



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2013-055

Kraft Canada Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Wednesday, November 5, 2014*

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IN THE MATTER OF an appeal heard by way of written submissions on July 15, 2014,  
pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF four decisions of the President of the Canada Border Services  
Agency, dated December 20, 2013, with respect to requests for review of advance rulings  
on tariff classification pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**KRAFT CANADA INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed.

Daniel Petit  
Daniel Petit  
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 15, 2014
Tribunal Member:	Daniel Petit, Presiding Member
Counsel for the Tribunal:	Georges Bujold
Acting Senior Registrar Officer:	Haley Raynor
Acting Registrar Support Officer:	Sara Pelletier

**PARTICIPANTS:****Appellant**

Kraft Canada Inc.

**Counsel/Representatives**Wendy Wagner  
Anca Sattler**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Abigail Martinez

Please address all communications to:

Canadian International Trade Tribunal  
15th Floor  
333 Laurier Avenue West  
Ottawa, Ontario K1A 0G7Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

1. This is an appeal filed by Kraft Canada Inc. (Kraft) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from four decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), with respect to requests for review of advance rulings on tariff classification.

2. The issue in this appeal is whether certain food preparations intended to be marketed in Canada under the product line “Kraft (Fresh Take/What’s Cooking) Cheese & Breadcrumb Mix” (the goods in issue)<sup>2</sup> are properly classified under either tariff item No. 0406.20.91 or tariff item No. 0406.20.92 of the schedule to the *Customs Tariff*<sup>3</sup> as grated or powdered cheese of all kinds,<sup>4</sup> as determined by the CBSA, or should be classified under tariff item No. 2103.90.20 as mixed condiments and mixed seasonings, as claimed by Kraft.

## PROCEDURAL HISTORY

3. On November 21, 2011, Kraft requested an advanced ruling pursuant to section 43.1 of the *Act* with respect to the tariff classification of one of the goods in issue, the “Rosemary & Roasted Garlic” mixture.

4. On January 6, 2012, the CBSA issued an advanced ruling pursuant to paragraph 43.1(1)(c) of the *Act* determining that the “Rosemary & Roasted Garlic” mixture was classifiable under tariff item No. 2103.90.20 as mixed condiments and mixed seasonings.

5. On October 12, 2012, Kraft informed the CBSA of an anticipated brand name change for the “Rosemary & Roasted Garlic” mixture from “Fresh Take” to “What’s Cooking” and requested confirmation that the name change would not affect the January 6, 2012, advance ruling. On the same date, Kraft also requested advance rulings pursuant to section 43.1 of the *Act* with respect to the tariff classification of the three other cheese and seasoned breadcrumb mixtures in issue, namely, the “Cheddar, Jack & Bacon” mixture, the “Classic Four Cheese” mixture and the “Italian Parmesan” mixture. Kraft submitted that those three products should be classified similarly under tariff item No. 2103.90.20.

6. On October 23, 2012, the CBSA issued an advance ruling replacing the previous advance ruling issued on January 6, 2012, noting the product’s name change. The “Rosemary & Roasted Garlic” mixture remained however classified under tariff item No. 2103.90.20 according to this revised advance ruling.

7. On January 29, 2013, the CBSA modified the advance ruling issued on October 23, 2012, pursuant to paragraph 43.1(1)(c) of the *Act* with respect to the tariff classification of the “Rosemary & Roasted Garlic” mixture. The CBSA re-determined that this product was properly classified as grated or powdered cheese under tariff item No. 0406.20.91, if within access commitment, or tariff item No. 0406.20.92, if over access commitment. The CBSA also issued similar advance rulings with respect to the tariff classification of the three remaining goods in issue, determining that each was properly classified under either tariff item No. 0406.20.91 or tariff item No. 0406.20.92.

8. On April 15, 2013, Kraft requested a review of the four advance rulings pursuant to subsection 60(2) of the *Act* and submitted that the goods in issue should be classified under tariff item No. 2103.90.20.

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

2. There are four such products that combine cheese and a seasoned breadcrumb mixture in issue. Each product has a specific flavour and was the subject of a separate advance ruling on tariff classification and a separate decision pursuant to subsection 60(4) of the *Act*. The four advance rulings and decisions under appeal are identical.

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

4. The importation of cheese into Canada is subject to market access commitments in the form of tariff rate quotas. If the quantities of cheese imported are within access commitment (in-quota), they are classified under tariff item No. 0406.20.91 and are subject to low duty rates. If the imported quantities are over Canada’s access commitment, they are classified under tariff item No. 0406.20.92 and are subject to higher duty rates.

