

Ottawa, Thursday, August 8, 1996

Appeal No. AP-95-076

IN THE MATTER OF an appeal heard on January 16, 1996,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of
National Revenue with respect to requests for re-determination
under section 63 of the *Customs Act*.

BETWEEN

L&F CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Anita Szlajak
Anita Szlajak
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-076

L&F CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the Customs Act from decisions of the Deputy Minister of National Revenue. The issue in this appeal is whether cans of “Lysol Brand Disinfectant Spray” in the regular, fresh and country scents are properly classified under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms, as determined by the respondent, or should be classified under tariff item No. 3808.40.10 as disinfectants in packages of a gross weight not exceeding 1.36 kg each, as claimed by the appellant.

***HELD:** The appeal is allowed. The Explanatory Notes to the Harmonized Commodity Description and Coding System (the Explanatory Notes) to heading No. 33.07 indicate that prepared room deodorizers “consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours by, for example, Van der Waal’s bonds.” The evidence before the Tribunal indicates that the goods in issue mask odours and kill odour-causing bacteria. In the Tribunal’s view, masking an odour and killing odour-causing bacteria are not the same as acting chemically on an odour or physically absorbing an odour. Based on the specific description in the Explanatory Notes of what is contemplated by the phrase “[p]repared room deodorisers,” the Tribunal is not persuaded that the goods in issue are properly classified in heading No. 33.07.*

The Explanatory Notes to heading No. 38.08 provide that disinfectants “are agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects.” The evidence before the Tribunal indicates that the goods in issue meet this description. Moreover, the goods in issue are registered as disinfectants under the Pest Control Products Act and, as indicated by the information on their labels, are marketed and used as disinfectants.

*Place of Hearing: Ottawa, Ontario
Date of Hearing: January 16, 1996
Date of Decision: August 8, 1996*

*Tribunal Members: Lyle M. Russell, Presiding Member
Arthur B. Trudeau, Member
Anita Szlajak, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

*Appearances: Michael Sherbo, for the appellant
Brian Tittmore, for the respondent*

Appeal No. AP-95-076

L&F CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ARTHUR B. TRUDEAU, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue. The issue in this appeal is whether cans of “Lysol Brand Disinfectant Spray” in the regular, fresh and country scents are properly classified under tariff item No. 3307.49.00 of Schedule I to the *Customs Tariff*² as other preparations for perfuming or deodorizing rooms, as determined by the respondent, or should be classified under tariff item No. 3808.40.10 as disinfectants in packages of a gross weight not exceeding 1.36 kg each, as claimed by the appellant.

The following are the relevant provisions from Schedule I to the *Customs Tariff*:

- 33.07 *Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties.*
-Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites:
- 3307.49.00 *--Other*
- 38.08 *Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers).*
- 3808.40 *-Disinfectants*
- 3808.40.10 *---In packages of a gross weight not exceeding 1.36 kg each*

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

The appellant's witness, Mr. Robert T. Fellows, Product Development Co-ordinator for Reckitt & Colman Canada Inc.,³ explained that the goods in issue contain about 80 percent ethanol, 15 percent water, a small amount of ortho-phenylphenol, a biocidal quaternary compound, abbreviated n-alkyl n-ethyl morpholinium ethylsulfate, a corrosion inhibitor and some perfume. He stated that the ethyl phenylphenol, the biocidal quad and the ethanol are all active ingredients that contribute to the disinfecting properties of the goods in issue. He agreed with counsel for the respondent that, when the goods in issue destroy the bacteria or germs, they also remove the odour caused by those bacteria or germs.

Mr. Fellows introduced, as an exhibit, a can of the goods in issue. The front of the can reads, in part, as follows:

Lysol BRAND DISINFECTANT SPRAY
Eliminates Odours
KILLS HOUSEHOLD GERMS, MOLD AND MILDEW
REG. NO. 11997, P.C.P. Act
GUARANTEE: O-Phenylphenol 0.100%, N-Alkyl
(C18 92%, C16 8%) N-Ethyl Morpholinium Ethylsulfates 0.035%

The back of the can reads, in part, as follows:

Destroys odour causing bacteria. Deodorizes and disinfects garbage cans, diaper pails, animal areas, toilet areas, under sinks, nurseries, sickrooms, basements, musty corners and other places where odour causing germs are a problem. Kills mould and mildew.
To Disinfect: Hold can upright 15 cm to 20 cm from surface and spray 2 to 3 seconds until covered with mist.
To Deodorize: To eliminate cooking, smoke, bathroom and other unpleasant household odours, spray centre of room 1 to 2 seconds.

