



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-003

CapsCanada[®] Corporation

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, July 2, 2010*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE..... 2

 ANALYSIS 2

 Law 2

 Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes..... 3

 Tariff Classification at Issue 5

 Conclusion..... 8

DECISION 9

IN THE MATTER OF an appeal heard on April 20, 2010, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 26, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CAPSCANADA[®] CORPORATION

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

André F. Scott
André F. Scott
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 20, 2010

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by CapsCanada[®] Corporation (CapsCanada) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision of the President of the Canada Border Services Agency (CBSA) dated January 26, 2009, with respect to a request for re-determination pursuant to subsection 60(4).

2. The issue in this appeal is whether K-CAPS[®] vegetarian capsules (the goods in issue) are properly classified under tariff item No. 3923.90.90 of the schedule to the *Customs Tariff*² as other articles of plastics for the conveyance or packing of goods, as determined by the CBSA, or should be classified under tariff item No. 9602.00.10 as gelatin capsules for pharmaceutical products, worked, of unhardened gelatin (except gelatin of heading No. 35.03), as claimed by CapsCanada.

PROCEDURAL HISTORY

3. The goods in issue were imported between January 1 and December 31, 2006, and originally classified under tariff item No. 9602.00.10.

4. On April 1, 2008, further to a customs compliance verification made pursuant to sections 40 and 42 of the *Act*, the CBSA re-classified the goods in issue under tariff item No. 3923.90.90.³

5. On October 20, 2008, the CBSA informed CapsCanada of a preliminary decision pursuant to section 59 of the *Act* to maintain the classification under tariff item No. 3923.90.90 and denied the classification under tariff item No. 9602.00.10 requested by CapsCanada.⁴

6. In a letter dated January 5, 2009, the CBSA confirmed the classification of the goods in issue under tariff item No. 3923.90.90.⁵

7. On April 20, 2009, CapsCanada appealed the CBSA's decision dated January 26, 2009, to the Tribunal pursuant to section 67 of the *Act*. On April 20, 2010, the Tribunal held a public hearing in Ottawa, Ontario. Mr. Christopher Peter Kotevich, Director of Operations for CapsCanada, Mr. Dale E. Martin, General Manager for CapsCanada, and Mr. William F. Busch, Senior Development Specialist for Dow Wolff Cellulosics, with over 20 years of experience in plastics, testified on behalf of CapsCanada. Mr. Alan Granville, Senior Chemist in the Polymers and Papers Section of the CBSA's Laboratory and Scientific Services Directorate, and Ms. Kathleen Smith, Senior Chemist in the Food Products Section of the CBSA's Laboratory and Scientific Services Directorate, testified on behalf of the CBSA. The Tribunal qualified Mr. Granville as an expert with respect to the definition and composition of hydroxypropyl methylcellulose (HPMC).⁶ Ms. Smith was qualified as an expert with respect to the definition and composition of gelatin.⁷

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

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

3. Tribunal Exhibit AP-2009-003-06A, tab 9.

4. *Ibid.*, tab 10.

5. *Ibid.*, tab 11.

6. *Transcript of Public Hearing*, 20 April 2010, at 157-73.

7. *Ibid.* at 199-205.

GOODS IN ISSUE

8. The goods in issue are two-piece empty hard-shelled capsules made of HPMC, which is a cellulose ether, a chemical derivative of cellulose extracted from softwood pulp and mixed with water, sorbitol and silicone dioxide.⁸

9. CapsCanada filed four physical exhibits, two of which were identified as clear and opaque versions of the goods in issue and two of which were clear and opaque versions of capsules made of animal gelatin.⁹

10. Basically, the goods in issue are a vegetarian alternative to capsules made of animal gelatin.¹⁰

ANALYSIS

Law

11. On appeals pursuant to section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

12. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.¹¹ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

13. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . 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^[12] and the Canadian Rules^[13] set out in the schedule.”

14. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.¹⁴ Classification therefore begins with Rule 1, which provides as follows: “. . . 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.”

8. Tribunal Exhibit AP-2009-03-06A, tabs 2, 3; *Transcript of Public Hearing*, 20 April 2010, at 32, 143-46, 174.

9. *Transcript of Public Hearing*, 20 April 2010, at 20-22, 36, 187, 188.

10. *Ibid.* at 53-54, 59-60, 74, 100-102.

11. Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.

12. S.C. 1997, c. 36, schedule [*General Rules*].

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

14. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

15. Section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[15] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[16] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has indicated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.¹⁷

16. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

17. Thus, the Tribunal must first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relevant Section or Chapter Notes in the *Customs Tariff*.

