Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Appeals

## DECISION AND REASONS

Appeal No. AP-2013-006

SMS Equipment Inc.

v.

President of the Canada Border Services Agency

*Decision and reasons issued*
*Friday, March 28, 2014*

Canada

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IN THE MATTER OF an appeal heard on December 19, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 26 decisions of the President of the Canada Border Services Agency, dated January 16, 2013, pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**SMS EQUIPMENT INC.** **Appellant**

**AND**

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

## DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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|---|---|
| Place of Hearing: | Ottawa. Ontario |
| Date of Hearing: | December 19, 2013 |
| Tribunal Member: | Serge Fréchette, Presiding Member |
| Counsel for the Tribunal: | Elysia Van Zeyl |
| Manager, Registrar Programs and Services: | Sarah MacMillan |
| Senior Registrar Officer: | Lindsay Vincelli |
| Registrar Officer: | Ekaterina Pavlova |

**PARTICIPANTS:**

| **Appellant** | **Counsel/Representative** |
|---|---|
| SMS Equipment Inc. | Richard A. Wagner |

| **Respondent** | **Counsel/Representative** |
|---|---|
| President of the Canada Border Services Agency | Paul Battin |

**WITNESSES:**

| | |
|---|---|
| Lindon Petty Jr.<br>Vice-President, Parts and Service<br>SMS Equipment Inc. | Bill Fleming<br>Vice-President, Coal Engineering<br>Projects and Business Improvement<br>Teck Resources |

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# STATEMENT OF REASONS

## BACKGROUND

1. This is an appeal filed by SMS Equipment Inc. (SMS) with the Canadian International Trade Tribunal (the Tribunal) on April 11, 2013, pursuant to subsection 67(1) of the *Customs Act*[1] from 26 decisions of the President of the Canada Border Services Agency (CBSA), dated January 16, 2013, made pursuant to subsection 60(4).

2. The appeal concerns the tariff classification of certain items imported by SMS for the maintenance and repair of large off-road haul trucks, specifically the following parts and components for the suspension systems of Komatsu haul trucks: rear suspension kit, key shear, suspension core charge and suspension housing (the goods in issue).

3. The matter to be decided by the Tribunal in this appeal is whether the goods in issue are classifiable under tariff item No. 9908.00.00 of the schedule to the *Customs Tariff*[2] as articles for use in utility vehicles of heading No. 87.03 and lorries (trucks) or shuttle cars of heading No. 87.04, for use underground in mining or in developing mineral deposits or for use in extracting machinery for extracting minerals directly from the working face of a mine.

## ANALYSIS

### Legal Framework

4. 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).[3] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

5. 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*[4] and the *Canadian Rules*[5] set out in the schedule.

6. The *General Rules* comprise six rules. The classification process 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.

7. 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*[6] and the *Explanatory Notes to the Harmonized Commodity Description and Coding*

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997. c. 36.
3. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
4. S.C. 1997, c. 36, schedule [*General Rules*].
5. S.C. 1997, c. 36, schedule.
6. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

*System*,[7] 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.[8]

8. 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* based on 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. If the goods in issue cannot be classified at the heading level through the application of Rule 1, the Tribunal must then consider the other rules,[9] which are intended to be considered sequentially and applied in a cascading manner.[10]

9. Once the Tribunal has determined the heading in which the goods in issue are properly classified, a similar approach is used to determine the proper subheading,[11] with the final step being to determine the proper tariff item.[12]

**Tariff Classification in Issue**

10. In the present appeal, the parties appear to agree that the goods in issue are properly classified under tariff item No. 8708.80.99 as other parts and accessories of the motor vehicles of heading Nos. 87.01 to 87.05, suspension systems and parts thereof (including shock-absorbers). The only source of disagreement between the parties—and hence the issue in this appeal—is whether the goods in issue are also classifiable under tariff item No. 9908.00.00 and may benefit from the relief of duties on this basis.

11. Chapter 99, which includes tariff item No. 9908.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter. Moreover, since the Harmonized System reserves Chapter 99 for special classifications (i.e. for the exclusive use of individual countries), there are no classification opinions or explanatory notes to consider.

