Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-027

Nestlé Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Tuesday, February 7, 2017

Canada

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- DECISION 17

IN THE MATTER OF an appeal heard on August 9, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 7, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

NESTLÉ CANADA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 9, 2016
Tribunal Panel:	Jean Bédard, Presiding Member
Support Staff:	Kalyn Eadie, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
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President of the Canada Border Services Agency	Julie Greenspoon

WITNESSES:

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Nestlé Canada Inc. (Nestlé) on February 8, 2016, pursuant to subsection 67(1) of the *Customs Act*[1] from a further re-determination of tariff classification by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*, dated January 7, 2016.

2. The appeal concerns the tariff classification of the Nestlé "Double Up" frozen dessert sandwich (the good in issue).

3. The issue is whether the good in issue is properly classified under tariff item No. 2105.00.91 as other ice cream and other edible ice, whether or not containing cocoa, within access commitment, or under tariff item No. 2105.00.92 as other ice cream and other edible ice, whether or not containing cocoa, over access commitment, as determined by the CBSA, or should be classified under tariff item No. 1806.90.90 as other chocolate and other food preparations containing cocoa, or, alternatively, under tariff item No. 2105.00.10 as flavoured ice and ice sherbets, as claimed by Nestlé.

PROCEDURAL HISTORY

4. On December 11, 2013, Nestlé applied for an advance ruling under paragraph 43.1(1)(c) of the *Act* and requested that the good in issue be classified under tariff item No. 1806.90.90 as other chocolate and other food preparations containing cocoa.[2]

5. On July 2, 2014, the CBSA issued an advance ruling in which it determined that the good in issue was properly classified as other edible ice, whether or not containing cocoa, under tariff item No. 2105.00.91 (within access commitment) or under tariff item No. 2105.00.92 (over access commitment).[3]

6. On September 5, 2014, pursuant to subsection 60(2) of the *Act*, Nestlé requested a re-determination of the advance ruling and requested that the good in issue be classified under tariff item No. 1806.90.90.

7. On January 7, 2016, pursuant to subsection 60(4) of the *Act*, the CBSA re-affirmed its decision.[4]

8. On February 8, 2016, pursuant to subsection 67(1) of the *Act*, Nestlé filed this appeal with the Canadian International Trade Tribunal (the Tribunal).

9. On August 9, 2016, the Tribunal held an oral hearing. The following witnesses testified at the hearing:

- Ms. Cristina Cuda, formerly Frozen Group Lead for the Regulatory and Scientific Affairs Group at Nestlé;[5]
- Ms. Suzette Jordan, Manager, Technical Applications, at Nestlé;
- Ms. Sara Rodrigues, Manager, Marketing, at Nestlé;

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2015-027-06B (protected), Tab 1A, Vol. 2.
3. Exhibit AP-2015-027-06B (protected), Tab 1B, Vol. 2.
4. Exhibit AP-2015-027-06B (protected), Tab 1D, Vol. 2.
5. *Transcript of Public Hearing*, 9 August 2016, at 12.

- Dr. H. Douglas Goff, a professor in the Department of Food Science at the University of Guelph, specializing in the area of dairy science and technology, and carbohydrate chemistry; and
- Ms. Andrea O'Brien, Senior Chemist, Food/Organics, Customs Analysis Section, Science and Engineering Directorate of the CBSA.

10. Dr. Goff was qualified as an expert witness in the area of ice cream, edible ice, and related products.[6]

11. On October 4, 2016, the Tribunal invited the parties to make post-hearing submissions on the applicability of the Tribunal's decision in *J. Cheese Inc. v. President of the Canada Border Services Agency*,[7] and the Supreme Court of Canada's decision in *Canada (Attorney General) v. Igloo Vikski Inc.*,[8] both of which were released after the hearing. On October 7, 18, and 21, 2016, the parties made their respective submissions. Accordingly, the record of this appeal was closed on October 21, 2016.

DESCRIPTION OF THE GOOD IN ISSUE

12. The good in issue is the Nestlé "Double Up" frozen dessert sandwich.[9] It consists of three components: (1) two chocolate wafers/biscuits, (2) a chocolatey nut coating, and (3) a frozen dessert layer. The frozen dessert layer forms the interior of the good in issue. Half is covered by the chocolate wafers and half is covered by the chocolatey nut coating.[10]

13. The good in issue contains three dairy ingredients: (1) skim milk powder, (2) whey powder, and (3) whole milk powder.[11] The parties differ as to the exact milk solid content of the good in issue; however, both parties have calculated that the milk solids content of the good in issue is above 5%.[12]

14. Both parties agree that the good in issue contains only trace amounts of milk fat. The milk fat in the frozen dessert mix has been replaced by coconut oil.[13]

LEGAL FRAMEWORK

15. 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 (WCO).[14] 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.

