



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-030

Johnson & Johnson Inc.

v.

Commissioner of the Canada
Customs and Revenue Agency

*Decision and reasons issued
Wednesday, April 28, 2004*

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IN THE MATTER OF an appeal heard on January 22, 2004, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency, dated June 11, 2003, with respect to a request for re-determination under section 60 of the *Customs Act*.

BETWEEN

JOHNSON & JOHNSON INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 22, 2004

Tribunal Members: Pierre Gosselin, Presiding Member
Richard Lafontaine, Member
Meriel V. M. Bradford, Member

Counsel for the Tribunal: John Dodsworth

Clerk of the Tribunal: Anne Turcotte

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REASONS FOR DECISION

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA), dated June 11, 2003, under subsection 60(4) of the *Act*.
2. The goods in issue are described as NovaThin® pre-formed absorbent cores, in rolls of a width of 5.6 cm. The CCRA classified the goods in issue under tariff item No. 3926.90.90 of the schedule to the *Customs Tariff*² as other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14.
3. Johnson & Johnson Inc. (Johnson & Johnson) claimed that the goods in issue should be classified under tariff item No. 4818.90.90 as other cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, or cut to size or shape.
4. Johnson & Johnson proposed that, as an alternative, the goods in issue be classified in heading No. 39.06 as acrylic polymers in primary forms.

EVIDENCE

5. Johnson & Johnson's first witness was Mr. Jacques Vadeboncoeur. Mr. Vadeboncoeur has been employed with Johnson & Johnson for 18 years and is currently responsible for all transportation and customs matters in Montréal, Quebec. Mr. Vadeboncoeur described the goods in issue as polymers embedded in two layers of pulp paper. The goods in issue are, by weight, 60 percent pulp paper and 40 percent superabsorbent polymer (SAP).³ Mr. Vadeboncoeur testified that the goods in issue are imported in large rolls of a width of 5.6 cm. They are used in the production of sanitary napkins.
6. Mr. Vadeboncoeur testified that the goods in issue are no longer imported into Canada. However, a similar product is now imported that is, by weight, 76 percent pulp paper and 24 percent SAP.⁴
7. Johnson & Johnson's second witness was Mr. John F. Poccia, who has been employed with Johnson & Johnson for 22 years as a scientific researcher involved in the design and development of nonwoven and absorbent material product lines. At the hearing, Mr. Poccia was qualified as an expert witness in two areas: the function of polymers and cellulose fibres (i.e. the paper material); and the design and function of both the goods in issue and the sanitary napkin that is produced using the goods in issue.
8. Mr. Poccia testified that the goods in issue consist of two layers of pulp paper composed of cellulose fibres from bleached chemical pulp and the SAP in a granular form. Mr. Poccia testified that the goods that are currently being imported, which are, by weight, 76 percent pulp paper and 24 percent SAP, provide the same degree of leakage protection as the goods in issue, but are cheaper.

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

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

3. The CCRA's decision referred to this component as a colourless, granular powder composed of an acrylic polymer, specifically, sodium polyacrylate. It was also referred to as a superabsorbent powder by a witness for Johnson & Johnson.

4. A sample of this product was submitted to the CCRA and formed the basis of its laboratory report referred to in its detailed adjustment statement.

9. Mr. Poccia testified regarding the production process of the goods in issue and how the SAP is introduced and blended with the cellulose fibres. He testified that the purpose of the SAP is to absorb and retain menstrual fluid and described the composition of menstrual fluid and how it differs from water.

10. Mr. Poccia testified that the two layers of paper of the goods in issue also absorb and retain menstrual fluid. He testified that, while the individual cellulose fibres by themselves provide minimal absorption, they create a web that has significant absorption properties. The cellulose web also functions as a mechanism for the transport of menstrual fluid in order to distribute it evenly throughout the goods in issue and provides a matrix to encapsulate and contain the SAP particles.

11. Mr. Poccia testified that the cellulose fibres absorb fluid faster than the SAP and that the fibres hold the fluid until absorbed by the SAP. He also testified that there would be more leakage of the fluid from the goods in issue without the cellulose web. Mr. Poccia testified that Johnson & Johnson produces another product that consists only of cellulose fibres, without the SAP, and that the two products absorb the same amount of menstrual fluid; however, this other product is much thicker. Mr. Poccia testified that the cellulose web component of the goods in issue and the SAP play approximately equal roles in terms of the total amount of fluid absorbed.

