Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-010

Rona Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, June 24, 2020

Canada

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IN THE MATTER OF an appeal heard on February 27, 2020, 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 April 12, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

RONA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 27, 2020
Tribunal Panel:	Susan D. Beaubien, Presiding Member
Support Staff:	Heidi Lee, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Rona Inc.	Jeffrey Goernert Marco Ouellet

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Luc Vaillancourt Rigers Alliu Émilie Raby-Roussel

WITNESSES:

Pierre-Olivier Corcos Chief Engineer and Asia Operations Manager OVE Décors ULC	Mathieu Morin Category Director, Fashion Plumbing and Kitchens Rona Inc.

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STATEMENT OF REASONS

OVERVIEW

[1] Rona Inc. ("Rona") imports glass bath screens for sale in its retail stores and online. The Canada Border Services Agency (CBSA) has classified the goods as "Other articles of glass" falling within heading 70.20 for the purposes of the *Customs Tariff*.[1]

[2] Rona disputes that the bath screens are correctly classified under heading 70.20. It appeals the CBSA's decision to the Tribunal and contends that the bath screens should instead be classified under heading 70.07 as "Safety glass, consisting of toughened (tempered) or laminated glass". In the alternative, Rona submits that the bath screens should be classified under heading 70.13 as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 70.10 or 70.18)".[2]

BACKGROUND AND PROCEDURAL HISTORY

[3] Rona began importing the bath screens in early 2017. At that time, Rona declared, for customs purposes, that the goods were classifiable as "other articles of iron or steel" under tariff item 7326.90.90.90.[3]

[4] In August 2017, Rona requested a re-determination, seeking to instead have the bath screens classified as "other safety glass" under tariff item 7007.19.00. In doing so, Rona requested a refund of duties paid pursuant to the existing classification. The CBSA denied this request and decided that the goods should be classified as "aluminum structures" under tariff item 7610.10.00.[4]

[5] Rona invoked subsection 60(1) of the *Customs Act*,[5] which provides for an internal appeal process within the CBSA. As a result of this process, the CBSA decided that the screens were properly classifiable as "safety glass" under tariff item 7020.00.90. That decision issued on April 12, 2018,[6] gives rise to the present appeal, which Rona filed with the Tribunal on June 6, 2018.[7]

[6] At Rona's request and the consent of the CBSA, this appeal was held in abeyance pending a decision in another case before the Tribunal (AP-2017-060)[8] wherein the classification of analogous goods was in dispute.

The CBSA's Decision

[7] The CBSA's decision was issued on April 18, 2018, pursuant to subsection 60(4) of the *Customs Act*.

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1 S.C. 1997, c. 36.
2 Notice of Appeal (Exhibit AP-2018-010-01), p. 6; Appellant's Brief (Exhibit AP-2018-010-08), p. 5.
3 Respondent's Brief (Exhibit AP-2018-010-10A), p. 5, para. 6.
4 Respondent's Brief (Exhibit AP-2018-010-10A), p. 5-6, paras. 7-8; p. 92-97.
5 R.S.C., 1985, c. 1 (2nd Supp.).
6 Notice of Appeal (Exhibit AP-2018-010-01), p. 9-16.
7 Notice of Appeal (Exhibit AP-2018-010-01).
8 Notice of Appeal (Exhibit AP-2018-010-01), p. 6.

[8] The decision identified the goods at issue as a bath tub screen of tempered glass (UBERHAUS Design Bath Screen Article #87775010).[9]

[9] The CBSA described the bath screen as a bath tub accessory designed for bathroom use in a domestic or household setting. The screen functions as a barrier to prevent water from splashing outside of the bathtub.[10]

[10] The screen is imported in unassembled form, comprising the following:

- 2 separate pieces of tempered glass (each 6 mm in thickness):
  - 1 rectangular panel (10" wide by 55" tall); and
  - 1 door panel (3 straight sides & 1 outward facing curved side; 10" wide at top, 30" wide at bottom, and 55" tall).
- 1 aluminum wall mount rail;
- 1 aluminum door pivot hinge;
- 1 aluminum stabilizing bar (top of rectangular panel to tub wall);
- 1 aluminum towel bar (for use in the door panel);
- 1 shower screen seal; and
- Minor metal parts of general use (screws and/or bolts).[11]

[11] The decision summarizes the methodology used by the CBSA in determining tariff classification as a sequential determination of the correct heading, the correct subheading and then the correct tariff item. These determinations are made by following the provisions of sections 10 and 11 of the *Customs Tariff*, namely, the *General Rules for the Interpretation of the Harmonized System*[12] (GIRs), the *Canadian Rules*,[13] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[14] while also having regard to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*.[15] International rulings are considered, but are not binding on the CBSA.[16]

[12] The CBSA began its analysis by considering relevant headings, starting with heading 70.07, which covers safety glass, consisting of toughened (tempered) or laminated glass.[17]

[13] Although the glass panels, taken individually, appeared to meet the terms of the heading, the CBSA concluded that the goods did not satisfy the types of end uses described by the explanatory notes. More particularly, the common purpose of safety glass "is to protect one from injury from contact by a physical force or from exposure to other industrial or environmental elements (and generally in a non-domestic setting)." Although tempered, the main purpose of the glass used in the bath screens serves to prevent water from leaving a bath tub in a domestic setting, and not to protect the bather from injury due to external forces.[18]

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9 Notice of Appeal (Exhibit AP-2018-010-01), p. 10.
10 Notice of Appeal (Exhibit AP-2018-010-01), p. 11.
11 Notice of Appeal (Exhibit AP-2018-010-01), p. 10.
12 S.C. 1997, c. 36, schedule [*General Rules*].
13 S.C. 1997, c. 36, schedule.
14 World Customs Organization, 6th ed., Brussels, 2017.
15 World Customs Organization, 4th ed., Brussels, 2017.
16 Notice of Appeal (Exhibit AP-2018-010-01), p. 11.
17 Notice of Appeal (Exhibit AP-2018-010-01), p. 11.
18 Notice of Appeal (Exhibit AP-2018-010-01), p. 11.

[14] As such, the CBSA concluded that the end use of the goods at issue was distinguishable from the end use described by the explanatory notes. Accordingly, the CBSA found that the bath screens could not be classified under heading 70.07.[19]

[15] Turning to heading 76.10, the CBSA found that the goods must form parts of aluminum structures. Relying on a dictionary definition of the word "structure" and noting that the bath screen includes a frameless door and that "doors" are specifically named by the heading, the CBSA concluded that the goods were excluded from heading 76.10 because they are intended for use as a bathroom accessory in a domestic or household setting. As neither the bathtub, nor the bathroom, nor the home is an "aluminum structure", the bath screens are consequently outside the terms used in heading 76.10. In reaching this conclusion, the CBSA also considered the explanatory notes to heading 73.08 which apply, *mutatis mutandis*, to heading 76.10.[20]

[16] The CBSA then considered heading 70.20, which it characterized as being a residual category. As the goods at issue did not meet the terms of any other heading within Chapter 70 and have the essential character of glass articles, the CBSA concluded that the bath screens should be classified under this heading.[21]

[17] As the next step in its analysis, the CBSA referred to classification considerations at the heading level, having regard to GIR 2(a) and (b). Noting that the goods are composite in nature, and presented unassembled, the CBSA concluded that each component (except for the towel bar) is integral to the overall physical structure of the item, which was characterized as having the general character of a "glass wall/door".[22]

[18] This led the CBSA to reach the following conclusion:

> Classification of the goods at the heading level is *prima facie* under 70.20 (and no other) by GIRs 1, 2(a) & 2(b); with regard to the general ENs to Chapter 70 and ENs to Headings 70.07 & 70.20.[23]

[19] The CBSA then concluded that the goods should be classified under subheading 7020.00. At the tariff item level, two choices were presented – glassware having specific described characteristics (7020.00.10) and the residual category of "Other" (7020.00.90). The CBSA selected the latter and classified the goods under tariff item 7020.00.90.[24]

[20] Rona appealed this decision to the Tribunal.

Additional Evidence on Appeal

[21] In support of its appeal, Rona filed the following:

(a) a copy of the decision under appeal;[25]

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19 Notice of Appeal (Exhibit AP-2018-010-01), p. 11.
20 Notice of Appeal (Exhibit AP-2018-010-01), p. 12.
21 Notice of Appeal (Exhibit AP-2018-010-01), p. 13.
22 Notice of Appeal (Exhibit AP-2018-010-01), p. 13.
23 Notice of Appeal (Exhibit AP-2018-010-01), p. 14.
24 Notice of Appeal (Exhibit AP-2018-010-01), p. 14.
25 Notice of Appeal (Exhibit AP-2018-010-01), p. 9-16.

