Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-043

Danson Décor Inc.

v.

President of the Canada Border Services Agency

Decision issued
Friday, September 6, 2019

Reasons issued
Wednesday, September 25, 2019

Canada

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IN THE MATTER OF an appeal heard on May 9, 2019, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated August 23, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

DANSON DÉCOR INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Susan D. Beaubien
Susan D. Beaubien
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 9, 2019
Tribunal Member:	Susan D. Beaubien, Presiding
Support Staff:	Sarah Perlman, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Danson Décor Inc.	Marco Ouellet Jeffrey Goernert
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Marilou Bordeleau

WITNESSES:

Mike Giambattisto Directeur du Traffic / Traffic Manager Danson Décor	Tony Di Feo Senior Engineer Natural Resources Canada

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STATEMENT OF REASONS

OVERVIEW

1. Danson Décor Inc. (Danson) appeals a decision of the President of the Canada Border Services Agency (CBSA) concerning the tariff classification of goods described as "polished river rocks obtained from a riverbed" (the goods).

2. For the purposes of subsection 60(4) of the *Customs Act*,[1] the CBSA has classified the goods within tariff item 6802.99.00 as "other worked monumental or building stone (except slate) and articles thereof, other than goods of heading 68.01".

3. Danson contends that the goods in issue should be classified under tariff item 2517.10.00 as "pebbles, gravel, broken or crushed stone, of a kind commonly sued for concrete aggregates, for road metaling or for railway or other ballast, shingle and flint, whether or not heat-treated".

4. At issue in this appeal is the correct tariff classification of the goods imported by Danson and whether they are properly classified under tariff item 6802.99.00 or 2517.10.00.

5. A public hearing was held on May 9, 2019. Both parties were represented, presented evidence in the form of witness testimony, and made oral arguments to the Tribunal.

BACKGROUND AND PROCEDURAL HISTORY

6. Danson is a corporation having a place of business in Saint-Laurent, Quebec. Its product line comprises over 3,000 items, which are grouped, for the purposes of Danson's business, into four principal "lines" or product categories: Christmas, Halloween, Garden and Everyday.[2]

7. The "Everyday" category comprises goods for home décor and those used for arts and crafts. The goods in issue are sold for decorative purposes[3] and for use in various arts and crafts.[4]

8. Between August 2013 and January 2017,[5] Danson imported the goods, namely polished river rocks from China packaged in bags ranging from 800 g to 1700 g by weight. Although previous shipments of the goods imported by Danson had been declared for tariff purposes under tariff heading 25.17, the CBSA undertook a compliance audit pursuant to section 59 of the *Act* and determined that these goods should instead be classified under tariff heading 68.02.[6] As a consequence of this re-determination, the CBSA retroactively adjusted the duties payable by Danson on several years of previous shipments of river rocks.[7]

9. Danson sought re-determination of the classification, pursuant to subsection 60(1) of the *Act*.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. *Transcript of Public Hearing* at 23.
3. *Ibid.* at 27.
4. *Ibid.* at 27-28.
5. Exhibit AP-2018-043-03, Vol. 1 at 17, 24; Exhibit AP-2018-043-05A, Vol. 1 at 5.
6. *Ibid.* at 129.
7. *Ibid.* at 129-134; Exhibit AP-2018-043-03, Vol. 1 at 21-24.

The CBSA decision

10. At the CBSA's request, Danson submitted documents concerning the goods. These comprised a Material Certification, a product information sheet, and descriptive information outlining the processes to which the goods were subjected, including representative photographs and emails between Danson and its Chinese supplier.

11. The record before the CBSA indicated that the goods are natural rocks harvested from a river bed in China. The rocks are washed, sifted and sorted according to size and colour. The rocks are then polished in accordance with customer requirements. The polishing process is carried out by machine. The rocks are tumbled within a rotating drum-like apparatus for a period of time ranging from 7 to 30 hours. The polished rocks are bagged according to weight, packed and then shipped.[8]

12. The CBSA began its analysis by considering whether "the river rocks are goods of Chapter 25". The limitations prescribed by note 1 to Chapter 25 were considered, together with the explanatory notes to Chapter 25 set forth by the World Customs Organization (WCO).

13. Danson asserted that the rocks are "cleaned, sifted and levigated before being packed in small bags". The CBSA noted that the record contained no reference to levigation, or to process, equipment or apparatus used for levigation. Only the term "polishing" appeared in the materials submitted by Danson, including the documentation provided by the Chinese supplier. The CBSA also concluded that the photographs obtained from Danson's Chinese supplier depicted a "large cylindrically-shaped machine which appears to be a type of rotary tumbler used to smooth and polish rocks."[9]

14. After considering several dictionary definitions of the word "levigate", the CBSA found that none of the definitions referred to the polishing or smoothing of stone, rock or mineral products. It was observed that "polishing" was not specifically named as a process by either note 1 to Chapter 25, by the explanatory notes to Chapter 25, or by any heading in Chapter 25. As note 1 to Chapter 25 specifically excludes those products which have been "subjected to processing beyond that mentioned in each heading", the CBSA concluded that the goods could not be classified within Chapter 25.[10]

15. The CBSA then turned to Chapter 68 as the next potentially relevant classification. After reviewing the notes to Chapter 68 and the explanatory notes to Chapter 68, the CBSA found that the goods were excluded from heading 68.01 as they are not "setts, curbstones and flagstones of natural stone (except slate)".

16. The CBSA then concluded that the goods are "worked monumental or building stone" as defined by note 2 to Chapter 68. This conclusion was underpinned by the portion of the explanatory notes to heading 68.02 stating the following:

> This heading covers natural monumental or building stone (**except** slate) which has been worked **beyond** the stage of the normal quarry products of Chapter 25. . . .
>
> The heading thus covers stone in the forms produced by the stone-mason, sculptor, etc., viz:
>
> . . .

8. *Ibid.* at 3-8, 17-18.
9. *Ibid.* at 18.
10. *Ibid.* at 18-20.

> (B) Stone of any shape (including blocks, slabs or sheets), whether or not in the form of finished articles, which has been bossed (i.e., stone which has been given a "rock faced" finish by smoothing along the edges while leaving rough protuberant faces), dressed with the pick, bushing hammer, or chisel, etc., furrowed with the drag-comb, etc., planed, sand dressed, ground, polished, chamfered, moulded, turned, ornamented, carved, etc.
>
> . . . other ornamental goods essentially of stone are, in general, classified in this heading . . . .