12. On cross-examination, Mr. Poccia testified that, if the SAP were removed from the goods in issue, they would lose absorbency. He further testified that the SAP is two to three times more expensive than cellulose fibre. Mr. Poccia also testified that, in North America, the sales volume of products made solely of cellulose fibres is approximately the same as the sales volume of products that include both a cellulose web and SAP.

13. Upon questioning by the Tribunal, Mr. Poccia testified that Johnson & Johnson had spent millions of dollars trying to find a good in vitro model of fluid that is fairly representative of menstrual fluid, but had found no satisfactory proxy.

14. The CCRA's first witness was Ms. Valérie Bélisle who was qualified as an expert in chemistry, in the area of textiles and polymers. Ms. Bélisle testified regarding her laboratory analysis of the goods in issue. She confirmed that the goods in issue were made of three layers: a layer of paper, a layer of loosely distributed polymer granules and another layer of paper. Ms. Bélisle testified that the goods in issue absorbed a great deal of water and that it was clear from the literature that the polymer absorbed more water than did the paper layers.

15. The CCRA's second witness was Mr. Brian Finch, who was qualified as an expert in the characteristics of SAP and cellulose. Mr. Finch testified regarding the SAP, including its uses and the various products in which it has been incorporated. Mr. Finch testified that the goods in issue have been put into feminine hygiene products to absorb and hold moisture. Mr. Finch testified that the purpose of the cellulose web is to create a matrix to transport the liquid to the SAP. The matrix will also immobilize the SAP and hold it in place in the area of the product where it will absorb liquid when in use. Mr. Finch testified that the absorptive capacity of the goods in issue is provided primarily by the SAP. While the cellulose web plays an absorptive role, it is secondary to the absorptive role of the SAP, according to Mr. Finch.

16. Mr. Finch described the tests that he undertook to measure the absorbency of the goods in issue relative to other products made of cellulose. He testified that the goods in issue absorb a very significant amount of water and that the absorbency is much higher than for goods made only of cellulose. Mr. Finch testified that, in his opinion, the higher absorbency of the goods in issue is due to the presence of the SAP.

17. Mr. Finch testified that the SAP component of the goods in issue also absorbs the higher amount of menstrual fluid and that it is not a plastic as defined in Note 1 to Chapter 39. Mr. Finch testified that the SAP granules are distributed throughout the goods in issue to provide access to all the granules by the liquid. The cellulose matrix enables water to go from one area to another by a process known as “capillary action”. The matrix acts like a fire hose, bringing the water to the fire, but that function is ancillary to that performed by the SAP, which is to absorb the water.

18. Mr. Finch disagreed with Mr. Poccia’s testimony that the SAP and the cellulose web play an equally important role in the absorption of fluid. Anything that is aqueous will be absorbed to a much greater degree by the SAP than by the cellulose web. Mr. Finch testified that the SAP plays a role in transporting liquid from one part of the goods in issue to another, as long as the granules are touching one another. However, he agreed that cellulose plays a far greater role in this regard than does the SAP.

19. Mr. Finch testified that the SAP is the predominant material in the retention of fluid, whereas cellulose would play a key role in the acquisition of the liquid. The SAP has higher rewet properties than does cellulose, and the wicking and liquid distribution property of the product is predominantly related to the SAP. Mr. Finch testified that the SAP is in a primary form.

20. Mr. Finch testified that, while he did not test the absorbency of the goods in issue with menstrual blood, blood is an aqueous-based substance that would be absorbed into the SAP in the same way as water. While different materials will be absorbed at different rates, in general, the SAP absorbs significant amounts of any aqueous-based system. Further, Mr. Finch testified that the cellulose web of the goods in issue and the product in which the goods in issue are found act as a filter for much of the solid material contained in menstrual fluid. According to Mr. Finch, most of what comes into contact with the goods in issue is aqueous-based.

ARGUMENT

21. Johnson & Johnson noted that the goods in issue are used in the manufacture of women’s sanitary napkins and that they are not used for the absorption of water alone or for the absorption of urine. In this context, if the Tribunal determines that the goods in issue should be classified in accordance with Rule 3 of the *General Rules for the Interpretation of the Harmonized System*,⁵ it cannot take into account uses for which the goods were not intended.

22. Johnson & Johnson described the goods in issue as a “complete system”, whose design is intended to maximize the interaction between the SAP and the cellulose web. Johnson & Johnson emphasized the role played by the cellulose web in the absorption and retention of menstrual fluid and in the distribution of the menstrual fluid throughout the goods in issue. The cellulose web and the SAP operate in a symbiotic relationship to achieve the greatest degree of efficiency in performing the objective of the goods in issue.

23. Johnson & Johnson argued that the cellulose web component of the goods in issue should be classified in heading No. 48.18.

