Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-047

Tri-Pac Inc.

v.

President of the Canada Border Services Agency

Decision issued
Wednesday, January 23, 2019

Reasons issued
Monday, February 4, 2019

Canada

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IN THE MATTER OF an appeal heard on September 25, 2018, 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 September 12, 2017, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

TRI-PAC INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

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

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 25, 2018
Tribunal Panel:	Jean Bédard, Q.C., Presiding Member
Support Staff:	Sabrina Ottoni, Counsel Caroline Morgan, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Tri-Pac Inc.	Victor Q. Truong Behnam A. Borojeni
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	David Aaron

WITNESSES:

David F. Wood President David F. Wood Consulting Ltd.	Alex Taylor Operation Manager Tri-Pac Inc.

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STATEMENT OF REASONS

BACKGROUND

1. This appeal was filed by Tri-Pac Inc. (Tri-Pac) on December 8, 2017, pursuant to subsection 67(1) of the *Customs Act*,[1] from a decision made on September 12, 2017, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether the goods in issue are entitled to duty-free treatment under tariff item No. 9908.00.00 of the schedule to the *Customs Tariff*[2] as articles for use in either (1) utility vehicles of heading No. 87.03 and lorries (trucks) or shuttle cars of heading No. 87.04, for use in underground mining or in developing mineral deposits, (2) loading machinery for loading minerals directly from the working face of the mine, or (3) extracting machinery for extracting minerals directly from the working face of a mine.

PROCEDURAL HISTORY

3. On January 20, 2015, Tri-Pac requested an advanced tariff ruling for the goods in issue. The CBSA responded to Tri-Pac's request on October 15, 2015, ruling that the goods in issue are classified under tariff item No. 6305.32.00 and that based on the information provided, the goods in issue are not eligible for the benefits of tariff item No. 9908.00.00.

4. On January 11, 2016, Tri-Pac filed a request for a re-determination pursuant to subsection 60(2) of the *Act*, arguing that the goods in issue should qualify for the benefits of tariff item No. 9908.00.00.

5. On September 12, 2017, the President of the CBSA issued a decision under subsection 60(4) of the *Act* confirming the original advance ruling that there is no eligibility for the goods in issue under tariff item No. 9908.00.00.

6. Tri-Pac filed the present appeal on December 8, 2017, which was heard on September 25, 2018.

DESCRIPTION OF THE GOODS IN ISSUE

7. The goods in issue consist of white, flexible, cube-shaped bags measuring approximately 91 cm on each side, which have been assembled by sewing together various pieces of woven textile fabrics. There are two circular openings in the bag, one on the top and one on the bottom, to which additional textile fabric is sewn creating a tubular shape with a closure at the end. There are also four looping straps at the top by which the goods in issue can be hoisted. The goods in issue are designed to hold 1 000 kilograms of "shotcrete", a dry, flowable substance, which is emptied into a machine (shotcrete machine) via the tube at the bottom of the bag; the goods in issue need to be hoisted over the shotcrete machine to do so. The shotcrete machine combines the contents of the goods in issue with water and sprays the mix over a surface, such as a rock face to keep it from collapsing.

8. The parties agree that the goods in issue are classified under tariff item No. 6305.32.00.

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997. c. 36.

WITNESSES AND EVIDENCE

9. Tri-Pac called two witnesses: Mr. Alexander Taylor and Mr. David Wood. Mr. Taylor is responsible for the business operations and finances of Tri-Pac. Mr. Wood is a professional engineer in the provinces of Ontario and British Columbia. Tri-Pac sought to qualify Mr. Wood as an expert witness in the area of mining engineering, including rock support design, and application and design of shotcrete structures. At the hearing, the Tribunal qualified Mr. Wood as an expert in rock engineering with experience in shotcrete in various applications, including the mining environment.