17. The CBSA noted that "polishing" was specifically included within group (B) of the explanatory notes to heading 68.02, together with a non-exhaustive list of processes for working of stone beyond the process of shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing, or which otherwise extend beyond the simple processes defined and limited by the scope of Chapter 25.

18. As the goods constitute "a mixture of various types of rocks and are intended to be used for decorative purposes", the appropriate subheading was found to be "Other".[11] Having regard to Rules 1 and 6 of the *General Rules*, the CBSA classified the goods under tariff item 6802.99.00.

19. The CBSA issued its decision on August 23, 2018. Danson appealed to the Tribunal on October 19, 2018.

Danson's appeal

20. The notice of appeal framed the issue as whether the goods are classifiable under heading 68.02 or under heading 25.17. Danson contends that "polishing" is a treatment included within the scope of heading 25.17.

21. In support of its appeal, Danson submitted a written argument which included photographs of various aspects of the processing of the river rocks and photographs of the final product (bagged rocks of comparable size and colour). Danson's brief also comprised dictionary definitions for various terms used in the tariff headings at issue.

22. In reply, the CBSA filed its brief on February 15, 2019. In addition to written submissions, the CBSA's brief included dictionary definitions relevant to the tariff headings at issue.

23. Danson filed representative samples of the goods as physical exhibits.

24. The CBSA also tendered an expert witness statement of Dr. Tony Di Feo, who is employed by Canmet Mining as an engineer in mineral processing.

25. Supplemental material was filed by Danson. This comprised an article purporting to describe a mine (Glencore Raglan Mine) that had previously employed Dr. Di Feo; additional dictionary definitions; articles directed to river rocks and their potential uses and email correspondence between Danson and its Chinese supplier. This material, together with a curriculum vitae of Danson's proposed corporate witness (Mike Giambattisto) was submitted to the Tribunal on April 23, 2019.

26. In a separate filing on April 25, 2019, Danson also filed a copy of its product catalogue. Danson later advised the CBSA and the Tribunal of its intention to refer only to two pages from that catalogue during the testimony of its witness at the hearing.

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11. *Ibid.* at 21.

27. The CBSA filed a bibliographic list of documents used by Dr. Di Feo in the preparation of his affidavit and a signed undertaking in the prescribed form with respect to the responsibilities of an expert witness.

28. Both parties tendered copies of jurisprudence that was asserted to support their respective positions on this appeal.

Interlocutory matters

29. The CBSA objected to the filing of Danson's supplemental materials and product catalogue on the grounds that the materials were filed less than 20 days before the hearing, as required by Rule 34(3) of the *Canadian International Trade Tribunal Rules*.[12] The Tribunal directed Danson to bring a motion seeking a retroactive extension of time for the filing of the contested materials. Danson filed submissions explaining that due to an oversight, its counsel believed that additional materials could be tendered up to 10 days before the hearing date.

30. The CBSA reiterated its objections, contending that Danson had failed to file a motion seeking the requisite leave for a retroactive extension and had not provided justification for the late filing. A further objection to the supplemental materials was advanced by the CBSA on the basis that Danson was splitting its case and that the documents included within its supplemental brief could have been filed earlier, as part of the Appellant's Brief. The CBSA argued that the criteria of Rule 24.1 for late filing of material had not been met.

31. The Tribunal provided both parties an opportunity to address these issues by way of oral submissions at the outset of the hearing held on May 9, 2019.

32. After hearing the parties, the Tribunal dismissed the CBSA's objections. Although parties must put their best foot forward and not split their case, the Tribunal's procedure must allow for some flexibility.[13] The paramount consideration is to ensure that parties are provided a fair opportunity to make out their case.

33. In the exercise of its discretion, the Tribunal allowed Danson's supplemental materials and product catalogue to remain on the record.

34. According to the Tribunal's records, Danson's supplemental materials were filed and served electronically on the due date (April 23, 2019) provided by the *Rules*. As such, the CBSA was deemed to have received Danson's supplemental materials on that date. The fact that the CBSA received a paper copy of these materials on the following day (April 24, 2019) did not create prejudice sufficient to justify striking the material, even if it were to be assumed that the electronic version had not been received on the previous day.

35. With respect to the CBSA's substantive objections to Danson's supplemental materials, the Tribunal dismissed the CBSA's objections to the filing of additional case law. The Tribunal takes judicial notice of its own decisions, so the filing of additional jurisprudence in advance of the hearing is not prejudicial.[14]

12. SOR/91-499 [*Rules*].
13. *Andritz Hydro Canada Inc. and VA Tech Hydro Canada Inc. v. President of the Canada Border Services Agency* (21 June 2013), AP-2012-022 (CITT) at para. 34.
14. *Transcript of Public Hearing* at 18.

36. The Tribunal noted that articles and additional dictionary definitions in Danson's supplemental materials appeared to be either responsive to the expert witness statement of Dr. Di Feo or was anticipatory to the cross-examination of that witness at the oral hearing. As such, it could not have been included in the Appellant's Brief filed by Danson which predated the service of Dr. Di Feo's witness statement. Notwithstanding, the Tribunal held that the content of this material would be disregarded to the extent that it could not be addressed or corroborated by Dr. Di Feo during cross-examination.[15]

37. The Tribunal regarded the articles on river rocks to be either corroborative or duplicative of material already on the record. As there seemed to be no dispute between the parties concerning the uses of river rocks and the goods in issue, the Tribunal found no prejudice in allowing this material to remain on the record.

