



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2004-061

Franklin Mint Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, June 13, 2006*

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IN THE MATTER OF an appeal heard on December 13, 2005, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency dated December 24 and 29, 2004, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**FRANKLIN MINT INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

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

Hélène Nadeau  
Hélène Nadeau  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: December 13, 2005

Tribunal Members: James A. Ogilvy, Presiding Member  
Zdenek Kvarda, Member  
Meriel V. M. Bradford, Member

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## STATEMENT OF REASONS

1. This is an appeal pursuant to section 67 of the *Customs Act*<sup>1</sup> from decisions of the President of the Canada Border Services Agency (CBSA) dated December 24 and 29, 2004, made under subsection 60(4) of the *Act*.

2. The appeal was initially filed in respect of various goods, including statuettes, plates, coins, sculptures and models. However, in a letter dated November 29, 2005, the Tribunal confirmed that a narrower range of products was covered by the appeal,<sup>2</sup> as Franklin Mint Inc. (Franklin) and the CBSA had come to an agreement as to the classification of several goods that were initially in issue.

3. For greater simplicity in dealing with this appeal, the Tribunal will group the remaining goods in issue into 10 distinct categories based on the schedule to its letter dated November 29, 2005.

4. Section 10 of the *Customs Tariff*<sup>3</sup> provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>4</sup> and the *Canadian Rules*.<sup>5</sup> Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>6</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.<sup>7</sup>

5. 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. Rule 1 provides the following:

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.

6. The Tribunal will apply this requirement below in its analysis of the goods in each of the 10 categories.

## ANALYSIS

### Category 1: “The Wizard of Oz” Statuettes and Bell Jars

7. The statuettes<sup>8</sup> are figurines that evoke memories of particular scenes in the movie “The Wizard of Oz”.<sup>9</sup> The three statuettes depict “Auntie Em”, the “Mayor of Munchkinland” and “Munchkin Man”. The bell jars depict six scenes from the movie.<sup>10</sup> These products are manufactured for Franklin under licence.

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

2. Exhibit No. AP-2004-061-36.

3. S.C. 1997, c. 36.

4. *Ibid.*, schedule [General Rules].

5. *Supra* note 3, schedule.

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

7. Customs Co-operation Council, 2d ed., Brussels, 1996 [Explanatory Notes].

8. Exhibit No. AP-2004-061-36, Amended Schedule “B”, items 1-3.

9. *Transcript of Public Hearing*, 13 December 2005, at 27.

10. Exhibit No. AP-2004-061-36, Amended Schedule “B”, items 41-46.

Franklin submitted that these products should be classified under tariff item No. 9503.90.00 of the schedule to the *Customs Tariff* as other toys, while the CBSA submitted that they were properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials.

8. Mr. John Mark Morton, Vice-President of Tax and Treasury, Franklin Mint Inc., in Pennsylvania, appeared on behalf of Franklin. In respect of the statuettes, he stated that they could be either put on a shelf or played with and manipulated, and that Franklin's head of marketing referred to them as "highly detailed action figures".<sup>11</sup> Mr. Morton acknowledged that these goods were not marketed as toys, but more as collector's items,<sup>12</sup> and that they were bought mostly for personal amusement and to let other people know about the purchaser's personal interests.<sup>13</sup> Ms. Lynn McMaster, Manager, Programmes and Canadian Children's Museum Planning at the Canadian Museum of Civilization, gave evidence on the CBSA's behalf. When asked if she agreed that the statuettes could be used in the same manner as tin soldiers, she noted that, based on their material and the fact that they do not have articulation, she would not consider them to be toys.<sup>14</sup>

9. Franklin submitted that the goods in issue in this category are toys, although it does not market them as such. Franklin further argued that goods do not have to be played with in order to be classified as toys. It referred to the *Explanatory Notes* to heading No. 95.02 that provide that this heading, which covers dolls representing only human beings, "... includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes (e.g., boudoir dolls, mascot dolls) . . ." On the other hand, the CBSA submitted that these goods were not toys and that they were properly classified according to their chief material of composition. It contended that one cannot manipulate or play with them as with a toy and that their purpose is simply to provide aesthetic pleasure. The CBSA quoted an excerpt of the Tribunal's decision in *Zellers Inc. v. Deputy M.N.R.*<sup>15</sup> where the Tribunal stated that a toy is an object which is intended to amuse and with which to play. The CBSA noted that the goods were described as being superbly crafted, hand-painted, masterfully sculpted, or hand-crafted; in its view, all these terms describe the aesthetic features of the goods as opposed to their value as an object with which to play.