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6. *Transcript of Public Hearing*, 9 August 2016, at 109.
7. (13 September 2016), AP-2015-011 (CITT) [*J. Cheese*].
8. 2016 SCC 38 (CanLII) [*Igloo Vikski*].
9. Exhibit AP-2015-027-06A, Tab 2, Vol. 1C.
10. Exhibit AP-2015-027-04A at para. 7, Vol. 1; Exhibit AP-2015-027-04B, Tab A, Vol. 1.
11. Exhibit AP-2015-027-04A at para. 10, Vol. 1; Exhibit AP-2015-027-04E (protected), Tab A, Vol. 2; *Transcript of Public Hearing*, 9 August 2016, at 27-28.
12. Exhibit AP-2015-027-04E (protected), Tab B, Vol 2; Exhibit AP-2015-06B (protected), Tab 4C, Vol. 2. The CBSA's calculation was made with respect to the frozen dessert layer only; however, based on the proportion of the frozen dessert layer to the total, the milk solids content of the total good in issue would still be greater than 5% using the CBSA's numbers.
13. Exhibit AP-2015-027-04A at paras. 9, 18, Vol. 1; Exhibit AP-2015-027-04E (protected), Tab A, Vol. 2.
14. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

16. Subsection 10(1) of the *Customs Tariff* provides that, subject to subsection (2), the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[15] and the *Canadian Rules*[16] set out in the schedule.

17. Subsection 10(2) of the *Customs Tariff* provides that goods shall not be classified under a tariff item that contains the phrase "within access commitment" unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act*[17] and in compliance with the conditions of the permit.

18. 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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.[18]

19. 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*[19] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[20] 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.[21] Furthermore, Rule 2 of the *Canadian Rules* provides that, "[w]here both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence." This suggests that internationally standardized definitions of terms, such as those appearing in the *Codex Alimentarius*, should supersede those presented in domestic regulations.

20. Therefore, the Tribunal must 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.[22]

21. 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.[23]

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15. S.C. 1997, c. 36, schedule [*General Rules*].
16. S.C. 1997, c. 36, schedule.
17. R.S.C., 1985, c. E-19 [*EIPA*].
18. *Igloo Vikski* at para. 21.
19. World Customs Organization, 2nd ed., Brussels, 2003.
20. World Customs Organization, 5th ed., Brussels, 2012.
21. 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.
22. Rules 1 through 5 of the General Rules apply to classification at the heading level.
23. 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."

22. The final step is to determine the proper tariff item classification. 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.

TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

Tariff Item Nos. 2105.00.10, 2105.00.91 and 2105.00.92[24]

Section IV **PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES**	**Section IV** **PRODUITS DES INDUSTRIES ALIMENTAIRES; BOISSONS, LIQUIDES ALCOOLIQUES ET VINAIGRES; TABACS ET SUCCÉDANÉS DE TABAC FABRIQUÉS**
Chapter 21 **MISCELLANEOUS EDIBLE PREPARATIONS**	**Chapitre 21** **PRÉPARATIONS ALIMENTAIRES DIVERSES**
2105.00 Ice cream and other edible ice, whether or not containing cocoa.	**2105.00 Glaces de consommation, même contenant du cacao.**
2105.00.10 - - -Flavoured ice and ice sherbets	2105.00.10 - - -Glaces et sorbet aromatisés
- - -Other:	- - -Autres :
2105.00.91 - - - -Within access commitment	2105.00.91 - - - -Dans les limites de l'engagement d'accès
2105.00.92 - - - -Over access commitment	2105.00.92 - - - -Au-dessus de l'engagement d'accès

23. There are no relevant legal notes to either Section IV or Chapter 21.

24. There are no relevant explanatory notes to Chapter 21. The explanatory notes to heading No. 21.05 read as follows:

> This heading covers ice cream, which is usually prepared with a basis of milk or cream, and other edible ice (e.g., sherbet, iced lollipops), whether or not containing cocoa in any proportion. However, the heading **excludes** mixes and bases for ice cream which are classified according to their essential constituents (e.g., **heading 18.06**, **19.01** or **21.06**).
>
> La présente position comprend les crèmes glacées, préparées le plus souvent à base de lait ou de crème, et les produits glacés similaires (sorbets, sucettes glacées, par exemple), même contenant du cacao en toute proportion. Toutefois, **ne sont pas compris** dans cette position les mélanges et bases pour la confection des glaces de consommation qui sont classés suivant la nature de l'ingrédient essentiel qu'ils contiennent (**n^{os} 18.06**, **19.01** ou **21.06**, par exemple).