9. On December 20, 2013, the CBSA affirmed the advance rulings pursuant to subsection 60(4) of the *Act* and maintained that the goods in issue are properly classified under either tariff item No. 0406.20.91 or tariff item No. 0406.20.92.

10. On January 15, 2014, Kraft filed the present appeal with the Tribunal.

11. The Tribunal decided to hold a hearing by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*,<sup>5</sup> as requested by Kraft and on the consent of the CBSA. The hearing was held in Ottawa, Ontario, on July 15, 2014. Physical exhibits of the goods in issue were made available to the Tribunal for the hearing.

## GOODS IN ISSUE

12. The goods in issue comprise four stock keeping units (SKUs) of a product line of seasoned coatings combining shredded cheese and a seasoning breadcrumb mixture that are to be applied to poultry, other meat or seafood to create a “ready-to-eat” dish or meal. They are described on their packaging as a “Cheese & Breadcrumb Mix”, followed by their respective flavours, namely, “Rosemary & Roasted Garlic”, “Cheddar, Jack & Bacon”, “Classic Four Cheese” and “Italian Parmesan”.

13. Each of the goods in issue is a kit or a set consisting of the two separate components (i.e. the cheese and the seasoned breadcrumb mixture) in a plastic bag separated by a sealed septum. The plastic bag is further packaged in a cardboard sleeve for retail sale. In order to use the product, the consumer is directed to rupture the septum and mix the two components in the bag. The directions advise the consumer to simply add the meat or fish products directly into the bag in order to coat them with the mixture. The coated meat or fish products can then be baked in an oven.<sup>6</sup>

14. Laboratory reports prepared by the CBSA indicate that each of the goods in issue contains a cheese portion which represents over 60 percent of the total package content by weight. The balance of the weight can be attributed to the seasoned breadcrumb portion in each case.<sup>7</sup>

15. In the United States, the goods in issue are marketed and sold as a meat and poultry coating. Marketing studies identified the primary competing product categories as dry coating and breadcrumbs, marinades and barbeque sauces, salad dressings and boxed meal kits (i.e. other seasoned meat coatings and meal kits). In Canada, marketing studies indicated that consumers would most likely use the goods in issue as a chicken coating.<sup>8</sup>

16. Kraft also shelves the goods in issue in the dairy section of the grocery store because the product is perishable. Kraft also has existing shelf space within the dairy section due to its other product offering but not within other potentially appropriate perishable food sections, such as the meat aisle. According to Kraft, consumers do not however expect to find the goods in issue in the dairy aisle, which makes it necessary for Kraft to use strategies to ensure that the consumer can find them in the store (e.g. marketing through its Web

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5. S.O.R./91-499.

6. Exhibit AP-2013-055-06B at paras. 5-10, tabs B and C, Vol. 1.

7. Exhibit AP-2013-055-09A (protected), tab 5, Vol. 2. While the goods in issue are comprised of two distinct components, the cheese and the seasoned breadcrumbs, the specific ingredients that make up each of these components are different in each case. For example, the cheese component of the rosemary and roasted garlic SKU is comprised of Provolone, Parmesan and Mozzarella; and garlic and rosemary are the main seasoning ingredients of its breadcrumb component. In the case of the “Cheddar, Jack & Bacon” SKU, the cheese component is comprised of a mixture of Cheddar, Monterrey Jack and Provolone, whereas the breadcrumb mixture is seasoned primarily with bacon fat and bits. However, the parties have not submitted that the specific ingredients of each of the goods in issue have any bearing on their tariff classification. As discussed below, it is beyond dispute that the seasoned breadcrumbs in all of the goods in issue would be classified under tariff item No. 2103.90.20 as mixed condiments and mixed seasonings and that their cheese component is itself properly classified under either tariff item No. 0406.20.91 or tariff item No. 0406.20.92 as grated or powdered cheese.

8. Exhibit AP-2013-055-06B at paras. 8, 15-16, tabs D, E and J, Vol. 1.

site and the positioning of “shelf-takers” in the aisle with meat coatings which direct the consumer to the dairy aisle).<sup>9</sup>

## LEGAL FRAMEWORK

17. 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 developed by the World Customs Organization (WCO).<sup>10</sup> 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.

18. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>11</sup> and the *Canadian Rules*<sup>12</sup> set out in the schedule.

19. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

20. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>13</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>14</sup> published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>15</sup>

21. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.<sup>16</sup>

22. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.<sup>17</sup> The final step is to determine the proper tariff item.<sup>18</sup>

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9. Exhibit AP-2013-055-06B at paras. 17-19, tabs K and L, Vol. 1.

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

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

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

13. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

14. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

15. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.

17. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

18. Rule 1 of the *Canadian Rules* provides that “. . . 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*] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” The *Classification Opinions* and the *Explanatory Notes* do not apply to classification at the tariff item level.

**RELEVANT CLASSIFICATION PROVISIONS**

23. The relevant provisions of the *Customs Tariff* are as follows:

<b>Chapter 4</b>		<b>Chapitre 4</b>	
<b>DAIRY PRODUCE; BIRDS' EGGS; NATURAL HONEY; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED</b>		<b>LAIT ET PRODUITS DE LA LAITERIE; OEUF D'OISEAUX; MIEL NATUREL; PRODUITS COMESTIBLES D'ORIGINE ANIMALE, NON DÉNOMMÉS NI COMPRIS AILLEURS</b>	
...		[...]	
<b>04.06</b>	<b>Cheese and curd.</b>	<b>04.06</b>	<b>Fromages et caillebotte.</b>
...		[...]	
<b>0406.20</b>	<b>-Grated or powdered cheese, of all kinds</b>	<b>0406.20</b>	<b>-Fromages râpés ou en poudre, de tous types</b>
...		[...]	
	-- -Other:		-- -Autres :
0406.20.91	----Within access commitment	0406.20.91	----Dans les limites de l'engagement d'accès
...			
0406.20.92	----Over access commitment	0406.20.92	----Au-dessus de l'engagement d'accès
...		[...]	
<b>Chapter 21</b>		<b>Chapitre 21</b>	
<b>MISCELLANEOUS EDIBLE PREPARATIONS</b>		<b>PRÉPARATIONS ALIMENTAIRES DIVERSES</b>	
...		[...]	
<b>21.03</b>	<b>Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard.</b>	<b>21.03</b>	<b>Préparations pour sauces et sauces préparées; condiments et assaisonnements, composés; farine de moutarde et moutarde préparée.</b>
...		[...]	
<b>2103.90</b>	<b>-Other</b>	<b>2103.90</b>	<b>-Autres</b>
...		[...]	
2103.90.20	-- -Mixed condiments and mixed seasonings	2103.90.20	-- -Condiments et assaisonnements, composés
...		[...]	

24. The applicable section and chapter notes, along with any relevant explanatory notes will be discussed in the Tribunal's analysis below, as appropriate.



## TRIBUNAL'S ANALYSIS

25. The parties agree that the goods in issue are put up in sets for retail sale and, for this reason, should be classified at the heading level according to Rule 3 of the *General Rules*, more specifically pursuant to Rule 3 (b).<sup>19</sup> The Tribunal agrees with the parties on this point for the following reasons.

26. Rule 3 of the *General Rules* provides as follows:

3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
  - (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
  - (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
  - (c) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

27. It is clear that, in this appeal, the goods in issue are, *prima facie*, classifiable in two headings, namely, heading No. 04.06, if considered cheese products, and heading No. 21.03, if considered mixed condiments and mixed seasonings. Indeed, given that the goods in issue consist of two main components (cheese and seasoned breadcrumbs) that are classifiable in different headings, *prima facie*, they appear to fall under more than one heading. This renders Rule 3 of the *General Rules* applicable.<sup>20</sup>

28. Rule 3 (a) of the *General Rules* provides that goods are to be classified in the heading which provides the most specific description. However, Rule 3 (a) also states that, when two or more headings each refer to "... part only of the items in a set put up for retail sale ...", those headings are to be regarded as equally specific, even if a particular heading provides a more complete or precise description of the goods. Rule 3 (b) further provides that goods "... put up in sets for retail sale ...", which cannot be classified pursuant to Rule 3 (a), are to be classified as if they consisted of the component which gives them their essential character.

29. Therefore, to the extent that the goods in issue are properly considered goods "... put up in sets for retail sale ...", they cannot be classified according to Rule 3 (a) of the *General Rules* and are to be classified as if they consisted only of the component which gives them their essential character pursuant to Rule 3 (b).