10. The relevant nomenclature from the *Customs Tariff* is as follows:

...	
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14.
...	
3926.40	-Statuettes and other ornamental articles
3926.40.10	--Statuettes
3926.40.90	---Other ornamental articles
...	
95.03	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.
...	
9503.90.00	-Other
...	

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11. *Transcript of Public Hearing*, 13 December 2005, at 29.

12. *Ibid.* at 82.

13. *Ibid.* at 84.

14. *Ibid.* at 197-98.

15. (29 July 1998), AP-97-057 (CITT) [*Zellers*].

11. The following excerpts from the *Explanatory Notes* are relevant to the goods in issue in this category:

*Explanatory Notes* to heading No. 39.26

...

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

They include:

...

(3) Statuettes and other ornamental articles.

...

*Explanatory Notes* to heading No. 95.03

...

This heading covers toys intended essentially for the amusement of persons (children or adults) . . . .

12. Basing its conclusions on the evidence on the record, the Tribunal is of the view that the statuettes and bell jars do not fall in heading No. 95.03 and were properly classified by the CBSA in heading No. 39.26.

13. In *Zellers*, the Tribunal gave the following description of a toy:

In essence, a toy is something from which one derives amusement or pleasure. Toys can replicate things or animals or have forms of their own. They can be of hard or stiff construction, or be soft and cuddly. They can be designed for manipulation or for display on a shelf. They can be cute and friendly in presentation, or be fierce and frightening. They can be designed for rough and tumble use or require careful handling. Their value is often small in cash terms, although some toys, such as miniature electric train sets, can easily cost thousands of dollars. This is all to say that toys cover a world of products, some of which are readily identified as toys and some of which are recognizable as toys only upon closer inspection.<sup>16</sup>

14. In *Regal Confections Inc. v. Deputy M.N.R.*,<sup>17</sup> the Tribunal supplemented its reasoning by saying the following:

Regarding toys generally, and in light of *Zellers*, the Tribunal notes that, in *Zellers*, the Tribunal referred to the essence of a toy as being amusement. *That does not mean, however, merely because a product provides amusement value, that it should necessarily be classified as a toy.* It is common knowledge that a child will play for hours with an empty cardboard box, a paper bag or a stick. *Thus, the Tribunal is of the view that amusement alone does not make an object a toy for the purpose of tariff classification.*<sup>18</sup>

[Emphasis added]

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16. *Zellers* at 7.

17. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].

18. *Regal* at 8.

15. Applying Rule 1 of the *General Rules*, the Tribunal finds that the goods cannot be classified in heading No. 95.03. In light of the Tribunal's jurisprudence, and in particular *Regal*, the Tribunal does not consider the goods to be toys. The Tribunal acknowledges that, although they may have an amusement value, this factor is not determinative and does not make them toys for the purpose of tariff classification. "Play value" is an identifying aspect of toys, and the testimony focussed on the visual aesthetic value of these items as the pleasure-giving element and, in fact, de-emphasized any play value that they might have. The goods are not sold as toys, are usually not played with by children and are not designed to be manipulated. This is particularly true of the bell jars. Moreover, the testimony of Franklin's witness indicated that the goods were marketed as collector's items rather than toys in order to fetch a higher price in the market.<sup>19</sup>

16. Having concluded that the goods are not classifiable in heading No. 95.03, the Tribunal must now look at heading No. 39.26, which covers the following: "Other articles of plastics and articles of other materials of headings 39.01 to 39.14." The *Explanatory Notes* to heading No. 39.26 indicate that it includes, among other things, statuettes and other ornamental articles. The Tribunal finds that the statuettes and bell jars fall under the description of this heading, and more precisely in subheading No. 3926.40, which covers statuettes and other ornamental articles.

17. The Tribunal must now classify the goods at the tariff item level. In this regard, Rule 1 of the *Canadian Rules* states the following:

For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*], on the understanding that only tariff items at the same level are comparable. For the purpose of this Rule the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.