38. Similarly, the copies of the email correspondence between Danson and its Chinese supplier formed part of the record before the CBSA used to reach the decision under appeal.[16] As such, the Tribunal could find no prejudice to the CBSA in allowing this material to form part of the record on this appeal.[17]

39. With respect to the Danson product catalogue, it was undisputed that this material was filed late, albeit by a maximum of two days. Although the catalogue runs to some 200 pages or so, Danson gave prior notice that only two pages would be referred to (or relied upon) during the testimony in chief of Danson's corporate witness. As these pages depict the goods in the context of a catalogue and physical exhibits of the goods had already been timely filed, the Tribunal found no prejudice in admitting the late-filed catalogue. Notwithstanding, Danson was advised that the Tribunal would hold Danson to its commitment that reference to the product catalogue would be confined to the specific extracts as identified by Danson prior to the hearing.[18]

Evidence at the hearing

40. At the hearing, Mr. Mike Giambattisto testified on behalf of Danson. Mr. Giambattisto has been employed by Danson for the past 25 years.[19] His current job responsibilities include oversight of all aspects of Danson's product purchasing, including customs tariff classification for Danson's product line.[20]

41. Mr. Giambattisto gave descriptive evidence concerning Danson's product line, including the nature and uses of the goods. Danson's supplier packages rocks of similar size and colour into bags, according to weight. By way of example, an individual bag may comprise 400 or 800 grams for retail sale. The bags are then packed into cartons for shipment to Canada.[21]

42. Danson sells the goods to retailers such as Walmart, BMR, Rona, and Buck or Two.[22]

43. The goods are sold for decorative purposes, including arts and crafts.[23]

15. *Ibid.* at 17-18.
16. Exhibit AP-2018-043-10A, Vol. 1 at 100-102; Exhibit AP-2018-043-03, Vol. 1 at 17.
17. *Transcript of Public Hearing* at 19.
18. *Ibid.* at 20-21; Exhibit AP-2018-043-15A, Vol. 1.
19. *Ibid.* at 22.
20. *Ibid.* at 23.
21. *Ibid.* at 23-26, 41-44.
22. *Ibid.* at 26.
23. *Ibid.* at 27-28, 31-32.

44. Mr. Giambattisto also gave evidence concerning the origin and processing of the goods. In doing so, he referenced the content of email correspondence between Danson and its long-standing Chinese supplier.[24] In the course of that correspondence, Danson's supplier confirmed that the rocks were "polished" by machine tumbling, and not by hand.[25]

45. On cross-examination, Mr. Giambattisto admitted that his knowledge of the processing and packaging of the goods in issue was derived from correspondence with Danson's supplier and that he had not personally attended in China to inspect the processing of the goods in issue.[26]

46. Dr. Tony Di Feo gave evidence on behalf of the CBSA.

47. Dr. Di Feo graduated from McGill University with a bachelor's degree and a PhD in metallurgical engineering and a Master's degree in chemical engineering. He has been employed as an engineer by numerous companies in the mining industry (Corem, Glencore, Royal Nickel and Freeport McMoran). Since 2017, he has been employed as senior engineer with Canmet Mining, which is part of Natural Resources Canada.[27]

48. Dr. Di Feo gave evidence as to the meaning of the term "levigation", gleaned from his work experience in the mining industry. In his experience, levigation is used to separate various size fractions in solids.[28] He agreed with the following dictionary definition for "levigate":

> a. separating fine powder from coarser material by forming a suspension of the fine material in a liquid.
>
> b. means of classifying a material as to particle size by the rate of settling from a suspension.[29]

49. In the mining industry, the liberation or extraction of minerals from surrounding rock is critical.[30]

50. Levigation may be used to produce various size fractions for mineral liberation analysis or to separate gold particles from silicates.[31] Dr. Di Feo further explained that levigation entails the separation of various size fractions by sedimentation. [32] It is a process tailored for the separation of materials having significantly different densities.[33] Material must first be reduced, typically to a size range measured in micrometers, in order to be levigated. Grinding is used to reduce particles to a size that is small enough to facilitate separation by sedimentation.[34]

51. Levigation may be carried out in a laboratory using a cyclosizer,[35] or outside a laboratory using a series of tanks where particles are sequentially separated into finer particles by allowing material to settle in

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24. This correspondence formed part of the record before the CBSA at first instance (see Exhibit AP-2018-043-03, Vol. 1 at 17; Exhibit AP-2018-043-10A, Vol. 1 at 100-102); *Transcript of Public Hearing* at 32-36, 38-39, 40-41, 44.
25. *Transcript of Public Hearing* at 40.
26. *Ibid.* at 40-41, 44-45.
27. *Ibid.* at 48.
28. *Ibid.* at 49.
29. Exhibit AP-2018-043-05A, Vol. 1 at 166-167; *Transcript of Public Hearing* at 49.
30. *Ibid.* at 61.
31. *Ibid.* at 49-50.
32. *Ibid.* at 62.
33. *Ibid.* at 91.
34. *Ibid.* at 88-89, 95-96.
35. *Ibid.* at 49-50.

water as sediment, according to density. This latter technique is relatively uncommon, as the mining industry works with very high tonnages.[36]

52. Elutriation is a synonym for levigation.[37]

53. On cross-examination, Dr. Di Feo admitted geology was not his field of expertise. He is a metallurgical engineer, with particular expertise in grinding and flotation. He has not worked professionally with river rock and was unfamiliar with the terms "building stone" and "monumental stone".[38]

54. Dr. Di Feo testified that he was familiar with tumbling of stone in the mining industry but that the mining industry does not work with washing of rocks or "in the area of polishing or smoothing rocks".[39]

55. Dr. Di Feo also conceded that some dictionary definitions for the word "levigate" did not accord with the meaning of the term as used in the mining industry.[40] He is unfamiliar with the use of levigation in any other industry or context besides mineral processing and metallurgy.[41]

56. The Tribunal found both Mr. Giambattisto and Dr. Di Feo to be cooperative and credible witnesses.

POSITION OF THE PARTIES ON APPEAL

Danson

57. Danson argued that the word "levigate" should be assigned its plain and ordinary meaning ("to polish") because it is not a technical term relevant to either Danson's business or the end use of the goods (arts and crafts).

58. Danson submitted dictionary definitions wherein "to make smooth" or "polish" is included as a definition of "levigate" or "levigation".[42]

59. It also argued that the goods fall squarely within heading 25.17 as they are pebbles and fulfill the dictionary meaning of the word "pebble". The goods fall outside the scope of Chapter 68 because they are "materials", not "articles". The processing steps do not change the rocks or convert them into articles.[43]

60. As the goods are not finished or semi-finished products, they are not "articles" and thus cannot be "articles of stone" as covered by Chapter 68.[44]

61. Even though the goods are sold by Danson for arts and crafts, they remain inherently capable of the uses listed in note 1 to Chapter 25 (i.e. of a type commonly used for concrete aggregates, road metalling or for railway or other ballast).