Mr. Fellows testified that the goods in issue are not designed to act chemically on an odour. Rather, the goods in issue mask an objectionable odour with a pleasant odour and kill odour-causing bacteria which, he stated, was a biological reaction. He also testified that the percentage of odoriferous material in the goods in issue is 0.1 percent and that he had not seen a disinfectant that did not contain an odoriferous chemical compound.

By way of comparison, Mr. Fellows also introduced, as an exhibit, a can of "Airwick Odour Neutralizer." The back of the can of "Airwick Odour Neutralizer" reads, in part, as follows:

Suggested Uses: To deodorize and freshen bathroom, kitchen, car and pet areas. Airwick® Odour Neutralizer also eliminates stale tobacco smells and other problem odours.
Directions: SHAKE WELL BEFORE EACH USE. Point away from face. Press button and spray upwards.

Mr. Fellows testified that this product contains about 0.85 percent perfume and that it acts chemically on bad odours. He indicated that the goods in issue are different from the "Airwick Odour

3. It was confirmed at the hearing that Reckitt & Colman Canada Inc. acquired L&F Canada Inc. around January 1995. See Transcript of Public Hearing, January 16, 1996, at 10.

Neutralizer” in terms of the quantity of perfume, the spray pattern and the applicable government regulations. He stated that the goods in issue have a horizontal spray pattern, a very small amount of propellant and a large orifice, so that the resulting spray has large droplets that fall quickly. By contrast, the “Airwick Odour Neutralizer” sprays vertically into the air with a significant amount of propellant (about four times the amount of gas as the goods in issue) and has a small orifice so that the spray comes out in small droplets for better and lasting dissolution in the air. With respect to government regulations, the Department of Agriculture regulates the goods in issue, whereas the “Airwick Odour Neutralizer” is not a regulated product.

Mr. Fellows agreed with counsel for the respondent that, when sprayed, both the goods in issue and the “Airwick Odour Neutralizer” have the effect of masking or removing an odour. However, he was of the view that the “Airwick Odour Neutralizer” acts chemically on an odour, since it converts the molecule into a molecule that does not have the odour characteristics or odour profile of the original malodorous compound.⁴ He agreed that the goods in issue are often marketed in supermarkets alongside other products like the “Airwick Odour Neutralizer.” He indicated that neither the goods in issue nor the “Airwick Odour Neutralizer” contains lauryl methacrylate. However, he could not confirm whether the “Airwick Odour Neutralizer” contained a compound similar to lauryl methacrylate.

When asked whether the appellant sells disinfectants, Mr. Fellows introduced, as exhibits, a bottle of “Lysol Brand Concentrated Disinfectant” and a bottle of “Dettol Antiseptic Disinfectant.” The front of the bottle of “Lysol Brand Concentrated Disinfectant” reads, in part, as follows:

CLEANS • DISINFECTS • SANITIZES
REG. NO. 12000 P.C.P. ACT
GUARANTEE: O-Phenylphenol 2.8%, Xylenols 1.5%, O-Benzyl-P-Chlorophenol 2.7%

The back of the bottle of “Lysol Brand Concentrated Disinfectant” states, in part, the following with respect to use:

NURSERY - diaper pail, changing table, crib, toys.
BATHROOM - toilet bowl, shower, sink.
GENERAL HOUSEHOLD CLEANING - LAUNDRY SANITIZER
DIRECTIONS: CONCENTRATE - MAKES APPROXIMATELY 31 LITRES OF
CLEANING SOLUTION. Add 45 mL (3 tablespoons) to each 4 litres of water. LAUNDRY
SANITIZER. After filling the washer with water, add 250 mL (1 cup) to sanitize your wash.

