Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2003-040

Les Produits Laitiers Advidia Inc.

v.

Commissioner of the Canada Customs and Revenue Agency

and

Dairy Farmers of Canada

Decision and reasons issued
Tuesday, March 8, 2005

Canada

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IN THE MATTER OF an appeal heard on September 14 and 15, 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 October 30, 2003, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

LES PRODUITS LAITIERS ADVIDIA INC. **Appellant**

AND

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

AND

THE DAIRY FARMERS OF CANADA **Intervener**

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

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 14 and 15, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member Richard Lafontaine, Member Meriel V. M. Bradford, Member
Counsel for the Tribunal:	Reagan Walker Michael Keiver
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Richard S. Gottlieb and Shane Brown, for the appellant Jean-Robert Noiseux and Yannick Landry, for the respondent Gregory O. Somers and Benjamin P. Bedard for the intervener

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STATEMENT OF REASONS

1. This is an appeal pursuant to section 67 of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA) dated October 30, 2003, made under subsection 60(4) of the *Act*, regarding the classification of PROMILK 872 B. The product is manufactured in Switzerland by Ingrédia S.A. (Ingrédia). Les Produits Laitiers Advidia Inc. (Advidia) imported the product in issue on June 30, 2003. By order of the Tribunal issued on April 20, 2004, the Dairy Farmers of Canada was granted intervener status in the appeal.

2. The issue in this appeal is whether the product in issue is properly classified under tariff item No. 0404.90.20 of the schedule to the *Customs Tariff*,[2] as determined by the CCRA, or should be classified in heading No. 35.01 or under tariff item No. 3504.00.00, as claimed by Advidia.

3. The relevant nomenclature reads as follows:

04.04	Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.
0404.90	-Other
0404.90.20	---Over access commitment
35.01	Casein, caseinates and other casein derivatives; casein glues.
3504.00.00	Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed.

PRELIMINARY MATTER

4. Advidia's initial argument was that classification depended on whether the product in issue was a milk protein isolate (MPI) or a milk protein concentrate (MPC) and that the Canada Border Services Agency (CBSA) (formerly the CCRA) had an "administrative policy" to classify MPIs in Chapter 35 and MPCs in Chapter 4. Advidia contended that the policy was consistent with international "commercial interpretations",[3] whereby MPIs, which by definition[4] exceed 85 percent protein substance on a dry matter basis, are classified in Chapter 35. Advidia argued that the CCRA's decision to change the classification to Chapter 4 was based on Ms. Cathy Copeland's laboratory report and on concerns of the Canadian dairy industry.[5] In cross-examination, Ms. Copeland admitted that, under certain definitions, the product in issue could be considered an MPI and that she was not an expert in classification.

5. Advidia drew the Tribunal's attention to the alleged unfairness of the CCRA's handling of the above importation and contended that, under the circumstances, the CBSA should bear the onus of proving that the classification was correct, rather than Advidia having to prove that it was incorrect.[6]

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. *Transcript of Public Argument*, 15 September 2004, at 45.
4. The terminology is not consistent. In some cases, MPIs are called "milk protein substances" and, in other cases, "whole milk proteins". But regardless of their name, they are classified in Chapter 35.
5. *Transcript of Public Argument*, 15 September 2004, at 8, 10.
6. Appellant's Revised Non-confidential Brief at 28.

6. Goods identical to the product in issue had been imported into Canada, under a national customs ruling, as milk albumin under tariff item No. 3502.20.00 since December 1, 1999.[7] On August 10, 2001, the benefit of the ruling was transferred to Advidia.[8] On April 16, 2003, the CCRA reversed its position and issued a "corrective" ruling, changing the classification to tariff item No. 0404.90.10 ("Within access commitment") or 0404.90.20 ("Over access commitment"). No notice or other communication preceded the ruling.

7. Some time in June 2003, Advidia questioned the corrective ruling, but was told that the only way that it could "appeal" it was to actually import the product and follow the procedures for appealing decisions on the classification of importations, which are laid down by the *Act*.[9] Advidia imported 1,500 kg of the product in issue on June 30, 2003.

8. Advidia argued that the CCRA's classification "policy" for such products was confused and contradictory. In a decision dated July 21, 2003, the CCRA classified the product in issue under classification No. 0404.90.10.90.[10] Advidia appealed on August 7, 2003.[11] On October 10, 2003, an officer in the CCRA's Appeals Division in Montréal, Quebec, orally advised Advidia that the product in issue would be classified under tariff item No. 3504.00.00.[12] However, the CBSA contends that this was only a "recommendation".[13] Advidia also learned that an equivalent product from New Zealand[14] was being allowed into Canada under tariff item No. 3504.00.00. But, on October 30, 2003, the CCRA notified Advidia in writing that, according to new facts that had come to light, the proper classification was classification No. 0404.90.20.90[15] Under that classification, Advidia's PROMILK 872 B entered Canada subject to import controls that imposed an "Over access commitment" tariff of 270 percent *ad valorem* on the product.