12. There are no notes to Section XXI (which includes Chapter 99). However, the Tribunal considers notes 3 and 4 to Chapter 99 to be relevant to the present appeal. These notes provide as follows:

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7. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
8. Refer to *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 the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this direction is equally applicable to the *Classification Opinions*.
9. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
10. *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)*, 2009 FCA 345 (CanLII) at para. 17.
11. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according 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."
12. 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." The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

> 3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin only after classification under a tariff item in Chapters 1 to 97 has been determined and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met.
>
> 4. The words and expressions used in this Chapter have the same meaning as in Chapters 1 to 97.

13. In accordance with Note 3 to Chapter 99, the goods in issue may only be classified in Chapter 99 after classification under a tariff item in Chapters 1 to 97 has been determined. As indicated above, the parties do not take issue with the determination that tariff item No. 8708.80.99 applies. The Tribunal accepts this classification. Therefore, for the purposes of this appeal, the Tribunal is of the view that the condition set out in Note 3 to Chapter 99 has been met.

14. Consequently, the issue remaining before the Tribunal is whether the goods in issue meet the conditions of tariff item No. 9908.00.00, which provides as follows:

> **Utility vehicles of heading 87.03 and lorries (trucks) or shuttle cars of heading 87.04, for use underground in mining or in developing mineral deposits;**
>
> ***Articles (excluding tires and inner tubes) for use in the foregoing equipment,* or for use in loading machinery for loading coal or for loading minerals directly from the working face of a mine, *or for use in extracting machinery for extracting minerals directly from the working face of a mine.***
>
> [Emphasis added]

15. In *Sandvik Tamrock Canada Inc. v. Deputy M.N.R.*,[13] tariff item No. 9908.00.00 was broken down into five distinct categories as follows:

> (1) utility vehicles, lorries (trucks) and shuttle cars of certain headings for use in underground mining or in developing mineral deposits;
>
> (2) articles for use in equipment listed in (1);
>
> (3) articles for use in loading machinery for loading coal;
>
> (4) articles for use in loading machinery for loading minerals directly from the working face of a mine;
>
> (5) articles for use in extracting machinery for extracting minerals directly from the working face of a mine.

16. For the sake of consistency, the Tribunal will continue to refer to the categories identified above, although in this appeal, only categories 2 and 5 are relevant.

17. SMS claims that the goods in issue meet the requirements of tariff item No. 9908.00.00 in two separate ways. Firstly, according to SMS, the goods in issue are classifiable under tariff item No. 9908.00.00 on the basis that they are articles for use in trucks of heading No. 87.04, which trucks are used in developing mineral deposits (in other words, under category 2 above). Secondly, SMS submits that the goods in issue are classifiable under tariff item No. 9908.00.00 as articles for use in extracting machinery for extracting minerals directly from the working face of a mine (under category 5 above).

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13. (30 June 2000), AP-99-083 (CITT).

18. In contrast, the CBSA argues that the goods in issue are not classifiable under tariff item No. 9908.00.00 because the condition of use underground applies to both mining activities and mineral development activities and that, although the haul trucks are involved in the development of mineral deposits, they do not operate underground. In regard to the additional basis for classification proposed by SMS, the CBSA submits that the goods in issue are not articles for use in extracting machinery and that to so find would be a stretch of the Federal Court of Appeal's interpretation of "extracting machinery", as reflected in *Sandvik Tamrock Canada Ltd.. v. Canada (Deputy Minister of National Revenue)*.[14]

19. For the purposes of this appeal, the Tribunal will first analyze whether the goods in issue are classifiable under tariff No. 9908.00.00 on the basis that they are articles for use in lorries (trucks) of heading No. 87.04 for use underground in mining or in developing mineral deposits and then analyze whether the goods in issue are classifiable under tariff item no. 9908.00.00 as being articles for use in extraction machinery for extracting minerals directly from the working face of a mine. If the goods in issue meet the requirements of either category 2 or category 5, they will be classifiable under tariff item No. 9908.00.00.

**Do the Goods in Issue Fall Under Category 2?**

"Articles"

20. The term "article" is not defined in the *Customs Tariff*. SMS provided several dictionary definitions[15] of the term "article", including the following:

> . . . [a] distinct part or portion; a piece, a particular . . . A commodity; a piece of goods or property . . . .[16]
>
> . . . a particular commodity or substance . . . .[17]

21. In previous cases, the Tribunal has noted that an "article" is generally considered to be "any finished or semi-finished product, which is not considered to be a material."[18] There is no indication that the goods in issue in this case are considered to be a material.