18. Although the CBSA's classification under the tariff item must stand for the statuettes, as they are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials, the bell jars should be classified under tariff item No. 3926.40.90 as other ornamental articles, since they are not statuettes.

## Category 2: "Star Trek" Sculptures and "Spock" Statuette

19. This category comprises sculptures<sup>20</sup> and a "Spock" statuette.<sup>21</sup> Franklin submitted that these products should be classified under tariff item No. 9503.90.00 as other toys. The CBSA submitted that the statuette was properly classified under tariff item No. 8306.29.00 as other statuettes and ornaments of base metal. It was also the CBSA's position that the sculptures were properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials.

20. Mr. Morton testified that the sculptures, which are displayed in bell jars, represent scenes from the "Star Trek" television show. He stated that collectors buy them and put them on their desks, as the sculptures recall their childhood and provide a personal feeling of amusement or pleasure.<sup>22</sup> He also noted that they convey a feeling of intelligence by the person who displays them, because of the fact that the person is a "Trekkie".<sup>23</sup>

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19. *Transcript of Public Hearing*, 13 December 2005, at 93.

20. Exhibit No. AP-2004-061-36, Amended Schedule "B", items 23-34.

21. *Ibid.*, item 92.

22. *Transcript of Public Hearing*, 13 December 2005, at 32.

23. *Ibid.* at 33.



21. When asked if the “Spock” statuette was a display item as opposed to a play item, Mr. Morton answered that it is certainly intended to be a display item. He testified that, given its bulkiness and heaviness, it would be dangerous for children to play with this statuette. He also mentioned that it was a high-value item.

22. The Tribunal is of the view that, for the same reasons as those given in respect of the goods in Category 1, the sculptures and “Spock” statuette are not toys of heading No. 95.03. Although the CBSA’s classification under the tariff item must stand for the “Spock” statuette, as it is properly classified under tariff item No. 8306.29.00 as other statuettes and ornaments of base metal, the sculptures should be classified under tariff item No. 3926.40.90 as other ornamental articles, since they are not statuettes.

### **Category 3: “Betty Boop”<sup>TM</sup> Bell Jars**

23. This category comprises bell jars that contain different representations of the cartoon character Betty Boop<sup>TM</sup>.<sup>24</sup> Franklin submitted that the bell jars should be classified under tariff item No. 9503.90.00 as other toys. The CBSA submitted the bell jars were properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials.

24. Regarding the bell jars, Mr. Morton stated that they were not used for decorative purposes, but rather to amuse the person who buys them, as they evoke a memory.<sup>25</sup> In cross-examination, he stated that these bell jars were marketed not as toys, but as collector’s items.<sup>26</sup>

25. The Tribunal is of the view that, for the same reasons as those given in respect of the goods in Category 1, the bell jars are not toys of heading No. 95.03. Although the CBSA’s classification in heading No. 39.26 must stand, since they are not statuettes, the bell jars should be classified under tariff item No. 3926.40.90 as other ornamental articles.

### **Category 4: Mood Dragon<sup>TM</sup> Figurines and Baby Mood Dragon<sup>TM</sup> Egg Figurines**

26. This category comprises Mood Dragon<sup>TM</sup> figurines and Baby Mood Dragon<sup>TM</sup> egg figurines.<sup>27</sup> Franklin submitted that the figurines should be classified under tariff item No. 9503.49.00 as other toys representing animals or non-human creatures. The CBSA submitted that the figurines were properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials.

27. Mr. Morton testified that Franklin had first created a fantasy list with dragons, which were made of crystal and different kinds of materials. It later decided to market a line with little Mood Dragons<sup>TM</sup> made of plastic. He further explained that people who display the figurines tell something about themselves. He stated that he has seen them throughout his office building on people’s computers, generally just one at a time, with a different figurine being displayed depending on the mood of the person.<sup>28</sup> Each figurine evokes a personality trait: cocky, dreamy, gloomy, guilty, happy, lazy, sneaky, etc.<sup>29</sup> Mr. Morton indicated that they were aimed more at an adult market, but that they also appealed to children.

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24. Exhibit No. AP-2004-061-36, Amended Schedule “B”, items 51-54.

25. *Transcript of Public Hearing*, 13 December 2005, at 55.

26. *Ibid.* at 82.