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19. Exhibit AP-2013-055-09B at paras. 39-45, Vol. 1; Exhibit AP-2013-055-06A at paras. 19-26, Vol. 1. While Kraft's primary position is that the goods in issue should be classified according to Rule 3 (b) of the *General Rules*, it submitted, in the alternative, that the goods in issue would have to be classified pursuant to Rule 3 (c), if Rule 3 (b) could not be applied.

20. Rule 2 (b) of the *General Rules*, which provides that classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3, also supports this conclusion.

30. It is common ground between the parties, and the Tribunal accepts, that the goods in issue are "... put up in sets for retail sale ...". In this regard, the explanatory notes to Rule 3 of the *General Rules* provide as follows:

- (X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
  - (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. . . .
  - (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
  - (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

31. The Tribunal is satisfied that that the goods in issue meet each of these three requirements. Specifically, the goods in issue (i) consist of at least two different articles which are, *prima facie*, classifiable in different headings (i.e. a cheese component and a seasoned breadcrumb component), (ii) consist of articles put up together to meet a particular need (i.e. to form a seasoned coating for meat or seafood) and (iii) are packaged in a format suitable for sale directly to consumers (i.e. in a sealed plastic bag further packaged in a cardboard sleeve for retail sale).

32. Moreover, the explanatory notes to Rule 3 of the *General Rules* also provide that the term "goods put up for retail sale" covers sets "... consisting, for example, of different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal." It is clear that, in the present case, the goods in issue consist of two food products that are to be combined with other ingredients (i.e. meat or seafood) to prepare a ready-to-eat dish or meal.

33. Having established that the goods in issue are properly considered "... goods put up in sets for retail sale ...", which cannot be classified at the heading level pursuant to Rule 3 (a) of the *General Rules*, the Tribunal must proceed to Rule 3 (b) and attempt to classify the goods in issue as if they consisted of the component which gives them their essential character. In other words, the Tribunal must attempt to determine whether the essential character of the goods in issue is conferred by the cheese or the seasoned breadcrumbs.

34. In accordance with Rule 3 (b) of the *General Rules*, if the Tribunal concludes, as claimed by Kraft, that the essential character of the goods in issue is conferred by the seasoned breadcrumbs, then the goods in issue should be classified as if they consisted only of that component, in heading No. 21.03. However, if the Tribunal concludes, as determined by the CBSA, that it is the cheese that gives the goods in issue their essential character, then they should be classified as if they consisted only of that component, in heading No. 04.06.

35. In this regard, the Tribunal notes that there is no dispute between the parties regarding the tariff classification of each of the components. Kraft conceded that the cheese component is properly classified in heading No. 04.06, more specifically under tariff item No. 0406.20.91 or tariff item No. 0406.20.92.<sup>21</sup> The CBSA did not dispute Kraft's arguments that the seasoned breadcrumb mixture in the goods in issue is

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21. Exhibit AP-2013-055-06A at para. 35, Vol. 1.

properly classified in heading No. 21.03 and, more specifically, under tariff item No. 2103.90.20 as mixed seasonings, which the Tribunal accepts.<sup>22</sup>

36. Having determined the proper tariff classification of the components of the goods in issue, the Tribunal will now examine whether the essential character of the goods in issue is conferred by the cheese or the seasoned breadcrumbs.<sup>23</sup> According to Note (VIII) of the explanatory notes to Rule 3 of the *General Rules*, “[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.”

37. The parties both requested the Tribunal to settle the tariff classification question at issue by determining whether it is the cheese or the seasoned breadcrumb mixture that gives the goods in issue their essential character. This is the core of the dispute between the parties.

### **CBSA’s Position**

38. The CBSA submitted that the application of the factors listed in Note (VIII) of the explanatory notes to Rule 3 of the *General Rules* leads to the conclusion that it is the cheese component which gives the goods in issue their essential character. In the CBSA’s view, unlike the breadcrumbs, the cheese makes up a significant portion of the goods in issue, adds value to the goods and also makes them unique, by allowing them to serve a distinct purpose.

39. More specifically, the CBSA submitted as follows:

- the laboratory reports prepared by the CBSA confirms that more than half of the overall quantity and weight of the goods in issue consist of cheese;
- in comparison to the seasoned breadcrumbs, the cheese clearly represents the more valuable or expensive component of the goods in issue;
- in terms of the role of the cheese in relation to the use of the goods in issue, it is the cheese that plays an essential role in allowing the goods in issue to perform the uses for which they were intended, as evidenced by the fact that the goods in issue are marketed and labeled with the cheese first in advertisements and product reviews, as well as on the list of ingredients.
- it is the cheese that plays an essential role in giving dishes made with the goods in issue a distinctive flavour; for example, the suggested uses outlined in the “Kraft Fresh Take” recipe booklet highlight the importance of the cheese in the overall content of the package to obtain an “*au gratin*” cheese dish; and
- cheese possesses a unique character as a fresh product and, therefore, makes the goods in issue unique by allowing them to create a variety of dishes.

