in this appeal is whether the precipitated calcium carbonates coated with stearic acid are excluded from Chapter 928 of Group XII of the *Customs Tariff* by virtue of subsection 9(1) of the Interpretation Rules. The Tribunal must determine whether the goods in issue constitute separate chemically defined compounds of Chapter 928 with an added stabilizer necessary for their preservation or transport. If so, they should be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following ..." instead of tariff item 93819-1 as "Chemical products and preparations of the chemical or allied industries ... : Other than the following."

The appellant's agent argued that the stearic acid is a stabilizer of the physical form of untreated precipitated calcium carbonate that is necessary for its preservation and transport. The

agent contended that the stearic acid preserved the calcium carbonate in the same form as it was when it was first manufactured. In support of that position, the agent presented scientific evidence that coating the product did not alter the chemical composition of the product. The agent submitted that the product starts as calcium carbonate and ends up as calcium carbonate and suggested that the main principle which was enunciated in the case *Omya, Inc. v. Deputy Minister of National Revenue for Customs and Excise*[6] should apply in this appeal. In that case, the Tariff Board found that the addition of the stearic acid to the ground marble did not change the substantial nature or the dominant characteristic of the ground marble.

The appellant's agent agreed that precipitated calcium carbonate is a product of the chemical industry and that stearic acid imparts hydrophobicity. However, the agent submitted that evidence demonstrates that the stearic acid coated product flows better than the uncoated product. On this point, the agent referred the Tribunal to the conclusions drawn in Mr. Whalen's report.

The agent finally argued that, in section 9 of the Interpretation Rules, the only restriction to the addition of a stabilizer is that it must be necessary for the preservation or transport of the separate chemically defined compound. On this point, the agent referred to Mr. Gobstein's testimony where he stated that it was not necessary to add the stearic acid to the calcium carbonate when it could be used immediately after manufacture; however, it is necessary to add stearic acid to the product in order to stabilize its form for later use. The appellant's agent also stressed that the Tribunal should only refer to the Explanatory Notes found in Memorandum D10-12-6 if it could not reach a decision because of a lack of clarity in the legislation itself, and it was submitted that the legislation is clear.

On the other hand, counsel for the respondent argued that the treatment of calcium carbonate with stearic acid produces a chemical reaction during which a layer of calcium stearate is bound around the particles. Counsel submitted that the testimonies of the witnesses and the descriptions of the products in issue in the Pfizer literature had shown, first, that the character of the basic product has been altered by this chemical reaction in that it becomes hydrophobic and, second, that the primary purpose of the stearic treatment is to improve dispersion of the calcium carbonate in polymeric systems.

Counsel for the respondent submitted that calcium carbonate is a very stable product which does not need to be stabilized for preservation or transport, and that the treated product is designed for a very specific use in the plastic industry. Once coated, the product becomes hydrophobic and cannot be used in an aqueous system. Therefore, it cannot be used the way it was before the treatment.

Counsel for the respondent pointed out that the evidence has shown that the products in issue are chemical products. As to the wording of tariff item 92842-1, counsel argued that it is very different from the headings found in other parts of the *Customs Tariff*. It forms part of Group XII and, as such, is completely different from all the other parts of the Tariff. On that point, counsel drew the attention of the Tribunal to the relevant parts of the Report by the Tariff Board in Reference No. 120[7] and to the decision *Ener-Gard Energy Products Inc. v. Deputy*

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6. (1986), 11 T.B.R. 550.

7. Report by the Tariff Board Relative to the Inquiry Ordered by the Minister of Finance Respecting Chemicals, Vol. 4, Part II, General Considerations, Reference No. 120, 1967.

Minister of National Revenue for Customs and Excise[8] for an overview of the origin of Group XII. That case states that, because of the origin of the provisions in Group XII, it is proper for the Tribunal to look at the Explanatory Notes as an aid to the interpretation of the description of the goods in the tariff items.