(b) a product information sheet for the goods at issue;[26]

(c) copies of the *Glass Doors and Enclosures Regulations*, SOR/2016-174;[27]

(d) a publication of the Canadian General Standards Board, which purports to set national standards for safety glazing in Canada;[28]

(e) definitions for the words "frame",[29] "glassware",[30] "mainly",[31] "may",[32] and "such as"[33] as sourced from online dictionaries;

(f) articles entitled "All About Shower Glass",[34] "What Is Safety Glass",[35] and "How Is Tempered Glass Made?",[36] a Wikipedia entry entitled "Tempered Glass",[37] and "What Is Float Glass & How Is It Made?",[38] all of which appear to have been downloaded from the Internet;

(g) the transcript of a hearing before the Tribunal in *OVE Décors*;[39] and

(h) a document dated March 2009 purporting to be a manual describing changes effected to the Quebec Construction Code with respect to Chapter 3 (Plumbing).[40]

[22] In its responding materials, the CBSA submitted the following:

(a) a copy of the CBSA's response to Rona's initial request for reconsideration;[41]

(b) a copy of the decision under appeal;[42]

(c) printouts from websites of Rona and Mecanair;[43]

(d) printout of the Design Operators Manual for the Uberhaus bath screen product in issue.[44]

[23] Both parties submitted written arguments, together with copies of relevant statutory authorities and jurisprudence relied upon.

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26 Appellant's Brief (Exhibit AP-2018-010-08), p. 17.
27 Appellant's Brief (Exhibit AP-2018-010-08), p. 124-130.
28 Appellant's Brief (Exhibit AP-2018-010-08), p. 131-168.
29 Appellant's Brief (Exhibit AP-2018-010-08), p. 212-222.
30 Appellant's Brief (Exhibit AP-2018-010-08), p. 223-224.
31 Appellant's Brief (Exhibit AP-2018-010-08), p. 225-226.
32 Appellant's Brief (Exhibit AP-2018-010-08), p. 227-229.
33 Appellant's Brief (Exhibit AP-2018-010-08), p. 230-231.
34 Appellant's Brief (Exhibit AP-2018-010-08), p. 232-235.
35 Appellant's Brief (Exhibit AP-2018-010-08), p. 236-239.
36 Appellant's Brief (Exhibit AP-2018-010-08), p. 312-316.
37 Appellant's Brief (Exhibit AP-2018-010-08), p. 317-322.
38 Appellant's Brief (Exhibit AP-2018-010-08), p. 323-325.
39 Appellant's Brief (Exhibit AP-2018-010-08), p. 256-292.
40 Appellant's Brief (Exhibit AP-2018-010-08), p. 326.
41 Respondent's Brief (Exhibit AP-2018-010-10A), p. 92-97.
42 Respondent's Brief (Exhibit AP-2018-010-10A), p. 99-106.
43 Respondent's Brief (Exhibit AP-2018-010-10A), p. 108-115.
44 Respondent's Brief (Exhibit AP-2018-010-10A), p. 116-127.

[24] Prior to the oral hearing, Rona tendered an expert report of Pierre-Olivier Corcos,[45] who is employed by OVE Decors ULC ("OVE") as its Director of Operations and Chief of Engineering. Mr. Corcos has a Master's degree in Chemical Engineering from Sherbrooke University.[46]

[25] Rona also gave notice that it intended to call Mathieu Morin as a lay witness at the hearing. With the consent of the CBSA, Rona also filed printouts from its website showing product pages for a bath screen, soap dish, shower basket, toothbrush holder, and towel bar, together with customs declaration forms, invoices and commercial documents pertaining to importation of the goods at issue.

[26] The CBSA advised that it would not be calling any witnesses at the hearing, but that it would be contesting the qualification of Mr. Corcos as an expert witness.

[27] A boxed specimen of the bath screen product (unassembled) was brought to the hearing, but neither party referred to it, as the parties were in agreement concerning the contents of the box.[47]

Oral Hearing

[28] An oral hearing was held on February 27, 2020. Both parties were represented.

[29] Prior to commencement of the hearing, some technical difficulties were unexpectedly encountered with computers installed in the Tribunal's hearing room. This appeared to be caused by software problems resulting from the installation an operating system update. As the Tribunal conducts electronic hearings, these IT issues could have affected the registry's capacity to retrieve and display during the hearing. In an abundance of caution, the hearing was moved to a different hearing room. However, that room was not then equipped with a redundant recording system, which is used by the verbatim reporter for backup purposes, when transcribing the hearing.

[30] At the outset of the hearing, these issues were disclosed to the parties, who were invited to express any concerns that they might have with respect to moving ahead with the hearing in the absence of a backup recording being taken for possible use by the verbatim reporter in preparing a hearing transcript. Both parties confirmed that they wished to proceed with the hearing.[48]

Pierre-Olivier Corcos

[31] Pierre-Olivier Corcos was called as an expert witness by Rona at the hearing. His written report was deemed to be incorporated as his testimony before the Tribunal, subject to qualification as an expert and to cross-examination.[49]

[32] Mr. Corcos has been employed with OVE since 2013.[50] OVE does business as a fashion plumbing distributor throughout Canada and the United States.[51] It sells over 60,000 showers per

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45 Corcos Report (Exhibit AP-2018-010-16).
46 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 1.1; *Transcript of Public Hearing*, p. 12-13.
47 *Transcript of Public Hearing*, p. 109.
48 *Transcript of Public Hearing*, p. 1-4, 7-8.
49 *Transcript of Public Hearing*, p. 19.
50 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 1.2.
51 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 1.2; *Transcript of Public Hearing*, p. 27.

year through retail outlets, such as Lowes, Home Depot, Costco, Rona and Menards.[52] In the course of his work with OVE, Mr. Corcos' report states that he has overseen the development, production, shipment and aftersale of different types and models of shower enclosures.[53]

[33] As a result of work experience with OVE, Mr. Corcos claims "in-depth knowledge and experience with shower enclosure, shower screen, bathtub door, and bathtub screen manufacturing, distribution, sales, marketing, installation and troubleshooting."[54]

[34] Rona's counsel stated that Mr. Corcos' employer is a competitor to Rona's supplier of the goods at issue. As such, Rona says that Mr. Corcos is qualified to provide an opinion concerning the design and function of the bath screens at issue, the process for manufacturing these goods, quality control and safety measures applicable to these goods and how they are marketed and sold.[55]

[35] Counsel for the CBSA cross-examined Mr. Corcos concerning his educational background and work experience.[56]

[36] Following cross-examination, the parties made submissions concerning whether Mr. Corcos should be qualified as an expert witness. There was some debate concerning the scope of Mr. Corcos' subject matter expertise. Rona's counsel took the view that Mr. Corcos should be accepted as an expert in the manufacture of glass bath products, their channels of trade and end users.

[37] The CBSA objected that Mr. Corcos could not be an expert with respect to bathroom products not actually manufactured or sold by OVE, but conceded his expertise with respect to the design and manufacture of shower enclosures and bath screens.[57] An objection was also made to any opinion testimony by Mr. Corcos with respect to marketing and sales of the goods, as the CBSA submitted that Mr. Corcos had no education or practical work experience in these areas.[58] Counsel for the CBSA clarified that this objection was limited to opinion evidence, but not to factual evidence on these matters.[59]

[38] In order for expert evidence to be admissible, four threshold requirements must be met:

(a) The evidence that is proposed to be given by the expert must be relevant to the issues to be decided;

(b) The expert's evidence must be necessary, in that it will serve to assist the trier of fact;

(c) There must be no exclusionary rule of evidence which operates to exclude the expert's evidence; and

(d) The expert must be properly qualified to opine on the subject matter at issue.[60]

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52 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 1.3.
53 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 1.4; *Transcript of Public Hearing*, p. 27.
54 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 2.1; *Transcript of Public Hearing*, p. 15-17, 27-28.
55 *Transcript of Public Hearing*, p. 10-11.
56 *Transcript of Public Hearing*, p. 12-19.
57 *Transcript of Public Hearing*, p. 24-25.
58 *Transcript of Public Hearing*, p. 24-25.
59 *Transcript of Public Hearing*, p. 9, 21, 25.
60 *R. v. Mohan*, [1994] 2 S.C.R. 9.

[39] The expert has an overriding duty to the court or tribunal to provide opinion evidence that is fair, objective and non-partisan.[61]

[40] Having reviewed Mr. Corcos' report, his *curriculum vitae* and his testimony on preliminary cross-examination, the Tribunal is satisfied that his evidence is relevant to the issues in dispute between the parties and would be of assistance to the Tribunal. The Tribunal finds there is no exclusionary rule of evidence that would operate to exclude Mr. Corcos' evidence.