10. The CBSA did not call any witnesses.

Preliminary matter—admissibility of expert report

11. The CBSA objected to the admissibility of Mr. Wood's written expert report, submitting that extensive portions of the report provided Mr. Wood's interpretation of provisions of the *Customs Tariff*, an area in which Mr. Wood has no expertise. The CBSA argued that other paragraphs found in the report, namely regarding the history of mining, were also outside of Mr. Wood's expertise. The CBSA therefore requested for paragraphs 1.5, 3.1 to 3. 8, 4.3, 4.4 and 4.7 to be struck from the report.

12. Expert evidence must be limited to matters within the expert's area of expertise and cannot usurp the adjudicative role of the Tribunal. It is clear that interpretation of domestic law falls within the confines of the Tribunal's role. Therefore, expert witnesses cannot assume the Tribunal's functions as experts in matters of law.

13. The Tribunal agrees that the wording in some of the paragraphs of Mr. Wood's expert report could be construed as an attempt to provide an interpretation of domestic law. Nonetheless, the Tribunal chose not to strike the above-mentioned paragraphs from the expert report, but advised that the probative weight accorded to these paragraphs would be attributed in light of those remarks.

Mr. Wood's testimony

14. Mr. Wood testified on the application of shotcrete structures in underground mining and stated that application of shotcrete is an integral part of underground mining excavations.

15. He explained that shotcrete is a means of placing and compacting concrete for the mining process and specified it to be a "blend of fine aggregates, sand, cement, very often silica fume, which is an admixture, as well as other water reducing agents, accelerators, steel fibres, et cetera . . . that go into the mix but it is being pumped hydraulically and then pneumatically projected onto a receiving surface where it is compacted."

16. Mr. Wood described mining as the process of removing valuable materials from the ground, in a cyclical process (or stages) which includes, on the one hand, the development of the tunnel, and on the other hand, the act of removing the ore itself and other valuable products. In an underground mining setting, including either metal or non-metal environments, shotcrete is used as a tool in the mining process.

17. Mr. Wood stated that in normal circumstances, shotcrete is applied to the roof of the mine opening. However, when conditions are poor in the working face of a mine, shotcrete can be applied to provide support to prevent rock fall from occurring. Mr. Wood clarified that "if the face conditions are very bad, shotcrete will be placed on the face that will then be broken away next time. It would normally be applied to

the roof of the opening and then after the muck has been taken out, there's also a possibility of drilling and installing rock bolts together with shotcrete."[3]

18. Mr. Wood further explained how access through most Canadian hard rock mines is done via a shaft through which materials are delivered underground in sized packages and then projected through a nozzle onto a receiving surface. Usually, the length of the nozzle and the hose connected to it is restricted to a few hundred metres. This is the case for the nozzles attached to the goods in issue.

19. At this point, the goods in issue are suspended from the machine to allow the underneath opening to fit onto the hopper of the shotcrete equipment. The processing of the shotcrete materials would then continue right through the placement of it on the wall of the tunnel.

20. Whether the goods in issue are part of a stationary machine or placed on a separate piece of mobile equipment, a lifting device is required to carry the goods in issue in and out of the mining area. The shotcrete machine could not function without the goods in issue. Mr. Wood also specified that the forklifts used for lifting and transporting the goods in issue to where the machinery is located (in order to place the shotcrete) do not have any unique attributes.

Mr. Taylor's testimony

21. Mr. Taylor explained how Tri-Pac has been selling the goods in issue over the past decade exclusively to King's (KMP Industries Ltd.) plant in Dowling, Ontario. King buys the goods in issue solely for the purposes of underground mining, specifically the transportation of cement materials known as shotcrete. The goods in issue are thus strictly used for the mines in and around the Dowling plant for the purposes of supplying shotcrete.

22. Mr. Taylor clarified that the goods in issue are mainly manufactured by hand to ensure the required strength and reinforcements for the prevention of blowouts.

