



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Friday, February 13, 2004

Appeal No. AP-2002-117

IN THE MATTER OF an appeal heard on November 17, 2003,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of
the Canada Customs and Revenue Agency dated January 7, 23
and 24, 2003, with respect to a request for re-determination under
subsection 60(4) of the *Customs Act*.

BETWEEN

PURATOS CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2002-117

PURATOS CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency concerning the importation of various food additives on February 9, 1998. The imported products consist of four flavouring agents used in the making of sourdough bread: two powders (Othello and Traviata) and two liquids (Fidelio and Panarome LW). At the outset of the hearing, Puratos Canada Inc. withdrew its appeal with regard to Panarome LW.

HELD: The appeal is dismissed. The Puratos flavouring agents, which were the subject of this appeal, are properly classified in heading No. 21.06 according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*. Heading No. 19.01 is not applicable because the goods did not meet the two-prong test of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 19.01, whereby the products need to have a basis of flour and the essential character of the product must be derived from the flour. According to the Tribunal, the goods did not meet the latter requirement.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 17, 2003
Date of Decision:	February 13, 2004
Tribunal Member:	Patricia M. Close, Presiding Member
Counsel for the Tribunal:	Reagan Walker
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael A. Sherbo, for the appellant Tatiana Sandler, for the respondent



Appeal No. AP-2002-117

PURATOS CANADA INC.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), pursuant to subsection 60(4) of the *Act*, concerning the importation of various food additives on February 9, 1998. The imported products consist of four flavouring agents used in the making of sourdough bread: two powders (Othello and Traviata) and two liquids (Fidelio and Panarome LW). At the outset of the hearing, Puratos Canada Inc. (Puratos) withdrew its appeal with regard to Panarome LW.

The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 2106.90.99 of the schedule to the *Customs Tariff*² as other food preparations not elsewhere specified or included, as determined by the Commissioner, or should be classified under tariff item No. 1901.90.20 as food preparations of flour not elsewhere specified or included, as claimed by Puratos.

The relevant nomenclature reads as follows:

19.01	Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.
1901.90	-Other
1901.90.20	---Food preparations of flour, meal, starch or malt extract
21.06	Food preparations not elsewhere specified or included.
2106.90	-Other
2106.90.99	---Other

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

2. S.C. 1997, c. 36.

EVIDENCE

No physical exhibits were filed with the Tribunal. Instead, Puratos filed technical data sheets that describe each product.³ The goods in issue were also described in detail in laboratory reports filed by experts on behalf of the Commissioner.⁴ For the purposes of these reasons, the goods in issue are described as follows:

- Fidelio: concentrated liquid wheat sourdough flavouring, made from a natural yeast fermentation of wheat flour, which is meant to be used in a proportion of 10 percent by flour weight
- Othello: concentrated powder malty sourdough flavouring, made from a natural yeast fermentation of rye flour, which is meant to be used in a proportion of 1-5 percent by flour weight
- Traviata: concentrated powder crusty-style sourdough flavouring, made from a natural yeast fermentation of rye flour, which is meant to be used in a proportion of 1-3 percent by flour weight

On behalf of Puratos, Dr. Marion Wick⁵ testified that the goods in issue were made directly from flour in a fermentation process involving flour, water and starter cultures; that apart from water, flour is the main ingredient in the product after fermentation; and that the goods are used in breadmaking to enhance the bread by giving it a sourdough flavour. She explained that starter cultures are concentrated micro-organisms that “run” the fermentation process; they break down the nutrients in the flour (sugar and protein) into organic acids, alcohols and amino acids. When asked on cross-examination whether or not it was generally accepted in the baking industry that lactic acid (from lactic acid bacteria [LAB]) essentially gave sourdough bread its sour flavour, Dr. Wick responded that this was an oversimplification and that the flavour was due to the total combination of acids and alcohols, including those derived from the amino acids of the flour, not just lactic acid.

On behalf of the Commissioner, Mr. Philippe St-Amour⁶ testified that he had analyzed Othello and Fidelio for the purpose of ascertaining whether they contained flour, by testing (through microscopic observation, electrophoresis and ion chromatography) for the presence of the main components of flour, i.e. starch and proteins; that, based on those tests, there was no flour remaining in the products; and that the essence of the products was the very sharp odour that came from lactic and acetic acids.