[41] With respect to the fourth requirement, there was some dispute concerning the scope of Mr. Corcos' qualifications. These issues were substantially narrowed at the hearing, with the parties reaching some agreement. The Tribunal advised the parties that Mr. Corcos would be admitted as an expert and that the Tribunal would assess his evidence and deal *ad hoc*, in these reasons, with any aspects of his testimony that might fall outside the scope of Mr. Corcos' expertise as agreed upon, or that might be objected to, during the course of the witness' testimony.[62]

[42] In his written report, Mr. Corcos testified that he had inspected a sample of the goods at issue and that he was familiar with this type of product (bath screen), which is a common product in the industry. Mr. Corcos' employer (OVE) has sold numerous models of bath screens over the years.[63]

[43] According to Mr. Corcos, the bath screen at issue is "commonly described as a frameless shower door or screen"[64] and is considered to be a "fashion plumbing accessory". It is typically marketed as an upgrade from a standard shower curtain[65] as a bathtub accessory.[66]

[44] On cross-examination, Mr. Corcos identified "bath accessories" as a subset of "fashion plumbing". Accessories are differentiated from bathroom fixtures, such as bathtubs, vanities and toilets. Mr. Corcos described "accessories" as "add-ons" to existing fixtures. Towel bars, hang bars, shower curtains, shelving, bath carpets, faucets and soap dishes are examples of "bath accessories". Items such as "towels" and "soap" are not considered as "bath accessories".[67]

[45] Mr. Corcos opined that the function of the bath screen is to retain water inside the enclosure defined by a bathtub, to prevent water from splashing out during showering.[68] Use of a bath screen or shower curtain is an optional bathroom accessory but without one, water will splash onto the bathroom floor when the shower is being used.[69] The bath screen has no other purpose.[70]

[46] At the hearing, Mr. Corcos was asked to define or describe certain items, notably "bathtub door", and "shower enclosure".[71] He explained that shower enclosures and bathtub screens differ in both structure and installation. A bath screen does not have a frame and does not fully enclose the

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61 *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23.
62 *Transcript of Public Hearing*, p. 24-26.
63 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 2.3.
64 Corcos Report (Exhibit AP-2018-010-16), p. 2, paras. 2.4.2, 2.4.3.
65 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 2.4.2.
66 *Transcript of Public Hearing*, p. 34-35.
67 *Transcript of Public Hearing*, p. 41-43.
68 Corcos Report (Exhibit AP-2018-010-16), p. 2, para. 2.4; *Transcript of Public Hearing*, p. 32-33, 43.
69 *Transcript of Public Hearing*, p. 33.
70 *Transcript of Public Hearing*, p. 49-50.
71 *Transcript of Public Hearing*, p. 28-29.

space over the bathtub, but are installed "on top of a tub".[72] The bath screen has no support function, but itself is supported.[73]

[47] This particular model of bath screen is characterized by two panels of glass – a moving panel (door) and a fixed (stationary) panel – together with installation hardware and an ornamental handle.[74] The fixed panel and door are both made of tempered glass.[75] The door is hinged and is supported by the fixed panel, which enables the user to easily enter and exit the bathtub, by opening or closing the hinged door.[76]

[48] The fixed panel is affixed to the wall by means of an aluminum wall track. A pivot mechanism serves to attach the door to the fixed panel. A support arm made from zinc alloy is also attached to the fixed panel and is fixed to the wall. No other frame or support is present.[77] The aluminium track provides support for the door with respect to lateral forces, the bathtub provides downward support and the support arm provides support with respect to the push and pull forces which are generated during opening and closing of the door.[78]

[49] Mr. Corcos testified that tempered glass is the most important component of the bath screen in terms of volume, weight and product design.[79]

[50] Mr. Corcos provided a summary description of the manufacture of the fixed panel, door, and aluminum track and support arm. The tempered glass of the fixed panel and door is manufactured by gradually heating and then rapidly quenching annealed glass, a process known as "heat tempering".[80]

[51] In his written report, Mr. Corcos also provided a description of the installation procedure for the bath screen.[81] On cross-examination, Mr. Corcos conceded that the goods were sold unassembled in a box containing all of the components needed to assemble the bath screen.[82] The number of components in the box was estimated to be approximately 44.[83]

[52] Mr. Corcos confirmed that the installation process comprises a series of steps and that further work or adjustments might be required thereafter in order to ensure a product that functions as desired.[84] Once assembled, the bath screen is a fairly large and heavy item.[85]

[53] The Tribunal found Mr. Corcos to be a credible and co-operative witness. On cross-examination, he admitted that the Tribunal's decision in this case might affect OVE's interests. However, he was uncertain about if or how OVE might be affected, other than a possible change in customs

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72 *Transcript of Public Hearing*, p. 29.
73 *Transcript of Public Hearing*, p. 43.
74 *Transcript of Public Hearing*, p. 32.
75 *Transcript of Public Hearing*, p. 29-31.
76 Corcos Report (Exhibit AP-2018-010-16), p. 2-3, para. 2.4; *Transcript of Public Hearing*, p. 32.
77 Corcos Report (Exhibit AP-2018-010-16), p. 3, para. 2.4.5.
78 Corcos Report (Exhibit AP-2018-010-16), p. 3, para. 2.4.6.
79 *Transcript of Public Hearing*, p. 34.
80 Corcos Report (Exhibit AP-2018-010-16), p. 3, para. 3.1.
81 Corcos Report (Exhibit AP-2018-010-16), p. 4, para. 4.
82 *Transcript of Public Hearing*, p. 36.
83 *Transcript of Public Hearing*, p. 36-38.
84 *Transcript of Public Hearing*, p. 38-40.
85 *Transcript of Public Hearing*, p. 41.

declaration for OVE's future imports of bath screens.[86] The Tribunal concludes that this issue is speculative and in any event did not affect Mr. Corcos' testimony to the Tribunal, which was given fairly and impartially.

Mathieu Morin

[54] Mathieu Morin is employed by Rona as category director for fashion plumbing and kitchen.[87] He is responsible for leading and managing these product categories with Rona's buying team, including marketing strategy, product selection, and negotiation with vendors.[88]

[55] Rona is a hardware retailer. The bathroom department in Rona's retail stores may comprise up to 4,000 square feet, with approximately four to five store aisles devoted to fashion plumbing items.[89]

[56] Fashion plumbing is considered to include products that are not "behind the wall".[90] Mr. Morin testified that fashion plumbing items are those which are visible in the bathroom, including bathtubs, toilets, vanities, and soap dishes.[91]

[57] Mr. Morin confirmed that the goods at issue are imported by Rona, unassembled, but otherwise complete and ready for installation at the time of purchase.[92] They are categorized and displayed in Rona's stores in the bathroom department, and may be displayed installed on a bathtub.[93] The bath screens are not manufactured by OVE, but by another of Rona's suppliers.[94]

[58] According to Mr. Morin, the goods are typically purchased as a bathroom upgrade, in order to replace old shower curtains.[95] A bath screen is not considered to be a "shower enclosure", but is categorized as a glass partition or half wall. The goods at issue are not marketed as either "doors" or "enclosures", but simply as "bath screens".[96]

[59] On cross-examination, Mr. Morin agreed that the purpose of the bath screens is to retain water inside the bathtub enclosure and that the bath screen has no support function.

[60] Rona also sells soap dishes, sponge/shower baskets, toothbrush holders, towel bars.[97] These products are sold in the "bathroom" section of Rona stores and on Rona's website, which shows at least three subcategories of bathroom products: bathtubs; bathroom accessories and bathtub and shower accessories.[98] In Rona retail stores, bath accessories are sold in different aisles than the bath screens at issue.[99]

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86 *Transcript of Public Hearing*, p. 19.
87 *Transcript of Public Hearing*, p. 52, 60.
88 *Transcript of Public Hearing*, p. 52.
89 *Transcript of Public Hearing*, p. 52-53.
90 *Transcript of Public Hearing*, p. 61.
91 *Transcript of Public Hearing*, p. 64-65.
92 *Transcript of Public Hearing*, p. 52, 65.
93 *Transcript of Public Hearing*, p. 53.
94 *Transcript of Public Hearing*, p. 81-82.
95 *Transcript of Public Hearing*, p. 54.
96 *Transcript of Public Hearing*, p. 55-56, 65.
97 *Transcript of Public Hearing*, p. 57.
98 *Transcript of Public Hearing*, p. 59, 71, 69, 78.
99 *Transcript of Public Hearing*, p. 71.

[61] Mr. Morin was cross-examined about the relative and comparative size and weight of various items characterized as bathroom accessories (soap dishes, sponge baskets, liquid soap distributors, hooks, toothbrush holders, towel rails). He conceded that the accessory and any item supported by or contained therein could be easily moved within or even removed from the bathroom, except for mounted towel rails.[100]

[62] Mr. Morin was also a forthright and credible witness. In some aspects, the factual substance of his testimony overlapped with that of Mr. Corcos'. There was some difference in how the witnesses described the ambit of "fashion plumbing", but the Tribunal concludes that these differences are inconsequential for the purposes of deciding the appeal.

[63] Following the testimony given by Mr. Corcos and Mr. Morin at the hearing, both parties submitted oral arguments to the Tribunal.