24. 2013 List of Tariff Provisions as amended.

Tariff Item No. 1806.90.90[25]

Section IV **PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES**	**Section IV** **PRODUITS DES INDUSTRIES ALIMENTAIRES; BOISSONS, LIQUIDES ALCOOLIQUES ET VINAIGRES; TABACS ET SUCCÉDANÉS DE TABAC FABRIQUÉS**
Chapter 18 **COCOA AND COCOA PREPARATIONS**	**Chapitre 18** **CACAO ET SES PRÉPARATIONS**
18.06 Chocolate and other food preparations containing cocoa.	**18.06 Chocolat et autres préparations alimentaires contenant du cacao.**
1806.90 -Other	**1806.90 -Autres**
- - -Chocolate ice cream mix or ice milk mix:	- - -Mélange de crème glacée ou mélange de lait glacé au chocolat :
1806.90.11 - - - -Within access commitment	1806.90.11 - - - -Dans les limites de l'engagement d'accès
1806.90.12 - - - -Over access commitment	1806.90.12 - - - -Au-dessus de l'engagement d'accès
1806.90.90 - - -Other	1806.90.90 - - -Autres

25. There are no relevant legal notes to Section IV. The relevant legal notes to Chapter 18 read as follows:

1. *This Chapter does not cover the preparations of heading* 04.03, 19.01, 19.04, 19.05, *21.05*, 22.02, 22.08, 30.03 or 30.04.	1. *Le présent Chapitre ne comprend pas les préparations des n*^{os} 04.03, 19.01, 19.04, 19.05, *21.05*, 22.02, 22.08, 30.03 ou 30.04.
2. Heading 18.06 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.	2. Le n^{o} 18.06 comprend les sucreries contenant du cacao, ainsi que, sous réserve des dispositions de la Note 1 du présent Chapitre, les autres préparations alimentaires contenant du cacao.

[Emphasis added]

26. The relevant explanatory notes to Chapter 18 provide as follows:

GENERAL	**CONSIDERATIONS GENERALES**
This Chapter covers cocoa (including cocoa beans) in all forms, cocoa butter, fat and oil and preparations containing cocoa (in any proportion), **except**:	Le présent Chapitre se rapporte au cacao proprement dit (y compris en fèves), sous toutes ses formes, et au beurre, à la graisse et à l'huile de cacao, ainsi qu'aux préparations alimentaires contenant du cacao en toutes proportions, **à l'exception**, toutefois :
(f) Ice cream and other edible ice, containing cocoa in any proportion (**heading 21.05**).	f) Des glaces de consommation contenant du cacao en toutes proportions (**n^{o} 21.05**).

25. 2013 List of Tariff Provisions as amended.

27. The relevant explanatory notes to heading No. 18.06 provide, in part, as follows:

> The heading also includes all sugar confectionery containing cocoa in any proportion (including chocolate nougat), sweetened cocoa powder, chocolate powder, chocolate spreads, and, in general, all food preparations containing cocoa (**other than** those **excluded** in the General Explanatory Note to this Chapter).
>
> On range également ici les sucreries contenant du cacao en proportion quelconque, les nougats au chocolat, les poudres de cacao additionnées de sucre ou d'autres édulcorants, les chocolats en poudre additionnés de poudre de lait, les produits pâteux à base de cacao ou de chocolat et de lait concentré et, d'une manière générale, toutes préparations alimentaires contenant du cacao, **autres que** celles **exclues** dans les Considérations générales du présent Chapitre.

POSITIONS OF PARTIES

Nestlé

28. Nestlé argued that the good in issue is not properly classified as other edible ice under tariff item No. 2105.00.91 or 2105.00.92.

29. Nestlé's principal argument was that the good in issue cannot be classified under tariff item No. 2105.00.91 or 2105.00.92 because it is not a supply-managed dairy product that is subject to Canada's tariff rate quota (TRQ) system. Nestlé argued that goods classified under those tariff items must be limited to dairy products that are identified in item No. 134 of Canada's Import Control List (ICL), which in Nestlé's submission is limited to ice cream and ice milk (including novelties), and products that are mainly manufactured of ice cream or ice milk. However, the good in issue contains coconut oil rather than milk fat, and therefore cannot be considered ice cream or ice milk in accordance with the CBSA's administrative policy and regulatory definitions of those terms.

30. Accordingly, Nestlé submitted that the phrase "other edible ice" must be interpreted with regard to the principle of statutory coherence, which requires that it be given a meaning consistent with item No. 134 of the ICL, and in a manner that gives effect to the "within access commitment" and "over access commitment" language that appears in the tariff items in question.

31. Nestlé also submitted that the 5% milk solids threshold applied by the CBSA to determine whether an edible ice must be classified within the residual category "other edible ice" is arbitrary.