Mr. Wendell Ward⁷ testified that he had analyzed the chemical composition of Traviata and found evidence of starches and sugars, which meant that it was a flour-based product. However, upon learning that

3. Appellant’s Brief, Tab 1.

4. Expert Witness Report of Mr. Philippe St-Amour, Exhibit B (for Othello and Fidelio); Expert Witness Report of Mr. Wendell Ward, Exhibit B (for Traviata).

5. Product Manager, Beldem s.a., a member of the Puratos Group. Dr. Wick was accepted as an expert in fermentation and the goods in issue.

6. Senior Chemist, Organic and Inorganic Products Section, Laboratory and Scientific Services Directorate, Canada Customs and Revenue Agency. Mr. St-Amour was accepted as an expert in organic chemistry who was capable of leading evidence as to the chemical composition of the goods in issue.

7. Chief, Instrumentation and Analytical Services Section, Laboratory and Scientific Services Directorate, Canada Customs and Revenue Agency. Mr. Ward was also accepted as an expert in organic chemistry who was capable of leading evidence as to the chemical composition of the goods in issue.

the product would only comprise 2 or 3 percent by weight of the bread mix, he revised his opinion to state that Traviata was being used to provide the sour flavour resulting from its lactic acid content, not for the flour that was present in the product. Flour had merely acted as a carrier for the fermentation process, and any residual flour was of no interest in terms of providing sourdough flavour.

Dr. Pierre Gélinas⁸ testified that, in his opinion, flour was *not* the fundamental ingredient of the goods in issue. Rather, flour was just a carrier for the fermentation process in order to create a dough that contained the desired sourdough flavour. Indeed, Puratos had added specific bacteria to the flour base of the product in order to “orient” the consumer’s taste, and the bacteria, not the flour, were what was important. On cross-examination, he added that, in the case of the powders, the high-temperature drying process involved in their manufacture resulted in a product that was closer to autolysed yeast⁹ than dough. In his opinion, the products were not based on flour but rather on the aromatic compounds that were present after final processing, and their most important ingredient was the LAB.

ARGUMENT

Puratos contends that the goods in issue are food preparations of flour not elsewhere specified or included, within the meaning of tariff item No. 1901.90.20. In support of that contention, it points to the allegedly plain meaning of the tariff item and argues that it should prevail over any conflicting *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹⁰ According to its submission, a food preparation is “of flour” if it comes or derives from flour, which is the case with the goods in issue.

Puratos relies on a number of *Explanatory Notes* that, it claims, lead directly to heading No. 19.01. The *Explanatory Notes* to Chapter 19 state that “[t]his Chapter covers a number of preparations, generally used for food, which are made . . . directly from. . . the products of Chapter 11” (i.e. flour). Puratos argues that its products are made directly from flour through the process of fermentation. The *Explanatory Notes* to heading No. 19.01 state that “[t]his heading covers a number of food preparations with a basis of flour or meal, of starch or of malt extract, which derive their essential character from such materials whether or not these ingredients predominate by weight or volume.” Puratos argues that “a basis of flour”, as used in the *Explanatory Notes*, means that flour must be the main ingredient, which is the case with all the goods in issue, according to the evidence.

Similarly, Puratos also relies on other less direct explanatory notes. The *Explanatory Notes* to heading No. 11.02 (Cereal Flours Other Than of Wheat or Meslin) state that “[f]lours which have been further processed or had other substances added with a view to their use as food preparations are **excluded** (generally **heading 19.01**).” An identical statement is found in the *Explanatory Notes* to heading No. 11.01 (Wheat or Meslin Flour). Puratos emphasizes that, according to the evidence, fermentation was a *process* within the meaning of the *Explanatory Notes*.

The Commissioner maintains that the goods in issue are properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included. In so doing, he relies on

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8. Research Scientist, Quality of Cereal Foods, Flour, Bakery and Pastry Products, Department of Agriculture and Agri-food. Dr. Gélinas was accepted as an expert in dough fermentation, flour quality and bakery applications.
 9. A substance used as a food flavouring. It is made by destroying yeast cells through the action of intracellular enzymes in a process called autolysis or self-digestion. The dead yeast cells are no longer able to act as a leavening agent.
 10. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

Classification Opinion 2106.90/2¹¹ for Vitamix, an additive for cereal flours containing vitamin B₁, in which it was determined that such additives should be classified in subheading No. 2106.90. The implication is that flavour additives are analogous to food supplement additives and should be similarly classified.