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36. *Ibid.* at 51.
37. *Ibid.* at 51, 92.
38. *Ibid.* at 55, 58.
39. *Ibid.* at 71, 75-76.
40. *Ibid.* at 63-66.
41. *Ibid.* at 90.
42. Exhibit AP-2018-043-03, Vol. 1 at 18, 52-62; Exhibit AP-2018-043-10A, Vol. 1 at 45-56.
43. Exhibit AP-2018-043-03, Vol. 1 at 15-16; *Transcript of Public Hearing* at 110-111.
44. *Ibid.* at 110-111.

62. As the goods are not excluded from Chapter 25, they should be classified as "pebbles" within heading 25.17.

63. Danson thus contended that the goods are properly classified under tariff item 2517.10.00 pursuant to Rule 1 of the *General Rules*.

64. At the hearing, Danson argued that the goods are distinguishable, in terms of characteristics, from monumental or building stone. It contended that the word "levigate" has multiple definitions and meanings and that a definition used in the mining industry should be inapplicable as Danson is not in the mining business.[45]

CBSA

65. The CBSA conceded that the washing and sorting processes used on the river rocks fall within the scope of Chapter 25.

66. The CBSA disagreed that the word "levigate" means "to polish". It relied on a definition from the *Dictionary of Mining, Mineral, and Related Terms*, which defines "levigation" as follows:

> a. separating fine powder from a coarser material by forming a suspension of the fine material in a liquid. ASM, 1
>
> b. A means of classifying a material as to particle size by the rate of settling from a suspension. CF: trituration[46]

67. It also put forward a similar definition from Lenntech, said to be a major international engineering company;[47] a definition from the archeology industry which characterizes "levigation" as "purified by sedimentation . . .",[48] as well as similar definitions from the *Dictionary of Ceramic, Science and Engineering*,[49] together with some non-industry-specific definitions.[50]

68. Relying on the application of Rule 1, the CBSA contended that the goods are excluded from Chapter 25 because "polishing" is not specifically listed as a permitted process within the notes to Chapter 25. The CBSA contended that the goods fall within an exclusion described by note 1 to Chapter 25, namely that the rocks have been "subjected to processing beyond that mentioned in each heading".

69. Although the CBSA conceded that "levigate" has different meanings, and may be used in different industries, the CBSA argued that the relevant definition of "levigate" refers to the separation of particles by size and density.[51]

70. It also pointed out that neither Danson nor its supplier initially described the goods as having been "levigated". Instead, the rocks are described as having been "polished".

45. *Ibid.* at 103-105.
46. Exhibit AP-2018-043-05A, Vol. 1 at 13.
47. *Ibid.*
48. *Ibid.* at 13-14.
49. *Ibid.* at 14.
50. *Ibid.* at 14-16.
51. *Transcript of Public Hearing* at 116-117.

71. Having been processed beyond the processing of Chapter 25, the CBSA argued that the appropriate classification is found within Chapter 68, specifically under tariff item 6802.99.00 as other worked monumental or building stone. It argued that stone classified within Chapter 68 may be of any shape or size.[52]

STATUTORY FRAMEWORK

72. The *Act* governs the reporting, valuation and imposition of duties with respect to goods imported into Canada.

73. Customs tariffs vary from product to product. Those tariffs are prescribed by the *Customs Tariff*,[53] which classifies goods into various classifications. The *Customs Tariff* is premised on an international system, the Harmonized Commodity Description and Coding System (Harmonized System).

74. Recently, the Supreme Court of Canada provided the following overview of the statutory framework in Canada governing the tariff classification of goods for customs purposes:

> [4] The Harmonized System was developed by the World Customs Organization, an intergovernmental body of which Canada is a member. To foster stability and predictability in classification practices internationally, it is used as a standard tariff classification system by all parties to the Convention, including Canada: see *Customs Tariff*, s. 10(1) and the Schedule thereto. At the same time, it permits states parties to set their own rates of duty on those goods in conformance to their individual international trade obligations: M. Prabhu, *Canada's Laws on Import and Export: An Overview* (2014), at p. 79.
>
> [5] The Harmonized System uses an eight-digit classification system for tariff classifications, which is incorporated into the Schedule to the *Customs Tariff*. That system proceeds, within sections of the Schedule, from general to specific classifications via chapters, headings, subheadings and tariff items. For example, within Section I ("Live Animals; Animal Products") is found the eight-digit tariff item No. 0302.13.40, applicable to fresh or chilled sockeye salmon. The first two digits of that tariff item (03) denote the item as falling within Chapter 3 ("Fish and Crustaceans, Molluscs and Other Aquatic Invertebrates"); the first four digits (03.02) denote the heading ("Fish, fresh or chilled, excluding fish fillets . . ."); the first six digits (0302.13) denote the subheading ("Pacific Salmon"); and the full eight-digit tariff item denotes the specific good ("Sockeye").
>
> [6] The Schedule to the *Customs Tariff* also contains "General Rules for the Interpretation of the Harmonized System". Section 10(1) of the *Customs Tariff* directs that "the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules".
>
> [7] The General Rules are comprised of six rules governing the classification of goods under the Harmonized System. According to the jurisprudence of the Federal Court of Appeal and the CITT, these rules are to be applied in a "cascading" fashion. As I explain below, however, the term "cascading" does not quite describe their application. While it is the case that the General Rules are to be applied in a set order, it is more helpful to understand that order as a function of a hierarchy rather than a cascade: Prabhu, at p. 82.
>
> [8] In addition to the Harmonized System and the General Rules, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* (5th ed. 2012) published and amended from time to time by the World Customs Organization also inform the classification of imported goods. Specifically, s. 11 of the *Customs Tariff* provides that, in interpreting the headings and

52. *Ibid.* at 118.
53. S.C. 1997, c. 36.