27. Exhibit No. AP-2004-061-36, Amended Schedule “B”, items 80-91, 114-119, 121, 122.

28. *Transcript of Public Hearing*, 13 December 2005, at 41-42.

29. Exhibit No. AP-2004-061-36, Amended Schedule “B”, items 80-91.

28. The Tribunal is of the view that, for the same reasons as those given in respect of the goods in Category 1, the mood dragons and baby mood dragon egg figurines are not toys of heading No. 95.03. They are properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials.

#### **Category 5: Coca-Cola™ Polar Bear Bell Jars**

29. This category comprises Coca-Cola™ polar bear bell jars.<sup>30</sup> Franklin submitted that the bell jars should be classified as other toys under tariff item No. 9503.90.00 or, in the alternative, as articles for Christmas festivities of tariff item No. 9505.10.00. The CBSA submitted that the bell jars were properly classified under tariff item No. 3926.40.10 as statuettes of plastics and other materials or, in the alternative, in heading No. 69.13 as statuettes and other ornamental ceramic articles.

30. Mr. Morton testified that the bell jars are used to decorate the house for the holidays and are put away afterwards.<sup>31</sup> When asked by the Tribunal what made a polar bear a Christmas item, Mr. Morton explained that the item had started with a very popular Coca-Cola™ promotion that depicted polar bears and the North Pole, where Santa Claus lives.<sup>32</sup>

31. In argument, the CBSA submitted that bell jars were primarily collectibles as opposed to festive articles. In addition, it argued that, although there is some snow in the representations, there is nothing that is directly associated with Christmas.

32. The Tribunal is of the view that, for the same reasons as those given in respect of the goods in Category 1, the bell jars are not toys of heading No. 95.03. The Tribunal is also not of the opinion that they are festive articles. Their relation to a specific festive event, in this case Christmas, is marginal at best. Moreover, the Tribunal is of the opinion that the bell jars cannot be classified in heading No. 69.13, as argued in the alternative by the CBSA, since they are not made of porcelain or china. Mr. Morton testified that the bell jars were made of Tesori® porcelain, which is porcelain powder mixed with resin and which is basically plastic.<sup>33</sup> Although the CBSA was correct in its classification in heading No. 39.26, the Tribunal is of the view that the bell jars should be classified under tariff item No. 3926.40.90 as other ornamental articles, since they are not statuettes.

#### **Category 6: Noah's Ark**

33. This category comprises what was described by the CBSA as a religious sculpture that depicts an Old Testament scene from the story of Noah's Ark.<sup>34</sup> Franklin submitted that the item should be classified under tariff item No. 9986.00.00 as a religious statuette. The CBSA submitted that the item was properly classified under tariff item No. 3926.40.10 as a statuette of plastics and other materials.

34. Mr. Morton described the item as a depiction of the Bible story of Noah in his Ark with his animals. He explained that the item was marketed to a segment of Franklin's customers called "religious buyers".

35. In dealing with the classification of the item, the testimony of Mr. Richard Gill, a sculptor who appeared on behalf of the CBSA, was instructive. The Tribunal qualified Mr. Gill as an expert in plates,

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30. *Ibid.*, items 55-58.

31. *Transcript of Public Hearing*, 13 December 2005, at 35, 53.

32. *Ibid.* at 89-90.

33. *Ibid.* at 19.

34. Respondent's Brief, Volume 1 of III at 9.

plaques and sculptures.<sup>35</sup> He described “sculpture” as the general category of representations that have more than two dimensions. He stated that there exist different categories of “sculpture” and that statues, statuettes and figures were sub-categories of “sculpture”.<sup>36</sup> He defined a statue as a representation of a life form, usually human. He stated that statues can contain other accessories, for example, a branch, or the life form may be holding an object, but that it is the life form that is predominantly represented.<sup>37</sup> He defined a statuette in the same manner, but noted that it was smaller than life-size. He also defined “figure” as a general term meaning a representation of a figure, human or animal.<sup>38</sup>

36. When asked how he would categorize the item, Mr. Gill stated that he would classify it as a sculpture, since it is a composite of numerous different elements, such as animals and waves, as well as Noah himself. This explains why, in his view, it is not a statuette.<sup>39</sup>

37. The Tribunal must determine whether the item should be entitled to the benefit of tariff item No. 9986.00.00 as a religious statuette. In accordance with Note 3 to Chapter 99, goods may be classified in this chapter only after classification under a tariff item in Chapters 1 to 97 has been determined. The item was initially classified under tariff item No. 3926.40.10 as a statuette of plastics and other materials. The Tribunal accepts Mr. Gill’s testimony regarding statues and considers that they are figures that represent singular life forms, primarily humans or animals, are life-size or larger and stand alone, with the exception of certain accessories that may provide physical support (e.g. a chair) or some specific aspect of context (e.g. an equestrian statue in which a person is placed on or with a horse). The Tribunal also accepts the testimony that statuettes are small-scale statues.