Counsel for the respondent also referred to the decision *Dowell Schlumberger Canada Inc. v. Deputy Minister of National Revenue for Customs and Excise*[9] in support of the argument that Memorandum D10-12-6 is admissible in evidence, even if it has not been implemented in the legislation, and that, therefore, it is proper to look at paragraph 2(a)(4) of the Explanaroty Notes contained in that memorandum for guidance. On the basis of that paragraph and the evidence, counsel argued, first, that the character of the basic product has been altered by the treatment with stearic acid and, second, that the products are designed for a specific use because the treatment gives them a specific character for use in the plastics industry. Third, the products to which is added a water-repellent are excluded from Chapter 928.

Counsel for the respondent argued that, for classification under Chapter 928, the products in issue must be a carbonate and a separate chemically defined compound to which a stabilizer can be added, if it is necessary for transport or preservation. However, if that stabilizer changes the character of the product, renders it suitable for a specific use or is a water-repellent, then the products cannot be classified under Chapter 928 and must be classified under Chapter 938.

Finally, counsel concluded that section 11 of the new *Customs Tariff*[10] gives directions as to how the Tariff should be interpreted. Counsel submitted that section 11 is an interpretative or a declaratory provision and that the presumption against construing it retroactively does not apply. On the basis of that argument, counsel claimed that, under the new Harmonized Commodity Description and Coding System (Harmonized System), headings 28.36 and 38.23 dealing with the chemicals in issue were similar to headings 92842 and 93819. Therefore, it is essential to refer to the Explanatory Notes to the Harmonized System to interpret heading 92842. In the Explanatory Note to heading 28.36, which is similar to heading 92842, it is stated under "(4) Precipitated calcium carbonate" that the heading excludes "... calcium carbonate in powder form, the particles of which are coated with a water-repellent film of fatty acids (e.g., stearic acid) (heading 38.23)." Therefore, counsel concluded that, since heading 28.36 is almost identical to heading 92842, the exclusion of stearic acid coated calcium carbonate from heading 28.36 is a clear indication that this product is also excluded from heading 92842 and should remain classified under tariff item 93819-1, which is similar to heading 38.23 in the Harmonized System.

DECISION

To decide the question in issue, the Tribunal must determine whether the chemicals that are the subject of this appeal contain a stabilizer necessary for their preservation or transport. If so, they should therefore be classified under tariff item 92842-1. In order to make that determination, the Tribunal must first decide whether it is bound to refer to the Explanatory Notes to the Harmonized System to interpret tariff item 92842-1. Counsel for the respondent argued that the Harmonized System must be referred to in interpreting the Tariff and classifying the goods at issue. This is possible, argued the respondent, because of section 11 of the new *Customs*

8. (1987), 12 T.B.R. 531.
9. (1987), 12 T.B.R. 499.
10. R.S.C. 1985, c. 41 (3rd Supp.).

Tariff.[11] It is the respondent's contention that this section is declaratory and that, consequently, it could be applied retroactively. The appellant did not respond to that argument. If that argument were to succeed, the goods in issue would have to be classified under tariff item 93819-1 rather than tariff item 92842-1, and the Tribunal would have to decide in favour of the respondent.

The Tribunal will review this question hereafter at length because of its importance, particularly in the context of chemicals. To determine the validity of this reasoning, reference must be made to the legislative history of section 11. A reference to the legislative history of a provision may be made where this may reveal the legislative intent of the provision. As recognized by Justice Pigeon in *Gravel v. City of St-Léonard*:[12]

> *... The Legislature has the power to enact laws having a retroactive effect, including declaratory laws (see Cusson v. Robidoux [(1977) 1 S.C.R. 650]). However, this is not to be presumed....*
>
> > *When an act is not applicable because it is subsequent to the facts which gave rise to the action, nothing is to be made of it: M.F.F. Equities v. The Queen [(1969) S.C.R. 595], at pp. 598-599. Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.... The situation is completely different with respect to a statute subsequent in time to the facts which gave rise to the action. The construction of prior legislation is then exclusively a matter for the courts. In refraining from giving the new enactment retroactive or declaratory effect, the legislator avoids expressing an opinion on the previous state of the law, leaving it to the courts.*

The usefulness of referring to the legislative history of a provision of the *Customs Tariff* was recognized by Tariff Board Member Bertrand in the decision of *Canadian General Electric Company Limited v. Deputy Minister of National Revenue for Customs and Excise*[13] which also referred to Supreme Court Justice Pigeon in the case of *Gravel v. City of St-Léonard* referred to above.