The Commissioner contends that heading No. 19.01 would be inappropriate for several reasons. First, the fact that food preparations must be “of flour” does not mean that all goods containing flour at some point in their manufacturing process should be classified in this heading; such an interpretative approach is very broad and contrary to legislative intent. Second, the *Explanatory Notes* to heading No. 19.01 quoted earlier impose a two-prong test: (1) the product must have “a basis of flour”; and (2) the essential character of the product must be derived from the flour, whether or not it is the predominant ingredient.

The Commissioner argues that the goods in issue do *not* have a basis of flour because, at the time of their importation, there was no flour remaining in them, as a result of the fermentation process. The operative time at which to examine imported goods for classification purposes is at the time of their importation.¹² The goods in issue must therefore have flour as one of their final ingredients. He also argues that the essential character of the goods in issue is *not* flour, because they are only mixed with flour in a proportion of 1-10 percent by weight. According to his expert witnesses, the essential character of the goods in issue was derived from various acidic by-products of fermentation, the main one being lactic acid. The goods have lost the main characteristic of flour, which is an ability to retain gas that causes dough to rise. In this connection, he refers to the *Explanatory Notes* to heading No. 19.01, which state that the heading includes “[u]ncooked pizza consisting of a pizza base (dough) covered with various other ingredients”.

By way of reply, Puratos submits that heading No. 21.06 is the ultimate residual heading and can only apply if there is nowhere else to classify a food preparation. In this respect, there *is* somewhere else, heading No. 19.01, which is confirmed by the *Explanatory Notes* to heading No. 21.06, which state that “[p]owders based on flour . . . fall in **heading . . . 19.01**”. The fact that Fidelio comes in liquid form, not powder, should not disqualify it from the classification indicated by the above explanatory notes, since the *Explanatory Notes* to heading No. 19.01 state that “[t]he preparations of this heading may be liquid or in the form of powders, granules, doughs or other solid forms such as strips or discs.”

Regarding the Commissioner’s arguments against heading No. 19.01, Puratos replies that, in terms of the first branch of the two-prong test referred to above, nothing in the *Customs Tariff* requires that flour be an ingredient of the food preparation in its final form. The Federal Court of Appeal’s judgment rendered in *Her Majesty the Queen v. Suncor Inc.*¹³ stands for the proposition that there is no requirement that a constituent or component in the final product must retain its identity from the time it is introduced into the manufacturing process until the end. Moreover, in two national customs rulings involving fermentation,¹⁴ the Department of National Revenue classified the goods in heading No. 19.01 despite the fact that fermentation changed the components that gave the goods their essential character. In terms of the second branch, evidence that lactic acid gave the goods in issue their essential character was disputed; it would be more correct to say that lactic acid played an important role, along with a number of *other* components. In

11. *Compendium of Classification Opinions*, Customs Co-operation Council, 1st ed., Brussels, 1987 [*Classification Opinions*].

12. Subsection 20(1) of the *Customs Tariff*.

13. [1996] F.C.J. No. 351 (C.A.) (QL) [*Suncor*].

14. Department of National Revenue, “Policy Content of Tariff Classification National Customs Rulings (NCRs)” (31 March 1999) at IV-2, IV-3.

any event, lactic acid can be purchased separately, and, if it truly were the source of sourdough flavour, there would be no market demand for the goods in issue.

DECISION

Based on the evidence, the Tribunal finds the relevant facts to be the following: under proper conditions, when it comes into contact with sugar or starch, yeast will produce alcohol and carbon dioxide gases in a series of chemical reactions known as fermentation. In breadmaking, the release of the gases causes the dough to rise and gives an airy texture to the bread. However, in sourdough fermentations, the dough must also be acidified in order to give the bread its sourdough flavour. This is accomplished through the addition of LAB or organic acids to the yeast culture so as to form a liquid medium called sourdough starter.