22. Furthermore, the CBSA expressly acknowledges that the goods in issue are articles within the meaning of the *Customs Tariff*.[19]

23. The Tribunal agrees with the parties in this case that the ordinary meaning of the word "article" is sufficiently broad to encompass the goods in issue.

14. 2001 FCA 340 (CanLII) [*Sandvik*].
15. Exhibit AP-2013-006-04A, tab 1 at para. 50, Vol. 1.
16. Exhibit AP-2013-006-04B, tab 6, Vol. 1.
17. *Ibid.*, tab 7, Vol. 1A.
18. *Wolseley Canada Inc. v. President of the Canada Border Services Agency* (18 January 2011), AP-2009-004 (CITT) at para. 25*; Great West Van Conversions Inc. v. President of the Canada Border Services Agency* (30 November 2011), AP-2010-037 (CITT) at para. 34; *A.M.A Plastics Ltd. v. President of the Canada Border Services Agency* (23 September 2010), AP-2009-052 (CITT) [*A.M.A. Plastics*] at para. 33.
19. Exhibit AP-2013-006-09A at 10, Vol. 1B.

"For Use In" Lorries (trucks) of Heading No. 87.04

24. In this case, neither party disputes that the Komatsu haul trucks are classified in heading No. 87.04.[20]

25. In regard to whether the goods in issue are considered "for use in" lorries (trucks) of heading No. 87.04, the Tribunal notes that the phrase "for use in" is defined in subsection 2(1) of the *Customs Tariff* as follows:

> "for use in", wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item.

26. Previous Tribunal decisions confirm that, in order for a good to be considered "for use in", the goods in issue must be physically attached to and functionally joined the other goods referred to in the tariff item.[21]

27. One way to substantiate end use, where required in order to establish eligibility for duty relief under a tariff item in Chapter 99, is through the provision of end-use certificates. Although the Tribunal expressed some concerns about the end-use certificates presented by SMS—namely, although certificates were provided, the Tribunal was unable to link these particular certificates to the particular goods in issue on the basis of the evidence presented to it[22]—there is sufficient evidence on record to satisfy the Tribunal that the goods in issue are, as a factual matter, for use in lorries (trucks) of heading No. 87.04.

28. The goods in issue are incorporated into certain types of trucks that are used in the mining sector. Komatsu is the brand name and, as was indicated at the hearing, there are various models of Komatsu trucks, each of which serves the singular function of hauling large quantities of minerals and overburden, generally ranging from 200 tonnes to 360 tonnes.[23]

29. The trucks are custom-built in the United States and are shipped to Canada by highway and in pieces, generally taking six loads to transport because of their large size. They are taken to the mine site and assembled there.[24] Witness testimony indicated that these trucks cannot be used on roads or highways.[25] The Tribunal heard ample testimony to the effect that the goods in issue can only be used in Komatsu haul trucks.[26] In fact, witness testimony indicated that the goods in issue are designed and made specifically for certain models of Komatsu haul trucks.[27] As was indicated by Mr. Lindon Petty, a witness from SMS, these trucks are used exclusively in the mining sector.[28]

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20. *Transcript of Public Hearing*, 19 December 2013, at 34; Exhibit AP-2013-006-09A at 11, Vol. 1B.
21. *Imation Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (29 November 2001), AP-2000-047 (CITT); *PHD Canada Distributing Ltd. v. Commissioner of Customs and Revenue* (25 November 2002), AP-99-116 (CITT) ; *Sony of Canada Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (3 February 2004), AP-2001-097 (CITT); *Jam Industries Ltd. v. President of the Canada Border Services Agency* (20 March 2006), AP-2005-006 (CITT); *A.M.A. Plastics.*
22. *Transcript of Public Hearing*, 19 December 2013, at 38-39.
23. *Ibid.* at 27, 34.
24. *Ibid.* at 33.
25. *Ibid.* at 32.
26. *Ibid.* at 25.
27. *Ibid.* at 25.
28. *Ibid.* at 16.