23. Mr. Taylor also described how the goods in issue were not designed to be used in industries other than mining. He stipulated that nothing precludes the shotcrete bags from being used in such other industries. However, to his view, the likelihood if this occurring would be very low since the goods in issue are twice as more expensive than any other comparable "tote bag".

Tribunal's finding on credibility

24. The Tribunal found both the evidence from Mr. Wood's and Mr. Taylor's respective testimonies to be truthful and reliable. The Tribunal has therefore accepted the following findings of fact:

- While the goods in issue (the bags) can theoretically be used in a context other than mining, they are specifically designed for the mining industry and are priced accordingly.
- The goods in issue can either be attached to a stationary machine or to a mobile machine.
- The shotcrete machinery could not function without the bag of shotcrete, whether or not it is attached directly to the machine.

3. *Transcript of Public Hearing* at 48; Expert Witness Report of David F. Wood, Exhibit AP-2017-047-12 at paras. 4.2-4.4, Vol. 1A.

- The length of the nozzle and the hose connected to the goods in issue is normally restricted to a few hundred metres and could also be considerably less.
- Shotcrete is mainly used for the roof or crown of the mine. There are instances, however, where shotcrete is used on the face of the mine. In these instances, the face hardened by the shotcrete will be broken as the mining operations continue and the face of the mine keeps moving to a different location.

LEGAL FRAMEWORK

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

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

27. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

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

29. Chapter 99, which includes tariff item No. 9908.00.00, provides special classification provisions that allow certain goods to be imported into Canada duty-free. The provisions of this chapter are not standardized at the international level. As none of the headings of Chapter 99 are divided at the subheading or tariff item level, the Tribunal need only consider, as the circumstances may require, Rules 1 through 5 of the *General Rules* in determining whether goods may be classified in that chapter.

30. In customs appeals before the Tribunal, by virtue of subsection 152(3) of the *Act*, the appellant bears the onus of establishing that the CBSA erred in its ruling. Here, Tri-Pac must show on a balance of probabilities that the goods in issue should qualify for the benefits provided under tariff item No. 9908.00.00.

POSITIONS OF THE PARTIES

Tri-Pac

31. Tri-Pac refers the Tribunal to *Sandvik*[4] and *SMS Equipment*[5], cases in which the interpretation and application of tariff item No. 9908.00.00 were assessed by the Tribunal and the Federal Court of Appeal

4. *Sandvik Tamrock Canada Ltd. v. Canada (Deputy Minister of National Revenue)*, 2001 FCA 340 (CanLII) [*Sandvik*].

(FCA). Of the five distinct categories of which tariff item No. 9908.00.00 consists according to the Tribunal and the FCA, Tri-Pac argues that the goods in issue comply with the requirements of three of those categories:

> (a) the goods in issue are articles for use in utility vehicles of heading No. 87.03 or lorries and shuttle cars of heading No. 87.04 for use in underground mining or in developing mineral deposits (Category 2);
>
> (b) the goods in issue are articles for use in loading machinery for loading minerals directly from the working face of a mine (Category 4); and
>
> (c) the goods in issue are articles for use in extracting machinery for extracting minerals directly from the working face of a mine (Category 5).

32. Tri-Pac does not specifically address how the goods in issue are articles for use in utility vehicles, lorries and shuttle cars of heading No. 87.03 and heading No. 87.04 for use in underground mining or in developing mineral deposits.

33. Tri-Pac submits that the goods in issue are for use in a variety of loading machinery. The goods in issue are used in shotcrete machinery in underground mining projects during the tunnelling and extraction phases, shotcrete being the "complete material" for excavation stabilization. Tri-Pac explains that the goods in issue are loaded into the shotcrete machinery by loading machinery which is used for loading minerals at the working face of the mine. Tri-Pac relies on the definitions of "loading machinery" and "face" of a mine found in the *Dictionary of Mining, Mineral, and Related Terms* to support its argument as to how the terms used in tariff item No. 9908.00.00 should be interpreted.