9. Advidia made several requests under the *Access to Information Act*[16] for background on the matter. The documents obtained in response to the requests[17] disclosed internal inconsistencies among members of the CCRA's staff. Advidia then sought the production of missing details from the disclosed documents through subpoenas *duces tecum* issued by the Tribunal. In response to a motion brought by the Dairy Farmers of Canada, the Tribunal, in a letter dated September 13, 2004, quashed the *duces tecum* portions of the subpoenas chiefly because it was unwilling to substitute its judgment on the redactions made to the documents for that of the CCRA's access to information staff, who have expertise in the application of the legislation.

7. *Ibid*., Tab 9.
8. *Ibid*., Tab 10.
9. Appellant's Original Confidential Brief, 12 January 2004, at 2.
10. Appellant's Revised Non-confidential Brief at 10.
11. *Ibid*., Confidential Exhibit No. 14.
12. Appellant's Exhibit No. 22 at 43.
13. *Transcript of Public Argument*, 15 September 2004, at 62.
14. ALAPRO 4900.
15. Appellant's Revised Non-confidential Brief, Tab 1.
16. R.S.C. 1985, c. A-1.
17. Appellant's Supplementary List of Exhibits, Tab 22.

10. The Tribunal's letter also stated that it had "consistently interpreted its delegated authority under its enabling legislation as allowing it to determine the appropriate classification of goods presented to it on appeal as opposed to declaring the validity or invalidity of the [CCRA's] decisions in law. Therefore, for purposes of this appeal, the Tribunal [was] of the view that questions of the [CCRA's] jurisdiction -- including the rules of natural justice -- are irrelevant, and it [would] not admit evidence or hear argument on that line of challenge of the [CCRA's] decision at the hearing."

11. At the hearing—both in the evidentiary[18] and argument[19] phases—Advidia renewed its assertion that the CBSA should bear the burden of proof in the appeal and, therefore, should be obliged to proceed first. Advidia's contention was that, because the CCRA had never disclosed the "new facts" mentioned above, it was operating in the context of an improper "absence of notice". In making the assertion, Advidia relied on *Johnston v. M.N.R.*[20] It called Mr. Christian Emmanuel, a customs consultant, to confirm the above chronology of events.[21] It also subpoenaed a number of witnesses in the employ of the CBSA and examined them at the hearing in connection with the "new facts" mentioned above and other alleged internal procedural irregularities. They were: Mr. Michael Jordan, Director General of Human Resources; Mr. André Blais, Auditing and Inspection Officer; Mr. Dean Hibbard, Senior Program Officer; Ms. Elizabeth Udell, Senior Program Officer; and Mr. John Dalrymple, Appeals Officer.

12. The CBSA answered Advidia's contention by submitting that the onus rested on Advidia,[22] based on *Deputy M.N.R.C.E. v. Unicare Medical Products Inc.*,[23] to prove its case.

DECISION ON PRELIMINARY MATTER

13. As stated by the Supreme Court of Canada, in legal proceedings, the general rule is that *he or she who asserts must prove*, i.e. the burden of proof rests upon the party that substantially asserts the affirmative of an issue. The rule is supportable not only on the ground of fairness but also because of the greater practical difficulty involved in proving a negative. The party on which the burden of proof rests will fail if, when all the evidence is produced, the mind of the trier of fact is in a state of real doubt as to the effect of the evidence.[24] The above rule should be set aside only in the most exceptional cases.[25]

14. The rule is no different in tax cases, which are often resorted to by way of analogy in classification disputes. Each tax assessment is based on an assumption of facts on the part of the Minister of National Revenue (or equivalent public office), i.e. the Minister of National Revenue interprets facts that the taxpayer has previously disclosed. Those facts are uniquely within the knowledge and control of the taxpayer and, therefore, it is not unfair to place a burden upon the taxpayer to disprove the facts when, on appeal, the latter seeks to have the assessment declared incorrect.[26]

15. Advidia argues, based on *Johnston*, that the CBSA, having failed to disclose new facts justifying a change in position, as reflected in the "Canada Customs—Detailed Adjustment Statement", must bear the

18. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 11, 115.
19. *Transcript of Public Argument*, 15 September 2004, at 8.
20. [1948] S.C.R. 486 at 490 [*Johnston*].
21. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 106.
22. *Transcript of Public Argument*, 15 September 2004, at 63.
23. (30 April 1990), Appeal Nos. 4237, 2438, 2485, 2591 and 2592 (CITT).
24. *Smith v. Nevins*, [1925] S.C.R. 619.
25. *St-Jean v. Mercier*, [2002] 1 S.C.R. 491.
26. *Dwyer v. Canada*, 2003 FCA 322, [2003] F.C.J. No. 1256 (C.A.) [*Dwyer*].

onus of proof in this appeal, i.e. that the burden of proof shifted to the CBSA as a result of the non-disclosure.[27] The argument must fail for the following reasons.