30. Witness testimony indicates that there are other types of trucks employed in the mining industry. An example would be service support vehicles.[29] However, the goods in issue are not used on those other types of vehicles and, in contrast to the haul trucks, there was no argument in this case that articles for those types of trucks (such as service support vehicles) would be eligible for duty-free treatment under tariff item No. 9908.00.00.[30]

31. Taking all of the above evidence into consideration, the Tribunal is satisfied that the goods in issue are for use in lorries (trucks) of heading No. 87.04, as required in tariff item No. 9908.00.00.

For use underground in mining or in developing mineral deposits

32. In order to be eligible for duty relief under category 2, it is not sufficient that the articles be for use in trucks of heading No. 87.04. In addition, tariff item No. 9908.00.00 requires that the trucks of heading No. 87.04, into which the goods in issue are incorporated, be "for use underground in mining or in developing mineral deposits."

33. The parties seem to agree that the Komatsu haul trucks are used in developing mineral deposits.[31] In particular, the evidence on the record indicates that the Komatsu haul trucks are used in "open-pit mining", which was aptly described to the Tribunal as ". . . different from your traditional mine in that when you look up[,] you can always see the sky."[32] Witness testimony indicates that coal, for example, cannot be mined without also mining waste rock (or overburden).[33] Moreover, in order to access the coal, the waste rock must be removed from the site, and this is typically done by haul trucks.[34] SMS submitted that this hauling away of waste rock is generally considered by the mining industry to be part of the development process.[35]

34. The dispute between the parties on this particular part of the tariff item is an issue of legal interpretation. Specifically, the question before the Tribunal is whether the term "underground", as it is used in this part of tariff item No. 9908.00.00, applies only to "mining" or whether the term "underground" should be read by the Tribunal as also applying to "developing mineral deposits".

35. The CBSA argued that the word "underground" in tariff item No. 9908.00.00 applies to both mining and to the phrase "in developing mineral deposits". In the CBSA's view, the goods do not qualify for duty relief under tariff item No. 9908.00.00 because they are used in open-pit mining rather than in underground mining. In support of its argument, the CBSA relies on the language of Tariff Code 1344, which is a previous iteration of tariff item No. 9908.00.00, prior to the introduction of the *Harmonized Tariff*, and which read as follows:

> The following to be employed in mining, quarrying, or developing mineral deposits:
>
> . . .
>
> 1344 Lorries (trucks) and shuttle cars of heading No. 87.04 and utility vehicles of heading No. 87.03 (all the foregoing for use underground); articles for use in the foregoing (excluding tires and tubes).[36]

29. *Ibid.* at 18-20.
30. *Ibid.* at 12-13, 35, 95.
31. Exhibit AP-2013-006-09A at para. 11, Vol. 1B; Exhibit AP-2013-006-04A at paras. 55-65, Vol. 1.
32. *Transcript of Public Hearing*, 19 December 2013, at 41, 51.
33. *Ibid.* at 59.
34. *Ibid.*
35. Exhibit AP-2013-006-04A at para. 31, Vol. 1.
36. Exhibit AP-2013-006-09B, tab 10, Vol. 1B.

36. The CBSA submitted that the legislative revisions to the *Customs Tariff* were intended to make to *Customs Tariff* simpler, but to leave the substance of the provisions unchanged. It is on this basis, and on account of the fact that Tariff Code 1344 specified that the trucks in which the goods in issue are used must operate underground, that the CBSA argues that the Tribunal should read this portion of tariff item No. 9908.00.00 as also requiring the trucks to be used underground in regard to both mining and mineral deposit development activities. In addition, the CBSA argues that interpreting the provision in this manner is consistent with the modern approach to statutory interpretation.

37. To the contrary, SMS argues that there is no requirement in category 1 or 2 that the development of mineral deposits must occur underground. Instead, SMS submits that there are two separate instances in which category 2 provides relief for articles used in trucks of heading No. 87.04: firstly, when they are for use underground in mining and, secondly, when they are for use in developing mineral deposits.

38. Notwithstanding the able arguments of the CBSA, the Tribunal cannot agree with the CBSA's interpretation of this part of the provision. While it may have been clear in Tariff Code 1344 that the intent was for duty relief to be granted only to trucks operating underground in mining and parts for use in those trucks, the Tribunal cannot disregard the fact that the language of tariff item No. 9908.00.00 is ambiguous in regard to whether the activities contemplated must both be completed underground in order for the trucks of heading No. 87.04 and articles for use therein to be eligible for duty relief.