34. Tri-Pac submits that the shotcrete machinery in which the goods in issue are used is extracting machinery within the meaning of tariff item No. 9908.00.00. Tri-Pac argues that the term "extracting machinery" should be interpreted broadly and claims that this argument is supported by the FCA's decision in *Sandvik* and by the Tribunal's in *SMS Equipment*. The *Dictionary of Mining, Mineral, and Related Terms* defines 'extraction' as "the process of mining and removal of coal or ore from a mine . . . " and Tri-Pac submits that shotcrete machinery used in underground mining performs an integral function in the extraction process as it prevents the rock mass surrounding the excavation from collapsing.

35. Finally, Tri-Pac contends that the broader wording of Tariff Code 1344,[6] the predecessor to tariff item No. 9908.00.00, indicates Parliament's intention that tariff item No. 9908.00.00, and the meaning of "extracting" in particular, be broadly and inclusively interpreted.

36. It is to be noted that throughout the hearing, Tri-Pac mainly relied upon its argument of satisfying the Category 5 requirements, namely, how the goods in issue are articles for use in extracting machinery for extracting minerals directly from the working face of a mine.

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5. *SMS Equipment Inc. v. President of the Canada Border Services Agency* (28 March 2014), AP-2013-006 (CITT) [*SMS Equipment*].
6. "The following to be employed in mining, quarrying or developing mineral deposits: Lorries (trucks) and shuttle cars of heading No. 87.04 and utility vehicle of heading 87.03 (all the foregoing for use underground); articles for use in the foregoing (excluding tires and tubes)."

CBSA

37. The CBSA submits that the goods in issue cannot benefit from beneficial treatment under tariff item No. 9908.00.00, as they do not meet any of the required conditions for classification under that tariff item.

38. The CBSA submits that the goods in issue are not used with vehicles classified under heading No. 87.03 or heading No. 87.04. Heading No. 87.03 refers to "[m]otor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars". However, neither the lifting or handling machines used for lifting the goods in issue, nor the machine used to apply the contents of the goods in issue to the surface of the mine, are designed for the transport of persons. For its part, heading No. 87.04 covers "[m]otor vehicles for the transport of goods". The CBSA submits that the lifting/handling machinery used to suspend the goods in issue over the shotcrete machine are forklift trucks classified under heading No. 84.27 or a mechanical arm attached to the shotcrete machine itself, which is classified under heading No. 84.28.

39. The CBSA further argues that the machinery used to apply the shotcrete also cannot be classified under heading No. 87.04. The stationary shotcrete machinery does not meet the description of motor vehicles and instead is classified under heading No. 84.13 based on the terms of that heading and the relevant explanatory notes. For its part, the mobile shotcrete machinery cannot be classified under heading No. 87.04 because it does not transport, but rather prepares and applies, the shotcrete. Based on the explanatory notes of heading No. 87.05, the CBSA submits that the mobile shotcrete machinery meets the description of a concrete mixer lorry of heading No. 87.05 and is thus classified under that heading.

40. Regarding whether the goods in issue are articles for use in loading machinery for loading minerals directly from the surface of a mine, the CBSA claims that there is no evidence that shotcrete can be classified as a mineral, nor is there any evidence that it is loaded from the surface of the mine. On the contrary, the shotcrete is applied to the walls or ceiling of the mine.

41. Finally, the CBSA contends that the goods in issue are not articles for use in extracting machinery for extracting minerals directly from the surface of a mine. The CBSA concedes that the goods in issue are of assistance in the mining process as a whole but argues that the wording in tariff item No. 9908.00.00 refers to a more specific process: the "extraction process".