38. Although the religious nature of the item is obvious, it cannot, in light of the evidence, be entitled to the benefit of tariff item No. 9986.00.00 as a religious statuette, as it is not a statue or a statuette. The Tribunal notes that tariff item No. 9986.00.00 is an exhaustive list as opposed to a list of examples. In the Tribunal’s view, the item does not meet the requirements for inclusion under one of the descriptive terms in that tariff item. The Tribunal is consequently of the opinion that the item is properly classified under tariff item No. 3926.40.90 as other ornamental articles.

### **Category 7: Transfiguration Egg**

39. This category comprises what both parties identified as a transfiguration egg.<sup>40</sup> Franklin submitted that the egg should be classified under tariff item No. 9986.00.00 as a religious statuette. The CBSA submitted that the egg was properly classified under tariff item No. 3926.40.90 as other ornamental articles. The CBSA described the egg as a religious Fabergé-like egg. Approximately one third of the front of the egg has been removed and the rest has been hollowed out. The exposed interior contains a three-dimensional figure of Jesus surrounded by clouds. The egg is balanced on one end and placed on a pedestal.<sup>41</sup>

40. Mr. Morton testified that the egg is marketed to Franklin’s segment of religious buyers, the same collectors who buy the Noah’s Ark sculpture. When asked how he would describe the nature of this product, Mr. Gill responded that there was “more going on” in the piece and that he would not classify it as either a

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35. *Transcript of Public Hearing*, 13 December 2005, at 132.

36. *Ibid.* at 136-38.

37. *Ibid.* at 139.

38. *Ibid.*

39. *Ibid.* at 140-41.

40. Exhibit No. AP-2004-061-36, Amended Schedule “B”, item 60.

41. Respondent’s brief, Volume I of III at 9.

statue or a statuette, but rather as a sculpture. He noted that it was a composite of numerous different elements and that he would therefore consider it to be a figurative sculpture.<sup>42</sup>

41. For the same reasons as those given in respect of the goods in Category 6, the Tribunal is of the opinion that the egg is properly classified under tariff item No. 3926.40.90 as other ornamental articles and is not entitled to the benefit of tariff item No. 9986.00.00.

### Category 8: “Bast” Cat

42. This category comprises what Mr. Morton described as the Egyptian “Bast” cat.<sup>43</sup> He explained that, around the time of the King Tut exhibit, an interest in Egyptian things developed and Franklin decided to market the Bast cat.<sup>44</sup> Franklin submitted that the “Bast” cat should be classified under tariff item No. 9986.00.00 as a religious statue. The CBSA submitted that it was properly classified under tariff item No. 3926.40.90 as other ornamental articles. In cross-examination, Mr. Morton conceded that this item was not marketed to the religious buyers and that, to his knowledge, no one was purchasing the “Bast” cat to worship.<sup>45</sup>

43. Franklin argued that there is no requirement for objects falling under tariff item No. 9986.00.00 to be used in religion. It submitted that it is enough for the object to be concerned with religion, whether or not that religion is current.<sup>46</sup> In support of this argument, Franklin cited an article which states as follows: “. . . In early times Bast . . . was a goddess with the head of a lion or a desert sand-cat and was regarded as mother of Mahes, a lion-headed god . . .”<sup>47</sup> While the CBSA did not dispute the fact that this item was a statuette, it did not agree that it had a religious aspect. In support of its position, the CBSA referred to Memorandum D10-15-12.<sup>48</sup> According to this memorandum, tariff item No. 9986.00.00 covers articles used in religious services or used as explicit witness of a religious affiliation or devotion. In addition, articles that simply incorporate a religious motif do not qualify for importation under this tariff item if they are not generally regarded as having a religious function or purpose.