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22. In this regard, it warrants noting that the explanatory notes to heading No. 21.03 indicate that this heading covers preparations, generally of a highly spiced character, used to flavour certain dishes (meat, fish, salads, etc.) and made from various ingredients (eggs, vegetables, meat, fruit, flours, starches, oil, vinegar, sugar, spices, mustard, flavourings, etc.). The seasoned breadcrumbs in the goods in issue fit this description.

23. To the extent that no single component can be said to confer essential character to the goods in issue, then their classification at the heading level cannot be effected under Rule 3 (b) of the *General Rules*. In that event, the next rule to consider is Rule 3 (c), which provides that goods must be classified in the heading which occurs last in numerical order among those which equally merit consideration.

40. The CBSA further submitted that the goods in issue meet the requirements of heading No. 04.06 on the basis of the explanatory notes to this heading<sup>24</sup> because they retain the character of cheese, as they must be kept refrigerated to avoid spoilage. Conversely, the CBSA submitted that the goods in issue do not meet the requirements of heading No. 21.03 because they do not retain the character of mixed seasonings.

### **Kraft's Position**

41. Kraft submitted that the seasoned breadcrumbs give the goods in issue their essential character because they play the dominant role in coating the poultry, seafood or meat, which is the intended use of the product. Moreover, it argues that the seasoned breadcrumbs are fundamental to the manner in which the goods in issue are marketed to consumers and used by consumers, i.e. as seasoned meat coatings.

42. Relying on Federal Court of Appeal and Tribunal precedents,<sup>25</sup> Kraft submitted that the Tribunal's task is to determine the essence or fundamental nature of the goods in issue and that, in this exercise, the role of a constituent material in relation to the use of the goods is the factor that must be given primary importance in this appeal. Kraft argued that, in the case of foodstuff such as the goods in issue, the weight of each component is not a factor that should be emphasized in the analysis of essential character.

43. According to Kraft, one must conclude that it is the seasoned breadcrumbs that provide the goods with their essence or fundamental nature when the role of this component is considered in relation to the use of the goods in issue. In this connection, Kraft submitted as follows:

- the goods in issue were conceived and developed, and marketed and sold, as seasoned coatings for poultry, seafood or meat, i.e. as mixed seasonings; the product line is an evolution from Kraft's "Shake 'n Bake" coating product and is used to create a ready-to-eat meal in the same manner as that product; the goods in issue are not marketed to the consumers as cheese products, as evidenced by the fact that the consumers are instructed to use the product in precisely the same way as other mixed seasonings for meat;
- it is the seasoned breadcrumbs that play the primary role in adherence of the coating to the poultry, seafood or meat and in the creation of the "crunchy" coating exterior, which is fundamental to the "workability" of the goods in issue and confers them their primary characteristic as meat coatings; the grated cheese plays a secondary role in adherence to the meat by providing a moisture base, which could alternatively be provided by other products, such as oil or egg;
- the goods in issue cannot function as meat-coating products without the seasoned breadcrumbs;

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24. These notes provide, *inter alia*, that the presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification in heading No. 04.06, provided the goods retain the character of cheese.

25. *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*, 2004 FCA 346 (CanLII) [*Mon-Tex*]; *Naturin Canada v. Deputy M.N.R.* (14 January 2000), AP-98-108 (CITT); *Transilwrap of Canada, Ltd. v. Commissioner of the Canada Customs and Revenue Agency* (11 September 2001), AP-2000-018 (CITT) [*Transilwrap*]; *S.C. Johnson & Son, Limited v. President of the Canada Border Services Agency* (19 July 2006), AP-2005-015 (CITT).