32. Further, as the good in issue was never intended to be subject to supply management, Nestlé argued that the classification of the good in issue under tariff item No. 2105.00.92 (over access commitment), which is a TRQ tariff item of the *Customs Tariff*, would be inconsistent with Canada's obligations under the *General Agreement on Tariffs and Trade* and the World Trade Organization agreements.

33. Nestlé's position is that the good in issue is properly classified under tariff item No. 1806.90.90 as other food preparations containing cocoa because it is not edible ice, is a food preparation and contains cocoa. According to Nestlé, the good in issue is a "food preparation" because it is a mixture of culinary ingredients that are selected, measured and combined for the specific purpose of creating a frozen confectionery.

34. As the explanatory notes to heading No. 18.06 also state that the heading includes "all sugar confectionery containing cocoa in any proportion", Nestlé submitted that the good in issue meets dictionary definitions of "confectionery" and contains a significant percentage of sugar. Nestlé also submitted that the good in issue has similar ingredients as non-frozen chocolate bars and is marketed to consumers in the same way.

35. In the alternative, should the Tribunal find that the good in issue is classifiable within heading No. 21.05, Nestlé submitted that tariff item No. 2105.00.10 is the more appropriate tariff item. Nestlé argued that, since the good in issue is not a supply-managed dairy product, it cannot be classified under tariff item No. 2105.00.91 or 2105.00.92. Therefore, the expression "flavoured ice" has to be interpreted broadly to cover all edible ices containing flavouring that are neither sherbets nor supply-managed dairy products.

CBSA

36. The CBSA's position is that the good in issue is properly classified under tariff item No. 2105.00.91 or 2105.00.92.

37. Due to the exclusionary note to Chapter 18, the chapter proposed by Nestlé, the CBSA submitted that the Tribunal must begin its analysis by determining if the good is classifiable within the excluded heading, i.e. heading No. 21.05.

38. The CBSA submitted that the good in issue is classifiable under heading No. 21.05 because it is edible ice. In support of this position, the CBSA argued that the good in issue is a frozen dessert and that the expression "frozen dessert" is used interchangeably with the expression "edible ice".

39. With respect to the classification of the good in issue at the tariff item level, the CBSA argued that it can neither be considered "flavoured ice", because it contains milk ingredients, nor "ice sherbet", because it contains more than 5% milk solids. These thresholds are based on the CBSA's administrative policy, which in turn incorporates the definitions set out in domestic regulations. Since it cannot be classified under tariff item No. 2105.00.10 as flavoured ice and ice sherbets, the good in issue must be classified under the residual tariff item as other ice cream and other edible ice, whether or not containing cocoa.

40. In response to Nestlé's arguments regarding the TRQ system, the CBSA recalled that this appeal concerns the tariff classification of the good in issue using the *General Rules* and the *Canadian Rules* for classification. The issue is not whether the TRQ system should or can apply to the good in issue or to a particular tariff classification. The CBSA submitted that concerns regarding the administration of the TRQ system should be directed to Global Affairs Canada (GAC).

ANALYSIS

Preliminary Comments

41. Before turning to the tariff classification exercise, a few preliminary remarks on Canada's TRQ system for the supply management of dairy products are necessary in order to set the context for Nestlé's arguments in this appeal.

42. As explained by Nestlé in detail during closing arguments, one of the key components of the Uruguay Round, which established the World Trade Organization, was the requirement for members to convert various pre-existing non-tariff barriers, including import quotas, into tariff equivalents, a process referred to as "tariffication". Accordingly, the TRQs are now reflected in the *Customs Tariff* as ordinary customs duties.

43. Canada has implemented a permit system for products that are subject to the TRQ system. The permit system is governed by the *EIPA*, which is administered by GAC. The Minister of Foreign Affairs has the authority to grant permits to import goods that are included on the ICL. Generally, a total amount of quota for a given product included on the ICL is set on an annual basis and importers can apply for quota allocations. Shipment-specific permits are issued for each importation within an importer's allocation. Goods that are imported under the authority of a permit may be imported at the "within access commitment" rate, as provided for by subsection 10(2) of the *Customs Tariff*. In the absence of an import permit, the importer must pay the "over access commitment" duty rate, which is significantly higher.

44. Inclusion on the ICL is governed by tariff classification, in accordance with the tariffication obligation discussed directly above. As noted by Nestlé, tariff item Nos. 2105.00.91 and 2105.00.92 are included on the list at item No. 134. Item No. 134 of the ICL also replicates the terms of the tariff item:

134 Ice cream and other edible ice, whether or not containing cocoa, other than flavoured ice and ice sherbets, that are classified under tariff item No. 2105.00.91 or 2105.00.92 in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*.	**134** Crème glacée ou autres glaces de consommation, même contenant du cacao, autres que les glaces aromatisées et les sorbets glacés, qui sont classées dans les numéros tarifaires 2105.00.91 ou 2105.00.92 de la liste des dispositions tarifaires de l'annexe du *Tarif des douanes*.