39. As presently constructed, two differing interpretations are possible for this part of tariff item No. 9908.00.00. Considering all the facts and circumstances before it, the Tribunal is of the view that the more reasonable interpretation is that proposed by SMS. While it is undeniable that one of the purposes of the tariff harmonization exercise was to streamline the provisions in the schedule to the *Customs Tariff*, the documents filed describing this process also reflect an intent to modernize the provisions, incorporating updated and streamlined provisions that "... better reflect the current conditions facing Canadian industry ...."[37] While it is recognized that the majority of the amendments to the tariff schedule were of a housekeeping nature, it is clear that a number of these amendments made substantive changes.

40. It is also apparent that the Canadian mining industry has changed significantly since the introduction of Tariff Code 1344. Specifically, the Tribunal heard witness testimony indicating that the vast majority of mining in Canada today is open-pit mining, whereas, in the past, underground mining was by far predominant.[38] Given this shift in the Canadian mining industry, it seems entirely plausible that, in the harmonized tariff, "underground" was intended only to apply to mining operations and not to apply to the development of mineral deposits, the "or" between these provisions operating in a fully disjunctive fashion.

41. In addition, section 13 of the *Official Languages Act*[39] provides that the English and French versions of any act of Parliament are equally authoritative. As the Tribunal has stated in the past, neither the English nor the French version of the schedule to the *Customs Tariff* enjoys priority over the other.[40] Accordingly, when differences appear between French and English legislative texts, it is the Tribunal's duty to try to resolve any differences by applying the "shared meaning rule", whereby the ordinary meaning that is shared by both versions is presumed to be the meaning intended by Parliament and is therefore the one that ought to be adopted.[41]

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37. Exhibit AP-2013-006-09B, tab 9, Vol. 1B.
38. *Transcript of Public Hearing*, 19 December 2013, at 51.
39. *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.).
40. *Marmen Énergie Inc. and Marmen Inc. v. President of the Canada Border Services Agency* (14 December 2012), AP-2011-057 and AP-2011-058 (CITT) at para. 80.
41. *Cycles Lambert Inc. v. President of the Canada Border Services Agency* (10 July 2013), AP-2011-060 (CITT).

42. SMS's proposed interpretation of the first part of tariff item No. 9908.00.00 in regard to the term "underground" is supported by the French version of tariff item No. 9908.00.00, which provides for "*camions-navettes de la position 87.04, devant servir à l'usage souterrain dans les mines ou à la mise en valeur de gisements minéraux*." On this point, the Tribunal agrees with SMS' submissions that, if "*souterrain*" were intended to apply to the whole of this part of tariff item No. 9908.00.00, French rules of grammar dictate that it would need to be repeated after "*gisements minéraux*".[42]

43. Accordingly, the Tribunal is of the view that it is not necessary for the Komatsu haul trucks, classified in heading No. 87.04 and used in developing mineral deposits, to perform this activity underground in order to qualify for duty relief under this first part of tariff item No. 9908.00.00.

**Do the Goods in Issue Fall Under Category 5?**

44. In any case, even if the Tribunal is mistaken in its conclusion regarding category 2, it is clear that the goods in issue would eligible for duty relief under category 5 on the basis of their use in extracting machinery for extracting minerals directly from the working face of a mine.

45. As discussed above, on the basis of the ordinary meaning of the word "article", the Tribunal is of the view that the goods in issue are properly considered to be "articles".

46. As also discussed above, the Tribunal is satisfied that the goods in issue are "for use in", as that term is defined in the *Customs Tariff* and generally interpreted by the Tribunal, the Komatsu haul trucks.

47. The next issue to be considered then is whether the Komatsu haul trucks can appropriately be characterized as "extracting machinery".

48. The term "extracting machinery" is not defined in the *Customs Tariff*. Regard shall therefore be had to the common and ordinary meaning of the term, taking into account its general usage in the mining industry and as reflected in the relevant jurisprudence on point.