The immediate predecessor to the new *Customs Tariff*[14] did not refer to the Harmonized System as an aid to interpretation. It, however, obligated the Governor in Council to refer to the Brussels Nomenclature to assist in the formulation of rules and explanatory notes for the interpretation of the several descriptions of goods in Group XII of Schedule II to the *Customs Tariff*.[15] Group XII applies to products of the chemical, plastics and allied industries. The group is composed of several chapters, one of which is Chapter 928: "Inorganic Chemicals...." Chapter 928 is in turn divided into headings, one of which is heading 92842, each of which contains a number of tariff items.

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11. Supra, footnote 10.
12. [1978], 1 S.C.R. 660, p. 667.
13. (1988), 13 T.B.R. 15.
14. Supra, footnote 10.
15. Supra, footnote 4.

The Governor in Council has prescribed rules for the interpretation of Group XII of Schedule II to the *Customs Tariff*,[16] namely, the Interpretation Rules. The Tribunal notes that, in the present case, the rules applicable to Chapter 928 of Group XII are identical to the Chapter Notes found in Chapter 28 of the Brussels Nomenclature, the counterpart of Chapter 928. Authority for the Interpretation Rules is found in section 40 of the *Customs Tariff*.[17] At the time the present case arose, section 40 read as follows :

> *40(1) The Governor in Council, on the recommendation of the Minister, may by regulation prescribe rules for, and explanatory notes to assist in resolving conflicts or doubts respecting, the interpretation of the several descriptions of goods in Group XII of Schedule II, set out under the group designation "Products of the Chemical, Plastics and Allied Industries."*
>
> *(2) In the formulation of the rules and explanatory notes to be prescribed pursuant to subsection (1), the Governor in Council shall be guided, as closely as possible, by the Nomenclature for the Classification of Goods in Customs Tariffs published by the Customs Co-operation Council in Brussels, commonly known as the "Brussels Nomenclature," including the rules for the interpretation of the Brussels Nomenclature, the section and chapter notes and the headings, and the Explanatory Notes to the Brussels Nomenclature published by the Council, as amended from time to time*.[18]

This provision was first inserted in a 1968 amendment to the *Customs Tariff*[19] following the conclusions reached by the Tariff Board in its inquiry respecting chemicals nomenclature on a reference to the Tariff Board by the Minister of Finance. In its Report[20] to the Minister, the Tariff Board had recommended the adoption, to the greatest extent practicable, of the Brussels Nomenclature respecting chemicals. However, the Tariff Board noted that it was not possible to maintain complete similitude between their proposal for the Canadian *Customs Tariff* and the Brussels Nomenclature. As the Tariff Board explained in its Report, there were problems in attempting to establish complete correspondence between the two differing nomenclatures. It was not possible to extricate the portion of the Brussels Nomenclature which the Tariff Board had followed from consistent and closely integrated parts of the whole Brussels Nomenclature in order to insert it into the Canadian *Customs Tariff*. The problem was also that the structure of the *Customs Tariff* was very different from the Brussels Nomenclature. Indeed, not all chemical products existing in the Brussels Nomenclature could be included in the Canadian *Customs Tariff* and, conversely, some products classified in the *Customs Tariff* chapter on chemicals are not found in the Brussels Nomenclature. In short, the match between the two customs nomenclature systems was, in the Tariff Board's view, far from perfect. However, the Tariff Board recommended that the contemplated legislative amendments to the Canadian *Customs Tariff* follow closely, in many parts, the contents of the Brussels Nomenclature.