4. He proposed the following definition of “neutralization”: “A chemical reaction in which water is formed by mutual interaction of the ions that characterize acids and bases when both are present in an aqueous solution ... the remaining product being a salt,” The Merck Index, 7th ed. (Rahway: Merck, 1960) at 816.

The back of the bottle of "Dettol Antiseptic Disinfectant" reads, in part, as follows:

REG. NO. 14590 P.C.P. ACT

GUARANTEE: 4-chloro-3, 5-xyleneol-4.8%

DIRECTIONS

First aid.

Skin blemishes.

General disinfection. To disinfect toilet seats and bowls, diaper pails, floors, walls, sinks, pet areas etc.

When asked whether these products would contain a perfume, Mr. Fellows indicated that every consumer product contains a perfume to mask the odour of the base formula, as well as to signal to the consumer that an area has been treated.

The appellant's evidence concluded with the showing of two videotapes of television commercials for the goods in issue which emphasized their use as "disinfectants."

Mr. Wendell Ward, Head of the Analytical Section, Organic and Food Products Laboratory of the Laboratory and Scientific Services Directorate of the Department of National Revenue (Revenue Canada), was accepted by the Tribunal as an expert witness in chemical analysis of organic products and, in particular, those products of the chemical or allied industries. Mr. Ward referred to the "Report of the Laboratory and Scientific Services Directorate" of Revenue Canada dated September 20, 1995, which he had prepared. He confirmed that he found that there were three types of chemicals, disinfectants (ethanol, ortho-phenylphenol and quaternary ammonium compound), odoriferous materials and fixatives, in each of the goods in issue. He indicated that the purpose of the disinfectants is to kill germs, that the purpose of the odoriferous materials is to mask odours and that the purpose of the fixatives is to extend the active time of the odoriferous materials. He stated that, in his view, the effect of the goods in issue in killing germs could be characterized as a combination of a chemical and biological effect.

Although he had not had the opportunity to analyze the samples of "Dettol Antiseptic Disinfectant" and "Lysol Brand Concentrated Disinfectant," Mr. Ward indicated that, based on his experience and a smell test, he was of the view that neither contained a masking perfume and that the "Dettol Antiseptic Disinfectant" had an odour of pine oil and the "Lysol Brand Concentrated Disinfectant" an odour of phenol.

In response to questions from the appellant's representative, Mr. Ward stated that a disinfectant which kills odour-causing bacteria would stop an odour from being formed, and eventually the odorous gas would dissipate. He agreed that there are products which may act chemically or physically on an odour without acting on the cause of the odour. He confirmed that activated charcoal would be a product that would act physically on an odour, but that would have nothing to do with the bacteria, and that chlorophyll would act chemically on an odour, but that may have nothing to do with the bacteria.

Mr. Ward indicated that he could not confirm whether the "Airwick Odour Neutralizer" that he examined contained an ingredient exhibiting the same absorption properties as lauryl methacrylate. However, he did indicate that it might contain such an ingredient.

The appellant's representative argued that, pursuant to section 10 of the *Customs Tariff*, the classification of goods is to be determined in accordance with the General Rules for the Interpretation of the Harmonized System⁵ (the General Rules) and the Canadian Rules.⁶ Rule 1 of the General Rules states that classification is to be determined according to the terms of the headings and any relative Section or Chapter Notes. The representative submitted, therefore, that, in determining the proper classification of the goods in issue, the Tribunal must focus on the phrase "prepared room deodorizers, whether or not perfumed or having disinfectant properties" in heading No. 33.07 and the phrase "disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles" in heading No. 38.08. The representative further submitted, based on section 11 of the *Customs Tariff*, that the Tribunal should have regard to the Explanatory Notes to the Harmonized Commodity Description and Coding System⁷ (the Explanatory Notes) in interpreting those phrases.

The Explanatory Notes to Chapter 33 provide that "prepared room deodorisers remain classified in heading 33.07 even if they have disinfectant properties of more than a subsidiary nature." The Explanatory Notes to heading No. 33.07 read, in part, as follows:

(IV) Preparations for perfuming or deodorising rooms, including odoriferous preparations used during religious rites.