16. The so-called "new facts" that Advidia had sought proved to be immaterial and in no way reshaped the contours of the dispute so as to require a corresponding shift in the burden of proof. Under cross-examination by Advidia, Mr. Dalrymple indicated exactly what the facts were:

> [T]he new facts were what Mr. Hibbard told me when he said that his recommendations were 04.04.[28]

17. Mr. Hibbard had told Mr. Dalrymple that: (a) the U.S. Customs Service had received a letter from the International Dairy Foods Association urging the former to continue to classify milk protein concentrates in heading No. 04.04; and (b) another senior program officer had expressed concern that the Dairy Farmers of Canada might challenge any change of classification for such concentrates.[29]

18. Further, in its brief and supplementary documents, the CBSA disclosed more than enough factual information for Advidia to know the case that it had to meet. The CBSA's confidential exhibits and expert witness statement gave ample notice to Advidia that there would likely be a dispute over whether or not PROMILK 872 B was a protein isolate for the purposes of heading No. 35.04. The remainder of the case centered on the proper interpretation of various headings and tariff items, and it is well settled that "[t]he construction of tariff items is a question of law", [30] not fact. The Supreme Court of Canada has held that neither party ever bears an onus or a burden of proof with respect to the law.[31]

19. Therefore, in the Tribunal's view, Advidia failed to establish the exceptional circumstances necessary to justify shifting the onus of proof in this appeal to the CBSA. The remainder of these reasons will examine the parties' evidence and argument on the substantive issue of classification described above and provide the Tribunal's analysis and decision on the issue.

EVIDENCE

20. No physical samples of the product in issue were adduced in evidence. However, the parties attached descriptive documents to their briefs, including a fact sheet giving a detailed breakdown of the product's characteristics.[32] There was no serious dispute concerning the product's chemical composition: 87.5 percent milk protein (on a dry weight basis), according to the fact sheet.[33] All expert witnesses agreed that the constituent materials of the product in issue were all found in natural milk, although some were at the trace element level.[34] Much of the evidence addressed the issue of whether the product constituted a "milk protein *concentrate*", as determined by the CCRA, or a "milk protein *isolate*", as claimed by Advidia.

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27. Appellant's Revised Non-confidential Brief, para. 108.
28. *Transcript of Public Hearing*, Vol. 2, 15 September 2004, at 248.
29. Appellant's Supplementary List of Exhibits, Tab 22 at 38.
30. *Hunt Foods Export Corp. of Canada v. Deputy M.N.R.C.E.,* [1970] Ex. C.R. 828 at 836.
31. *Dwyer*, para. 22.
32. Appellant's Revised Non-confidential Brief, Tab 2.
33. See, also, Ms. Copeland's laboratory report, Confidential Exhibit No. 2.
34. *Transcript of Public Hearing*, Vol. 2, 15 September 2004, at 280.

21. Advidia's position was that there was a distinction between MPCs and MPIs. Advidia cited the *milkingredients.ca* Web site, which is sponsored by the Canadian Dairy Commission,[35] as defining the line between the two: "A Milk Protein Concentrate (MPC) is a dairy protein product with a protein content greater than 55%B preferably greater than 75%B on a dry matter basis. . . . A Milk Protein Isolate (MPI) is a dairy protein product with a protein content greater than 85%, on a dry matter basis."[36]

22. Advidia called Mr. Jean-François Boudier, Ingrédia's Director of Science and a chemist with many years' experience in the development of dairy-related standards and practices in Europe. The Tribunal qualified him as an expert in Ingrédia's processes, including, in particular, the production of the product in issue. Mr. Boudier explained that the advantage of PROMILK 872 B is that it is an all-natural milk protein product, with high calcium but low sugar content, which makes it a particularly attractive product for the "low-carb"[37] sector of the market. Moreover, its calcium content is useful in preventing osteoporosis. Of the 87.5 percent of the product consisting of protein, 92.0 percent was casein, the predominant protein in natural milk. Mr. Boudier explained that PROMILK 872 B was produced by using a porous membrane in a process involving filtration and diafiltration. Traditionally, casein is precipitated through chemical processes, by adding either acid or rennet to milk,[38] but the difficulty with these processes is that they break down the protein micelle[39] and release any calcium that had been bound to it.[40] Produced by using a membranous process, PROMILK 872 B preserves the protein micelle in its native state together with the calcium. Chemically, it is a native phosphocaseinate.[41] The product was developed and marketed by Ingrédia primarily for use in the dairy industry.