The traditional method of baking sourdough bread from sourdough starter has the disadvantage of depending on a slow and not entirely reliable fermentation process. To provide a quicker and more reliable method, Puratos markets to commercial bakers a number of products that replace sourdough starter with a pre-fermented flavouring agent. The flavouring is added to flour in very small proportions, along with yeast, in making the sourdough. Although flour is a substrate, or carrier, for *this* fermentation process (which is not to be confused with yeast fermentation mentioned in the above paragraph), at the end of fermentation, no flour remains. The process is a proprietary one involving various flours and starter cultures (i.e. concentrated micro-organisms that control fermentation). Although LAB is the main source of sourdough flavour, to get the desired flavours from the goods in issue, the choice of flour used in making the products is important, since the flour must contain specific nutrients that lead to the particular sourdough flavour after fermentation. Thus, to a certain extent, flour is used as more than a mere substrate.

The goods in issue are not foodstuffs in the traditional sense; rather, they are intermediate food preparations that are used by the baking industry for making bread. Although Dr. Wick testified that bread could be made directly from the goods in issue, the Tribunal accepts Dr. G  linas's testimony that any such bread would have an unacceptable texture and flavour for any interest from the consumer foods market.

As mentioned, the issue in this appeal is whether the goods in issue are properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included, as determined by the Commissioner, or should be classified under tariff item No. 1901.90.20 as food preparations of flour not elsewhere specified or included, as claimed by Puratos. The Tribunal's practice in such appeals is to hear the matter and then determine the proper classification of the goods under appeal in accordance with the relevant statutory interpretative rules.

The various tariff classifications are set out in considerable detail in the schedule, enacted as part of the *Customs Tariff*. Each section and chapter of the *Customs Tariff* has its own notes, and sometimes supplementary notes, followed by a list of goods categorized under a number of headings, subheadings and individual tariff items. The *Customs Tariff* contains its own rules for interpreting the schedule, which are found in sections 10 and 11:

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.

...

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 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.

The *General Rules for the Interpretation of the Harmonized System*¹⁵ referred to in section 10 of the *Customs Tariff* originated in the *International Convention on the Harmonized Commodity Description and Coding System*. They are structured in cascading form so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on. Rule 1 reads as follows:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, 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 following provisions.

The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods on an appeal: first, to examine the schedule to see if the goods fit *prima facie* within the language of a tariff heading; second, to see if there is anything in the chapter or section notes that precludes the goods from classification in the heading; and third, to examine the *Classification Opinions* and the *Explanatory Notes* to confirm classification of the goods in the heading.

If this process leads to the classification of the goods in one, and only one, heading, the next step is to find the appropriate subheading and tariff item. If the process leads to classification in more than one heading, the remaining general rules must be applied in sequence, until the most appropriate heading is found. If necessary, the same process is repeated at the subheading and tariff item levels, applying the *Canadian Rules* in the case of the latter.

As mentioned, Puratos contends that the goods in issue should be classified in heading No. 19.01 as “food preparations of flour”. Rule 1 of the *General Rules* requires that classification be determined according to the terms of the heading itself and any relative section or chapter notes. Both parties agree that the goods in issue are “food preparations”. The Tribunal also agrees, even though they are intermediate products, since the *Explanatory Notes* to heading No. 19.01 confirm that food preparations may also consist of “intermediate preparations for the food industry.”

The nub of the dispute is whether the goods are “food preparations *of flour*” [emphasis added]. Note 2(a) to Chapter 19 defines “flour” as “[c]ereal flour . . . of Chapter 11”. Note 2(A) to Chapter 11 describes the flours covered by the chapter in terms of their starch and ash content. Chapter 11 also divides cereal flours into two groups: (a) wheat or meslin flour (heading No. 11.01); and (b) cereal flours other than of wheat or meslin (heading No. 11.02). The *Explanatory Notes* to these headings define cereal flours as “the pulverised products obtained by milling the cereals” and add that “[f]lours of this heading may be improved by the addition of very small quantities of mineral phosphates, anti-oxidants, emulsifiers, vitamins or prepared baking powders (self-raising flour).” In other words, “flour” is given a very broad meaning for purposes of Chapter 19. There was nothing in the evidence to suggest that the flour from which the goods in issue were made was not “flour” within the meaning of Chapter 19.

15. *Supra* note 2, schedule [*General Rules*].

Section 11 of the *Customs Tariff* requires the Tribunal to take into account the *Explanatory Notes* and the *Classification Opinions* when classifying goods. The *Explanatory Notes* to Chapter 19 state that the chapter covers “a number of preparations, generally used for food, which are made . . . directly from . . . the products of Chapter 11” (i.e. cereal flours). The *Explanatory Notes* to heading No. 19.01 state that “[t]his heading covers a number of food preparations with a basis of flour or meal, of starch or of malt extract, which derive their essential character from such materials whether or not these ingredients predominate by weight or volume.” The Tribunal agrees with the Commissioner that this creates a two-prong test: the goods not only need to have a basis of flour but also need to derive their essential character from the flour.