> subheadings employed by the Harmonized System, "regard shall be had" to the *Explanatory Notes*. While, therefore, the *Explanatory Notes* (unlike the Harmonized System and the General Rules themselves) are not binding, they must be at least considered in determining the classifications of goods imported into Canada.[54]

75. Danson's appeal is brought pursuant to subsection 67(1) of the *Act*, which provides that a "person aggrieved" by a decision of the CBSA may appeal that decision to the Tribunal by filing a notice of appeal within the prescribed timeframe:

> **67 (1)** A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

76. Although "person aggrieved" is undefined by the *Act*, the same language is used at common law and in other statutory schemes to confer standing. The term is generally used in reference to a person who is affected in some way by an act, decision, or property right of another person or entity.[55] The Tribunal finds this meaning to be apt with respect to the term "person aggrieved", on a contextual reading of the right to appeal that is conferred by section 67.

77. It is undisputed that Danson is a "person aggrieved". Its business and financial interests are affected by the CBSA decision. Previous imports of river rocks had been classified by the CBSA in Chapter 25. The reclassification of the goods into Chapter 68 has created business uncertainty for Danson.[56]

78. The effect of the CBSA decision to reclassify the goods triggers a requirement that Danson pay readjusted, retroactive duties and penalties on imported river rocks not just on the shipment at issue, but also on previous shipments.[57]

79. The goods are modestly priced[58] and appear to be sold on narrow margins, having regard to the retail outlets where the goods are sold. Duties that are later levied at an expectedly higher rate may be prejudicial to Danson's competitive position, as the cost of duties payable is factored into the selling price of the goods to Danson's customers.[59]

80. The *Rules* prescribe the procedure to be followed on appeals brought under section 67 of the *Act*. On appeal, both the appellant and respondent may file additional materials, including physical exhibits that were not before the CBSA at first instance. The parties may also present evidence of fact and/or expert witnesses to testify before the Tribunal at an oral hearing. Any witnesses may be cross-examined by the opposing party and questioned by the Tribunal.[60]

81. As such, the record before the Tribunal on appeal may be quite different than the record which was used to arrive at the decision under appeal.

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54. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at paras. 4-8.
55. *Robert Crean & Co. v. Dobbs & Co.*, [1930] SCR 307; *Energy Probe v. Canada (Atomic Energy Control Board)*, 1984 CanLII 2966 at paras. 30-34; *Pollock v. Minister of Transport*, [1974] SCR 749 at 758.
56. *Transcript of Public Hearing* at 36-38, 45-46.
57. *Ibid.* at 45-46; Exhibit AP-2018-043-05A, Vol. 1 at 129-145.
58. *Transcript of Public Hearing* at 41.
59. *Ibid.* at 45-46.
60. Part II - Procedure for Appeals of the *Rules*.

82. A purposive analysis of the statutory scheme indicates that the Tribunal owes no deference to the decision under appeal. Although the right to file new or additional evidence on appeal is suggestive of a hearing *de novo*, this factor alone is not dispositive. Other regulatory regimes defined by federal statute, such as the one considered by Lutfy J. in *Young Drivers of Canada Enterprises Ltd. v. Chan*[61] also permit the filing of new evidence on a statutory appeal but have still been interpreted to impute deference to the specialized decision maker whose decision is being appealed.[62]

83. However, that reasoning arose in a context where a non-specialized decision-maker was reviewing a decision made by a specialized decision-maker, even with the benefit of new evidence. Although the CBSA is experienced with respect to the determination of tariff classification, the Tribunal is likewise a specialized decision maker with respect to such matters.[63] As such, section 67 of the *Act* provides a process for a specialized decision-maker to review, by way of appeal, the decision of another specialized decision maker.

84. The appeal to the Tribunal arises from a decision made by the CBSA under subsection 60(4) of the *Act*:

> **60 (4)** On receipt of a request under this section, the President shall, without delay,
>
> **(a)** re-determine or further re-determine the origin, tariff classification or value for duty;
>
> **(b)** affirm, revise or reverse the advance ruling; or
>
> **(c)** re-determine or further re-determine the marking determination.

85. Subsection 67(3) of the *Act* grants the Tribunal broad authority to adjudicate an appeal:

> **(3)** On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

86. This language does not merely vest the Tribunal with discretion afforded to the CBSA or place the Tribunal in the shoes of the decision maker at first instance by prescribing the Tribunal to make the decision that might (or should) have been made at first instance by way of re-determination, further re-determination, affirmation, revision or reversal.

87. Instead, subsection 67(3) of the *Act* grants the Tribunal broad statutory jurisdiction to "make such order, finding or declaration as the nature of the matter may require". The Tribunal's decision is protected by a privative clause, limited only by a right to appeal to the Federal Court of Appeal on a question of law alone.[64]

88. The structure and procedure for tariff classification appeals also explicitly require the CBSA to be a party to an appeal from its own decision.[65] This is a statutory exception to the general rule that a decider at first instance is not named as a party on appeal and does not appear to defend its own decision.[66]

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61. 175 FTR 99, 1999 CanLII 8629 (FC).
62. See also *Garbo Group Inc. v. Harriet Brown & Co.*, 1999 CanLII 8988 (FC) at paras. 18-41.
63. *Richards Packaging Inc. v. Canada (Deputy Minister of National Revenue)*, 2000 CanLII 16525 (FCA) at para. 4; *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) [*Yves Ponroy*] at paras 32, 37.
64. *Act*, s. 68.
65. *Rules*, s. 2, 30-35.
66. *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 at para. 66.

89. Moreover, appeals to the Tribunal pursuant to section 67 of the *Act* are further distinguishable from conventional appeals in that notices of hearing must be published in the Canada Gazette and participation may not be restricted to the appellant and respondent. As observed by Justice Sharlow in *Yves Ponroy*:

> The notice of hearing must be published in the *Canada Gazette*. Anyone is entitled to intervene in such appeals as of right, and to be treated as a party, even to the extent of being allowed to appeal under section 68. This statutory procedure indicates that Parliament contemplated that in such appeals, issues of fact or policy that may not be of particular interest to the appellant and the respondent, but are of interest to someone else, may be presented to the CITT, and if presented must be considered.[67]

90. Taken together, all of these factors signal that an appeal under section 67 of the *Act* is intended to be a new and distinct proceeding from the one undertaken at first instance by the CBSA.