Relevant Provisions of the Customs Tariff, General Rules and Explanatory Notes

18. The nomenclature of the *Customs Tariff* which CapsCanada claims should apply to the goods in issue reads as follows:

96.02 **Worked vegetable or mineral carving material and articles of these materials; moulded or carved articles of wax, of stearin, of natural gums or natural resins or of modelling pastes, and other moulded or carved articles, not elsewhere specified or included; worked, unhardened, gelatin (except gelatin of heading 35.03) and articles of unhardened gelatin.**

...

9602.00.10 ...
 Gelatin capsules for pharmaceuticals products

19. Note 2 to Chapter 96 states the following:

2. In heading 96.02 the expression “vegetable or mineral carving material” means:
 - (a) Hard seeds, pips, hulls and nuts and similar vegetable materials of a kind used for carving (for example, corozo and dom);
 - (b) Amber, meerschaum, agglomerated amber and agglomerated meerschaum, jet and mineral substitutes for jet.

20. The *Explanatory Notes* to Chapter 96 provide the following:

GENERAL

This Chapter covers carving and moulding materials and articles of these materials . . . and various other articles **not more specifically covered** by other headings in the Nomenclature.

15. World Customs Organization, 2d ed., Brussels, 2003.

16. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

17. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

21. The *Explanatory Notes* to heading No. 96.02 provide the following:

For the definition of the term “worked”, the second paragraph of the *Explanatory Notes* to heading 96.01 applies, *mutatis mutandis*, to this heading

[The *Explanatory Notes* to heading No. 96.01 read as follows: “For the purposes of this heading, the expression ‘worked’ refers to materials which have undergone processes extending beyond the simple preparations permitted in the heading for the raw material in question”]

...

(II) MOULDED OR CARVED ARTICLES OF WAX, OF STEARIN, OF NATURAL GUMS OR NATURAL RESINS OR OF MODELLING PASTES, AND OTHER MOULDED OR CARVED ARTICLES, NOT ELSEWHERE SPECIFIED OR INCLUDED; WORKED, UNHARDENED, GELATIN AND ARTICLES OF UNHARDENED GELATIN

This group includes, on the one hand, moulded and carved **articles** of various materials, **provided** those articles are **not specified or included** in other headings of the Nomenclature (e.g., articles of plastics - Chapter 39 It also covers worked **unhardened gelatin and articles thereof (other than goods of heading 35.03)**.

For the purposes of these materials, the expression “**moulded articles**” means articles which have been moulded to a shape appropriate to their intended use. . . .

Subject to the exclusions mentioned below, this group includes:

...

(8)

(ii) Capsules for pharmaceutical products

22. The nomenclature of the *Customs Tariff* which the CBSA considers applicable to the goods in issue reads as follows:

39.23 **Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics.**

...

3923.90 **-Other**

3923.90.90 - - -Other

23. The Notes to Chapter 39 provide the following:

1. Throughout the Nomenclature the expression “plastics” means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

...

2. This Chapter does not cover:
- ...
- (w) Articles of Chapter 96 (for example, brushes, buttons, slide fasteners, combs, mouthpieces or stems for smoking pipes, cigarette-holders or the like, parts of vacuum flasks or the like, pens, propelling pencils).
- ...
6. In headings 39.01 to 39.14, the expression “primary forms” applies only to the following forms:
- ...
- (b) ... powders (including moulding powders), granules, flakes and similar bulk forms.
24. The *Explanatory Notes* to Chapter 39 provide the following:
- In general, this Chapter covers substances called polymers and semi-manufactures and articles thereof, **provided** they are not excluded by Note 2 to the Chapter.
- ...
- General arrangement of the Chapter**
- ... sub-Chapter II covers ... semi-manufactures and articles.
- ...
- In sub-Chapter II ... [h]eadings 39.16 to 39.25 cover semi-manufactures or specified articles of plastics. ...
25. The *Explanatory Notes* to heading No. 39.23 provide the following:
- This heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products. ...

Tariff Classification at Issue

26. In the present appeal, the parties agree that the goods in issue are composed of HPMC, a cellulose ether, but disagree on where, in the nomenclature of the *Customs Tariff*, the goods should be classified.
27. CapsCanada argues that the goods in issue should be classified in heading No. 96.02. According to CapsCanada, the goods in issue are classifiable in heading No. 96.02 either as worked, unhardened gelatin (except gelatin of heading 35.03) and articles of unhardened gelatin or, in the alternative, as other moulded or carved articles, not elsewhere specified or included.
28. CapsCanada refers to the definition of “worked” in the *Explanatory Notes* to heading No. 96.01 as materials which have undergone processes extending beyond the simple preparations permitted in the heading for the raw material in question. In applying this definition, CapsCanada relies on the evidence that HPMC is transformed from softwood pulp, mixed with water, sorbitol and silicone dioxide to obtain a gelatinous mix and then shaped into a capsule before being hardened.¹⁸
29. CapsCanada claims that HPMC is a vegetable-based gelatin, not the animal-based gelatin covered by heading No. 35.03.