23. Concerning the MPC/MPI distinction, Mr. Boudier admitted that there was no scientific basis for drawing the line at 85 percent protein content; however, there was an important business purpose. With greater consumer awareness in today's society, the market insists on a division between MPCs and MPIs. The international consensus seems to be in favour of 85 percent, given its *de facto* acceptance by the European Union and the International Dairy Federation. This division is not contained in any standard of the *Codex Alimentarius*.[42] This, he argued, is because the market could not wait for lengthy, international proceedings[43] to run their course. In any event, there is an enormous difference between an MPC and an MPI. The latter has a very high concentration of protein, in purer form, has different properties and applications, and is called an "isolate" by analogy to the more familiar soy protein isolate.[44] However, the International Dairy Federation is currently considering renaming the MPI a "milk protein".[45]

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35. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 122.
36. Appellant's Revised Non-confidential Brief, Tab 6.
37. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 39.
38. *Ibid*. at 59.
39. "An ultramicroscopic aggregate in a colloid consisting of some tens or hundreds of ions or molecules." *The Oxford English Dictionary*, 2d ed., *s.v.* "micelle".
40. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 94.
41. It contains chemically bound phosphoric acid.
42. The Codex Alimentarius Commission was created in 1963 by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) to develop food standards, guidelines and related texts, such as codes of practice under the Joint FAO/WHO Food Standards Programme. The main purposes of this programme are to protect the health of consumers, ensure fair trade practices in the food trade and promote the coordination of all food standards work undertaken by international governmental and non-governmental organizations.
43 *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 93.
44. *Ibid*. at 92.
45. *Transcript of Public Hearing*, Vol. 2, 15 September 2004, at 308.

24. The CBSA called Ms. Copeland, a senior chemist in the Organic and Inorganic Products Section of its Laboratory and Scientific Services Directorate; the Tribunal qualified her as an expert in chemical and food analysis. Ms. Copeland testified that she had reviewed the product in issue , on the basis of available literature, in 2000, and performed a chemical analysis, on the basis of a sample, in 2002. She determined that all components in the product in issue were also found in milk and recommended that the product in issue be classified in heading No. 04.04. She clarified that the laboratory offers advice on classification only when asked to do so. In cross-examination, Ms. Copeland admitted that she had not analysed the proportions of proteins in the product in issue. She disagreed with calling PROMILK 872 B an "isolate" because, in her opinion, that term was only appropriate for products derived through chemical processes, whilst this case involved a product derived through a physical process and which is normally termed a "concentrate". In addition, based on her experience, isolates need to have at least 90 percent protein content.

25. The CBSA also called Dr. Michel Britten, a research scientist with the Department of Agriculture and Agri-Food's Food Research and Development Centre in Sainte-Hyacinthe, Quebec, and associate professor at Laval University. The Tribunal qualified him as an expert in dairy science and technology, with a specialization in dairy ingredients. Dr. Britten confirmed—in greater detail—much of what Mr. Boudier had already stated concerning the chemistry of dairy proteins. He also stated that, scientifically, an ingredient could be considered a protein substance if it had as little as 60 percent protein content.[46] He confirmed that there was no scientific basis for division between a concentrate and an isolate, stating that the increase in protein concentration is a continuous phenomenon and that there is no particular point at which it passes from a concentrate to an isolate. Dr. Britten viewed the distinction as arbitrary. He also explained that the Canadian Dairy Commission's Web site definitions of MPC and MPI had been drafted by someone with marketing training and had not been subject to peer review. The Web site, he testified, was set up for marketing purposes.

ARGUMENT

26. Advidia contended that PROMILK 872 B is covered by both Chapters 4 and 35, but that the headings of Chapter 35 provide a more specific description and, hence, that the product in issue should be classified there. Advidia claims that the phrase "provided such headings or Notes do not otherwise require" in Rule 1 of the *General Rules for the Interpretation of the Harmonized System*[47] requires the Tribunal to look beyond the first heading that appears to cover the goods and to see if they are covered more specifically in any subsequent headings, unless the chapter and heading notes expressly preclude such an approach. Advidia argues that the requirement is repeated in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[48] to heading No. 04.04, which contain the phrase "provided they are not more specifically covered *elsewhere*" (emphasis added). In addition, Advidia argued that, although the product in issue consists of natural milk constituents, it should be excluded from heading No. 04.04 by *analogy* to Note 4(b) to Chapter 4, which reads as follows: "This Chapter does not cover: . . . (b) Albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter) (heading 35.02) or globulins (heading 35.04)." PROMILK 872 B contains at least *87.5 percent* protein, on a dry weight basis.