91. Accordingly, an appeal from the CBSA is heard and decided *de novo* by the Tribunal.[68] As noted by Justice Rothstein in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*,[69] a *de novo* hearing is one where the reviewing tribunal makes findings of fact and determines issues based solely on the evidence before it, without deference to the decision made at first instance:

> I think it is important to first clarify the use of the term *de novo*. Strictly speaking, a *de novo* review is a review in which an entirely fresh record is developed and no regard at all is had to a prior decision (see *Bayside Drive-in Ltd. v. M.N.R.* (1997), 218 N.R. 150 (F.C.A.), at page 156; *Molson Breweries v. John Labatt Ltd.*, 2000 CanLII 17105 (FCA), [2000] 3 F.C. 145 (C.A.), at page 166).[70]

92. An appeal where the record is carried forward or supplemented by new evidence is not, strictly speaking, "an entirely fresh record". Notwithstanding, the jurisprudence recognizes that the appeal may, for practical purposes, proceed *de novo* where the parties have chosen to place the previous record in evidence on the appeal.[71]

93. As such, in considering the record before it, the Tribunal must reach its own decision concerning the correct tariff classification for the goods. In doing so, it is free to reassess and re-weigh the evidence and owes no deference to the CBSA decision.

THE GOODS

94. It is settled law that the Tribunal must assess the goods, for classification purposes, as of the date of importation into Canada.[72]

95. At the time of importation, the goods comprised a plurality of stones of generally similar colour, size and shape packaged in a clear or mesh bag. Both the photographs and physical exhibits tendered by Danson show that the packaged rocks have a generally smooth exterior surface.[73]

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67. *Yves Ponroy* at para. 34.
68. *Cargill Inc. v. President of the Canada Border Services Agency* (23 May 2014), AP-2012-070 (CITT) at para. 36.
69. [2004] 3 FC 572, 2004 FCA 4 (CanLII) [*Thanabalasingham*].
70. *Ibid.* at para. 6.
71. *Molson Breweries v. John Labatt Ltd.*, [2000] 3 FC 145, 2000 CanLII 17105 (FCA) at paras. 46-47, footnotes 12-13.
72. *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012), AP-2010-006 (CITT) at para. 22.
73. Exhibit AP-2018-043-03, Vol. 1 at 5-9; Exhibits AP-2018-043-A-01 to A-18.

96. On appeal, Danson's evidence concerning the goods and their processing is essentially unchanged from the record before the CBSA.

ARE THE GOODS CLASSIFIED WITHIN CHAPTER 25?

97. The goods at issue fall, *prima facie*, within the title of Chapter 25: Salt; sulphur; earths and stone; plastering materials, lime and cement, which falls within Section V: Mineral Products. It falls to the Tribunal to determine the correct heading and subheadings for classification of the goods.

98. Natural river rocks are conceded to be "stone".[74] The parties otherwise disagree as to whether the goods meet (or are excluded by) the criteria outlined in the notes to Chapter 25, or alternatively whether they are classifiable within Chapter 68.

99. The parties agree, and the Tribunal accepts, that the starting point of the analysis is whether the goods are properly classified within Chapter 25.

100. The relevant aspects of the notes to Chapter 25 are as follows:

> 1. Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.
>
> . . .
>
> 2. This Chapter does not cover:
>
> . . .
>
> (e) Setts, curbstones or flagstones (heading 68.01); mosaic cubes or the like (heading 68.02); roofing, facing or damp course slates (heading 68.03);
>
> . . .
>
> 3. Any products classifiable in heading 25.17 and any other heading of the Chapter are to be classified in heading 25.17.

101. As such, the Tribunal must first decide whether the characteristics of the goods serve to include or exclude them from the parameters of Chapter 25 and, consequently, from one of the headings therein.

102. Note 1 states that products (i.e. salt; sulphur; earths and stone; plastering materials, lime and cement) in the "crude state" are included within Chapter 25.

103. Products which have been "washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation)" also fall within the scope of Chapter 25.

104. Excluded from Chapter 25 are products that have been "roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading".

74. *Transcript of Public Hearing* at 53.

105. It is undisputed that the relevant heading within Chapter 25 is 25.17:

> Pebbles, gravel, broken or crushed stone, of a kind commonly used for concrete aggregates, for road metalling or for railway or other ballast, shingle and flint, whether or not heat-treated; macadam of slag, dross or similar industrial waste, whether or not incorporating the materials cited in the first part of the heading; tarred macadam; granules, chippings and powder, of stones of heading 25.15 or 25.16, whether or not heat-treated.

Analysis

106. To resolve the substantive issues of this appeal, the Tribunal must interpret the language used in the tariff classification using the relevant legal and explanatory notes. It must then determine, as a question of fact, the nature and properties of the goods and assign the goods to the correct tariff classification.[75]

107. The principles of statutory interpretation are well established.[76] Statutory language must be given a purposive interpretation having regard to the plain and ordinary meaning of the words, when read in overall context. The wording should be construed in its grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.[77]

108. When interpreting a regulation, the wording at issue must also be considered in the overall context of the enabling statute.[78] However, as noted by Décary J.A. in *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*,[79] the *Customs Tariff* is highly specialized legislation:

> Yet, the Customs Tariff, law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate. Furthermore, there are unique Canadian and international rules of interpretation applicable to the Customs Tariff that bear little resemblance to the traditional canons of statutory construction.[80]

109. At the time of importation, the goods are not in a "crude" state. That term may aptly describe the rocks when they are collected or harvested from river beds in China. However, the evidence indicates that the harvested rocks are washed, sorted and "polished" before being packaged and shipped.[81]

110. It is undisputed that the "washing" and "sorting" of the rocks fall within the scope of processes specifically listed in note 1 to Chapter 25.

111. At issue is the interpretation of the verb "levigated" and whether, as a question of fact, the "polishing" of the rocks occurs from a process of "levigation" before being packaged and shipped to Canada.

112. In the alternative, there is an issue as to whether the smoothing or "polishing" of the rocks is the consequence of any other process within the scope of Chapter 25.

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75. *Yves Ponroy* at para. 36.
76. See e.g. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559 at paras. 26-30.
77. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at paras. 21-22, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.
78. *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 SCR 533 at paras. 38, 43-44.
79. 1999 CanLII 7719 (FCA) [*Schrader*].
80. *Schrader* at para. 5.
81. *Transcript of Public Hearing* at 32-34.