- it is the seasoned breadcrumbs that play the primary role in defining the unique flavour characteristic of each of the goods in issue and which ultimately define the fundamental nature of the dish that results from the use of the goods in issue;<sup>26</sup>
- the consumers' perception of the competing products in the marketplace also indicates that it is the seasoned breadcrumbs that are the essential component of the goods in issue since the primary competing products are other mixed seasonings, not other dairy products or grated cheese;
- consumers can purchase shredded cheese alone to prepare dishes; it is the combination of the seasoned breadcrumbs and the cheese component that makes the goods in issue suitable for their intended use and allows them to serve a distinct purpose as meat coatings;
- while Kraft does not disagree that the cheese component distinguishes the goods in issue from other seasoned meat coatings, the point that is missed by the CBSA is that they nonetheless remain a type of seasoned meat coating, the essential character of which is defined by the seasoned breadcrumbs; innovative products such as the goods in issue do not become an entirely different category of products (e.g. cheese products) simply because an ingredient is added; and
- the CBSA's reliance on the explanatory notes to heading No. 04.06 is legally incorrect because it erroneously approaches the issue as though the relevant consideration were whether *both* components fall under either heading No. 04.06 or heading No. 21.03; under rule 3 (b) of the *General Rules*, the Tribunal's task is to determine which component gives the set put up for retail sale its essential character, not to determine whether the product as a whole "retains the character of cheese" or "retains the character of seasonings".

### Tribunal's Assessment

44. On the issue of "essential character", the Federal Court of Appeal, in *Mon-Tex*, explained that the purpose of an analysis under Rule 3 (b) of the *General Rules* "... is not merely to weigh the various elements of Explanatory Note VIII against one another, but rather to determine the essence or fundamental nature of the goods."<sup>27</sup> After referring to various dictionary definitions of the word "essential", the Federal Court of Appeal added that, "... to be essential, a characteristic must pertain to the essence of something. It must be fundamental."<sup>28</sup>

45. Applying this test, the Tribunal must assess whether one component of the goods in issue (the cheese or the seasoned breadcrumbs) can be said to determine their essence or fundamental nature. In this regard, the Tribunal notes that, while criteria such as bulk, quantity, weight and value are intrinsically objective, they are not, in and of themselves, necessarily dispositive.

46. As explained by the Tribunal in *Transilwrap*, "... that weight can be considered an objective measure is not sufficient for it to be the determining factor in the classification of goods. It must also have an

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26. In this regard, Kraft noted that it is the use of different seasoned breadcrumbs that creates a different type of meal, in that a consumer would not have a vastly different experience if consuming a mixture of rosemary, garlic, Cheddar and Provolone or consuming a mixture of rosemary, garlic, Monterrey Jack and Colby. A consumer would however have a significantly different experience if consuming a mixture of rosemary, garlic and Cheddar or Provolone or consuming a mixture of chipotle, Cheddar and Provolone.

27. *Mon-Tex* at para. 11.

28. *Mon-Tex* at para. 13.

impact on the essential character of the goods.”<sup>29</sup> This approach was also taken by the Tribunal *Oriental Trading (MTL) Ltd. v. Deputy M.N.R.*<sup>30</sup> where it had to determine which component of cotton swabs—the cotton wadding or the polypropylene stem—gave the goods their essential character. Despite the evidence that the polypropylene stem weighed more, was bulkier and accounted for more of the cost of the cotton swabs than the cotton wadding, the Tribunal found that, on the basis of the role that the cotton wadding played in contributing to the personal hygiene nature of the product, the essential character of the product was conferred by the cotton wadding.

47. Similarly, in this appeal, the Tribunal is not convinced by the CBSA’s arguments that the fact that cheese is the main ingredient in the goods in issue in terms of quantity, weight and value means that the essential character of the goods in issue is conferred by the cheese. In the Tribunal’s view, the undisputed evidence clearly establishes that the essence or the fundamental nature of the goods in issue is that of a seasoned meat-coating product.<sup>31</sup> It follows that, in order to determine which component gives the goods in issue their essential character, if any, one must examine the role of each constituent component in contributing to the use of the goods in issue as seasoned meat-coating products. In other words, the Tribunal agrees with Kraft that the factor that must be emphasized in the circumstances of this appeal is the role of a constituent material in relation to the use of the goods.