POSITIONS OF THE PARTIES ON APPEAL

Rona

[64] Rona concedes that it bears the burden of proof of demonstrating, on a civil standard of proof, that the CBSA has erred in classifying the bath screens under heading 70.20.[101]

[65] Relying on Rule 1, the description of heading 70.07 and its explanatory notes, Rona says that the goods in issue are "safety glass". Rona admits that heading 70.07 does not indicate whether other components (i.e. mounting hardware, in this case) may also be present. However, since the "safety glass" constitutes more than 90% of the bath screen, Rona submits that application of Rule 2(b) places the bath screen within heading 70.20, and more specifically under tariff item 7007.19.00.[102]

[66] Rona argues that the bath screens in this case are distinguishable from the goods at issue in *OVE Décors*[103] and those subject of the WCO classification opinion for subheading 7020.00, as discussed in *OVE Décor*[104]. Unlike the shower enclosures in *OVE Décors*, the bath screens at issue have no frame. They are said to comply with the *Glass Doors and Enclosures Regulations*.

[67] In distinguishing the Tribunal's decision in *OVE Décors*, Rona observes that explanatory notes of other headings (e.g. 73.08, 76.10) were considered and relevant to the Tribunal's decision in that case. Those provisions are not relevant in the present case, having regard to the differences between shower enclosures and bath screens. Even though both products are made of glass, the shower enclosures can be viewed as "doors", while the bath screens are not "doors".[105] Moreover, the decision in *OVE Décors* was reached by using Rules 1 and 2(a), without recourse to Rule 3, having regard to the explanatory notes to the headings and subheadings.

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100 *Transcript of Public Hearing*, p. 71-77.
101 Appellant's Brief (Exhibit AP-2018-010-08), p. 5.
102 Appellant's Brief (Exhibit AP-2018-010-08), p. 10-11.
103 *OVE Décors ULC v. President of the Canada Border Services Agency* (25 June 2019), AP-2017-060 (CITT) [*OVE Décors*].
104 Appellant's Brief (Exhibit AP-2018-010-08), p. 10, para. 31; Respondent's Brief (Exhibit AP-2018-010-10A), p. 86-90; *OVE Décors* at paras. 45-47.
105 *Transcript of Public Hearing*, p. 86-88.

[68] On a preliminary reading, Rona concedes that the wording of heading 70.07 does not wholly describe the goods at issue. Instead, it describes a material, namely, safety glass. However, Rona urges that a more comprehensive analysis should be undertaken.

[69] According to Rona, the respective requirements of sections 10 and 11 of the *Customs Tariff* create two pathways to classification, each leading to a different destination within the *Customs Tariff*. Section 10 deals with classification which is to be determined in accordance with the GIRs. On the other hand, Rona characterizes section 11 as pertaining to "interpretation" because section 11 stipulates the explanatory notes to the headings and subheadings shall be considered. Rona describes section 11 as "being curiously silent on Explanatory Notes to the general interpretative rules."[106] Rona thus posits the existence of an inherent conflict between sections 10 and 11. It asserts that the requirements of section 10 should take precedence.

[70] On this theory, Rona claims that use of the GIRs, specifically Rule 2(b) dealing with combinations of materials, "fills the void left where we classify using only Explanatory Notes in the interpretation of the headings and subheadings of 70.07."[107] Rona says that the explanatory notes to Rule 2(b) deals with combination of materials and with goods consisting of two or more materials. Within Chapter 70, heading 70.07 refers to a material (safety glass) while other headings (i.e. 70.13 or 70.20) refer to goods of that material (glassware). In view of this, Rona analogizes to *Mon-Tex Mills*[108] and says classification of the bath screens entails competing headings (70.07 vs. 70.13), which are both referable to the same good. Rona argues that this conflict is resolved by Rule 2(b), which operates to extend the scope of a heading referring to a material (i.e. the safety glass of heading 70.07) to encompass that material in combination with other materials (i.e. the installation hardware of the bath screen). Rona says that this interpretation of Rule 2(b) is supported by the reasons given by the Supreme Court of Canada in *Igloo Vikski*.[109]

[71] As the bath screens are functionally equivalent to a shower curtain, Rona says that it is the safety glass which provides the "raison d'être" of the bath screen. The installation hardware and handle are of lesser importance to the inherent nature and function of the bath screen. As such, they are of lesser or peripheral relevance in the classification analysis.

[72] Accordingly, Rona concludes that the application of Rules 1, 2(a) and 2(b) leads to the conclusion that the bath screens should be classified under heading 70.07, without the need for recourse to Rule 3.

[73] In the alternative, Rona contends that the bath screens should be classified as "glassware" under heading 70.13. Four types of glassware are listed in subheadings – table or kitchen glassware, toilet articles, office glassware, and glassware for indoor decoration.

[74] Rona submits that the term "glassware" simply means "article of glass". It is irrelevant that other parts or fittings may also be present.

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106 *Transcript of Public Hearing*, p. 89.
107 *Transcript of Public Hearing*, p. 90.
108 *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*, 2004 FCA 346 (CanLII) [*Mon-Tex Mills*].
109 *Attorney General (Canada) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) [*Igloo Vikski*].

[75] Looking to the relevant explanatory notes for heading 70.13, Rona says that five conditions must be met in order for the goods to be classified under heading 70.13:

(a) the goods must be glassware or articles of glass;

(b) the goods are obtained mainly by pressing or blowing;

(c) the goods must be used for toilets or bathrooms (or similar articles);

(d) if made of more than glass, the glass must give the whole character of the goods;

(e) the goods must not be excluded by the exclusionary notes found in the explanatory notes

[76] Rona asserts that all five conditions are met. As the bath screens are made of safety (tempered) glass, they are therefore "glassware", which the dictionary defines as being an "article of glass".

[77] With respect to the second condition, the explanatory note provides that the article of glass is obtained mainly by pressing or blowing. Although the tempered glass of the bath screen is obtained by "floating", Rona submits that use of the word "mainly" is open-ended and should be interpreted as signalling that other glass-producing processes (such as "floating") are contemplated as falling within the scope of heading 70.13.

[78] The third condition is fulfilled, according to Rona, because the bath screen is a type of glassware that would be found or used in a toilet or bathroom. Rona stresses that the relevant explanatory note to heading 70.13 (reproduced below) is open-ended. The list of items is not exhaustive, in view of the qualifier "such as":

> Toilet articles, such as soap-dishes, sponge-baskets, liquid soap distributors, hooks and rails (for towels, etc.), powder bowls, perfume bottles, parts of toilet sprays (other than heads) and tooth-brush holders
>
> [Rona's emphasis added]

[79] Rona points out that the listed items should be viewed as examples, as the heading description refers to "articles of glass or glassware having 'similar purposes'". The listed articles can be described as bathroom accessories. As the bath screens are bath tub accessories, they are likewise bathroom accessories and fall within heading 70.13, pursuant to Rule 1.

[80] Rona notes that glassware for indoor decoration is included within the examples listed to the explanatory note to heading 70.13. Rona characterizes the bath screens as being "an upscale alternative" to shower curtains which are arguably "intrinsically decorative in nature".[110] As both the functional and decorative aspects of the bath screens are attributable to the glass, Rona submits that this is consistent with the content of the explanatory note.

[81] Moreover, as "aquaria" are included and can be made of tempered glass, Rona says that this provides an example of glassware that is not produced by blowing or pressing, but that still falls within the scope of heading 70.13.

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110 *Transcript of Public Hearing*, p. 96.

[82] As the goods are imported unassembled, Rona submits that Rule 2(a) requires that the unassembled bath screen (as imported) be regarded, for classification purposes, as a fully assembled and installed bath screen.

[83] Within heading 70.13, Rona states that the correct subheading is "other", rendering the bath screens properly classified under tariff item 7013.99.00.

[84] As heading 70.20 is residual, Rona points to an exclusion defined by the explanatory notes. It states that heading 70.20 covers glass articles not covered by other headings of Chapter 70 or within other chapters of the tariff. According to Rona, the bath screens are covered by heading 70.07 or alternatively by heading 70.13. On that basis, Rona argues that heading 70.20 cannot apply.

CBSA

[85] The CBSA submits that classification of the bath screens can be effected using only Rules 1 and 2(a). As Rule 1 provides that classification is determined according to the terms of the headings, the goods must be considered in terms of the descriptions provided by the headings. According to Rule 2(a) reference to an article in a heading is deemed to include the article in either assembled or disassembled form. It is uncontested that the goods are unassembled and that all parts needed to assemble the bath screen are included in the package. The CBSA points out that explanatory note 7 to Rule 2(a) states that the complexity of the assembly process is not a relevant factor.

[86] The scope of Chapter 70 covers both "glass" and "glassware". The CBSA concedes that these terms are not synonymous and that glassware means "article of glass". The Tribunal was referred to the French language version of the chapter title – "Verre et ouvrages en verre".