49. In its submissions, SMS relied on the following dictionary definitions of the word "machinery":

> . . . Machines, or their parts, taken collectively; the mechanism or works of a machine or machines . . . .[43]

> . . . Any collection or functioning unit of machines or mechanical apparatus; the parts of a machine, collectively . . . .[44]

50. The Federal Court of Appeal's finding in *Sandvik* indicates that the word "machinery" can be taken to mean a collectivity of machines rather than a single type of machine.[45] Accordingly, there may be several types of equipment that fall within the scope of the term "extracting machinery".

51. In terms of what constitutes "extraction", the *Dictionary of Mining, Mineral and Related Terms* defines the word "extraction" as follows:

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42. *Transcript of Public Hearing*, 19 December 2013, at 134-136.
43. Exhibit AP-2013-006-04B, tab 6, Vol. 1A.
44. *Ibid*., tab 7, Vol. 1A.
45. *Sandvik* at para. 24.

> *extraction*
>
> a. *The process of mining and removal of coal or ore from a mine.* . . . b. *Used in relation to all processes of obtaining metals from ores. Broadly, these processes involve breaking down ore both mechanically (crushing) and chemically (decomposition), and separating the metal from the associated gangue*. Extractive metallurgy may be conveniently divided into beneficiation, pyrometallurgy, hydrometallurgy, and electrometallurgy. c. A designation for that part of the metallic content of the ore obtained by a final metallurgical process, e.g., the extraction was 85%. CF: recovery d. The process of dissolving and separating out specific constituents of a sample by treatment with solvents specific for those constituents. e. In chemical engineering, the operation wherein a liquid or solid mixture is brought into contact with an immiscible or particular miscible liquid to achieve a redistribution of solute between the phases.[46]
>
> [Emphasis added]

52. During the hearing, the extraction process was described by Mr. Bill Fleming, a witness from Teck Resources, as being the process of getting to the payable material in the ground, which includes not only the process of gaining access to the mineral but also the processes necessary in order to isolate the mineral from waste materials.[47] The undisputed testimony on the record indicates that a critical part of the extraction process is the mining and hauling away of waste rock or overburden, which is necessary in order to get access to the minerals underneath.[48]

53. Mr. Fleming described open-pit mining as a process that takes place essentially in "batches", where, first, some waste is mined, then, once exposed, ore is mined. The next phase is to mine more waste and more ore in a more or less continuous fashion until one reaches the last remaining deposit of coal.[49] Visual evidence was presented to illustrate the role that the haul trucks play in this process—the haul trucks are loaded with overburden or coal, as the case may be, at the location being mined.[50] The haul trucks then move this material to the processing area or the waste dump.

54. Mr. Fleming estimated that Teck Resources typically mines 25 million tonnes of saleable coal on an annual basis.[51] Mr. Fleming also testified that, in order to produce that quantity of coal, the company would typically mine around 600 million tonnes of waste rock.[52] When considered in these terms, it becomes apparent that the ability to effectively mine and transport waste rock is critical to the ability to mine coal, particularly in an open-pit environment.[53] In Mr. Fleming's words, "[y]ou've got to get the waste picked up and we've got to move it out of the way. So typically for us, our waste has to be hauled. . . . ultimately we've got to get it far enough so that it's clear of any other coal areas that we want to mine."[54]

55. The witness's description of what constitutes "extraction" from a mining perspective appears consistent with the evidence heard by the Tribunal and described by the Federal Court of Appeal in *Sandvik* as follows:

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46. Exhibit AP-2013-006-04B, tab 9, Vol. 1A.
47. *Transcript of Public Hearing*, 19 December 2013, at 78.
48. *Ibid.* at 59, 77.
49. *Ibid.* at 70.
50. *Ibid.* at 49, 72-77; Exhibit AP-2013-006-04, Vol. 1.
51. *Transcript of Public Hearing*, 19 December 2013, at 76.
52. *Ibid.* at 76.
53. *Ibid.* at 52.
54. *Ibid.* at 59.