113. If a term used in the *Customs Tariff* has a particular meaning in a trade, it should be interpreted in light of that meaning. Otherwise, the term should be given its ordinary meaning.[82]

114. Where an enactment akin to a regulation includes technical or scientific terminology, expert evidence may be admissible to assist the tribunal (or court) in interpreting that language. The purpose of such expert evidence is to assist in understanding the meaning of words, terminology and the relevant scientific or technical background. This constitutes an exception to the general rule that expert evidence is not admissible on the ultimate issue to be decided. However, experts do not supplant the role of the judicial or quasi-judicial decision maker. Interpretation of a regulation is a question of law reserved to the court or tribunal alone and may not be delegated to experts. As such, the opinion proffered by an expert may be accepted or rejected, in whole or in part.[83] The Tribunal considers that these general principles are likewise relevant and applicable to the interpretation of headings used in the *Customs Tariff*.

115. In the present case, the Tribunal accepts the testimony of Dr. Di Feo concerning the characteristics and use of levigation in the mining industry. However, the Tribunal finds that the goods are not products of the mining industry. The objective of mining is the extraction of mineral resources from the earth. In that context, the process of levigation as described by Dr. Di Feo facilitates the isolation of valuable minerals by reducing earth and stone to small particles, so that relatively small concentrations of valuable minerals can be extracted. That objective is very different and far removed from the nature, purpose and end use of the goods in issue.

116. In the mining context described by Dr. Di Feo, the extracted material is reduced and subjected to numerous procedures (which may include levigation) in order to obtain commercially useful amounts of valuable ores and/or minerals. The starting material is physically and/or chemically transformed, via a series of procedures, in order to obtain the end product.

117. In contrast, the goods are not significantly different at time of importation (in terms of their appearance and properties), as compared to their state at the time of harvesting. The intervening processes are essentially aesthetic, as opposed to being inherently transformative.

118. Considering the above, the Tribunal finds that the scientific discipline most relevant to the goods is geology, not metallurgy. During his testimony, Dr. Di Feo was forthright in saying that some of the questions asked of him concerning the goods pertained to geology, which is not his field of expertise. As such, the Tribunal finds that the process of levigation as described by Dr. Di Feo is of minimal to no relevance for the purpose of classifying these particular goods within Chapter 25.

119. In the absence of expert evidence as to whether "levigation" is known within the scientific discipline of geology, the Tribunal is left with the general dictionary definitions for the word "levigate", which include "to make smooth, polish".[84]

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82. *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011), AP-2010-060 (CITT) at para. 25.
83. See e.g. *Whirlpool Corp. v. Camco Inc.*, [2000] 2 SCR 1067 at paras. 49(e), 53, 57, 61; *Nekoosa Packaging Corp. v. AMCA International Ltd.* 85 FTR 160 (FCA) at paras. 12-14; *Halford v. Seed Hawk Inc.*, 2001 FCT 1154 at paras. 13-24 for discussions on the use and limits of expert testimony when construing technical language that must be interpreted as a question of law.
84. Exhibit AP-2018-043-03, Vol. 1 at 18; Exhibit AP-2018-043-05A, Vol. 1 at 183-186; *Transcript of Public Hearing* at 63-64.

120. The Tribunal must then consider the evidence in order to determine whether the processing of the goods falls within the scope of this definition of "levigation".

121. The CBSA objected to Danson's evidence concerning the harvesting and processing of the river rocks as hearsay, given that Mr. Giambattisto did not personally witness these activities by attending at the premises of Danson's supplier in China.[85]

122. At issue in the present case is correspondence between Danson and its supplier. The documents comprise email correspondence authored and sent by Mr. Giambattisto to Danson's offshore supplier and the supplier's replies to Danson.[86] Having reviewed that correspondence, the Tribunal finds that the nature of Danson's inquiries to its supplier is of the type that would not be unusual in the context of a supplier/customer business relationship.

123. As such, that correspondence was created in the normal course of business by Danson, thus bringing such documentation (at least *prima facie*) within the scope of the business records exemption of the *Canada Evidence Act*.[87]

124. In considering the CBSA's hearsay objection, the Tribunal further notes that the jurisprudence has modified the traditional rule against hearsay in favour of a principled approach. Hearsay may be admitted as evidence if it meets the criteria of reliability and necessity.[88]

125. Mr. Giambattisto appeared in person at the hearing. He testified that Danson has a long-standing business relationship with this particular supplier and expressed trust in the supplier's willingness to co-operate with Danson, and to answer the questions that he had posed.[89] The CBSA had the opportunity to cross-examine Mr. Giambattisto at the hearing and did so.

126. Having regard to the foregoing, the Tribunal finds that the information received by Danson via email from its supplier satisfies the threshold for reliability, as required by the "principled approach" to the common law exception permitting the admission of hearsay evidence.[90]

127. With respect to necessity, the alternative to tendering the email correspondence as evidence would have entailed Mr. Giambattisto (or someone else at Danson) travelling to China in order to personally witness the harvesting and processing of river rocks. Any such visit would have necessarily postdated the processing of the specific shipment at issue in these proceedings. In the alternative, a witness from the Chinese supplier having personal knowledge of the origin and processing of the specific shipment would have had to travel to Canada to give evidence at the hearing. The Tribunal finds that these alternatives would have been disproportionately costly and unnecessarily complex, having regard to the specific circumstances of this case, the summary nature of tariff classification matters and the objective of securing "the fairest, least expensive and most expeditious determination of every proceeding".[91]

128. Danson's evidence could have been more detailed, in particular by providing further information concerning the operation of the rock tumbler. Notwithstanding, the Tribunal finds that the evidence is

85. *Ibid.* at 33-35, 40-41, 128.
86. Exhibit AP-2018-043-10A, Vol. 1 at 100-102.
87. R.S.C. 1985, c. C-5, s. 30(1).
88. *R. v. Khan*, [1990] 2 SCR 531; *R. v. Smith*, [1992] 2 SCR 915; *R. v Starr*, [2000] 2 SCR 144 [*Starr*].
89. *Transcript of Public Hearing* at 45.
90. See e.g. *Starr* at para. 215.
91. *Rules*, s. 3.

adequate to enable the Tribunal to make reasonable inferences and draw conclusions concerning the processing of the goods for the purposes of determining the correct tariff classification under the *Customs Tariff*.