[87] The CBSA argues that heading 70.07 covers "safety glass" as a good *per se*, but not as a *component* of an article. It submits that the explanatory notes to heading 70.07 make it clear that goods incorporating safety glass are classified elsewhere in the *Customs Tariff*. Moreover, the explanatory notes do not prescribe the classification of goods having safety glass present in combination with materials other than glass. According to the CBSA, the limitation that the safety glass is "of size and shape suitable for incorporation in vehicles, aircraft, spacecraft, or vessels" is referable only to the size and physical characteristics of the glass being tailored for incorporation within some other article. It does not indicate that the suitability may arise from the presence of some other non-safety glass component.

[88] Referring to the Tribunal's decision in *OVE Décors*, the CBSA says that Chapter 70 does not necessarily cover all items of glass or glassware. In *OVE Décors*, the Tribunal considered the tariff classification of glass shower enclosures surrounded by an aluminium frame. In *OVE Décors*, the Tribunal found that the shower doors were not classified under heading 70.07.

[89] The CBSA concedes that there are differences between the shower doors in *OVE Décors* and the bath screens at issue in the present case. The shower doors in *OVE Décors* were framed, while the bath screens are frameless. Nonetheless, the CBSA's argument is that the similarities outweigh the differences. Both the shower doors and the bath screens are composed of safety glass, together with parts, fittings and/or associated hardware. Both items are installed in a bathroom and serve the same purpose, namely, to prevent water from splashing outside a shower. Accordingly, the CBSA says that the Tribunal's reasoning in *OVE Décors* should likewise apply in this case, namely, that the scope of heading 70.07 does not extend to articles comprising both glass and non-glass materials.

[90] Even if the bath screens comply with the *Glass Doors and Enclosures Regulations*, the CBSA argues that such regulatory compliance is irrelevant. It cannot override what the CBSA says is the clear directions provided by the explanatory notes, namely, that heading 70.07 covers "safety glass" as a good *per se* and does not extend to goods where safety glass is one of the components comprising the article, as is the case with the goods at issue.

[91] With respect to heading 70.13, the CBSA argues that this heading is limited to glassware that is relatively small and used for holding objects or for decorative purposes, and that this interpretation is supported by the relevant explanatory notes.

[92] There are four types of glassware categorized by the explanatory notes. In order to be classified within heading 70.13, the bath screens must fit within, or be described by, one of the four listed types – there is no residual room for an item that could be otherwise described as "glassware".

[93] The CBSA concedes that the articles so listed within the explanatory notes to heading 70.13 are representative. Each of the four lists is prefaced by language ("e.g.", "such as") which signal that the list is not intended to be exhaustive. The CBSA observes that the second list is described as "toilet articles" in English and as "objets pour les services de la toilette" in French. Only this second list of articles is potentially relevant to the goods at issue.

[94] Although other non-specified items may be included within each group of listed items, the CBSA says that the *ejusdem generis* rule of interpretation applies. As such, any such non-listed articles "must be of the 'same kind or class as the listed ones'", in order to be included.

[95] The listed articles are characterized by the CBSA as being small in size, requiring little to no installation and designed for either decorative purposes or to hold other items typically used in a bathroom, such as soaps, sponges, towels, powders, perfumes, sprays and toothbrushes.

[96] In contrast, the bath screens are big and heavy items which are not easily transportable. They are designed to be installed using a multistep process and for a different functional purpose, namely, to prevent water from splashing outside the bathtub enclosure. Any aesthetic or decorative aspect is secondary. Accordingly, the CBSA argues that they are not of the "same kind or class" as the items listed in the explanatory note and cannot be classified under heading 70.13.

[97] For sales and marketing purposes Rona groups the bath screens with bathtubs, but categorizes smaller items, such as soap dishes, toothbrush holders, and hooks, in a different "accessories" category. The CBSA says that this evidence supports its conclusion that the bath screens are not properly classified within heading 70.13.

[98] The CBSA submits that the bath screens thus fall to be classified under the residual heading 70.20. This heading covers glass articles that are not otherwise covered by another heading, including articles of glass that are combined with materials other than glass, so long as they retain the "essential character of glass articles".[111] This condition is met because the parties agree that the bath screens are predominantly made of tempered glass.

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111 Explanatory notes for heading 70.20; *Transcript of Public Hearing*, p. 126-127.

[99] Classification under heading 70.20 would also be consistent with the Tribunal's reasoning in *OVE Décors*[112] and with the WCO classification opinion[113] on glass shower enclosures, as referenced by the CBSA in its written brief.[114] Although this WCO classification opinion is not dispositive or binding on the Tribunal, the CBSA asserts that it should nonetheless be taken as persuasive authority.[115]

[100] The CBSA concedes that there are some structural differences between bath screens and shower enclosures, but says that the goods also share many similarities – both are frameless, mostly composed of tempered glass, are installed in a bathroom and serve the purpose of preventing water from splashing outside an enclosed bathing space.

[101] Glass shower enclosures are described under two or more headings but are properly classified as "other articles of glass" under heading 70.20, using Rule 3(b), because their essential character is referable to glass.[116] The CBSA urges the Tribunal to adopt similar reasoning with respect to the bath screens at issue, except that Rule 3(b) need not be resorted to. As the bath screens are not described by two or more headings, they are "other articles of glass" that are classifiable under heading 70.20, upon application of Rules 1 and 2(a), without recourse to Rule 3(b).[117]

[102] The CBSA also objected to Rona's arguments at the hearing with respect to Rule 2(b), asserting that these arguments were being raised for the first time. The CBSA asked for an opportunity to make additional submissions if the Tribunal was inclined to accept these allegedly new arguments by Rona. However, in its oral argument, the CBSA did make the point that Rule 2(b) cannot operate to extend the reach of heading 70.07 from covering glass to covering an article of glass. The Rules are hierarchical – if the goods can be classified by applying Rule 1 alone or in combination with Rule 2(a) (as the CBSA contends), then there is no need to invoke Rule 2(b) at all, as Rona seeks to do. In reply, Rona pointed to the CBSA's own reliance on Rule 2(b) in its reasons for the decision being appealed.

ANALYSIS

[103] Rona's appeal is brought pursuant to subsection 67(1) of the *Customs 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. As Rona is seeking a partial refund of tariffs previously paid on importation of the bath screens, this is sufficient to make Rona a "person aggrieved".[118] This is undisputed by the CBSA.

[104] The *Canadian International Trade Tribunal Rules*[119] prescribe the procedure to be followed on appeals brought under section 67 of the *Customs 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

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112 *Transcript of Public Hearing*, p. 127-128.
113 On subheading 7020.00 as reproduced in the Respondent's Brief. See FN 103, *supra*.
114 Respondent's Brief (Exhibit AP-2018-010-10A), p. 16-17, paras. 35-37, p. 86-90.
115 *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2019 FCA 20.
116 Respondent's Brief (Exhibit AP-2018-010-10A), p. 16-17, paras. 35-38; p. 86-90.
117 *Transcript of Public Hearing*, p. 127-130.
118 *Danson Décor Inc. v. President of the Canada Border Services Agency* (25 September 2019), AP-2018-043 (CITT) [*Danson Décor*] at paras. 75-79.
119 S.O.R./91-499 [*Rules*].

before the Tribunal at an oral hearing. Any witnesses may be cross-examined by the opposing party and questioned by the Tribunal.[120]

[105] Appeals to the Tribunal are determined *de novo*, even though one or both parties may elect to carry forward all or part of the record at first instance, to supplement that record with new evidence, or create a new one. The Tribunal must reach its own decision concerning the correct tariff classification for the goods. In doing so, the Tribunal is free to assess the record before it, up to and including the reweighing of evidence placed before the CBSA and giving new consideration to any new evidence that may be presented on appeal. The Tribunal owes no deference to the CBSA's decision.[121]

[106] There is a legal burden on the appellant to show that the CBSA has adopted an incorrect classification. In its written submissions, Rona refers to *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 [*Hickman*] as defining the burden that it must meet in order to succeed on this appeal. Rona says that once it has "discharged its onus of proof, the burden shifts to the Respondent."[122]

[107] In *Hickman*, the Supreme Court of Canada noted that varying degrees of proof may apply in order to discharge a burden of proof. According to the test in *Hickman*, an appellant may meet its burden, at least initially, by putting forward a *prima facie* case.