27. Advidia argued that, since the product in issue is a mixture of substances, Rules 2 (b) and 3 of the *General Rules* must be applied. Under Rule 3, there are three options for classifying goods. First, the

46. In reply, Mr. Boudier recited the *Codex Alimentarius* standard, adopted in July 2003, in which the term "milk protein" could be used if there was at least *50 percent* protein content, on a dry weight basis.
47. S.C. 1997, c. 36., schedule [*General Rules*].
48. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

heading which provides the most specific description shall be preferred. If a heading does not fully cover the constituent materials, the second option is to classify the goods according to the component that provides their essential character. Finally, if the goods cannot be classified according to the first two options, then Rule 3 (c) compels them to be classified in the heading that is last in numerical order.

28. Advidia contended that, in addition to heading No. 04.04, the Tribunal may, by virtue of Rule 3 (b) of the *General Rules*, classify the product in issue as a casein covered by heading No. 35.01, if it is of the view that casein gives the product in issue its essential character. Alternatively, if the Tribunal cannot determine the essential character, it could classify the product in issue in heading No. 35.04 as a "protein substance . . . not elsewhere specified or included" pursuant to Rule 3 (c), since heading No. 35.04 "occurs last in numerical order".

29. Advidia argued that the United States classifies PROMILK 872 B in heading No. 35.01,[49] and the European Union, in heading No. 35.04.[50] In either case, the headings of Chapter 35 are more specific than heading No. 04.04, which covers *all* goods consisting of natural milk ingredients, without further specificity.

30. The CBSA contended that, since the product in issue was expressly covered by heading No. 04.04, as a "natural milk constituent . . . not elsewhere specified or included," Rule 1 of the *General Rules* required the Tribunal to classify it in that heading. All three expert witnesses confirmed that the product in issue had the same constituents as natural milk. The product contains no non-milk additives, and the heading *fully* describes the product. There is no need to look beyond the above heading, since there is no legal or explanatory note that removes the product from the heading. Specifically, it was *not* excluded from the heading by Note 4(b) to Chapter 4, since it was neither an albumin nor a globulin.

31. The CBSA argued that the product could *not* be classified in heading No. 35.01, since it was not a "casein" within the meaning of the heading, which, according to Note (A)(1) of the *Explanatory Notes* to that heading, is "obtained . . . by precipitation (curdling), generally with acids or rennet." The evidence was clear that the casein in PROMILK 872 B was obtained by filtration and diafiltration instead of precipitation. Neither could the product in issue be classified in heading No. 35.02, since, by Mr. Boudier's own admission, it was not an albumin[51] within the meaning of the heading, i.e. a "milk albumin (lactalbumin)" according to Note (1) of the *Explanatory Notes* to heading No. 35.02. Neither was it 80 percent whey protein. Nor could it be classified in heading No. 35.04, in the category, "other protein substances . . . not elsewhere specified or included", since heading No. 04.04 was more specific than heading No. 35.04. The former completely describes the product, while the latter only covers its main ingredient and, in any event, is a "basket clause".[52] Moreover, all the above headings of Chapter 35 only partly cover the product in issue; they leave out the minerals (mainly calcium), fat and lactose.

32. The Dairy Farmers of Canada, added that the *General Rules* cited by Advidia do not apply, because the product in issue is not a mixture any more than natural milk—which is undisputedly covered by Chapter 4—is a mixture. Both are simply substances comprised of different natural components. Also, PROMILK 872 B cannot be classified in heading No. 35.04 because it is a "double" basket clause, requiring that the product be an "other" protein and a protein that is "not elsewhere specified or included".[53] In fact, the only milk-related substance mentioned in the *Explanatory Notes* to heading No. 35.04 is globulins,

49. *Transcript of Public Argument*, 15 September 2004, at 40.
50. *Ibid*. at 38.
51. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 83.
52. *Transcript of Public Argument*, 15 September 2004, at 55, 69.
53. *Ibid*. at 82.

which, by Mr. Boudier's admission, the product in issue is *not*.[54] Moreover, it is not even an isolate, because, as Ms. Copeland clarified, isolates involve the use of chemical agents to isolate the protein material, while concentrates involve the use of membranes to filter the milk and remove unwanted materials.[55] In any event, whether the product is an MPI or an MPC is immaterial, as is the fact that the European Union adopted by regulation an additional note to classify high concentrates of milk proteins in heading No. 35.04. In reply,[56] Advidia rejected the notion that heading No. 35.04 was a double basket clause, contending that "other" referred only to proteins other than peptones, which are referred to in the first clause of the heading. It added that 85 percent was a reasonable point to determine the essential character of a product and that a product need not be listed in an explanatory note to be covered by a heading.

DECISION

33. The Tribunal finds that the product in issue is a dry powder composed of natural milk ingredients consisting of the following principal components: (a) moisture (5.0 percent); (b) fat (1.5 percent); (c) protein (87.5 percent on a dry weight basis); and (d) lactose (2.0 percent). These components are in different proportions from those found in natural milk. Of the protein found in the product, 92 percent consists of casein micelles, and the remaining 8 percent, of whey protein. The product in issue is produced by filtration and diafiltration. Although the product is marketed as a milk protein isolate in spray powder, for reasons explained below, the Tribunal does not find it necessary to make a finding as to whether or not the product actually is a milk protein isolate.