18. *Transcript of Public Hearing*, 20 April 2010, at 126-28.

30. CapsCanada argues that the goods in issue could be classified as moulded or carved articles, not included or specified elsewhere because they are moulded. Note 2 to Chapter 96 refers to “. . . vegetable or mineral carving material . . .” HPMC is derived from vegetable carving materials (i.e. softwood pulp), and the goods in issue are not covered elsewhere in the nomenclature.

31. CapsCanada submits that a determination of the classification of the goods in issue in heading No. 96.02 in the United States is further proof of its claim.

32. CapsCanada submits that the goods in issue are specifically described under tariff item No. 9602.00.10 as gelatin capsules for pharmaceutical products.

33. CapsCanada further claims that the goods in issue cannot be classified in heading No. 39.23 as articles of plastics for the conveyance or packing of goods because, *inter alia*, they are not intended for repeated use, they dissolve after being ingested, and their functions are different from those of the articles listed in heading No. 39.23 (e.g. blister packs, vials, drums, plant containers, produce trays, food inserts).¹⁹ CapsCanada adds that the goods in issue cannot be classified in heading No. 39.23 because Note 2(w) to Chapter 39 excludes articles of Chapter 96 from the chapter.

34. The CBSA submits that the goods in issue are not “gelatin”, as defined by the *Explanatory Notes* to heading No. 35.03, dictionary definitions, industry knowledge and science, which refer to an animal-based product, not a product derived from softwood pulp.²⁰

35. The CBSA notes that, while articles of unhardened gelatin are provided for in heading No. 96.02, articles of HPMC, even if they are moulded articles, are not “vegetable carving material[s]”, as Note 2(a) to Chapter 96 limits that expression to “[h]ard seeds, pips, hulls, nuts and similar materials . . .” and they are specified or included in heading No. 39.23.

36. The CBSA claims that the goods in issue meet all the criteria for classification under tariff item No. 3923.90.90, in particular, as other articles of plastics for the conveyance of goods because they are articles that convey medicaments into the human body, and that the definition of “plastics” in Note 1 to Chapter 39 includes cellulose ether.²¹

37. The Tribunal will begin its analysis by examining the merits of the CBSA’s position in relation to heading No. 39.23.

38. To this end, the Tribunal observes that CapsCanada admits that the goods in issue are “articles”.²²

39. Are the goods in issue, then, articles of plastics “for the conveyance or packing of goods”? The ordinary meaning of the expression “conveyance” is the act or process of carrying, transmitting or transferring.²³ Mr. Kotevich testified that the goods in issue encapsulate a single dosage of an active pharmaceutical ingredient (i.e. medicine) and deliver it into the human body where it dissolves and releases

19. Tribunal Exhibit AP-2009-003-06A, at para. 17.

20. The *Explanatory Notes* to heading No. 35.03 define gelatin as follows: “Gelatin and the glues of this heading are water-soluble protein substances obtained by treating skins, cartilage, bones, tendons or similar animal materials, usually with warm water with or without addition of acids.”

21. *Explanatory Notes* to Chapter 39.

22. Tribunal Exhibit AP-2009-003-06A, at para. 38.

23. The *Canadian Oxford Dictionary*, 2d ed., defines “conveyance” as follows: “**1 a** the act or process of carrying. **b** the communication . . . **c** transmission. **2 a** a means of transport . . . **3 Law a** . . . transfer”.

its contents.²⁴ Although they described the goods in issue as primarily for the nutraceutical (i.e. vitamin) market, Mr. Martin and Mr. Busch also testified that they are an oral drug delivery system.²⁵ Therefore, notwithstanding the fact that they dissolve within the human body, the goods in issue carry, transmit or transfer medicine or vitamins into the human body, that is, they are articles for the conveyance of goods.

40. Are the goods in issue articles of plastics? Note 1 to Chapter 39 defines the expression “plastics” as “materials . . . which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding . . . into shapes which are retained on the removal of the external influence.” The *Explanatory Notes* to Chapter 39 add that this chapter covers “. . . polymers . . . and articles thereof . . .” As discussed, the parties agree that the goods in issue are made from a chemical derivative of cellulose extracted from softwood pulp, HMPC. The Tribunal heard that HPMC is a “synthesized” product, a “polymer”.²⁶ HPMC comes in the form of a dry white powder, which is dissolved in water.²⁷ The solution is heated with sorbitol that is added as a “plasticizer”.²⁸ Moulding pins are dipped into the heated solution, removed and dried. The film around the moulding pins is allowed to dry and harden, retaining a solid shape.²⁹ The film is then taken off the moulding pins, trimmed to proper length and joined to form capsules.³⁰ Therefore, the goods in issue meet the criteria of “plastics” dictated by Note 1 to Chapter 39 and the *Explanatory Notes* to Chapter 39.