[108] However, the making of a *prima facie* case does not operate to "shift" a *legal* burden, as Rona appears to argue. The *Customs Act* imposes the legal burden on an appellant to demonstrate that goods have been incorrectly classified pursuant to the *Customs Tariff*.[123]

[109] A legal burden is discharged where the party bearing that onus demonstrates to a court or tribunal that the outcome that he seeks is more likely to be correct than not (balance of probabilities), based on an assessment of all of the evidence that has been tendered.[124]

[110] However, when deciding whether a party bearing the legal burden has discharged it, a court or tribunal will weigh all of the evidence and relevant factors. Once the appellant tenders evidence or makes out a *prima facie* case, the respondent is presented with the opportunity to provide an answer by tendering its own evidence or making its own case. This has been variously described in the jurisprudence as a "shifting" of an evidential onus[125] or the creation of a "tactical burden"[126] which, depending on how it is dealt with, may lead to the drawing of adverse inferences when all of the evidence is considered.[127]

[111] As such, a legal burden (or onus) of proof does not literally "shift", especially where that onus is imposed by statute, as is the case for customs classification appeals brought pursuant to the

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120. Part II of the *Rules*.
121 *Danson Décor* at paras. 82-93.
122 Appellant's Brief (Exhibit AP-2018-010-08), p. 5.
123 *Customs Act*, s. 152.
124 E.g. *F.H. v. McDougall*, [2008] 3 SCR 41, at paras. 40-49; *Morrison v. The Queen*, 2018 TCC 220; *Morrison v. The Queen*, 2018 TCC 220, at paras. 65-89.
125 E.g. *Hickman* at paras. 92-95; *Eli Lilly and Co. v. Nu-Pharm Inc.*, 1996 CanLII 4073 (FCA), [1997] 1 FC 3; *House v. Canada*, 2011 FCA 234, at paras. 30-31.
126 *Snell v. Farrell*, [1990] 2 SCR 311 [*Snell*], at para. 32.
127 *Ibid.*

Act.[128] However, if the appellant has raised evidence or issues that have gone unanswered by the respondent, this will have a bearing on the determination of whether the legal burden has been discharged or not.

[112] The Tribunal has considered the evidence and arguments marshalled by Rona in support of its contention that the bath screens should be classified under either heading 70.07 or heading 70.13. Upon weighing the entire record, the Tribunal finds that Rona's case has been answered by the CBSA. The Tribunal has not been persuaded, on a balance of probabilities, that the bath screens have been erroneously classified under heading 70.20. As such, Rona has not discharged the legal burden to show incorrect classification.

[113] The analysis underpinning this conclusion is set forth below.

Statutory Framework

[114] Goods imported into Canada are subject to import tariffs. The tariff rate varies from product to product and is determined with reference to a classification system for goods, as prescribed by the *Customs Tariff*.

[115] The *Customs Tariff* also implements Canada's obligations under the International Convention on the Harmonized Commodity Description and Coding System, which seeks a rational and harmonious system for the classification of internationally traded goods and commodities. As such, the classification defined by the *Customs Tariff* is premised on the Harmonized Commodity Description and Coding System (the Harmonized System).[129]

[116] The Harmonized System provides a progressive eight-digit system for tariff classifications. The system proceeds from the general to the more specific, by way of chapters, headings, subheadings and tariff items, which is incorporated within the Schedule to the *Customs Tariff*. Each chapter within the *Customs Tariff* categorizes goods according to headings and subheadings and ultimately provides for classification pursuant to a defined tariff item. In some instances, the *Customs Tariff* may include notes which serve as a guide to the interpretation of the wording and categorization used in chapters and headings.

[117] Sections 10 and 11 of the *Customs Tariff* prescribe the analytical approach that the Tribunal must adopt when determining how goods are to be classified:

> **10 (1)** Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.
>
> **(2)** Goods shall not be classified under a tariff item that contains the phrase "within access commitment" unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act* and in compliance with the conditions of the permit.
>
> **11** In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and

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128 *Customs Act*, s. 152; *Morrison v. The Queen*, 2018 TCC 220; *Snell* at para. 32.

129 *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 4-5.

> the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

[118] The *General Rules* are intended to be applied pursuant to a sequential, hierarchical analysis of the goods, as described by the Supreme Court of Canada in *Igloo Vikski*.[130]

[119] In performing this analysis, section 11 requires that the Tribunal also consider the Explanatory Notes to the Harmonized System, as may be relevant and applicable to the goods at issue.

[120] In its notice of appeal, Rona described the goods at issue as being "tempered glass screen imported unassembled with its jambs, channels and hardware. It is used to equip existing bath and is intended to keep water from splashing out. The screen door swivels on pivot for better access to the bath."[131]

[121] It was undisputed that the goods are aptly described as "bath screens" and are sold as such.

[122] The Tribunal must assess the goods, for classification purposes, as of the date of importation into Canada.[132] At the time of importation, the bath screens are unassembled and are imported in the form of a kit containing all of the parts needed to assemble and install the product on a bathtub.

[123] The parties agree that the bath screens should be classified within one of the headings of Chapter 70 – "Glass and Glassware".[133]

[124] The Tribunal has considered the notes to Chapter 70. They define some specific exclusions from Chapter 70 (e.g. optical fibers, lamps, toys), none of which are relevant to the goods at issue or the potentially relevant headings. The notes also exclude goods made of glass that are more specifically covered by other headings of the tariff nomenclature.

[125] The Tribunal noted that a product otherwise identical to the bath screen at issue but made instead of a clear acrylic plastic or similar material (rather than glass) could serve the same operative function, yet be classified in a different part of the *Customs Tariff*. The parties concurred. The driving factor here is the primary constituent material of the good (glass) as opposed to their use or function.[134]

[126] Having reviewed the *Customs Tariff*, the Tribunal agrees with the parties that the only chapter relevant to the bath screens is Chapter 70. At issue is whether the bath screens should be classified under heading 70.07 or alternatively 70.13 , as argued by Rona, or under the residual heading of 70.20, as argued by the CBSA.

[127] In considering the headings within Chapter 70, the Tribunal must decide whether the goods can be classified according to Rule 1 of the *General Rules*. This requires an assessment of the terms

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130 *Igloo Vikski* at paras. 4-8.

131 Notice of Appeal (Exhibit AP-2018-010-01), p. 6.

132. *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21; *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012), AP-2010-006 (CITT) at para. 22.

133 Appellant's Brief (Exhibit AP-2018-010-08), p. 5, 9; Respondent's Brief (Exhibit AP-2018-010-10A), p. 11.

134 *Transcript of Public Hearing*, p. 109-110.

used in relevant headings, together with a consideration of any relevant section or chapter notes in the *Customs Tariff*. If the Tribunal is not satisfied that the goods can be properly classified at the heading level using Rule 1 of the *General Rules*, then subsequent rules must be considered and applied.

Heading 70.07

[128] Heading 70.07 covers "safety glass, consisting of toughened (tempered) or laminated glass".

[129] Explanatory notes (A) to heading 70.07 provide that toughened (tempered) glass is:

> (1) Glass obtained by reheating pieces of glass until they are soft but not soft enough to lose their shape. The glass is then cooled rapidly by appropriate processes (thermal-toughened glass).
>
> (2) Glass whose strength, durability and flexibility have been substantially increased by a complex physical-chemical treatment (e.g., ion-exchange) which may include a modification of the surface structure (commonly known as "chemically toughened glass").
>
> This glass cannot be worked after manufacture because of the internal stresses set up by the processing and is therefore always produced in the shapes and sizes required before tempering.
>
> . . .
>
> A characteristic of toughened safety glass is that under the effect of shock it breaks into small pieces without sharp edges or even disintegrates, thus reducing the danger of injury from flying fragments.

[130] Rona relies on the *Glass Doors and Enclosures Regulations*, apparently to advance the proposition that the goods at issue are "safety glass" within the meaning of heading 70.07.

[131] The *Glass Doors and Enclosures Regulations* are enacted pursuant to the *Canada Consumer Product Safety Act*[135]and define regulatory standards for safety glass products sold in Canada. In the absence of evidence to the contrary, and since good faith is *prima facie* presumed at law as a general principle,[136] the Tribunal is thus prepared to accept, for the sole purpose of considering Rona's argument, that the goods at issue meet the criteria of the *Glass Doors and Enclosures Regulations*. Even so, this does not assist Rona on this appeal.

[132] Although both the *Customs Act* and *Canada Consumer Product Safety Act* are federal statutes, they are enacted to achieve different legislative purposes – taxation with respect to the former and consumer safety and protection with respect to the latter. As such, the statutes are not in *pari materia*,[137] so the provisions of the *Glass Doors and Enclosures Regulations* are not useful in assisting the Tribunal with interpretation of the tariff provisions in dispute.

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135 S.C. 2010, c. 21; Appellant's Brief (Exhibit AP-2018-010-08), p. 127.

136 E.g. *Monit International Inc. v. Canada*, 2004 FC 75, at para. 82; *Guido Berlucchi & C. S.r.l.'s v. Brouillette Kosie Prince*, 2007 FC 245, at para. 52; *Charron v. The Queen*, 2009 TCC 290, at para. 34.

137 E.g. *Toronto Real Estate Board v. Canada (National Revenue)*, 1982 CanLii 2859, at para. 7; *Shaklee Canada Inc. v. Canada (National Revenue)*, 1990 CanLii 3912 (CA CITT).