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16. Supra, footnote 4.
17. Supra, footnote 4.
18. This section, which was old section 18, became section 40 in the 1985 Revised Statutes of Canada Consolidation.
19. S.C. 1968-69, c. 12, s. 4.
20. Supra, footnote 7.

Therefore, the Tribunal concludes that it cannot be assumed that all the chemical components of the Canadian *Customs Tariff* nomenclature are derived from the Brussels Nomenclature. Consequently, each case must be assessed on its own merits. This was also the position taken in many instances by the Tribunal's predecessor, the Tariff Board.

With regard to the tariff items at issue in the present case, it appears that the Canadian *Customs Tariff* maintained, throughout the years, a virtually identical wording to that found in the Brussels Nomenclature. The wording of headings 92842 and 93819 in the Canadian *Customs Tariff* is similar to the wording of headings 28.42 and 38.19 respectively in the Brussels Nomenclature. This similarity has been maintained in the Harmonized System. However, the Tribunal notes that in the supplementary Explanatory Note to heading 28.42 of the Brussels Nomenclature, after which heading 92842 is modeled, the heading does not specifically exclude the precipitated calcium carbonate coated with stearic acid as it now does in the corresponding Explanatory Note in the Harmonized System, and as claimed in the argument of the respondent. The wording found in the exclusion, now described in the Harmonized System Explanatory Notes, is entirely new and did not exist at the time of the importation into Canada of the goods at issue. The Tribunal further notes that, in the Deputy Minister's reasons for excluding the goods in issue from chapter 928 of Group XII, reference is made to the new heading 28.36 of the Harmonized System, although it was not in force in Canada at the time the subject goods were imported.

The wording of section 40 of the *Customs Tariff*[21] did not, in the view of the Tribunal, establish an obligation to refer to the Brussels Nomenclature in interpreting the Canadian *Customs Tariff*. Rather, as drafted, the provision allowed for the prescription by the Governor in Council of rules for the interpretation of the descriptions found in the chemicals nomenclature of the Schedule to the *Customs Tariff*.[22] Following the amendments to the *Customs Tariff*,[23] the Interpretation Rules were prescribed, but Explanatory Notes were not. Rather, a Minister's Departmental Memorandum was issued which served to explain the Interpretation Rules and the chemicals nomenclature found in the Schedule to the *Customs Tariff*.[24]

In 1987, an entirely rewritten *Customs Tariff*[25] was adopted in Canada. The act was assented to on December 18, 1987, and came into force on January 1, 1988. The long title of the act is of interest. It reads: "An Act respecting the imposition of duties of customs and other charges, to give effect to the International Convention on the Harmonized Commodity Description and Coding System, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof."

In this version, it is provided at section 10 that:

> *The classification of imported goods under a tariff item in Schedule I shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the*

21. Supra, footnote 4.
22. Supra, footnote 4.
23. Supra, footnote 4.
24. Supra, footnote 4.
25. Supra, footnote 10.

> *Harmonized System and the Canadian Rules set out in that Schedule.*

It is also provided at section 11 of the new *Customs Tariff*[26] that:

> *In interpreting the headings and subheadings in Schedule I, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, as amended from time to time, published by the Customs Co-operation Council, established by the Convention establishing a Customs Co-operation Council, done at Brussels on December 15, 1950, and to which Canada is a party.*

The marginal note to section 11 is entitled "Guides to interpretation."

It is argued by the respondent that this new section is a declaratory section which must apply retroactively. To establish this proposition, it must be demonstrated that the new provision merely restates what the law has always been. This contention was supported by a number of references to case law. However, these will not be restated here as the Tribunal is of the view that they are not helpful in resolving the question. Rather, it is necessary to consider the nature of a declaratory provision and whether this is indeed the nature of section 11 of the new *Customs Tariff*.[27]

A declaratory provision has been described as follows:[28]

> *Acts in the nature of declaratory Acts are declarations by Parliament of what the law must be deemed always to have been. They are therefore retroactive and accordingly apply to past transactions, pending litigation and in derogation of acquired rights.*