24. Johnson & Johnson argued that the CCRA’s classification of the SAP component of the goods in issue in heading No. 39.26, which reads, “[o]ther articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14”, is incorrect. Referring to the Tribunal’s decision in *Pigmalion Services v.*

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

*Deputy M.N.R.C.E.*⁶ and the Federal Court of Canada's decision in *Deputy M.N.R.C.E. v. Pigmalion Services*,⁷ Johnson & Johnson argued that the SAP that is within the subject goods is classified in heading No. 39.06.

25. Johnson & Johnson argued that the SAP remains in its primary form, even though it is part of the goods in issue. The SAP is not classified in heading No. 39.26, since it is not an article, as required by that heading. In order to constitute an "article", the material must have a definite form, shape and size. According to Note 6 to Chapter 39, the expression "primary forms" applies to powders and granules. The SAP granules contained in the goods in issue do not have a form, shape and size and therefore remain in "primary form".

26. Johnson & Johnson noted that Rule 3 (b) of the *General Rules* requires the Tribunal to consider which component, the cellulose web or the SAP, gives the product its essential character.

27. Johnson & Johnson argued that both the cellulose web and the SAP play an equally important role in relation to the overall function of the goods in issue. On one hand, the cellulose web absorbs some menstrual fluid and functions to distribute the fluid throughout the goods in issue in order to assist in their greater overall absorbency. The SAP, on the other hand, functions to absorb and retain menstrual fluid. Johnson & Johnson suggested that Mr. Poccia's evidence that the cellulose web and the SAP play an equally important role in absorbing menstrual fluid should be preferred to Mr. Finch's evidence, since Mr. Finch's tests were conducted with water, not menstrual fluid.

28. Johnson & Johnson argued that, given that the cellulose web component and the SAP component play equally important roles in respect of the function of the goods in issue, Rule 3 (b) does not assist in the classification of the goods in issue. Therefore, the goods in issue should be classified according to Rule 3 (c), in the heading that occurs last in numerical order among those that equally merit consideration. Given that the cellulose web is classified in heading No. 48.18 and that the SAP component is classified in either heading No. 39.26 or heading No. 39.06, the goods in issue should be classified in heading No. 48.18.

29. The CCRA argued that the goods in issue should not be classified in heading No. 39.06, as argued by Johnson & Johnson, since they are not in a primary form as defined in Note 6 to Chapter 39. The CCRA argued that the Tribunal must classify the entire goods in issue as they are imported and that it should not attempt to classify the individual components of those goods as they would exist if the goods were deconstructed. The CCRA argued that the goods in issue are articles of other materials of heading Nos. 39.01 to 39.14 and, consequently, are properly classified in heading No. 39.26.

30. The CCRA accepted that the goods in issue are also classifiable in heading No. 48.18 and are therefore composite goods, such that classification should proceed according to Rule 3 (b) of the *General Rules*. The CCRA argued that the factors that determine essential character are the following: the nature of the material or component, its bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

31. The role of the goods in issue is their absorptive, retention and non-leaching properties. The CCRA argued that the evidence is clear that the SAP plays the most significant role in terms of fluid absorption and retention. Further, the SAP is more expensive than the cellulose web. While the cellulose web weighs more than the SAP, the CCRA argued that weight by itself is not determinative of the tariff classification.

6. (1 June 1992), AP-90-138 (CITT).

7. (1994), 76 F.T.R. 313.

Therefore, since the SAP gives the goods in issue their essential character, the CCRA argued that they are properly classified in heading No. 39.26.

DECISION

32. Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules* and the *Canadian Rules*.⁸ The *General Rules* are structured in a cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. According to section 11 of the *Customs Tariff*, in interpreting the headings and subheadings of the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁹ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.¹⁰

33. The issue in this appeal is whether NovaThin® pre-formed absorbent cores are properly classified in heading No. 39.26 as other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14, as determined by the CCRA, or should be classified in heading No. 48.18 as cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm, as claimed by Johnson & Johnson. Alternatively, Johnson & Johnson argued that the goods in issue should be classified in heading No. 39.06 as acrylic polymers in primary forms.

34. The parties agree that, since the goods in issue consist of a combination of substances or materials, Rule 1 of the *General Rules* cannot be used for the classification of the goods. Rule 2 (a) that applies to the classification of incomplete or unassembled goods does not apply in the present circumstances. Rule 2 (b) deals with mixtures and combinations of materials or substances, and goods consisting of two or more materials or substances. Note XIII of the *Explanatory Notes* to Rule 2 states:

As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if *prima facie* classifiable under two or more headings, must therefore be classified according to the principles of Rule 3.