- (1) Preparations for perfuming rooms and odoriferous preparations used during religious rites. They usually operate by evaporation or burning, e.g., "Agarbatti", and may be put up as liquids, powders, cones, impregnated papers, etc. Certain of these preparations may be used for masking an odour.*
- (2) Prepared room deodorisers, whether or not perfumed or having disinfectant properties.*

Prepared room deodorisers consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours by, for example, Van der Waal's bonds. When for retail sale they are generally put up in aerosol cans.

The appellant's representative submitted that the goods in issue do not fall within this description of "prepared room deodorisers" and are not properly classified in heading No. 33.07, since they do not contain any substances, such as lauryl methacrylate, which act chemically on the odour to be overcome and do not physically absorb the odour.

The appellant's representative referred to the Notes to Section VI of Schedule I to the *Customs Tariff* which covers "Products of the Chemical or Allied Industries." In particular, he referred to Note 2 to Section VI, which reads as follows:

Subject to Note 1 above, goods classifiable in heading No.30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 37.07 or 38.08 by reason of being put up in measured

5. *Supra* note 2, Schedule I.

6. *Ibid.*

7. Customs Co-operation Council, 1st ed., Brussels, 1986.

doses or for retail sale are to be classified in those headings and in no other heading of the Nomenclature.

He submitted, based on this note, that goods put up for retail sale as disinfectants, which are covered by heading No. 38.08, are, therefore, to be classified in heading No. 38.08.

For further support, the appellant's representative referred to the Explanatory Notes to heading No. 38.08 which read, in part, as follows:

The heading also includes the following products, provided they are put up for retail sale as disinfectants, fungicides, etc.:

(a) Organic surface-active products and preparations, with active cation (e.g., quaternary ammonium salts), having antiseptic, disinfectant, bactericidal or germicidal properties.

Insecticidal, disinfecting, etc., preparations may have a basis of copper compounds (copper acetate, sulphate, acetoarsenite, etc.), of sulphur or sulphur compounds (calcium sulphide, carbon disulphide, etc.), of mineral creosote or anthracene oils, of DDT, lindane, parathion, of phenol or cresol derivatives, of arsenical products (calcium arsenate, lead arsenate, etc.).

(IV) Disinfectants

Disinfectants are agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects.

Disinfectants are used, for example, in hospitals for cleaning walls, etc., or sterilising instruments. They are also used in agriculture for disinfecting seeds.

The appellant's representative submitted that the goods in issue meet the description of disinfectants in these notes since they contain o-phenylphenol, which is a phenol derivative, and n-ethyl morpholinium, which is a quaternary ammonium compound, and they kill germs and odour-causing bacteria. Moreover, the goods in issue are registered as disinfectants under the *Pest Control Products Act*⁸ (the P.C.P. Act) and are marketed as disinfectants. Finally, the representative distinguished the goods in issue from room deodorizers on the basis that the goods in issue, as disinfectants, produce a more concentrated spray. Based on the foregoing, the representative submitted that the goods in issue should be classified as disinfectants in heading No. 38.08.

Counsel for the respondent submitted, based on the ordinary and common meaning of "deodorize," the Explanatory Notes to heading No. 33.07, the laboratory analysis and the labels on the cans of the goods in issue introduced as exhibits, that the goods in issue are properly classified as prepared room deodorizers in heading No. 33.07, and more particularly under tariff item No. 3307.49.00 as other preparations for perfuming or deodorizing rooms. Counsel referred the Tribunal to the following definitions of "deodorize": "destroy odour of"⁹ and "To deprive of odour, esp. of offensive or noisome odour; to take away the (bad) smell of."¹⁰ Counsel also drew the Tribunal's attention to the requirement in the Explanatory Notes that

8. R.S.C. 1985, c. P-9.

9. *The Concise Oxford Dictionary of Current English*, 7th ed. (Oxford: Clarendon Press, 1982) at 256.