An example of a retroactive statute is given by Professor Driedger:[29]

> *A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. Thus, for example, the Act to amend the Customs Tariff, S.C. 1969-70, c. 6, assented to on December 19, 1969, provided that the amendments to the Customs Tariff should be deemed to have come into force on June 4, 1969 (the date of the Budget Speech of the Minister of Finance) and to have applied to goods imported after that day; thus, a new and higher rate of duty was applied to past transactions as of a past time, namely, importations prior to the date the Act was enacted.*

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26. Supra, footnote 10.
27. Supra, footnote 10.
28. Driedger, E.A., Construction of Statutes, 1983, p. 198.
29. Supra, footnote 28, p. 186 and cases cited therein.

There are many indications in the new *Customs Tariff*[30] that the act applies to the future. At section 139, the act states the day of coming in force as follows:

> *139. This Act shall come into force or be deemed to have come into force on January 1, 1988 and shall apply, or be deemed to have applied, to all goods mentioned therein imported on or after that day and to goods previously imported that had not been accounted for under section 32 of the Customs Act before that day.*

This is a clear indication that the act applies to the future. In addition, section 136 entitled "Retroactivity" states that:

> *136(1) Any order or regulation made pursuant to this Act may, if it so provides, be retroactive and have effect with respect to any period before it is made but no such order or regulation may have effect from a day earlier than the day on which this Act comes into force.*
>
> *(2) Subsection (1) ceases to have effect eighteen months after the day on which this Act comes into force.*

Had Parliament intended retroactive application of section 11, it would have stated so. The care taken in drafting sections 136 and 139 is another indication that the clear intention of Parliament was that the act, regulations and orders made thereunder were intended only to apply on the date the act came into force.

There is a presumption against retroactive application of statutes. This presumption is a very old principle explained as follows:[31]

> *Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.... Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.* (Emphasis added)

Because there is no clear indication in the statute that it must be applied retroactively, then, it is only through necessary implication that it could be inferred that the Legislature intended the statute to apply retroactively. The Tribunal can find no such implication in the statute, more particulary in the wording of the new section 11. This view is reinforced by the legislative history of this provision.

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30. Supra, footnote 10.

31. *Philips v. Eyre* (1870), L.R. 6 Q.B., at p. 23, in Driedger, E.A., Construction of Statutes, 1983, p. 185.

The history of the section is a strong indication against retroactive application. Canada only adhered to the International Convention on the Harmonized System in December 1986. It implemented the Convention in Canadian law by legislation which came into force, by express words, on January 1, 1988. There are many indications in the history of the statute that it was not Parliament's intent to make in that section a "declaration of what the law must be deemed always to have been." Canada never adhered to the Convention establishing the Brussels Nomenclature. Rather, it maintained a separate *Customs Tariff* nomenclature. The act never had a provision such as that found in section 11. The Tariff Board recognized this in many cases and, when referring to the Brussels Nomenclature, the Tariff Board took many precautions to indicate that it was not bound by the Notes to the Brussels Nomenclature.[32]

The Tariff Board's recommendations to the Minister of Finance were that the two nomenclature systems simply did not fit together in a fashion that would allow integral adoption by Canada. What resulted in Canadian legislation was old section 18, which gave the Governor in Council the flexibility required, under the circumstances, and a direction to be guided, as closely as possible, by the Brussels Nomenclature in the drafting of rules for and explanatory notes to assist in the interpretation of Group XII of Schedule II.

It is only in the new *Customs Tariff*[33] that the obligatory referral to the Harmonized System was introduced in new section 11. This happened after Canada adhered to the International Convention, recast its *Customs Tariff* to fit the international system, and generally put itself in the position of participating in the Harmonized System nomenclature approach.