> The uncontradicted evidence before the CITT was that in the context of mining, extraction is a process and all parties were agreed that this process encompasses the removal of ore from a mine and the steps required to isolate the mineral from the ore. It follows that in the absence of some limitation to be found in the tariff item, machinery used to extract minerals in the course of that process is "extracting machinery'. This could include drilling machinery, excavating machinery, loading machinery, smelting machinery and refining machinery.[55]

56. The CBSA argued that the scope of extraction machinery in *Sandvik* is limited to machinery that removes mineral from the ground, displaces minerals to other machines and begins the early stages of mineral usage.[56] The Tribunal does not read the *Sandvik* decision as being limited in this way.

57. It is clear based on the definitions above and based on the Federal Court of Appeal's reasoning in *Sandvik*[57] that the term "extraction machinery", when used in this context, can potentially refer to a broad range of equipment that is used during the extraction process. In the Tribunal's view, there is no reason to believe that this definition could not potentially include haul trucks, to the extent that those haul trucks meet the other requirements of the provision.

58. Of course, not all machinery used in the extraction process will necessarily qualify for duty relief under tariff item No. 9908.00.00. In order to fall within the scope of this provision, the extraction machinery in question must extract minerals directly from the working face of a mine. Witness testimony described the working face of a mine as the location "where the action happens", in particular, "where the waste is being mined or the coal is being mined". Testimony and visual evidence substantiated the contention that the Komatsu haul trucks are physically located at the working face of the mine, which is where they are loaded with overburden and minerals.[58]

59. The term "working face" is defined in the *Dictionary of Mining, Mineral and Related Terms* as follows: "The place at which mining is being done in a breast, gangway, airway, chute, heading, drift, adit, crosscut, etc. See also: face".[59] The term "face" is defined as follows: "a. The surface of an unbroken coal bed at the advancing end of the working place. . . . d. The exposed surface of a coal or ore deposit in the working place where mining is proceeding."[60]

60. The CBSA submitted that the haul trucks, of which the goods in issue are incorporated, do not extract minerals *directly* from the ground and, on that basis, they cannot fall under category 5.[61] In particular, it was argued that the haul trucks cannot be considered to be involved in extracting minerals directly from the face of the mine because they are not physically removing anything from the ground.[62] The Tribunal disagrees. This line of argument suffers from the same flaws as the arguments made before the Federal Court of Appeal in *Sandvik*, wherein it was argued that certain drills do not themselves perform an extracting function and therefore do not qualify under category 5. In *Sandvik*, the Federal Court of Appeal specifically stated that ". . . the language that does appear embraces all extracting machinery, the only

55. *Sandvik* at para. 14.
56. Exhibit AP-2013-006-09A at para. 37, Vol. 1B.
57. *Sandvik* at para. 14.
58. *Transcript of Public Hearing*, 19 December 2013, at 66.
59. Exhibit AP-2013-006-04B, tab 9, Vol. 1A.
60. *Ibid.*
61. Exhibit AP-2013-006-09A at para. 39, Vol. 1B.
62. *Transcript of Public Hearing*, 19 December 2013, at 161.

limitation being as to its place of use."[63] The Tribunal is satisfied, on the basis of the evidence, that the place at which the haul trucks are used in performing their role in the extraction process is at the working face of a mine.

61. Moreover, to hold it necessary for extraction machinery to be the apparatus that physically removes minerals from the ground in order to be considered "extracting minerals directly from the working face of a mine" would seem to be inconsistent with several of the types of machinery that the Federal Court of Appeal specifically references in *Sandvik* as potentially being considered "extraction machinery", for example, smelters and refiners.

62. Moreover, The Federal Court of Appeal in *Sandvik*, in finding that certain drill rods fell within the scope of tariff item No. 9908.00.00, made the following comment:

> Drilling holes on the working face of a mine so as to allow for the break up of the ore body through blasting is an integral part of the extraction process and the machinery used to perform this function is "extracting machinery" within the meaning of tariff item No. 9908.00.00.[64]

63. Likewise, the Komatsu haul trucks perform a function at the working face of a mine that is integral to the extraction process. On the basis of the above analysis, the Tribunal is of the view that the Komatsu haul trucks are properly considered extracting machinery that extract minerals directly from the working face of the mine. Accordingly, the goods in issue, being parts of that machinery, are classifiable under tariff item No. 9908.00.00 as articles for use in extracting machinery for extracting minerals directly from the working face of a mine.

**DECISION**

64. The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

63. *Sandvik* at para. 20.
64. *Sandvi*k at para. 25.