34. The issue before the Tribunal, as explained above, is whether the product in issue is properly classified in heading No. 04.04 as products consisting of natural milk constituents not elsewhere specified or included, as determined by the CCRA, or should be classified in heading No. 35.01 as casein or in heading No. 35.04, in the category, "other protein substances not elsewhere specified or included", as claimed by Advidia.

Law

35. In appeals under section 67 of the *Act* concerning tariff classification, the Tribunal hears the matter and determines the proper classification of the goods under appeal in accordance with sections 10 and 11 of the *Customs Tariff*. Subsection 10(1) reads as follows:

> 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.

36. Section 11 of the *Customs Tariff* reads as follows:

> 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.

54. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 82.
55. *Transcript of Public Argument*, 15 September 2004, at 77.
56. *Ibid*. at 85.

37. The *General Rules* are structured in cascading form. If the classification of an article cannot be determined in accordance with Rule 1, then each of the following rules should be applied in their respective order until they lead to the heading or subheading that most precisely covers the goods. The *Canadian Rules*[57] reiterate that the classification of goods at the tariff item level shall also be determined according to the *General Rules*.

38. The CBSA and the Dairy Farmers of Canada argued that the classification issue in this case can be resolved by resorting to Rule 1 of the *General Rules* alone, since the product in issue is indisputably composed of nothing but natural milk constituents within the meaning of heading No. 04.04. This heading covers "products consisting of natural milk constituents . . . not elsewhere specified or included". The *Explanatory Notes* to heading No. 04.04 clarify that, if a product does not have the same composition as the natural product, i.e. milk, it is still included in the heading, provided it is not more specifically covered elsewhere. There was no disagreement over the chemical analysis of PROMILK 872 B.

39. All parties acknowledged that PROMILK 872 B is a product comprised of natural milk constituents and that the constituents are found in proportions that are different from those found in milk. Advidia admitted that the product in issue fits within the above description. However, a careful reading indicates that the Tribunal must also look beyond the terms of the above heading even if the product fits squarely within it. The heading only applies to "products consisting of natural milk constituents . . . *not elsewhere specified or included*" (emphasis added). The second paragraph of the *Explanatory Notes* to heading No. 04.04 clarifies that the heading applies provided the goods are "not *more specifically* covered elsewhere" (emphasis added).

40. Therefore, the task facing the Tribunal is to determine whether, applying the principles of classification described above, either of the headings suggested by Advidia more specifically covers the product in issue than does heading No. 04.04. If so, the product in issue must be classified in the more specific heading by virtue of Rule 3 (a) of the *General Rules*, which reads in part as follows: "When by application of Rule 2 (b) *or for any other reason*, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description." (Emphasis added)

41. Before turning to the headings, it is necessary for the Tribunal to deal with an argument that Advidia advanced concerning heading No. 04.04, i.e. that it cannot apply to the product in issue because of Note 4 to Chapter 4, which reads as follows: "This Chapter does not cover: . . . (b) Albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter) (heading 35.02) or globulins (heading 35.04)." Advidia admits that the product in issue is neither an albumin, within the meaning of heading No. 35.02, nor a globulin, within the meaning of heading No. 35.04. Nonetheless, it contends that the above chapter note should apply, *by analogy*, to the product in issue, so as to exclude it from heading No. 04.04, given its similarity to the two substances covered in the chapter note. The Tribunal does not accept this argument.

42. Only if the Tribunal were still unable to classify the goods after applying Rules 1 through 3 of the *General Rules* would it resort to classification by analogy. In this connection, it is useful to note Rule 4, which reads as follows: "Goods which cannot be classified *in accordance with the above Rules* shall be classified under the heading appropriate to the goods to which they are most akin." (Emphasis added)

57. S.C. 1997, c. 36., schedule.

Analysis

43. The remainder of these reasons will consider the headings suggested by Advidia and whether they include the product in issue and more specifically describe it than does heading No. 04.04. As mentioned above, Advidia argued that the product in issue could be classified in either heading No. 35.01, as a "casein", or heading No. 35.04, in the category, "other protein substances . . . not elsewhere specified or included".

Heading No. 35.01

44. The Tribunal agrees that "casein" is more specific than "products consisting of natural milk constituents . . . not elsewhere specified or included", the relevant phrase in heading No. 04.04. The latter is a basket clause, whilst the former covers a specific protein. However, the Tribunal rejects Advidia's argument that the product in issue may be classified in heading No. 35.01.