42. The CBSA argues that the present case should be distinguished from *Sandvik* and *SMS Equipment*, which are cited by Tri-Pac to support its argument that "extraction" should be given a broad interpretation. Notably, the present case should be distinguished on the basis that there is a significant difference between the machinery with which the goods in either *Sandvik* or *SMS Equipment* were used and the machinery with which the goods in issue in the present case are used. In *Sandvik* the parties agreed that "extraction" means the process of removing ore from a mine and the steps required to isolate the mineral from the ore. The CBSA submits that Tri-Pac has submitted no evidence of the involvement of the goods in issue with either of those processes.

ANALYSIS

43. Both parties agree that the goods in issue are properly classified under tariff item No. 6305.32.00. In addition to being classified under the above-mentioned tariff item, the Tribunal must determine whether or not the subject goods are entitled to beneficial treatment under tariff item No. 9908.00.00. This tariff item has been the subject matter of a decision from the FCA in *Sandvik*.

44. Tariff item No. 9908.00 provides as follows:

> **9908.00.00** **Utility vehicles of heading 87.03 and lorries (trucks) or shuttle cars of heading 87.04, for use underground in mining or in developing mineral deposits; Articles (excluding tires and inner tubes) for use in the foregoing equipment, or for use in loading machinery for loading coal or for loading minerals directly from the working face of a mine, or for use in extracting machinery for extracting minerals directly from the working face of a mine.**

45. Chapter 99 includes special classification provisions that allow certain commercial goods to be imported into Canada with tariff relief. As Chapter 99 is not standardized, there are no classification opinions or explanatory notes from the WCO which can assist the Tribunal in interpreting tariff items found under this chapter.

46. In this context, the FCA decision in *Sandvik*, which specifically addresses tariff item No. 9908.00.00, has a critical importance in the interpretation of this tariff item. In its decision in *Sandvik*,[7] subsequently appealed to the FCA, the Tribunal broke down tariff item No. 9908.00.00 into five distinct categories, which were also adopted by the FCA:

(1) utility vehicles of heading No. 87.03 and lorries (trucks) and shuttle cars of heading No. 87.04, for use in underground mining or in developing mineral deposits;

(2) articles for use in equipment listed in (1);

(3) articles for use in loading machinery for loading coal;

(4) articles for use in loading machinery for loading minerals directly from the working face of a mine;

(5) articles for use in extracting machinery for extracting minerals directly from the working face of a mine.

47. First, the Tribunal will analyze whether the goods in issue can be classified under tariff item No. 9908.00.00 on the basis that they are articles for use in lorries (trucks) of heading No. 87.04 for use underground in mining or in developing mineral deposits (Category 2).

48. Second, it will analyze whether the goods in issue are classifiable under tariff item No. 9908.00.00 as being articles for use in extraction machinery for extracting minerals directly from the working face of a mine (Category 5).

49. If the goods in issue meet either the Category 2 or the Category 5 requirements, the goods in issue would then be classifiable under tariff item No. 9908.00.00 for duty-free importation.

50. It is to be noted that during the hearing, counsel for Tri-Pac indicated that they were no longer pursuing Category 4. In any event, the Tribunal found that no evidence was adduced to suggest that the goods in issue are for use in machinery for loading minerals (Category 4).

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7. *Sandvik Tamrock Canada Inc. v. The Deputy Minister of National Revenue* (20 June 2000), AP-99-083 (CITT) at para 30.

Category 2

51. Pursuant to Category 2, the goods in issue would need to be "articles for use in utility vehicles of heading 87.03 or lorries (trucks) and shuttle cars of heading 87.04 for use in underground mining or in developing mineral deposits" (Category 1).

52. Heading No. 87.03 covers "[m]otor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars". It is therefore not applicable. Heading No. 87.04 covers "[m]otor vehicles for the transport of goods" and is potentially relevant to this case.