[133] The Tribunal is nonetheless satisfied, on the evidence, that the glass component of the bath screens is "safety glass". Mr. Corcos confirmed that the goods at issue are made of safety glass and that tempered glass is a type of safety glass. The use of tempered glass adds strength and reduces the risk of injury, should the glass break or shatter.[138] His evidence on this point was undisputed.

[134] In addition to safety glass, the bath screens also comprise additional components, namely, other parts and hardware required for assembly and installation.[139] These facts are agreed upon.

[135] The first issue is whether the relative predominance of the safety glass, in terms of product composition and function, enables the bath screens to be *prima facie* classified within heading 70.07, upon application of Rule 1.

[136] The Tribunal finds that the bath screens are not described by heading 70.07. The heading is expressed to cover "safety glass, consisting of toughened (tempered) or laminated glass". On a purposive and contextual reading, the use of the wording "consisting of" in the heading (as opposed to open-ended language, such as "comprising" or "including") defines a comprehensive and *closed* list. Safety glass is *either* toughened (tempered) *or* laminated glass.

[137] It is significant that the accompanying notes discuss the glass in terms of the processes used to manufacture the glass or the physical properties of the glass that has been so manufactured.

[138] The Tribunal agrees with the CBSA that heading 70.07 is thus limited to a *material* (safety glass) and does not extend to a finished article including that material, such as the bath screens at issue. As the bath screens have other components (installation hardware), the goods are consequently not described by the terms of heading 70.07.

[139] Rona has essentially argued that the installation hardware is a minor and peripheral aspect of the goods, which consequently does not affect or detract from the goods being, in essence, "safety glass".

[140] The hardware does represent a relatively small aspect of the product as sold, in terms of overall size and weight, as compared with the safety glass components. Notwithstanding, without the hardware, the bath screen would not be functional. The product being sold is not a mere aggregation. Rather, it is a *combination* of parts that co-operate to define, when assembled, a new article having an overall structure and functional purpose that is very different from the parts, taken either individually, or as an unassembled compilation of parts. Unless the bath screen is assembled and mounted on the bath tub using the hardware, the product cannot be used for the purpose for which it is purchased – i.e. keeping water from splashing out from the bathtub enclosure.

[141] The above conclusions of the Tribunal are consistent with, or complement, the reasons set forth in *OVE Décors* and the WCO classification opinions, as referred to in *OVE Décors* and included within Annex 4 to the CBSA's Brief.[140]

[142] Accordingly, on application of Rule 1, the bath screens are not properly classified in heading 70.07.

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138 *Transcript of Public Hearing*, p. 31.

139 *Ibid.*

140 *OVE Décors*; WCO classification opinion on subheading 7020.00; Respondent's Brief (Exhibit AP-2018-010-10A), p. 86-90.

Heading 70.13

[143] Heading 70.13 covers "glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 70.10 or 70.18)".

[144] The relevant explanatory notes to heading 70.13 provide as follows:

> This heading covers the following types of articles, most of which are obtained by pressing or blowing in moulds :
>
> (1) **Table or kitchen glassware**, e.g. drinking glasses, goblets, tankards, decanters, infants' feeding bottles, pitchers, jugs, plates, salad bowls, sugar-bowls, sauce-boats, fruit-stands, cake-stands, hors-d'oeuvres dishes, bowls, basins; egg-cups, butter dishes, oil or vinegar cruets, dishes (for serving, cooking, etc.), stew-pans, casseroles, trays, salt cellars, sugar sifters, knife-rests, mixers, table hand bells, coffee-pots and coffee-filters, sweetmeat boxes, graduated kitchenware, plate warmers, table mats, certain parts of domestic churns, cups for coffee-mills, cheese dishes, lemon squeezers, ice-buckets.
>
> (2) **Toilet articles**, such as soap-dishes, sponge-baskets, liquid soap distributors, hooks and rails (for towels, etc.), powder bowls, perfume bottles, parts of toilet sprays (**other than** heads) and tooth-brush holders.
>
> (3) **Office glassware**, such as paperweights, inkstands and inkwells, book ends, containers for pins, pen-trays and ashtrays.
>
> (4) **Glassware for indoor decoration** and other glassware (including that for churches and the like), such as vases, ornamental fruit bowls, statuettes, fancy articles (animals, flowers, foliage, fruit, etc.), table-centres, (**other than** those of **heading 70.09**), aquaria, incense burners, etc., and souvenirs bearing views.
>
> These articles may be e.g., of ordinary glass, lead crystal, glass having a low coefficient of expansion (e.g., borosilicate glass) or of glass ceramics (the latter two in particular, for kitchen glassware). They may also be colourless, coloured or of flashed glass, and may be cut, frosted, etched or engrave, or otherwise decorated, or of plated glass (for example, certain trays fitted with handles). Table-centres consisting of a simple mirror are, however, **excluded** (see Explanatory Note to **heading 70.09**).
>
> On the other hand, this heading covers decorative articles which are in the form of mirrors, but cannot be used as mirrors due to the presence of printed illustrations; otherwise they are classified in **heading 70.09**.
>
> Articles of glass combined with other materials (base metal, wood, etc.), are classified in this heading **only** if the glass gives the whole the character of glass articles. Precious metal or metal clad with precious metal may be present, **as minor trimmings only**; articles in which such metals constitute more than mere trimmings are excluded (**heading 71.14**).

[145] Additional notes define exclusions to heading 70.13, none of which are relevant to the goods at issue in this case.

[146] The parties agree that "glassware" means "article of glass".[141] Chapter 70 covers both "glass" and "glassware". Although these terms may overlap to some extent, they are not synonymous. Although "glassware" will include "glass", "glass" is not necessarily "glassware".

[147] The scope of heading 70.13 is not confined to "glassware" *per se*, or even "glassware used for table, kitchen, toilet, office, indoor decoration or similar purposes". Rather, the heading prescribes that the glassware is "of a kind" used for the foregoing purposes.

[148] Rona lists five conditions for inclusion under heading 70.13.[142] The second of these, as described by Rona, is that the goods are obtained mainly by pressing (into a mold) or blowing. The description of safety glass manufacture, as described by Mr. Corcos,[143] does not include reference to either "pressing" or "blowing". Rona's written submissions state that the safety glass is obtained by a process described as "floating",[144] but this expression was neither used nor explained by Mr. Corcos' testimony referable to safety glass manufacture. As such, there is an evidential gap as to whether, as a scientific or technical question, "pressing" or "blowing" encompasses "floating" or other processes for the manufacture of safety glass.

[149] The Tribunal accepts Rona's submission that heading 70.13 is not limited to glassware obtained by pressing or blowing, having regard to use of the qualifier "mainly". As such, there may be glassware produced by some other method that could fall within the scope of heading 70.13. However, that glassware would need to have characteristics that would deem it to be glassware *of a kind* suitable for the types of end uses listed in heading 70.13. Those characteristics would presumably be attributable to the process used to produce that glassware, but there is no evidence on point. If *any* type of glassware, regardless of characteristics or method of production, was being contemplated, then the words "of a kind" would be redundant.

[150] As such, classification within heading 70.13 depends on *both* the end use (i.e. table, kitchen, toilet, office, indoor decoration) and some inherent property of the glassware that makes it compatible ("of a kind") for the listed end uses.

[151] The explanatory notes provide examples of glass that are used to make glassware "of a kind" for kitchen, table, toilet, office or decorative purposes. These examples comprise ordinary glass, lead crystal, and glass having a low co-efficient of expansion (i.e. borosilicate glass) or of glass ceramics.

[152] The types of glass deemed to be suitable for the production of glassware "of a kind" for the types of end uses described by the explanatory notes does not include "safety glass". Likewise, the list does not categorically exclude "safety glass", as the wording used in the applicable is open-ended and illustrative.

[153] However, the fact that safety glass is not excluded also does not mean that it should be deemed to be included, by implication alone. The test is not whether the "glassware" could be used for the end uses listed by the note (i.e. glassware for . . .) but rather whether the glassware has some inherent characteristic or property consistent with the listed examples that render it "of a kind" that is

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141 *Transcript of Public Hearing*, p. 94, 100, 114-115.
142 Appellant's Brief (Exhibit AP-2018-010-08), p. 13-15.
143 Corcos Report (Exhibit AP-2018-010-16), p. 3, para. 3.
144 Appellant's Brief (Exhibit AP-2018-010-08), p. 14, paras. 49-50.

used for the purposes defined by the explanatory note. In this regard, there is no evidence upon which the Tribunal could make such a finding.

[154] The evidence does not compare the properties of safety glass with the types of glass exemplified in the explanatory note used to make glassware "of a kind" for the listed uses. Nor is there any evidence that would tend to prove that safety glass (a material) is inherently suitable for, and could be used for the practical and cost-effective manufacture of glassware intended for kitchen/table, toilet, office or decorative purposes. Any finding to that effect would entail speculation.

[155] The evidence demonstrates that the bath screens are marketed and sold in the "bathroom" section of Rona's stores and website, but is less clear concerning any marketing subcategories.