45. GAC also publishes the *Handbook of Export and Import Commodity Codes*, which ostensibly describes the goods that are included in the ICL items and assigns them each unique four-digit codes.

46. As noted above, the majority of Nestlé's arguments in this appeal concern the purported impact that the existence of the TRQ system should have on the Tribunal's tariff classification exercise. In particular, Nestlé argued that Rule 1 of the *General Rules* requires the Tribunal to take into account the fact that the *tariff items* make reference to the TRQ system when interpreting the terms of the *heading*.

47. This is a misstatement of the principles of tariff classification. Wording that appears in the tariff item language, which is developed by each individual signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, can have no bearing on the interpretation of the internationally standardized terms of the heading pursuant to Rule 1 of the *General Rules*. Accordingly, classification at the heading and subheading level (up to six digits) should not be informed by Canada's decision to engage in supply management.

48. As such, any bearing that the supply management program has should only be considered when considering what tariff item (seven-eight digits) applies. The Tribunal will give further consideration to Nestlé's arguments regarding the impact of the TRQ system when it arrives at this phase of the tariff classification exercise. At this juncture, the Tribunal wishes to stress that, in this instance, classification as between headings No. 21.05 and 18.06 will proceed on the basis of the *General Rules*, as is the case with all tariff classification appeals.

Tariff Classification

49. On appeals under 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.

50. As stated above, the Tribunal must first determine whether the good 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.

51. There are both legal and explanatory notes that exclude items of heading No. 21.05 from classification in Chapter 18. Accordingly, in line with its past practice in such situations, the Tribunal will begin its analysis with an examination of whether the good in issue is classifiable in heading No. 21.05.

> Is the good in issue ice cream and other edible ice, whether or not containing cocoa, of heading No. 21.05?

52. The terms "ice cream" and "edible ice" are not defined in the *Customs Tariff*. Tribunal practice in such situations is to adopt the approach to statutory interpretation endorsed by the Supreme Court of Canada, which is the modern contextual approach pursuant to which the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[26] The Tribunal has also been mindful of the Federal Court of Appeal's ruling that, if a term used in the *Customs Tariff* has a particular meaning in a trade, it should be interpreted in that sense.[27]

53. With respect to the latter point, Nestlé argued that Canadian regulatory standards govern industry usage of the term "ice cream" in Canada and that, accordingly, "ice cream" should be defined in the same way for tariff classification purposes as in the domestic regulations.[28]

54. According to Dr. Goff, "ice cream" is defined in Canada by reference to regulatory standards, such as the *Food and Drug Regulations*.[29] The key requirements of these standards are that ice cream must contain (1) not less than 36% solids and (2) a minimum of 10% milk fat or, where cocoa or chocolate syrup, fruit, nuts, or confections have been added, 8% milk fat.[30]

55. Accordingly, Nestlé argued that the good in issue cannot be considered "ice cream" for the purpose of tariff classification because it does not meet the Canadian regulatory definition of the term, due to the fact that it contains only trace amounts of milk fat.[31] Instead, these products, which are similar to ice cream in all ways except that the milk fat has been replaced by a vegetable fat, are known in Canada as "frozen dessert".[32]

56. However, at the hearing, Dr. Goff testified that in other jurisdictions the good in issue might be considered ice cream, as other countries do not restrict the definition of ice cream in the same way as Canada does.[33]

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26. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.
27. *Olympia Floor and Wall Tile Co. v. Deputy M.N.R.*, 5 C.E.R. 562 at 565 [*Olympia Tile*], as cited in *Cambridge Brass Inc. v. President of the Canada Border Services Agency* (7 December 2011), AP-2010-070 (CITT) at para. 48; *Outdoor Gear Canada v. President of the Canada Border Services Agency* (21 November 2011), AP-2010-060 (CITT) at para. 25.
28. *Transcript of Public Hearing*, 9 August 2016, at 156-60.
29. Exhibit AP-2015-027-10A at paras. 21-24, Vol. 1D.
30. Item B.08.061.
31. *Transcript of Public Hearing*, 9 August 2016, at 18.
32. Exhibit AP-2015-027-10A at paras. 28-29, Vol. 1D.
33. *Transcript of Public Hearing*, 9 August 2016, at 144; see also Exhibit AP-2015-027-10A at para. 26, Vol. 1D.