45. Although Mr. Boudier described the product in issue as a native phosphocaseinate,[58] the evidence still failed to prove that it was a casein within the meaning of heading No. 35.01. Note (A)(1) of the *Explanatory Notes* to that heading narrowly defines "casein" in the following words: "**Casein** is the main protein constituent of milk. It is obtained from skimmed milk by precipitation (curdling), generally with acids or rennet. The heading covers various types of casein which differ according to the method of curdling, e.g., acid casein, caseinogen and rennet casein (paracasein)." The evidence established that the product was produced by filtration and diafiltration, not precipitation through the use of acid or rennet. Therefore, the product in issue is not a casein for purposes of heading No. 35.01.

46. Advidia alluded to the fact that the United States classified PROMILK 872 B as a casein in heading No. 35.01.[59] The Tribunal does not find this information compelling. No evidence was adduced to explain the rationale for classification by U.S. Customs, beyond noting that the U.S. tariff contained tariff item No. 3501.10.10, "milk protein concentrate".[60] The Canadian tariff contains no similar specific tariff item.

Heading No. 35.04

47. The Tribunal finds that "other protein substances . . . not elsewhere specified or included", the relevant phrase in heading No. 35.04, is also more specific than "products consisting of natural milk constituents . . . not elsewhere specified or included", the relevant phrase in heading No. 04.04. Obviously, both are basket clauses. However, the Tribunal is of the view that the term "protein" is more specific than the term "milk constituents". The former includes only one class of biologically important molecules: proteins. By way of contrast, unless excluded, heading No. 04.04 includes all possible products containing natural milk constituents, even those containing added sugar. For example, the heading would cover such diverse substances as sugars (e.g. lactose), minerals or ash (e.g. calcium, potassium and lactoferrin) and vitamins (e.g. A, B1, B2, C and D), in addition to milk proteins.[61] In other words, this heading encompasses the entire universe of products consisting of natural milk constituents, except those specifically covered elsewhere, giving it a broader scope than the above phrase covering unlisted *proteins*.

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58. *Transcript of Public Hearing*, Vol. 1, 14 September 2004, at 79.
59. Appellant's Revised Non-confidential Brief at 20; *Transcript of Public Hearing*, Vol. 2, 15 September 2004, at 316.
60. Harmonized Tariff Schedule of the United States (2003), Respondent's Non-confidential Brief, Tab 10.
61. United States International Trade Commission, *Conditions of Competition for Milk Protein Products in the U.S. Market* at D-3—D-4.

48. Therefore, as *protein substances* is more specific than *products consisting of natural milk constituents*, the Tribunal finds that the product in issue should be classified in heading No. 35.04 by virtue of Rule 3 (a) of the *General Rules*. The uncontested evidence is that the product consists of 87.5 percent protein matter on a dry weight basis. The Tribunal is of the view that this qualifies the product as either a milk protein concentrate or a milk protein isolate. Regardless of whether it is a concentrate or an isolate, the Tribunal is of the view that, at this level of concentration, the product in issue is a protein substance.

49. The Dairy Farmers of Canada, argued that heading No. 35.04 does not specifically cover the product in issue, since it covers only the *protein portion* of the product. In its submission, it argues that heading No. 04.04 is the most appropriate classification, since it covers all the ingredients in PROMILK 872 B. The Tribunal does not accept the argument.

50. A product does not have to be 100.0 percent protein in order to be classified as a protein substance. The schedule to the *Customs Tariff* contains a number of headings that classify a product as if it were a pure substance, when it is clear that the major element of the product accounts for less than 100.0 percent. As mentioned above, milk albumins need only contain 80.0 percent whey protein in order to be classified in heading No. 35.02. In addition, in his testimony, Dr. Britten stated that a 60.0 percent protein content would be sufficient to qualify the product in issue as a protein substance. Mr. Boudier alluded to the *Codex Alimentarius,* which allows a product to be labelled as "milk protein" if it contains more than 50.0 percent protein matter on a dry weight basis.[62] At 87.5 percent protein content on a dry weight basis, the product in issue far surpasses the above thresholds.

51. Both the CBSA and the Dairy Farmers of Canada, argued that the product in issue could not be covered by heading No. 35.04 by the phrase "*other* protein substances", since, as a natural milk ingredient, it was already covered by heading No. 04.04. In fact, the Dairy Farmers of Canada contended that heading No. 35.04 was a "heading of last resort".[63] The Tribunal rejects this argument.