48. In this regard, Kraft provided compelling evidence, through the witness statement of Ms. Jenna Zylber, Brand Manager of Innovation at Kraft, that it is the seasoned breadcrumbs that play the crucial role in the adherence of the goods in issue to the meat or fish product and is therefore fundamental to their use as seasoned meat-coating products. In particular, Ms. Zylber stated the following:

In terms of product functionality, it is the seasoning/spice breadcrumb mix that plays the primary role in adherence of the coating to the poultry, seafood or meat and in the creation of the “crunchy” coating exterior, which is fundamental to the “workability” of the product and lends the product its primary characteristic as a meat coating. The grated cheese plays a secondary role in adherence to the meat by providing a moisture base, which could alternatively be provided by oil, egg, or potentially even the moisture base provided by the meat itself, similar to Kraft Shake ‘n Bake. Cheese is used to give the coating a creamier texture than would be obtained by using other potential moisture bases and also contributes to flavour.<sup>32</sup>

49. Ms. Zylber also stated that each of the goods in issue has a distinct flavour profile which is created by its unique seasoning mixture and that it is primarily the seasoned breadcrumb mixture that distinguishes them from one another.<sup>33</sup> According to this evidence, it is thus primarily the seasoned breadcrumbs that allow the goods in issue to serve their purpose by conferring on them their fundamental characteristic as meat-coating products and lending them their specific flavours. Moreover, the preponderant evidence indicates that the goods in issue are not in direct competition with other dairy or cheese products.<sup>34</sup> This fact also militates against finding that it is the cheese component that constitutes the essence or the fundamental nature of the goods in issue.

50. The Tribunal also notes that the CBSA did not file any rebuttal evidence to challenge Ms. Zylber’s statements and supporting documents which indicate that it is the seasoned breadcrumbs that confer to the

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29. *Transilwrap* at 3.

30. (31 August 1992), AP-91-081 and AP-91-223 (CITT) at 2.

31. See the description of the goods in issue under the heading “Goods in Issue” and the evidence thereunder, in particular, Exhibit AP-2013-055-06B at paras. 5-9, Vol. 1.

32. Exhibit AP-2013-055-06B at para. 10, Vol. 1.

33. Exhibit AP-2013-055-06B at paras. 13-14, Vol. 1.

34. Exhibit AP-2013-055-06B at paras. 15-16, tab J, Vol. 1.

goods in issue their primary characteristic as meat-coating products and allow them to serve their purpose. For example, the CBSA did not tender a witness or file a witness statement from a *chef* or other individual familiar with the use of seasoned meat-coating products in order to dispute Ms. Zylber's evidence on the primary importance of the seasoned breadcrumbs to create the desired "crunchy" exterior and ensure that the coating adheres to the meat or seafood. This is significant and undermines the CBSA's claim that it is the cheese component that "ultimately 'makes the goods in issue what they are.'"<sup>35</sup> On balance, the Tribunal finds that this argument is not borne out by the evidence on the record.

51. Indeed, the information concerning the production, marketing and sales of the goods in issue on the record is indicative of their fundamental character as seasoned meat-coating products, in which the seasoned breadcrumbs play a defining role. The CBSA's arguments, which emphasize the weight and value of the cheese component, the fact that cheese appears first in the list of ingredients and that the presence of cheese makes the goods in issue perishable and requires them to be packaged in a particular way and refrigerated,<sup>36</sup> ignore the evidence that it is the seasoned breadcrumbs that play the dominant role in ensuring the requisite coating of the meat or seafood, define the flavour profile and are indispensable to the manner in which the goods in issue are used (i.e. as seasoned meat or seafood coating products).

52. While the CBSA suggested that cheese could be used on its own to create a dish, the Tribunal accepts Kraft's argument that this does not mean that the essential character of the goods in issue is conferred by the cheese. In light of the uncontroverted evidence provided by Ms. Zylber, the resulting dish would not be a seasoned coated meat product similar in nature to the dish that results from the use of the goods in issue. In fact, absent the seasoned breadcrumbs, the cheese would neither adhere to the meat in the same way nor create the crunchy texture that is the salient characteristic of the dish created by the use of the goods in issue. Thus, it is clear that the cheese component of the goods in issue is not intended to be used alone, nor does it determine their *raison d'être*.

53. As for the CBSA's argument that it is the cheese component that provides the goods in issue with their uniqueness and distinctiveness and that the suggested uses outlined in the Kraft recipe booklet highlight the importance of cheese in the overall content of the package to obtain an *au gratin* dish,<sup>37</sup> the Tribunal considers that, even if one were to accept these assertions as facts, they would not establish that it is the cheese that plays the essential role in allowing the goods in issue to perform the uses for which they were intended. While the cheese is surely an important ingredient in the goods in issue, in that it distinguishes them from other seasoned meat-coating products, the fact remains that, according to the evidence on the record, the goods in issue cannot function as seasoned meat-coating products without the seasoned breadcrumbs. As such, the cheese component cannot be said to allow the goods in issue to perform the use for which they were intended since, in order for them to be used as seasoned meat-coating products, the cheese must be combined with the seasoned breadcrumbs.