44. In the Tribunal’s view, the “Bast” cat is entitled to the benefit of tariff item No. 9986.00.00 as a religious statuette. It is a copy of a representation of a deity dating from the period in which the religion in which this cat was worshiped was practised. The Tribunal is of the view that a religion need not be currently practised for an object related to it to be considered “religious”. The Tribunal is not bound by the CBSA’s memorandum which defines “religious articles” in a far more restrictive way than the *Customs Tariff* by incorporating additional usage requirements. In the Tribunal’s view, the plain meaning of the language of tariff item No. 9986.00.00 does not require the use of an article listed thereunder as explicit or current witness to a religious affiliation or devotion.

45. In light of the expert testimony of Mr. Gill noted earlier, the Tribunal finds that this item is a statuette. Accordingly, Franklin’s position prevails, and the Tribunal finds that the “Bast” cat is entitled to the benefit of tariff item No. 9986.00.00 as a religious statuette.

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42. *Transcript of Public Hearing*, 13 December 2005, at 142-43.

43. Exhibit No. AP-2004-061-36, Amended Schedule “B”, item 22.

44. *Transcript of Public Hearing*, 13 December 2005, at 30.

45. *Ibid.* at 80-81.

46. *Ibid.* at 18-19.

47. *Transcript of Public Argument*, 13 December 2005, at 29; Exhibit No. AP-2004-061-37.25.

48. “Interpretation of Tariff Item No. 9986.00.00—Religious Articles” (29 May 1998).

### Category 9: Christmas Plates

46. This category comprises what is generally described as Christmas plates.<sup>49</sup> Franklin submitted that these products should be classified under tariff item No. 9505.10.00 as festive articles. The CBSA submitted the goods were properly classified under tariff item No. 6913.10.00 as other ornamental articles.

47. Mr. Morton testified that all the goods in this category had a Christmas theme, i.e. Santa Claus. He stated that they were marketed as holiday decorations and that they were brought out only at Christmastime. He acknowledged that they were sold by Franklin and ordered by customers all the year round, but emphasized that they would not be displayed until the following Christmas season.<sup>50</sup> Moreover, he testified that one cannot serve food on the plates because of the chemical used in the manufacturing process and that Franklin prints a warning on the back of them to advise that they are not to be used for serving food.<sup>51</sup>

48. In argument, Franklin asserted that the serving of food was irrelevant to determine the classification of the plates in heading No. 99.05. It took the position that the plates are not going to be displayed all the year round and that they are clearly tied to a Christmas theme or a Christmas motif. Accordingly, it was Franklin's position that the goods are distinguishable from the ones in *N.C. Cameron & Sons, Limited v. Deputy M.N.R.*,<sup>52</sup> as the goods in issue in this category are without question decorated in a Christmas fashion. On the other hand, the CBSA argued that the goods are collector's plates, that they are imported all the year round and that they are primarily collector's items, not articles for Christmas festivities. It submitted that, in *Cameron*, the Tribunal determined that, since the goods in that appeal were predominantly collectibles and sold all the year round, they were not articles for Christmas festivities.

49. The two competing headings at issue are heading No. 95.05, which covers festive articles, and heading No. 69.13, which covers other ornamental ceramic articles. The *Explanatory Notes* to these two headings read as follows:

*Explanatory Notes* to heading No. 69.13

...

This heading covers a wide ranger of ceramic articles of the type designed essentially for the interior decoration of homes, offices, assembly rooms, churches, etc. . . .

...

The heading covers:

...

(B) **Tableware and other domestic articles only if the usefulness of the articles is clearly subordinate to their ornamental character**, for example, trays moulded in relief so that their usefulness is virtually nullified, ornaments incorporating a purely incidental tray or container usable as a trinket dish or ashtray, miniatures having no genuine utility value, etc. In general, however, tableware and domestic utensils are designed essentially to serve useful purposes, and any decoration is usually secondary so as not to impair the usefulness. If, therefore, such decorated articles serve a useful purpose no less efficiently than their plainer counterparts, they are classified in **heading 69.11 or 69.12** rather than in this heading.

...

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49. Exhibit No. AP-2004-061-36, Amended Schedule "B", items 21, 35-38, 50, 63-65, 76, 98.

50. *Transcript of Public Hearing*, 13 December 2005, at 48, 61.