41. Consequently, the goods in issue are *prime facie* classifiable in heading No. 39.23.

42. Are the goods in issue also classifiable in heading No. 96.02, as claimed by CapsCanada?

43. A central issue in this regard is whether HPMC mixed with water and sorbitol constitutes a type of unhardened gelatin. CapsCanada’s position is that, when mixed with water, HPMC forms a vegetable gelatin, that is, a gelatin not of heading No. 35.03 for the purposes of heading No. 96.02. The *Explanatory Notes* to heading No. 35.03 define “gelatin” as a “water-soluble protein substance[s] obtained by treating skins, cartilage, bones tendons or similar *animal materials*, usually with warm water with or without addition of acids” [emphasis added]. *As contemplated, the word gelatin appears to be limited to a protein substance obtained from animal materials.*³¹

44. The Tribunal notes however that dictionary definitions cited by both parties and introduced as evidence at the hearing also emphasize, in their primary definition of the word “gelatin”, that the term refers to a substance derived from animal materials.³² The Tribunal also notes that Ms. Smith testified that the word “gelatin” refers to a protein derived from the skin and bones of animals.³³ Mr. Busch, testifying for CapsCanada, acknowledged that HPMC derived from softwood pulp is not “gelatin” per se.³⁴ The Tribunal sees no reason to depart from the ordinary and scientific meanings of the word “gelatin” by treating HPMC-based solutions as “gelatin” for the purposes of tariff classification.

24. *Transcript of Public Hearing*, 20 April 2010, at 29-30, 36, 59, 63, 139.

25. *Ibid.* at 99-101, 121-22.

26. *Ibid.* at 119-20, 135, 144-46, 178.

27. *Ibid.* at 41-42, 144.

28. *Ibid.* at 46-47.

29. *Ibid.* at 42-45.

30. *Ibid.* at 39.

31. *Explanatory Notes* to heading No. 35.03.

32. Tribunal Exhibit AP-2009-003-14A, tabs 1, 19, 24a, 24b; Tribunal Exhibit AP-2009-003-13B, tabs 11, 12.

33. *Transcript of Public Hearing*, 20 April 2010, at 205.

34. *Ibid.* at 155.

45. The Tribunal also notes the admissions of Mr. Kotevich and Mr. Martin that the goods in issue are most commonly referred to as “vegetable capsules”, not “gelatin capsules”.³⁵

46. Consequently, the Tribunal finds that the goods in issue are not “. . . worked, unhardened gelatin (except gelatin of heading 35.03) and articles of unhardened gelatin.”

47. As for CapsCanada’s alternative position that the goods in issue are “worked vegetable or mineral carving material[s] and articles of these materials . . .”, the Tribunal notes that Note 2 to Chapter 96 defines vegetable or mineral carving materials as follows:

- (a) Hard seeds, pips, hulls and nuts and similar vegetable materials of a kind used for carving (for example, corozo and dom);
- (b) Amber, meerschaum, agglomerated amber and agglomerated meerschaum, jet and mineral substitutes for jet.

By virtue of their composition as a cellulose ether mixed with sorbitol, the goods in issue do not qualify as vegetable or mineral carving materials or articles of these materials.

48. In addition, the goods in issue do not qualify as “. . . moulded or carved articles of wax, of stearin, of natural gums or natural resins or of modelling pastes, and other moulded or carved articles, not elsewhere specified or included . . .” for the purposes of heading No. 96.02, in view of the *Explanatory Notes* to Chapter 96, which specify that the goods in issue be made of these materials.

49. The Tribunal also finds that the goods in issue do not qualify as natural resin in light of the fact that HPMC is a synthesized product.

50. Finally, the Tribunal notes that the goods in issue are not moulded articles as per the meaning of the *Explanatory Notes* to heading No. 96.02 because the group includes moulded articles of various materials, provided those articles are not specified or included in other headings of the nomenclature. The Tribunal finds that the goods in issue are classifiable in Chapter 39; therefore, these notes do not apply.

51. On the subject of the United States International Trade Commission documents submitted by CapsCanada, the Tribunal notes that parties are free to use foreign jurisdiction rulings to support their positions. However, such documents are not binding on the Tribunal and, for all the reasons discussed above, have no compelling value for the purposes of this appeal.

Conclusion

52. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified in heading No. 39.23 and, in particular, under tariff item No. 3923.90.90 as articles of plastics for the conveyance or packing of goods.

35. *Ibid.* at 55, 77, 99.

DECISION

53. The appeal is dismissed.

André F. Scott
André F. Scott
Presiding Member