57. In its recent decision in *J. Cheese*, the Tribunal ruled as follows:

> 73. The [Dairy Farmers of Canada] argued, and the Tribunal agrees, that *an approach by which domestic regulations govern tariff classification is inconsistent with the international nature of the harmonized nature of the tariff regime.* Rather, the Tribunal should strive to arrive at a classification that is compatible with the international nature of the harmonized system. Accordingly, in the absence of an express or implied term within the *Customs Tariff* directing the Tribunal to set aside the explanatory notes and to apply the domestic regulations, the Tribunal is required to proceed with the classification exercise in the usual manner, relying on the guidance provided in the explanatory notes. *While the Tribunal may consider the domestic regulations as informing its tariff classification exercise to the extent that they are relevant and helpful, in particular to understand technical or industry usage, they are not determinative, and they do not displace other potential sources of guidance.* Were it otherwise, countries could easily thwart the international and standardized nature of the tariff through the adoption of domestic compositional standards.
>
> [Emphasis added, footnote omitted]

58. In *J. Cheese*, there was a conflict between the definitions of "cheese" found in the explanatory notes, the international standard set out in the *Codex Alimentarius*, and the domestic regulations. While the Tribunal is not faced with such a situation in this case, the overall principle as expressed in the above-cited paragraph still applies. In other words, while domestic regulations can be helpful in establishing technical meaning or industry usage of a term, the Tribunal must respect the fact that the terms of the tariff are internationally standardized to the six-digit level. As such, an interpretation of a heading or subheading based solely on a definition that appears in domestic regulation, which is more restrictive than the tariff requires, and that has clearly not been adopted internationally, may not be appropriate.

59. However, in this case, the Tribunal finds that it is not necessary to arrive at a definition of "ice cream" or to determine whether the good in issue meets such a definition. This is because the term "edible ice" is a broad term that encompasses ice cream, as well as all other frozen dessert products.

60. This interpretation of "edible ice" is suggested by the use of the conjunctive "and" between the terms "ice cream" and "edible ice" in heading No. 21.05, which indicates that these terms are not meant to be mutually exclusive. More importantly, the equally authentic French text of heading No. 21.05 provides only for "glaces de consommation" and does not refer to "crème glacée".

61. Further, this interpretation aligns with the definition provided in Dr. Goff's expert report, which defines "edible ice" as follows:

> The term "Edible Ice" is taken in industrial, scientific and technical parlance globally to mean any ice cream-like or frozen dessert-type product that is manufactured by freezing and eaten while frozen. This broad category would include ice cream/gelato, ice milk, frozen dessert (containing non-dairy fats), sherbet, frozen yogurt, quiescently frozen water ice such as popsicles, dynamically frozen water ice such as sorbet, non-dairy frozen desserts such as those based on soy or rice or almonds but resembling ice cream, and so on.[34]

62. Dr. Goff also testified that the term "edible ice" is internationally understood as an umbrella term for all sweetened confection-type products that are characterized by being eaten while frozen.[35]

34. Exhibit AP-2015-027-10A at para. 7, Vol. 1D.
35. *Transcript of Public Hearing*, 9 August 2016, at 145.

63. The evidence on the record is that the good in issue is imported frozen and is meant to be consumed while frozen. The packaging identifies it as a "frozen dessert sandwich" and cautions that it should be kept frozen.[36] Further, the good in issue is sold from freezers where it is stored with ice cream and other frozen desserts, and is marketed as a frozen treat or confection.[37] The good in issue also contains a significant proportion of sugar, which is consistent with its description by Nestlé as confectionery.[38] In addition, Dr. Goff's report concludes that the good in issue is a "frozen dessert novelty" and that it meets the definition of "edible ice" set out above.[39] Taken together, this evidence all leads to the conclusion that the good in issue is "edible ice" and is classifiable in heading No. 21.05 pursuant to Rule 1.

64. However, the definition of "edible ice" provided by Dr. Goff arguably does not account for all of the components of the good in issue. Nestlé described the goods in issue of consisting of three components: (1) chocolate wafers, (2) a chocolate and nut coating, and (3) a frozen dessert mix. Given the definitions of "frozen dessert" and "edible ice" put forward in Dr. Goff's report, it is arguable that only the interior frozen dessert portion clearly meets the definition of "edible ice".

65. Even if this were the case, the good in issue could still fall under heading No. 21.05 through the application of Rule 2(b) of the *General Rules*. As recently stated by the Supreme Court of Canada, Rule 2(b) applies in conjunction with Rule 1 to determine the *prima facie* classification of goods where the goods are comprised of a mix of materials or substances (and where no heading specifically describes the mixed or composite good as such).[40]

66. Specifically, Rule 2(b) provides that a reference to goods of a given material or substance in a heading shall be taken to include goods consisting wholly or partly of such material or substance. The explanatory notes to Rule 2(b) introduce the caveat that Rule 2(b) does not extend a heading so as to cover goods which cannot be regarded as answering the description in the heading. The mixed or composite good is therefore described by that heading unless the addition of the other material or substance would deprive the good of the character of goods of the kind described in the heading.