52. Heading No. 35.04 expressly covers proteins. The first category covered by the heading is "peptones and their derivatives". Note (A) of the *Explanatory Notes* to heading No. 35.04 defines peptones as "soluble substances obtained when *proteins* are hydrolysed or submitted to the action of certain enzymes" (emphasis added). The next category is "other protein substances*"*. The final category covers "hide powder, whether or not chromed*"*. Note (C) of the *Explanatory Notes* to heading No. 35.04 defines hide powder as "virtually pure collagen", i.e. "[a] *protein* which is present in the form of fibres as a major constituent of bone, tendons and other connective tissue and which yields gelatine on boiling and leather on tanning"[64] (emphasis added). In the Tribunal's view, the use of *other protein substances* in the heading is simply for the purpose of distinguishing unspecified protein substances from *peptones and their derivatives*, which are covered by the preceding category, not from all other protein substances listed in the nomenclature, however described. Moreover, Note (B) of the *Explanatory Notes* to heading No. 35.04 contains an illustrative list of items covered by the category *other protein substances*, which includes, among other things, cereal proteins, soya proteins, nucleoproteids (proteins combined with nucleic acids) and vegetable protein isolates.

53. The basket clause to heading No. 35.04, "not elsewhere specifically specified or included", only catches protein substances not covered elsewhere in the nomenclature *as proteins per se*, and that heading is therefore more specific than heading No. 04.04. The last part of the *Explanatory Note* to that heading contain a list of items excluded from the heading. Some items are covered by headings that deal expressly

62. *Transcript of Public Hearing*, Vol. 2, 15 September 2004, at 306.
63. Public Brief of the Intervener, para. 46.
64. *The Oxford English Dictionary*, 2d ed., *s.v.* "collagen".

with other proteins, either directly or through a subheading, e.g. protein hydrolysates (subheading No. 2106.10, "protein concentrates and textured protein concentrates"); and enzymes, which by definition are "[a]ny of the proteins produced by cells which catalyse specific biochemical reactions"[65] (heading No. 35.07). Others deal specifically with chemicals, the composition of which involved—or may have involved—proteins, e.g. precious metal proteinates (heading No. 28.43,"colloidal precious metals"); and nucleic acid (heading No. 29.34). Still others involve—either directly or through subheadings—substances of which proteins were a major component, if not *the* major component, e.g. fibrinogen (heading No. 30.02, "other blood fractions"); and proteins put up as medicaments (subheading No. 3003.20, "other antibiotics"). Only one protein on the excluded list was classified in a basket clause similar to heading No. 04.04: hardened proteins (heading No. 39.13, "natural polymers not elsewhere specified or included"). However, the Tribunal views this clause as being narrower than heading No. 04.04, since it is limited to a single class of molecule, polymers, i.e. "any substance which has a molecular structure built up largely or completely from a number (freq. very large) of similar polyatomic units bonded together."[66] In other words, the *Explanatory Notes* do not support the argument that heading No. 35.04 is a basket clause "of last resort". Rather, Note (B) of the *Explanatory Notes* to heading No. 35.04 clarifies that the heading applies to other protein substances and their derivatives "not covered by a *more specific* heading in the Nomenclature" (emphasis added).

54. Much time and energy in this case was devoted to the issue of whether the product in issue was a milk protein isolate or a milk protein concentrate. In the Tribunal's view, it is not necessary to enter into this debate. Whatever its characterization, Advidia has proven that PROMILK 872 B is an "other protein [substance]" within the meaning of heading No. 35.04.[67] It is true that the *Explanatory Notes* to heading No. 35.04 include in particular, in their illustrative list, "**[p]rotein isolates** obtained by extraction from a vegetable substance". In the Tribunal's view, this does not raise any presumption that other unlisted protein substances are excluded. The very purpose of using "includes", when drafting a list, is to allow for the possibility of adding items through interpretation and application at a later time.[68]

55. The Tribunal also rejects the argument that, before goods can be classified, a legislative amendment must be made to heading No. 35.04, specifically adding high-protein concentrates, as was done in the European Union. It is true that the European Union chose to enact legislation, adding a note to the *Common Customs Tariff* of the European Union, which specified 85 percent protein content as the demarcation line between milk protein concentrates to be classified in heading No. 35.04 and those to be covered by heading No. 04.04.[69] The legislation was expressly enacted in 1990 for the purpose of classifying the concentrates in question in one or the other of the chapters so as to ensure the uniform application of the combined nomenclature among its many Member States. Parliament has not elected to pass similar legislation in this instance, presumably because there is no corresponding need to ensure uniform application of the nomenclature among any sub-federal entities, given that tariff classification falls exclusively within federal jurisdiction. Therefore, in light of this constitutional difference, the Tribunal is unwilling to draw any adverse inference from the existence of such a note.

65. *Ibid*., *s.v.* "enzyme".
66. *Ibid*., *s.v.* "polymer".
67. Public Brief of the Intervener at 18.
68. Robert C. Dick, *Legal Drafting*, 2d ed. (Toronto: Carswell, 1985) at 18, 24.
69. Appellant's Revised Non-confidential Brief, Tab 15.

56. The Tribunal therefore allows the appeal and determines that the product in issue should be classified under tariff item No. 3504.00.00, the only tariff item under heading No. 35.04.

Pierre. Gosselin
Pierre. Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

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