51. *Ibid.* at 50.

52. (11 February 2000), AP-98-047 (CITT) [*Cameron*].

*Explanatory Notes* to heading No. 95.05

...

This heading covers:

- (A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:
- (1) Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc.); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags).
  - (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees, nativity scenes, nativity figures and animals, angels, Christmas crackers, Christmas stockings, imitation yule logs, Father Christmases.

...

50. The Tribunal is of the opinion that 3 (a) the goods are *prima facie* classifiable in either heading No. 69.13 or heading No. 95.05. Because neither of these classifications is clearly determinative, the Tribunal must look beyond Rule 1 of the *General Rules*. Accordingly, the Tribunal moves to Rule 3 (a), which deals with goods that are classifiable in more than one heading. Under this Rule, the heading that provides the most specific description is to be preferred to headings that provide a more general description. The Tribunal finds that, in this case, the term “festive articles” better defines the goods. They are all associated with the Christmas season and are marketed as such. For example, one of the plates is entitled “Teddy’s First Christmas” and Santa Claus is depicted on it.<sup>53</sup> Another one is entitled “Santa Paws” and shows several different dogs dressed up for the holidays,<sup>54</sup> while another one is entitled “Santa’s Pepsi-Cola Workshop”.

51. In dealing with the classification of festive articles, in *Decolin Inc. v. President of the Canada Border Services Agency*,<sup>55</sup> the Tribunal stated the following:

27. . . . Accordingly, the Tribunal must determine if these goods are “festive” within the meaning of heading No. 95.05 and “Articles for Christmas festivities” as referred to in subheading No. 9505.10. The *Oxford English Dictionary* defines “festive” as being “[o]f a place or season: Appropriated to feasting. *the festive season*: spec. = ‘Christmas-tide’.” “Christmas-tide” is defined as “the season of Christmas, Christmas-time.” In the Tribunal’s view, because goods of this type are essentially sold only for the Christmas season these goods are “festive”, are “traditionally used for Christmas festivities” as contemplated by the *Explanatory Notes*, and “Articles for Christmas festivities” as referred to in heading No. 9505.10.

28. The *Explanatory Notes* indicate that goods classified in heading No. 95.05 “are generally made of non-durable material” . . . . Given that the *Explanatory Notes* do not exclude goods that are made of durable material, the Tribunal does not need to determine whether the goods in issue are made of durable or non-durable material.

[Footnotes omitted]

52. In the Tribunal’s view, these items are clearly used and displayed at Christmas festivities to decorate rooms, tables, etc. Although the testimony was that they may be ordered all the year round, they

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53. Respondent’s Brief, Volume II of III, Tab 2 at 19-22.

54. *Ibid.* at 11-12.

55. (13 September 2005), AP-2004-011 (CITT).

will be used essentially during the holiday season. The Tribunal accepts Mr. Morton's testimony that, for example, most people would never display such items in July.<sup>56</sup> Moreover, the following warning, which strongly suggests a decorative function rather than a utilitarian one, appears on the back of the plates: "A decorative accessory. Not to be used for food consumption. Pigments used for color may be toxic." In the Tribunal's view, heading No. 69.13, when examined in the context of the goods, has more of a residual character, as it covers other ornamental ceramic articles. Accordingly, the Tribunal finds that the goods are more specifically and, therefore, more properly described by heading No. 95.05 and should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities.

### Category 10: Jesus Bible-shaped Plates

53. This category comprises what was generally described as Jesus Bible-shaped plates.<sup>57</sup> The goods have an outside edge shaped like an open book. None of the plates contains any relief, and each plate depicts a religious scene.

54. Franklin submitted that these products should be classified under tariff item No. 9986.00.00 as religious figures. The CBSA submitted the goods were properly classified under tariff item No. 6913.10.00 as other ornamental articles.