53. Regarding whether or not the goods in issue are considered "for use in" lorries (trucks) of heading No. 87.04, the Tribunal highlights that the term "for use in" is defined in subsection 2(1) of the *Customs Tariff* as follows:

> ***for use in***, wherever it appears in a tariff item, in respect of goods classified in the tariff item, means that the goods must be wrought or incorporated into, or attached to, other goods referred to in that tariff item. (*devant servir dans ou devant servir à*)

54. The Tribunal notes that Chapter 87, which covers "[v]ehicles other than railway or tramway rolling stock", contains a number of headings, including heading No. 87.05, which covers "[s]pecial purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units)". Several headings are thus available under Chapter 87 to classify vehicles. Consequently, it is not because a particular vehicle is not used for the transport of persons (heading No. 87.03) that it will necessarily fall under heading No. 87.04. In other words, this is not a black-or-white dichotomy where if the goods do not fall under heading No. 87.03, they will automatically fall under heading No. 87.04, and vice-versa.

55. In order to discharge its burden of proof in this appeal, it is incumbent on Tri-Pac to provide all the evidence required to allow the Tribunal to potentially classify the spraying machine or the shotcrete machine in headings No. 87.03 or 87.04.

56. In its case brief, Tri-Pac provided pictures of machines to which the goods in issue are attached.[8] Some of them appear to be stationary.[9] There are two machines on wheels: one is described as a spraying machine[10] while the other one is described as a shotcrete machine.[11]

57. Upon review of the various pictures provided by Tri-Pac in its case brief, the Tribunal concludes that, in some instances, nothing fundamentally differentiates the stationary and mobile machines other than the presence of wheels on some of them.

58. Other machines, however, such as the MineMaster R20S and the Cybermine Spraymec 1050,[12] appear to be motor vehicles with a cab. Nothing in the documentation provided by Tri-Pac in its brief

8. Exhibit AP-2017-047-03A at pp. 32, 33 and 34, Vol. 1.
9. *Ibid.* at pp. 33 and 34.
10. *Ibid.* at p. 32.
11. *Ibid.* at p. 34.
12. *Ibid.* at p. 22.

suggests that these vehicles, or other mobile machines, are intended to transport the shotcrete or are used for that purpose.

59. Also, neither the pictures nor the accompanying description of the mobile machines indicates the purpose as being the transportation of goods. To the contrary, the pictures confirm the description that the machines are spraying (or shotcrete) machines and nothing more.

60. The Tribunal finds that Tri-Pac has failed to adduce sufficient evidence to show that the spraying or shotcrete machines with which the goods in issue are allegedly used could qualify as vehicles of headings No. 87.03 or 87.04. Consequently, it is not necessary to address whether such machines are vehicles "for use underground in mining or in developing mineral deposits".

61. As such, the Tribunal finds that the goods in issue are not for use in "utility vehicles" of heading No. 87.03 or "lorries (trucks) and shuttle cars" of heading No. 87.04.

Category 4

62. Category 4 refers to articles for use in loading machinery for loading minerals directly from the working face of a mine.

63. During the hearing, counsel for Tri-Pac indicated that they were no longer pursuing this category. In any event, there is no evidence that suggests that the goods in issue are for use in machinery for loading minerals. Accordingly, Category 4 does not apply.

Category 5

64. Pursuant to Category 5, the goods in issue would need to be articles "for use in extracting machinery for extracting minerals directly from the working face of a mine".

65. Category 5 of tariff item No. 9908.00.00 has been the subject matter of discussions by the FCA in *Sandvik* and in a subsequent decision by the Tribunal in *SMS Equipment*. In *Sandvik*, the FCA indicated that when reading the wording of the tariff item, a broad meaning must be given to the word "machinery". After reviewing various dictionary definitions of "machinery", the FCA concluded the following:

> It is apparent from these definitions that the word "machinery" in contrast with the word "machine" means a collectivity of machines, rather than a single one. The same interpretation flows from the French version of the tariff which refers to the word "machines" in the plural. It follows that the word "machinery" (or "machines") in tariff item No. 9908.00.00 cannot be construed as referring to a single machine . . . .[13]

66. Furthermore, the FCA stated the following regarding the term "extraction":

> The uncontradicted evidence before the CITT was that in the context of mining, extraction is a process and all parties were agreed that this process encompasses the removal of ore from a mine and the steps required to isolate the mineral from the ore. It follows that in the absence of some limitation to be found in the tariff item, machinery used to extract minerals in the course of that process is "extracting machinery" . . . .[14]

13. *Sandvik* at para. 24.
14. *Ibid.* at para. 14.