129. Based on its review of the evidence, the Tribunal concludes that "polishing" of the rocks occurs by causing the washed and sorted rocks to tumble in a drum-like, motor-driven apparatus that rotates about a cylindrical axis. The rock surfaces are smoothed by the physical forces of impact, abrasion, attrition and friction occurring as the rocks randomly strike each other and the interior wall of the tumbling apparatus, as the drum rotates.

130. The CBSA argued that the goods are excluded from Chapter 25 because the word "polishing" is not explicitly listed within the notes or within any of the headings of Chapter 25.

131. On a purposive reading, note 1 to Chapter 25 lists processes that are essentially physical or mechanical. These are distinguishable from the named processes ("roasted, calcined, obtained by mixing") which operate to exclude goods from Chapter 25. These exclusionary processes are suggestive of changes or transformation being imparted to the goods, which transcend purely mechanical operations.

132. Also excluded from the scope of Chapter 25 are goods "subjected to processing beyond that mentioned in each heading".

133. The Tribunal concludes that "processing beyond" what is permitted by Chapter 25 occurs where the further processing exceeds the purely mechanical and results in some inherent transformation or conversion of the product. This finding is underpinned by the notes to Chapter 25. These state that the products may be processed to eliminate impurities provided that the structure of the product is not changed and that any heating to which the products are subjected to in order to remove moisture or impurities does not modify either the chemical or crystalline structure of the product.

134. The tumbling of the rocks in a rotating drum is a purely mechanical process. It does not cause any modification to the chemical or crystalline structure of the rocks or to their inherent properties. The photographs tendered by Danson show the products as "rocks" before they are fed into the drum of the tumbling apparatus and as "rocks" after they emerge. It is conceded that the goods are "rocks" at the time of importation.

135. The "polishing" of the rocks serves to smooth the surface texture of the rock. This process may lead to a slight reduction in size of an individual rock as abrasive edges or dull surfaces are eroded during tumbling. This effect may be characterized as arising from "levigation", but the Tribunal also considers that the physical forces at work in the tumbler may also be characterized as "grinding", given that the result is to smooth the rock surface by means of impact, attrition, friction and abrasion. "Grinding" is a process that falls squarely within the scope of Chapter 25.

136. The CBSA also referred the Tribunal to decisions rendered by the U.S. customs authorities, which concluded that goods similar to the one at issue fell outside the scope of Chapter 25. While the Tribunal may consider findings made under the customs law of other countries, those findings need not be given significant weight.[92] Decisions made in other jurisdictions, even with respect to analogous goods, does not

92. *Liteline Corporation v. President of the Canada Border Services Agency* (1 February 2016), AP-2014-029 (CITT) at para. 43; *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) at 7; *BMC Coaters Inc. v. President of the Canada Border Services Agency* (6 December 2010), AP-2009-071 (CITT).

preclude, abridge or determine the outcome of the requisite analysis of the *Customs Tariff* that the Tribunal is required to undertake in a section 67 appeal, using relevant principles of Canadian law.

137. In the alternative, the Tribunal has also considered the CBSA's arguments that "polishing" of the rocks is a "processing beyond" the scope of Chapter 25, thus excluding the goods from Chapter 25 and bringing Chapter 68 into play.

138. Chapter 68: Articles of stone, plaster, cement, asbestos, mica or similar materials, falls within Section XIII: Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware. The relevant heading within Chapter 68 is 68.02:

> Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 68.01; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially coloured granules, chippings and powder, of natural stone (including slate).

139. The relevant aspects of the notes to Chapter 68 are as follows:

> 1. This Chapter does not cover:
>
> (a) Goods of Chapter 25;
>
> . . .
>
> 2. In heading 68.02 the expression "worked monumental or building stone" applies not only to the varieties of stone referred to in heading 25.15 or 25.16 but also to all other natural stone (for example, quartzite, flint, dolomite and steatite) similarly worked; it does not, however, apply to slate.

140. Classification of the goods within Chapter 68 would require the Tribunal to adopt a non-contextual and non-purposive interpretation of the notes applicable to both Chapters 25 and 68.

141. If goods have been processed beyond the scope of Chapter 25 so as to bring them within the purview of Chapter 68, the additional processing must be of a nature that converts the goods from "stone" to "worked stone". Not only must the stone be "worked", the adjective "monumental" is also applicable.

142. The explanatory notes to heading 68.02 state that this heading "covers stone in the forms produced by the stone mason, sculptor, etc."

143. As such, in order to be both excluded from Chapter 25 and properly classified within Chapter 68 requires "processing" that comprises human intercession in the form of the application of artistic or artisanal skills, workmanship or craftsmanship associated with the professions of stone mason or sculptor. Those characteristics are not found in the processing carried out by Danson's Chinese supplier. The rocks are not hand-polished, and the "polishing" of the rocks arises from the purely mechanical and random movement of the rocks as they tumble within the drum. The random movement of the rocks within a motor-driven drum is not akin to the judgment, workmanship or skill that would be exercised by an artisan such as a stonemason or sculptor when "working" stone.

144. The Tribunal considers the adjective "monumental" to be referable either to the size or intended use of the worked stone. The Tribunal does not consider the word "monumental" to be relevant to the goods. In view of the conclusions reached above, the Tribunal need not discuss this point any further.

145. Accordingly, the goods have not been "worked" such that they should be classified as "worked monumental stone" for the purposes of heading 68.02.

146. Having regard to the foregoing and upon application of Rule 1, the Tribunal finds that the goods are not excluded from Chapter 25 and are properly classified under heading 25.17. With respect to classification at the subheading level, there was no expressed disagreement by the parties that the applicable subheading of heading 25.17 would be 10.00, if the goods were found to be eligible for classification within heading 25.17. In any event, the Tribunal is satisfied that the goods in issue meet the criteria for classification under tariff item 2517.10.00 and should be classified accordingly. .

DECISION

147. The appeal is allowed.

Susan D. Beaubien
Susan D. Beaubien
Presiding Member