Because of this, the Tribunal cannot accept the respondent's contention that section 11 of the new *Customs Tariff*[34] is a declaratory section that applies retroactively. Section 11 is not, cannot and was not meant to be applied retroactively or retrospectively. To argue otherwise would put the taxpayer in a position of having to apply the Harmonized System to classification of goods in all cases of imports of goods that, sometimes, may not fit the Harmonized System nomenclature. This would bring the interpretation of the *Customs Tariff* to an absurd conclusion which could not have been considered by the Legislator. Rather, the Tribunal interprets the section as applying to the future only and to cases of goods imported on or after January 1, 1988, and interprets old section 40 as being an obligation imposed on the Governor in Council, before the fact, on the drafting of Rules and Explanatory Notes, only as closely as possible to the Brussels Nomenclature. This condition allowed the Governor in Council the flexibility necessary to maintain the integrity of the Canadian *Customs Tariff* nomenclature whenever necessary and where the circumstances so dictated.

This does not mean that this Tribunal is precluded from looking at the Harmonized System Explanatory Notes, as an aid to interpretation. However, there is no obligation at law to do so in this case. Such a reference would only be done where it would not otherwise lead the Tribunal to an absurd interpretation of the Canadian *Customs Tariff*.

In this case, there has been a definite change between the Explanatory Notes found in the Brussels Nomenclature and those found in the Harmonized System. The Explanatory Notes in the

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32. See for example, *BASF Canada Ltd. v. Deputy Minister of National Revenue for Customs and Excise* (1974), 6 T.B.R. 41, p. 50.
33. Supra, footnote 10.
34. Supra, footnote 10.

Brussels Nomenclature did not contain the additional exclusion concerning the chemicals in issue now found in those of the Harmonized System. This means that, at the time these goods were imported into Canada, both the Canadian *Customs Tariff* and the Brussels Nomenclature were silent on the specific classification of the goods.

There remains for the Tribunal to decide whether the chemicals in issue contain a stabilizer necessary for their preservation or transport. The critical point in this issue is the meaning of the word "stabilizer." Paragraph 9(1)(*a*) of the Interpretation Rules provides that Chapter 928 apply to separate chemical elements and separate chemically defined compounds. Paragraph 9(1)(*d*) of the Interpretations Rules allows the addition of a "stabilizer" necessary for their preservation or transport. In order to be classified under heading 92842, the goods imported by the appellant must meet three requirements: first, they must be separate chemical elements or separate chemically defined compounds; second, the stearic acid added to them has to be a stabilizer within the meaning of paragraph 9(1)(*d*) of the Interpretation Rules; and, third, the addition of the stearic acid must be necessary for the preservation or transport of the precipitated calcium carbonate.

Emerging from the evidence is the agreement that the goods in issue are separate chemically defined compounds. However, a review of the testimony adduced from the several witnesses presented by each party leads the Tribunal to the conclusion that there is an obvious disagreement as to whether the stearic acid is a "stabilizer" necessary for the preservation or transport of the precipitated calcium carbonate.

The Tribunal notes that the term "stabilizer" is not defined, and is used as a general term in paragraph 9(1)(*d*) of the Interpretation Rules. Evidence before the Tribunal indicates that chemists can define the word stabilizer in general terms. This is confirmed by various dictionary definitions.

The Glossary of Chemical terms[35] defines stabilizer as follows:

> *Any substance added to another substance or mixture to prevent or retard a chemical or physiochemical change, at least for a considerable time. As this function can occur in many different ways, the term is a very general one, which includes antioxidants, inhibitors, emulsifiers, protective colloids, etc. It is formed from the term "stable," meaning "unchanging."*

The Dictionary of Scientific and Technical terms[36] defines stabilizer as follows:

> *Any substance that tends to maintain the physical and chemical properties of a material.*

In Hawley's Condensed Chemical Dictionary,[37] "stabilizer" is defined as follows:

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35. Second edition, by Clifford A. Hampel and Gessner G. Hawley, Van Nostrand Reinhold Company, p. 270.
36. Fourth edition, McGraw-Hill Book Company, p. 1804.
37. Eleventh Edition, by Sax, N. Irving and Lewis, Richard J., New York, Van Nostrand Reinhold Company Inc., 1987.