67. However, the FCA cautioned on the limitation found in the tariff item:

> The only limitation to be found in the tariff item insofar as it relates to the articles in issue is with respect to the use of the extracting machinery. Amongst the categories identified by the CITT in its reasons, the fifth category (like the fourth) refers to machinery used "directly from the working face of a mine". It follows that in order to come within this category, the machinery must be put to this specified use . . . .[15]
>
> [Underlining in original]

68. The FCA further emphasized these two above-mentioned remarks by stating that ". . . the language that does appear [in tariff item No. 9908.00.00] embraces all extracting machinery, the only limitation being as to its place of use."[16]

69. In *SMS Equipment*, the Tribunal indicated that it did not adopt a narrow reading or interpretation of the *Sandvik* decision:

> The CBSA argued that the scope of extraction machinery in *Sandvik* is limited to machinery that removes minerals from the ground, displaces minerals to other machines and begins the early stages of mineral usage. *The Tribunal does not read the Sandvik decision as being limited in this way.*[17]
>
> [Emphasis added]

70. The Tribunal added that "[i]t is clear based on the definitions above and based on the Federal Court of Appeal's reasoning in *Sandvik* that the term 'extraction machinery', when used in this context, can potentially refer to a broad range of equipment that is used during the extraction process."[18]

71. The Tribunal further explained the following in *SMS Equipment*:

> [T]o hold it necessary for extraction machinery to be the apparatus that physically removes minerals from the ground in order to be considered "extracting minerals directly from the working face of a mine" would seem to be inconsistent with several of the types of machinery that the Federal Court of Appeal specifically references in *Sandvik* as potentially being considered "extraction machinery", for example, smelters and refiners.[19]

72. The Tribunal also reiterated in *SMS Equipment* that "[i]n order to fall within the scope of this provision, the extraction machinery in question must extract minerals directly from the working face of a mine."[20] In this regard, the Tribunal had referred to testimony which described the working face of a mine as the location "where the action happens", in particular, "where the waste is being mined or the coal is being mined"[21].

73. Accordingly, the generous interpretation of the term "extraction machinery" must be tempered by the limitation that the machinery must be used "directly from the working face of a mine".

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15. *Ibid.* at para. 15.
16. *Ibid.* at para. 20.
17. *SMS Equipment* at para. 56.
18. *Ibid.* at para. 57.
19. *Ibid.* at para. 61.
20. *Ibid.* at para. 58.
21. *Ibid.*

74. In *SMS Equipment,* the Tribunal adopted the definition of "working face" and "face" as set out in the *Dictionary of Mining, Mineral and Related Terms*:

> ["Working face":] "The place at which mining is being done in a breast, gangway, airway, chute, heading, drift, adit, crosscut, etc. See also: face". The term "face" is defined as follows: "a. The surface of an unbroken coal bed at the advancing end of the working place. . . . d. The exposed surface of a coal or ore deposit in the working place where mining is proceeding."[22]

75. As previously indicated, in his testimony, Mr. Wood established a difference between the face and the "crown" or "roof" of the mine. Tri-Pac did not advance any argument to the effect that the "working face" could include more than the "face" of the mine. In fact, a plain reading of the words in the definitions from the *Dictionary of Mining, Mineral and Related Terms* leads to the conclusion that there is very little difference between the "working face" and the "face". Based on a plain reading of the definitions—previously adopted by the Tribunal in *SMS Equipment*—the face may cover a larger area than the working face, which is the place at which mining is being done.