55. Mr. Gill described the characteristics of a plate as being flat, smooth, glazed and free of excessive relief, with the edges turned up and with a foot. He also noted that plates can come in various shapes.<sup>58</sup> When asked if he would consider the goods to be plates or plaques, he responded without hesitation that they were plates. In cross-examination, Mr. Gill noted that the goods were three-dimensional and agreed that they were in a reasonably realistic shape of a book. He noted that, in art circles, the words "figure" and "figurative" refer generally to art of the human body.<sup>59</sup>

56. Franklin argued that, despite the fact that they are called plates, the goods are "figures" according to dictionary definitions. It noted that, on one side of each plate, there was a Christian religious picture and, on the other side, a piece of scripture. It further contended that, in *Franklin Mint Inc. v. Commissioner of the Canada Customs and Revenue Agency*,<sup>60</sup> all the plates were basically round or square, as opposed to anything with a definite shape or format. The CBSA did not dispute the fact that the plates depict something religious, but it took the position that plates are not listed in the goods that are entitled to the benefits of tariff item No. 9986.00.00.

57. In *Franklin I*, the Tribunal stated the following with regard to religious plates:

...

The evidence shows that the goods in issue are marketed as collector plates. One of the Commissioner's expert witnesses, Mr. Gill, characterized the articles as plates by reason of their form. Furthermore, the inscription on the back of the articles themselves describes them as plates. Therefore, the Tribunal is of the view that the goods in issue are plates. Since plates, other than Seder plates or plates included in communion sets, are not specifically mentioned in tariff item No. 9986.00.00, the Tribunal is of the view that the goods in issue are not entitled to the benefit of that tariff item.

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56. *Transcript of Public Hearing*, 13 December 2005, at 37.

57. Exhibit No. AP-2004-061-36, Amended Schedule "B", items 94-97.

58. *Transcript of Public Hearing*, 13 December 2005, at 134.

59. *Ibid.* at 161.

60. (3 March 2004), AP-2003-013 (CITT) [*Franklin I*].

The Tribunal is also not convinced that the goods in issue are figures. The Tribunal is satisfied that the goods contain a pictorial representation of the life of Christ. However, this does not make the goods themselves figures, as in the case of sculptures or busts. In this regard, the Tribunal is assisted by paragraph 1 of Note A of the *Explanatory Notes* to heading No. 69.13, which associates the term “figures” with statues, statuettes, busts and haut or bas reliefs. In the Tribunal’s view, these goods are all stand-alone three-dimensional articles that, in their own right, can be referred to as figures. They do not include the representation of a human form by way of a picture on a plate. Therefore, the Tribunal is of the view that such a pictorial representation does not convert the plate into a figure.

...

[Footnotes omitted]

58. The Tribunal sees no reason to deviate from this view. That the plates are distinguishable by the fact that they are in the shape of the Bible is inconsequential. In light of the above, the Tribunal is of the view that the goods are not entitled to the benefit of tariff item No. 9986.00.00 and are properly classified under tariff item No. 6913.10.00.

59. In light of the reasons given in respect of each of the categories of goods in issue in this matter, the appeal is allowed in part. For greater convenience, the appendix summarizes the Tribunal’s decision in respect of each of the categories of goods in issue.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

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



## APPENDIX

<b>Category</b>	<b>Product Description</b>	<b>Amended Schedule "B" attached to the Tribunal's letter dated November 29, 2005</b>	<b>Tribunal's decision</b>
1	"The Wizard of Oz" Statuettes	Items 1 to 3	Properly classified under tariff item No. 3926.40.10
	"The Wizard of Oz" Bell Jars	Items 41-46	Should be classified under tariff item No. 3926.40.90
2	"Spock" Statuette	Item 92	Properly classified under tariff item No. 8306.29.00
	"Star Trek" Sculptures	Items 23-34	Should be classified under tariff item No. 3926.40.90
3	Betty Boop™ Bell Jars	Items 51-54	Should be classified under tariff item No. 3926.40.90
4	Mood Dragon™ Figurines and Baby Mood Dragon™ Egg Figurines	Items 80-91, 114-119 and 121-122	Properly classified under tariff item No. 3926.40.10
5	Coca-Cola™ Polar Bear Bell Jars	Items 55-58	Should be classified under tariff item No. 3926.40.90
6	Noah's Ark	Item 59	Should be classified under tariff item No. 3926.40.90
7	Transfiguration Egg	Item 60	Properly classified under tariff item No. 3926.40.90
8	"Bast" Cat	Item 22	Should be classified under tariff item No. 9986.00.00
9	Christmas Plates	Items 21, 35-38, 50, 63-65, 76 and 98	Should be classified under tariff item No. 9505.10.00
10	Jesus Bible-shaped Plates	Items 94-97	Properly classified under tariff item No. 6913.10.00