> *Any substance which tends to keep a compound, mixture, or solution from changing its form or chemical nature. Stabilizers may retard a reaction rate, preserve a chemical equilibrium, act as antioxidants, keep pigments and other components in emulsion form or prevent the particles in a colloidal suspension from precipitating.*

In The Oxford English Dictionary,[38] "stabilizer" has the following meaning:

> *More widely, an additive which inhibits chemical or physical change in a substance, esp. one used to prevent the breaking of an emulsion.*

Many of the dictionary references, even if they purport to give the definition in the chemical context, tend to do so in rather general terms. However, the Tribunal considers that the dictionary definitions indicate that the word "stabilizer," as used in the chemical context, implies the preservation of the physical and chemical properties of a material.

The Tribunal asked the witnesses many questions about the properties of the precipitated calcium carbonates and finds that certain facts emerge from the evidence. First, precipitated calcium carbonate has the following properties immediately after processing: it is a white, free-flowing powder that has an average particle size of 0.07 microns, that is not agglomerated, that is moisture-free, that does not cake and that is hydrophilic. Second, the uncoated precipitated calcium carbonate, quite soon after processing, is not free-flowing, agglomerates, has 0.6 percent moisture and cakes. The other properties of precipitated calcium carbonate are exactly the same as those of the product after processing. Third, precipitated calcium carbonate coated with stearic acid has the same properties as the uncoated product had immediately after processing, except for the fact that it is now hydrophobic.

The Tribunal is satisfied from the evidence and the meaning of the word "stabilizer" that the stearic acid constitutes a stabilizer of the properties of the precipitated calcium carbonate. The fact that precipitated calcium carbonate becomes hydrophobic after the addition of the stearic acid has been clearly established and admitted by both parties. However, the essential result of the addition of the stearic acid is to preserve the free-flowing and moisture-free properties of the precipitated calcium carbonate. Therefore, the Tribunal believes that the addition of the stearic acid is necessary to preserve the substantial nature of the precipitated calcium carbonate.

In the Tribunal's view, the principle enunciated in the Omya case[39] applies in this appeal: the addition of the stearic acid does not bring about any alteration of the substantial nature of the precipitated calcium carbonate, nor has the dominant characteristic been changed - the precipitated calcium carbonate has not become something else than precipitated calcium carbonate.

The respondent argued that a chemical reaction takes place when the stearic acid is added so as to alter the characteristics of the basic product, namely, the precipitated calcium carbonate. The Tribunal has heard contrary evidence on this point and finds the evidence inconclusive.

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38. Second Edition, Vol. XVI, Clarendon Press, Oxford, p. 431.
39. Supra, footnote 6.

Furthermore, the Tribunal is of the view that even if a chemical reaction did occur when the stearic acid was added to the precipitated calcium carbonate, it affected only a small percentage of the surface area of the particle. It did not alter the character of the basic product.

Because the goods in issue fulfill the above-noted requirements provided in subsection 9(1) of the Interpretation Rules and in view of the evidence, the Tribunal concludes that they are not excluded from Chapter 928 of Group XII of the *Customs Tariff*[40] and should be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...." This classification is more specific than tariff item 93819-1 and should govern.

CONCLUSION

The appeal is allowed. The Tribunal declares that the precipitated calcium carbonates known under the names of Ultra-Pflex and Super-Pflex 200 imported into Canada by the appellant from Pfizer Inc., Massachusetts, United States, on December 11, 1986, under entry number H104601, and the precipitated calcium carbonates known under the names Super-Pflex 200, Ultra-Pflex and Multifex SC also imported into Canada by the appellant from Pfizer Inc. on December 15, 1986, under entry number A214389, on May 14, 1987, under entry number A034277 and on May 28, 1987, under entry number A047491 are to be classified under tariff item 92842-1 as "Carbonates and percarbonates ... : Other than the following...."

W. Roy Hines
W. Roy Hines
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

40. Supra, footnote 4.