76. Furthermore, as indicated above, the definition of "face" makes reference twice to the "working place".[23] The phrase "working place" would include the "face" or "working face" and the "crown" or "roof" in the context of underground mining. As for the working face of the mine, it is not restricted to underground mining; it also applies to open pit mining (where there would be no roof nor crown). This interpretation is also consistent with the French expression "front de taille" in the French version of tariff item No. 9908.00.00. This being said, the Tribunal notes that the word "front" conveys the meaning of something that is vertical.

77. Within Category 5, four requirements are to be fulfilled: the goods in issue must be (1) articles (2) for use in (3) extracting machinery for extracting minerals (4) directly from the working face of the mine. They need not be reviewed in this specific order.

78. In light of the evidence presented in the case at hand, it cannot be said that the shotcrete or spraying machines are extracting machinery "for extracting minerals directly from the working face of the mine". As made clear by Mr. Wood's evidence, the shotcrete process is mainly for the purpose of securing the crown or the roof in the work place. While he indicated that shotcrete "can be applied to the face" in some circumstances, his testimony makes clear that the shotcrete process is "normally" applied to the "roof" or "crown".[24] Tri-Pac presented no other evidence of the use of the shotcrete process as part of extracting machinery for extracting minerals "directly from the working face of the mine".

79. The Tribunal finds that the evidence on the record establishes, at most, that the shotcrete process is occasionally applied to the face. The occasional use of a good or a process outside of its normal use does not establish that the good is "for" that use. A plain reading of the tariff provision in which Tri-Pac seeks classification indicates that what is required is more than an occasional use at the face of the mine. As such, Tri-Pac has not adduced sufficient evidence to show that the shotcrete or spraying machines are machinery for extracting minerals "directly from the working face of the mine".

80. Additionally, the FCA in *Sandvik* and the Tribunal in *SMS Equipment* both recognized that things evolve in the mining industry and, consequently, tariff item No. 9908.00.00 must be interpreted in a way that allows new processes to be considered for duty relief under this tariff item. However, the "directly from

22. *Ibid.* at para. 59.
23. See "the advancing end of the working place" and "the working place where mining is proceeding".
24. *Transcript of Public Hearing* at 47-48.

the working face of the mine" limitation is more static. While the process and the machinery may evolve, the definition of the "working face of the mine" does not change as new processes are being used.

81. In this regard, Category 5 implicitly recognizes that "extracting machinery" can be used at various locations in a mine. It makes it clear, however, that the extracting machinery that is covered by the tariff item must be for "extracting minerals directly from the working face of a mine". In fact, both Categories 3 and 4 illustrate good examples on how each word is chosen carefully with a specific meaning and intent.

82. Category 3 refers to "articles for use in loading machinery for loading coal". As long as the loading machinery is loading coal, no restriction applies. By contrast, Category 4 refers to "articles for use in loading machinery for loading minerals directly from the working face of a mine". In other words, as it was argued in the CBSA's submissions, once the loading machinery is used to load anything other than coal,[25] this has to be done "directly from the face of the mine".

83. As previously stated, to qualify under Category 5, the machinery has to meaningfully be involved in "extracting minerals directly from the working face of a mine". The shotcrete machine and the spraying machine fail to meet this requirement. Accordingly, articles for use in those machines do not qualify for classification under tariff item No. 9908.00.00.

84. In view of the above finding, there is no need for the Tribunal to determine whether the goods in issue are articles for use in extracting machinery.

CONCLUSION

85. The goods in issue imported by Tri-Pac are not entitled to duty-free treatment as they do not meet the conditions to qualify for the benefits of tariff item No. 9908.00.00.

DECISION

86. For the foregoing reasons, the appeal is dismissed.

Jean Bédard
Jean Bédard
Presiding Member, Q.C.

25. As long as it is a mineral.