10. *The Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon Press, 1989) at 468.

prepared room deodorizers “consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours.” Counsel interpreted this provision in the Explanatory Notes as indicating that lauryl methacrylate is an example of a substance that destroys or removes odours, but that other substances could be present in place of that substance to remove odours. Counsel submitted that the goods in issue meet this criterion and referred to the laboratory analysis report, as well as to the labels on the goods in issue, in support of his submission. The laboratory analysis report states that the goods in issue “deodorize by covering the objectional odour with other, more pleasant, odours. The effect is prolonged by the presence of the perfume fixatives, and by the disinfectants that kill odour causing bacteria.” The labels on the goods in issue indicate that they are for use as room deodorizers.

Finally, counsel for the respondent questioned the appropriateness of classifying the goods in issue in heading No. 38.08 on the basis of their disinfectant qualities. Counsel pointed out that the phrase “prepared room deodorizers, whether or not perfumed or having disinfectant properties” in heading No. 33.07, and the Explanatory Notes to Chapter 33, which provide that “prepared room deodorisers remain classified in heading 33.07 even if they have disinfectant properties of more than a subsidiary nature,” contemplate that goods such as those in issue, which have perfuming, deodorizing and disinfectant properties, should be classified in heading No. 33.07. Counsel further submitted that the goods in issue are not sold or used solely as disinfectants, but are also sold and used as room deodorizers.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the Canadian Rules. Rule 1 of the General Rules provides that classification is to 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 principles set out in Rules 2 through 6, as well as the Canadian Rules which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the starting point in classifying the goods in issue is to consider the terms of heading Nos. 33.07 and 38.08 and any relative Section or Chapter Notes and the Explanatory Notes which may provide some guidance as to the appropriate interpretation of the terms of those headings. Heading No. 33.07 covers “prepared room deodorizers, whether or not perfumed or having disinfectant properties.” While this description appears, on its face, to cover the goods in issue, the Tribunal is of the view that the Explanatory Notes to heading No. 33.07 indicate that it was intended that heading No. 33.07 cover only those types of “prepared room deodorizers” specified therein.

The Explanatory Notes to heading No. 33.07 indicate that prepared room deodorizers “consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours by, for example, Van der Waal’s bonds.” The respondent’s expert witness, Mr. Ward, testified that the goods in issue mask odours and kill odour-causing bacteria. Mr. Ward stated that, in his view, the act of killing odour-causing bacteria was a combination of a chemical and biological effect. However, he did not testify as to any chemical effect of the goods in issue on the odour itself. In the Tribunal’s view, masking an odour and killing odour-causing bacteria are not the same as acting chemically on an odour or physically absorbing an odour. Based on the specific description in the Explanatory Notes of what is contemplated by the phrase “prepared room deodorizers” in heading No. 33.07, the Tribunal is not persuaded that the goods in issue are properly classified in heading No. 33.07.

In considering whether the goods in issue should be classified in heading No. 38.08 as disinfectants, the Tribunal also started with the terms of that heading and any relative Section or Chapter Notes and the Explanatory Notes. The Explanatory Notes to heading No. 38.08 provide that it includes “[o]rganic surface-active products and preparations, with active cation (e.g., quaternary ammonium salts), having antiseptic, disinfectant, bactericidal or germicidal properties,” that disinfecting preparations “may have a basis of ... phenol or cresol derivatives” and that disinfectants “are agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects.” The evidence before the Tribunal indicates that the goods in issue contain o-phenylphenol (0.1 percent), which is a phenol derivative, as well as n-ethyl morpholinium ethylsulfate, which is a quaternary ammonium compound, and that they kill germs and odour-causing bacteria. Moreover, the goods in issue are registered as disinfectants under the P.C.P. Act and, as indicated by the information on their labels and in the television advertisements shown at the hearing, they are marketed, put up for retail sale and used as disinfectants.

Finally, the Tribunal notes that the labels on the other products, namely, “Lysol Brand Concentrated Disinfectant” and “Dettol Antiseptic Disinfectant,” introduced as exhibits and described as disinfectants, suggest that those products may be used for some of the same uses as the goods in issue.

Accordingly, the appeal is allowed. The goods in issue should be classified under tariff item No. 3808.40.10 as disinfectants in packages of a gross weight not exceeding 1.36 kg each.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Anita Szlajak
Anita Szlajak
Member