35. In the present case, the parties agree that the two principal constituent materials of the goods in issue are the cellulose web and the SAP. The parties agree that the cellulose web component should be classified in heading No. 48.18 as cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm. The parties also agree that the SAP, if imported on its own, would fall in heading No. 39.06 as acrylic polymers in primary forms.

36. However, the parties do not agree on the classification of the SAP component of the goods in issue. Johnson & Johnson argued that the SAP component should be classified in heading No. 39.06. The CCRA argued that the SAP is incorporated into an article and is no longer in a primary form. The CCRA argued that the *goods in issue* are articles of other materials of heading No. 39.06 and are therefore *prima facie* classified in heading No. 39.26.

8. *Supra* note 2, schedule.

9. Customs Co-operation Council, 1st ed., Brussels, 1987.

10. Customs Co-operation Council, 2d ed., Brussels, 1996.

37. The Tribunal accepts Johnson & Johnson's position that the SAP in the goods in issue is in *primary form*. Note 6 to Chapter 39 states:

In heading Nos. 39.01 to 39.14, the expression "primary forms" applies only to the following forms:

- (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;
- (b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

38. The Tribunal is of the view that the SAP need not be imported in bulk to qualify as a primary form. In this regard, it adopts the Federal Court of Canada's reasoning in *Deputy M.N.R.C.E. v. Pigmalion Services*.¹¹ The testimony indicates that the powder or granules are still in their original state and have not been transformed chemically or physically into another form. In the Tribunal's view, the SAP is still in its primary form, even though it is incorporated into another product and found between two layers of cellulose web. It was not contested that the SAP, on its own, was still in granular form in the goods in issue.

39. Rule 3 (b) of the *General Rules* specifies that composite goods "shall be classified as if they consisted of the material or *component* which gives them their essential character". [Emphasis added]

40. The Tribunal accepts that the goods in issue are composite goods and that their classification is to be determined by the component that gives them their essential character. Therefore, the Tribunal must ascertain the classification of each individual component. As stated above, the Tribunal is of the view that the SAP component of the goods in issue is in its primary form, as defined by Note 6 to Chapter 39 and is, in and of itself, not an article. Therefore, the two applicable classifications of the goods in issue are heading Nos. 48.18 and 39.06.

41. Rule 3 (a) of the *General Rules* states that the heading that provides the most specific description is to be preferred; however, when two or more headings refer to only part of the materials or substances contained in composite goods, the headings are to be considered as equally specific. Therefore, classification cannot be achieved by the application of Rule 3 (a), and the Tribunal is next required to consider Rule 3 (b).

42. As stated above, Rule 3 (b) of the *General Rules* provides that "composite goods . . . which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their *essential character*, insofar as this criterion is applicable." [Emphasis added]

43. In determining which component of a product gives it its essential character, Note VIII of the *Explanatory Notes* to Rule 3 (b) provides:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

44. The evidence suggests that, while the SAP has greater value, the cellulose web provides more bulk and weight. The Tribunal heard a large amount of testimony regarding the role played by the two components in relation to the use of the goods. It is not in dispute that the goods in issue are incorporated into feminine hygiene products and that they function to absorb menstrual fluid.

11. *Supra* note 7 at para.34.

45. The Tribunal is of the view that the evidence is clear that both components play an equally important role in the absorbency of the goods in issue. In tests using water, the SAP was far more absorbent than the other materials with which it was compared and had greater retention. At least in theory, given an even flow rate and sufficient time, it might absorb more of the menstrual fluid than the cellulose web. However, those tests were conducted with water and not menstrual fluid. Further, the time line for the menstrual flow is quite varied.

46. Furthermore, the evidence indicates that the ability of the SAP to absorb depends entirely on the function of the cellulose web in distributing menstrual fluid throughout the goods in issue. The goods in issue must address two requirements to be functional: the particular composition of the menstrual fluid and the optimal relationship of the two components of the goods in issue, i.e. the SAP and the cellulose web. Without the cellulose web's ability to distribute the fluid across the core and to initially absorb quickly, the product would fail to properly absorb and retain menstrual fluid. In the context of the advertised purpose and usefulness of the product, this failure would greatly undermine the usefulness and marketability of the product.

47. Based on the above, the Tribunal is of the view that neither component accounts for the essential character of the goods in issue and, therefore, Rule 3 (c) of the *General Rules* should be used. Accordingly, the goods in issue should be classified according to the heading which occurs last in numerical order among those that equally merit consideration, which, in the present case, is heading No. 48.18.

48. Therefore, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member