67. Accordingly, the Tribunal will consider whether the addition of the chocolate and nut coating and/or the chocolate wafers deprives the good in issue of the character of "edible ice".

68. Dr. Goff's expert report discusses ice cream sandwiches, which he referred to as "ice cream novelties", and also similar goods made with frozen dessert instead of ice cream, which he referred to as "frozen dessert novelties". The report nevertheless treats these novelty products as falling within the description of "edible ice".[41]

69. Despite Nestlé's attempts, in the context of its arguments for classification in heading No. 18.06, to convince the Tribunal that the good in issue is more akin to a non-frozen chocolate bar, the principal characteristic of the good in issue is still that it is eaten while frozen. The presence of the chocolatey coating and the chocolate wafers does not detract from this fact. Accordingly, the good in issue is not deprived of the character of edible ice by their addition.

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36. Exhibit AP-2015-027-06A, Tabs 2, 3, Vol. 1C.
37. *Transcript of Public Hearing*, 9 August 2016, at 47.
38. Exhibit AP-2015-027-04D at para. 77, Vol. 2.
39. Exhibit AP-2015-027-10A at para. 44, Vol. 1D.
40. *Igloo Vikski* at para. 22.
41. Exhibit AP-2015-027-10A at para. 27, Vol. 1D.

70. In light of the above, the Tribunal finds that the good in issue is "edible ice" of heading No. 21.05 and as a result is excluded from classification in heading No. 18.06 by the operation of the legal and explanatory notes to Chapter 18.

Subheading and Tariff Item Classification

71. There is only one subheading under heading No. 21.05, which is given as No. 2105.00 in the List of Tariff Provisions.

72. Classification at the tariff item level proceeds by *mutatis mutandis* application (pursuant to Rule 1 of the *Canadian Rules*) of the *General Rules*.

73. In the event that the Tribunal found that the good in issue should be classified in heading No. 21.05, Nestlé proposed that the good in issue should be classified under tariff item No. 2105.00.10 as flavoured ice and ice sherbets.

74. If the good in issue is not flavoured ice and ice sherbet, then the only alternative is classification under residual tariff item No. 2105.00.90 "Other", which contains tariff item Nos. 2105.00.91, within access commitment, and 2105.00.92, over access commitment.

Tariff item No. 2105.00.10

75. The CBSA determined that the good in issue could not be classified under tariff item No. 2105.00.10 as either flavoured ice or ice sherbet because it contains more than 5% milk solids. This 5% threshold is based on regulatory and industry definitions of "sherbet" and "flavoured ice", and is set out in the CBSA's Memorandum D10-18-4 (D-Memo).

76. According to the D-Memo, sherbet is a frozen food item other than ice cream or ice milk but made from a milk product and containing not less than 2% and not more than 5% milk solids.[42] This definition is based on the definition found in the *Food and Drug Regulations*.[43] Dr. Goff defined sherbet with reference to the same regulatory standard and stated that sherbet contains a maximum of 5% milk solids, including milk fat, and is acidified.[44]

77. According to the D-Memo, flavoured ice is a frozen food containing water, sugar or other sweetening agents, fruit juice or other flavouring but not containing milk, cream or other milk-derived ingredients.[45] Dr. Goff's expert report provides a similar definition.[46]

78. The CBSA submitted that, as the good in issue contains milk solids, it cannot be flavoured ice. Further, as the good in issue contains more than 5% milk solids, it cannot be an ice sherbet.

79. In Nestlé's submission, the CBSA's 5% milk solids threshold is arbitrary. Nestlé argued that the Tribunal should apply the 10% milk solids threshold used to classify non-frozen dairy preparations of Chapter 19. Specifically, Nestlé relied on the following tariff items to establish the existence of this 10% milk solids threshold:

42. Exhibit AP-2015-027-04B, Tab D at para. 21, Vol. 1.
43. Item B.08.063.
44. Exhibit AP-2015-027-10A at para. 19, Vol. 1D.
45. Exhibit AP-2015-027-04B, Tab D at para. 20, Vol. 1.
46. Exhibit AP-2015-027-10A at paras. 14-16, Vol. 1D.