[156] Both Mr. Corcos[145] and Mr. Morin[146] were questioned at the hearing concerning the presentation and categorization of various products under the heading "Bathroom" and subheadings as they appeared on printouts of Rona's website and that of a competitor (Lowe's). Mr. Morin conceded that Rona's website features at least three categories of bathroom products – bathtubs, bathroom accessories, and bathtub and shower accessories.[147]

[157] The Tribunal assigns lesser weight to the evidence which purports to show various bathroom products presented or listed under various categories on the websites maintained by Rona and its competitor, Lowe's. There was some ambiguity as to whether the website content remains constant or whether its depiction and categorization of products is subject to change. Although both witnesses appeared to be somewhat familiar with the websites (as reflected by the printouts shown to them during oral testimony), it was admitted that the printouts reflected the current website content and that it was possible that the website content could have been different on the date that the goods were imported into Canada, which is the relevant date for resolving disputed tariff classifications for customs purposes.[148]

[158] The CBSA argues that the bath screens should not be grouped, by analogy, with the "toilet articles" listed in the explanatory note to heading 70.13. Although it is conceded that the list is representative and open-ended, the CBSA asserts that the implicit addition of bath screens to that list is precluded by the *ejusdem generis* rule.

[159] The *ejusdem generis* rules comes into play where a general term *follows* a list of specific terms. As summarized by Professor Cote in *The Interpretation of Legislation in Canada*, at page 315:

> The *ejusdem generis* rule means that a generic or collective term that completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning.[149]

[160] In this case, the general term ("toilet articles") *precedes* the list of specific items. In such circumstances, the *ejusdem generis* rule typically does not apply.[150]

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145 *Transcript of Public Hearing*, p. 44-49.
146 *Transcript of Public Hearing*, p 56, 58-59, 66-71.
147 *Transcript of Public Hearing*, p. 69.
148 *Transcript of Public Hearing*, p. 79-81.
149 Quoted in *Bruneau v. Universal Coach Line Ltd.*, 2017 FC 541, in turn quoting *Montréal Port Authority v. Montréal (City)*, 2008 FCA 278.
150 *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029.

[161] For its part, Rona contends that the bath screens fall within the scope of "toilet articles" because the bath screens are an accessory to a bathtub, which is located in a bathroom. In most instances, a toilet will also be located with the bathtub in the same room (bathroom). Rona submits that the listed examples of "toilet articles" are all items that would be found or used in a bathroom.

[162] In essence, Rona is transposing the words "toilet" and "bathroom". The articles listed by the explanatory notes are not characterized as "bathroom articles". They are described as "toilet articles". Other portions of the explanatory note use specific room names ("Kitchen", "Office") to describe articles intended for use in particular rooms or contexts.

[163] Statutory language should be contextually construed in accordance with the meaning of the words as used in common language.[151] In considering the meaning of contested terminology used in the *Customs Tariff* or the explanatory notes, the Tribunal should thus adopt an interpretation that best suits the text of the tariff nomenclature and most accurately represents the common dictionary definitions of the term relevant to the goods at issue.[152]

[164] Neither party placed a dictionary definition of the word "toilet" before the Tribunal. Nonetheless, the Tribunal must undertake a contextual interpretation of the word "toilet" as used in the explanatory note, in order to inform its analysis as to whether the bath screens are properly classifiable under heading 70.13.

[165] Courts and tribunals may take judicial notice of the common dictionary meaning of words. As noted by the Supreme Court of Canada in *R. v. Krymowski*:

> 22 A court may accept without the requirement of proof facts that are either "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32, at para. 48. The dictionary meaning of words may fall within the latter category: see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at § 9.13 and § 19.22.[153]

[166] The term "toilet" is a commonly used word. Its meaning is generally understood and easily verifiable by resort to dictionaries. The Merriam Dictionary lists three primary meanings for the noun "toilet":

> – a fixture that consists usually of a water-flushed bowl and seat and is used for defecation and urination
>
> – bathroom, lavatory sense
>
> – the act or process of dressing and grooming oneself[154]

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151 *Pfizer Co. Ltd. v. Deputy Minister of National Revenue*, [1977] 1 SCR 456 at p. 460; *Hills v. Canada (Attorney General)*, [1988] 1 SCR 513 at para. 74.

152 E.g. see *LES INDUSTRIES TOUCH INC.*, 2017 CanLII 149227 (CA CITT) at para. 37.

153 E.g. *R. v. Krymowski*, [2005] 1 S.C.R. 101.

154 https://www.merriam-webster.com/dictionary/toilet.

[167] Indeed, during testimony at the oral hearing, both of Rona's witnesses (Mr. Corcos and Mr. Morin) referred[155] to a "toilet" as a bathroom fixture sold at retail as a fashion plumbing item.

[168] Rona's argument essentially rested on the premise that "toilet" is synonymous with "bathroom", being a room in a home that would include a bathtub and a toilet as fixtures. According to Rona, the use of the adjective "toilet" in the explanatory note indicates that the listed articles would be placed or used near or in the same room as the toilet, namely, the bathroom. As the bath screens are mounted to a bathtub, which is a fixture found in proximity to another fixture (toilet), Rona's argument comes full circle – the bath screens at issue should be grouped with the toilet articles listed in the explanatory note, with a consequential classification under heading 70.13.

[169] The Tribunal notes that although some rooms may contain both toilet and bathtub fixtures, there may be other configurations where the number and type of fixtures in a "bathroom" may be different (i.e. toilet/sink/shower; toilet/sink) and where no bathtub is present. Indeed, a range of combinations and permutations seems implicit from the term "fashion plumbing" which is used to describe items that are not "behind the wall". In this regard, the Tribunal further notes that Rona's evidence includes passages from the Quebec Construction Code pertaining to plumbing. A portion of that document comprises a schematic diagram which appears to describe installation specifications for a toilet in a "salle de toilette" (as opposed to "salle de bain").[156]

[170] Although the word "toilet" defines a plumbing fixture typically found in a bathroom, and may be used as a synonym for "bathroom" or "lavatory", a third meaning is referable to acts of personal care and grooming. This latter meaning is particularly suggested where the word "toilet" is used as an adjective (as is the case here), as opposed to a noun.

[171] In argument, counsel for the CBSA referred to the French language version of the relevant portion of the explanatory notes. The subcategory descriptor "toilet articles" is defined in French as "Les objets pour le service de la toilette".[157] The Tribunal finds that the French language version tends to support the interpretation that the "toilet articles" listed in the explanatory note are most closely referable to toiletry items for personal use and grooming. None of the listed items are associated with the word "toilet" when it is used to designate a bathroom plumbing fixture of that name.

[172] Where there is an apparent discrepancy or ambiguity between the English and French versions of statutory language, it is preferable to adopt a common meaning where possible. Otherwise, the version having the more restricted or limited meaning is to be preferred.[158] The Tribunal considers that these principles provide useful guidance when interpreting language of the explanatory notes.

[173] On a contextual reading, the French language wording "objets pour le service de la toilette" have a more consistent and shared meaning with the English version where the latter is interpreted to mean "articles used for personal grooming" as opposed to "articles which may be found in a bathroom". Although showering is typically included as part of personal care and grooming, the physical characteristics of the bath screens are distinguishable from those listed in the explanatory

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155 *Transcript of Public Hearing*, p. 42, 64
156 Appellant's Brief (Exhibit AP-2018-010-08), p. 341
157 Respondent's Brief (Exhibit AP-2018-010-10A), p. 80; *Transcript of Public Hearing*, p. 118
158 Schreiber v. Canada (Attorney General), 2002 SCC 6 @ para 56

note. Once installed, the bath screen becomes an extension of the bathtub and becomes a semi-permanent, if not permanent fixture within the bathroom.

[174] As such, the Tribunal agrees with the CBSA's argument that the items of glassware being described are more aptly characterized as small, light articles. In essence, they are accessories to, or used in conjunction with, toiletry items (i.e. soaps, perfumes). Although some of these items would be used or placed within a bathroom, some could be moved or used or in a setting other than a bathroom.

[175] Accordingly, on an application of Rules 1 and 2(a), the Tribunal concludes that the bath screens cannot be classified under heading 70.13.

Heading 70.20

[176] As noted above, heading 70.20 is residual. It covers "other articles of glass".

[177] Rona submitted that heading 70.20 did not apply because the bath screens were otherwise classifiable under other headings (i.e. 70.07 and 70.13). As the Tribunal has concluded that the bath screens cannot be classified under either heading 70.07 or 70.13, the argument is moot.

[178] There appears to be no disagreement between the parties with respect to subheadings and tariff items within the heading under heading 70.20. Having determined that heading 70.20 is the correct one, the Tribunal finds that the bath screens are correctly classified under tariff item 7020.00.90.

DECISION

1. For the foregoing reasons, the appeal is dismissed

Susan D. Beaubien

Susan D. Beaubien
Presiding Member