Regarding the first branch of the test, the Tribunal notes the definition of “basis” in the *Gage Canadian Dictionary*,¹⁶ which reads as follows: “the base or main part; foundation . . . the principal ingredient”. The Tribunal also accepts Puratos’s evidence that, in making the goods in issue, the goods were derived, through fermentation, from flour. The Commissioner argues that the goods in issue do not have a basis of flour because there is no flour present in the final form of the product. The Tribunal is of the view that nowhere do the *Explanatory Notes* impose such a condition and therefore finds that the goods in issue have a basis of flour. In reaching this finding, the Tribunal does not wish to be construed as accepting Puratos’s argument that *Suncor* compels such a conclusion. In the Tribunal’s opinion, *Suncor* is of no assistance in this appeal, given the vastly different purpose of the narrow and complex provision of the *Excise Tax Act*¹⁷ under consideration in that case from classification under the *Customs Tariff*.

Regarding the second branch of the test, the Tribunal finds that it is not flour that gives the goods in issue their essential character. Rather their character is provided by the concentrated organic acid compounds found in the products as a result of the fermentation process brought about by adding LAB culture to fermented flour culture. The purpose of the goods in issue is to add sourdough flavour to bread. Therefore, it is the “sour” rather than the “dough” that provides their essential character. Adding flour to flour would not bring about this taste, nor would adding straight lactic acid, according to Dr. Wick’s testimony. Instead it is the proprietary processing—including the specific mix of starter culture micro-organisms—that is required to bring about the sourdough flavour that these products impart to bread, thereby avoiding an otherwise long sourdough starter fermentation process.

Therefore, the Tribunal finds that the goods do *not* fall in heading No. 19.01.

During the course of the hearing, Puratos argued that Rule 1 of the *General Rules* obliged the Tribunal to follow the plain wording of the heading and that it should prevail over any explanatory notes to the contrary. However, such an interpretative approach would be inconsistent with the legislative scheme that the Tribunal must follow. Clearly, the *Explanatory Notes* are mandatory interpretative aids under section 11 of the *Customs Tariff*, which requires the Tribunal to take them into account. In any event, the Tribunal sees no conflict. The phrase “of flour” in heading No. 19.01 is vague and requires the additional information in the *Explanatory Notes* to that heading for its proper application.

The Commissioner maintains that the goods in issue are properly classified in heading No. 21.06 as “food preparations not elsewhere specified or included”. Applying Rule 1 of the *General Rules*, it is apparent that this is a residual heading for food preparations that do not fit anywhere else in the schedule.¹⁸

16. 1996, s.v. “basis”.

17. R.S.C. 1985, c. E-15.

18. *Intersave West Buying and Merchandising Services v. The Commissioner of the Canada Customs and Revenue Agency* (7 January 2002), AP-2000-057 (CITT).

There are no relevant section or chapter notes. Applying section 11 of the *Customs Tariff*, the Tribunal notes the *Explanatory Notes* to heading No. 21.06, which read, in part, as follows: “The heading includes preparations consisting of mixtures of chemicals (*organic acids*, calcium salts, etc.) with foodstuffs (*flour*, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.)” [emphasis added]. It also notes Classification Opinion 2106.90/2 and finds that the goods in issue are classifiable in heading No. 21.06.

Puratos argued that this heading was excluded by virtue of the *Explanatory Notes* to heading No. 21.06, which reads, in part, as follows: “Powders based on flour . . . fall in **heading 18.06 or 19.01** according to their cocoa content”. However, in the Tribunal’s view, the *Explanatory Notes* to heading No. 21.06 must yield to the greater specificity of the *Explanatory Notes* to heading No. 19.01, which, as quoted earlier, require that the goods, in addition to having a basis of flour, derive their essential character from the flour, which is not the case with the goods in issue.

In the absence of any other contending classification, the Tribunal also finds that the goods in issue are classifiable in subheading No. 2106.90, “Other”, and under tariff item No. 2106.90.99, “Other”, and that they are properly classified under that tariff item. The appeal is therefore dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member