54. This analysis leads the Tribunal to conclude that the essential character of the goods in issue is conferred by the seasoned breadcrumbs. In short, despite the addition of cheese, the goods in issue are and

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35. Exhibit AP-2013-055-09B at paras. 53, Vol. 1.

36. As discussed above, these factors are, at any rate, not determinative, given the nature of the goods in issue.

37. In this regard, the Tribunal notes that the dictionary definition of the cooking term "*au gratin*" filed with the Tribunal indicates that an *au gratin* dish sometimes, but not always, includes cheese, while it invariably features coating with breadcrumbs. See Exhibit AP-2013-055-06A at para. 58, tab 11, Vol. 1. Accordingly, even if the goods in issue might be used to create an *au gratin* dish, this does not mean that cheese constitutes their defining or essential characteristic.

remain innovative seasoned meat-coating products in which the seasoned breadcrumbs are the essential or defining component.

55. Finally, the Tribunal notes that the CBSA submitted that the goods in issue meet the requirements of heading No. 04.06 on the basis of the explanatory notes to that heading,<sup>38</sup> because they retain the character of cheese. Conversely, it submits that the goods in issue do not meet the requirements of heading No. 21.03 because they do not retain the character of seasoning. However, as pointed out by Kraft, this argument erroneously approaches the issue as if the relevant consideration was whether *both* components of the goods in issue fall under either heading No. 04.06 or heading No. 21.03. Under Rule 3 (b) of the *General Rules*, the question is not whether the product as a whole meets the terms of a heading, but the determination of the component which gives composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, such as the goods in issue, their essential character, where this criterion is applicable.

56. Thus, the Tribunal's task is not to assess whether the two components of the goods in issue, considered together, retain the character of cheese or the character of seasoning. The Tribunal must rather attempt to determine whether the essential character of the goods in issue is conferred by the cheese or the seasoned breadcrumbs. To the extent that one of those components gives the set put up for retail sale its essential character, then, pursuant to Rule 3 (b) of the *General Rules*, the goods in issue must be classified *as if they consisted only* of that component.

57. This is confirmed by the explanatory notes to Rule 3 (b) of the *General Rules*, which provide the following: "In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character . . .**" Thus, contrary the CBSA's submissions, once the classification exercise is conducted under Rule 3 (b), the issue is not whether a set put up for retail sale, considered as a whole, meets the terms of any of the competing headings. One must consider the tariff classification of the component which gives the goods in issue their essential character and, once this determination is made, classify them as if they consisted of that component, that is, in the heading that covers the component identified as the one which gives the set its essential character.

58. On the basis of the foregoing analysis, having determined that the seasoned breadcrumbs constitute the component which gives the goods in issue their essential character and considering that it is beyond dispute that the seasoned breadcrumbs are themselves classifiable in heading No. 21.03, the Tribunal concludes, in accordance with Rule 3 (b) of the *General Rules*, that the goods in issue should be classified in heading No. 21.03.

### **Classification at the Subheading and Tariff Item Levels**

59. Having determined the classification of the goods in issue at the heading level, the Tribunal must next determine the subheading in which the goods in issue should be classified. However, as the goods in issue were determined to be classified in heading No. 21.03 pursuant to Rule 3 (b) of the *General Rules*, the Tribunal must proceed with classification at the subheading level and, for that matter, at the tariff item level, on the implied notion that it is the seasoned breadcrumb component of the goods in issue that is being classified.

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38. The explanatory notes to heading No. 04.06 provide, *inter alia*, that "[t]he presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification [in heading No. 04.06] **provided** that the goods retain the character of cheese."



60. In this regard, a review of the terms of the subheadings of heading No. 21.03, pursuant to Rules 1 and 6 of the *General Rules*, reveals that the appropriate subheading is No. 2103.90, which covers mixed condiments and seasoning other than those specifically covered in the previous subheadings of heading No. 21.03.

61. Similarly, on the basis of the terms of the tariff items under subheading No. 2103.90, pursuant to the *Canadian Rules* and Rule 1 of the *General Rules*, the appropriate tariff item is No. 2103.90.20.

## **DECISION**

62. For the foregoing reasons, the Tribunal concludes that the goods in issue should be classified under tariff item No. 2103.90.20 as mixed condiments and mixed seasonings, as claimed by Kraft.

63. The appeal is therefore allowed.

Daniel Petit  
Daniel Petit  
Presiding Member