	- - -Food preparations of goods of headings 04.01 to 04.04, containing more than 10% but less than 50% on a dry weight basis of milk solids:
1901.90.31	- - - -Ice cream mixes or ice milk mixes, within access commitment
1901.90.32	- - - -Ice cream mixes or ice milk mixes, over access commitment
1901.90.33	- - - -Other, not put up for retail sale, within access commitment
1901.90.34	- - - -Other, not put up for retail sale, over access commitment
1901.90.39	- - - -Other
1901.90.40	- - -Food preparations of goods of headings 04.01 to 04.04, containing 10% or less on a dry weight basis of milk solids

80. According to Nestlé, the non-frozen dessert mix portion of the good in issue would be classified in the non-TRQ tariff item No. 1901.90.40 if imported alone, as it is not ice cream or ice milk and contains less than 10% milk solids. Nestlé submitted that it is illogical that the non-frozen dessert mix portion, which is the primary component of the good in issue, would not be subject to a quota, but the complete good, which has a lower milk solid percentage than the mix, is.

81. Finally, Nestlé proposed that "flavoured ice" must be interpreted to include all products that do not meet the regulatory definitions of ice cream, ice milk, or sherbet, and are not intended to be subject to supply management.

82. The CBSA submitted that, if the drafters had intended that a 10% milk solids threshold should apply to edible ice and ice cream products of heading No. 21.05, they would have explicitly included it. Further, according to the CBSA, the food preparations described in heading No. 19.01 are not comparable to those described in heading No. 21.05.

83. The Tribunal sees no reason to apply a 10% milk solids threshold explicitly included elsewhere in the tariff to a tariff item that does not contain such a requirement. The CBSA is correct that the drafters could have included such a requirement in the tariff items under subheading 2105.00 should they have thought it necessary.

84. Further, the evidence suggests that Nestlé is incorrect that the frozen dessert mix portion of the good in issue would be classified under tariff item No. 1901.90.40 if imported alone in its non-frozen state. According to the CBSA lab report, the frozen dessert mix contains more than 10% milk solids if measured on a dry weight basis.[47] Nestlé's calculation of milk solids, which puts the milk solid content of the frozen dessert mix at less than 10%, was not made on a dry weight basis, and Nestlé stated that the industry does not measure milk solids in this way.[48] However, the terms of the tariff items cited above explicitly require that milk solids be measured on a dry weight basis.

85. The parties have provided detailed submissions on the meaning of the word "sherbet". However, the Tribunal notes that the tariff does not refer merely to a "sherbet", but to an "ice sherbet". Moreover, the French text of the tariff refers to "glaces et sorbets aromatisés".

86. The term "sorbet" exists in both English and French. In French, "sorbet" is defined as "glace légère à base d'eau, de pulpe, de jus de fruits, de liqueur, etc."[49]

47. Exhibit AP-2015-027-06B (protected), Tab 4C at 2, Vol. 2.
48. *Transcript of Public Hearing*, 9 August 2016, at 39.
49. *Le Nouveau Petit Robert 2009*.

87. In English, "sorbet" is defined as "a usu. fruit-flavored ice served as a dessert or between courses as a palate refresher";[50] "a soft water ice made with fruit juice or fruit purée served esp. between main courses to cleanse the palate and reinvigorate the appetite, or as a dessert."[51] These definitions are consistent with Dr. Goff's testimony that a "sorbet" is an aerated fruit juice with added sugar and stabilizers that contains no dairy.[52] The English definitions are also consistent with the French meaning.

88. "Sherbet" is defined generally as "a frozen dessert, similar to ice cream, made from water, *milk*, and sugar, and usu. fruit-flavoured";[53] "an ice with *milk*, egg white, or gelatin added"[54] [emphasis added]. This definition corresponds to that provided by Dr. Goff and to the definition of "sherbet" in the English version of the *Food and Drug Regulations*, albeit that both of these latter definitions are more restrictive in that they refer to specific milk solid and acid content. The French text of item B.08.063 of the *Food and Drug Regulations* provides for "sorbet laitier" ("dairy sorbet"), which is also consistent with these definitions.

89. The French version of the D-Memo defines "sorbets du numéro tarifaire 2105.00.10" by reference to the *Food and Drug Regulations*. In other words, the CBSA has read the word "sorbet" in the French version of tariff item 2105.00.10 as being limited to "sorbet laitier". The Tribunal does not agree that the tariff item should be read in this way.

90. Instead, in order to be consistent with the French text, the term "ice sherbet" should be read as having the same meaning as the French and English definitions of "sorbet". Based on the dictionary definitions above, as well as Dr. Goff's testimony, a sorbet does not contain any dairy. This interpretation accounts for the addition of the qualifier "ice" to the term "ice sherbet".

91. In any case, the Tribunal is satisfied that the good in issue is neither an "ice sherbet" ("sorbet") nor a "sherbet" ("sorbet laitier"), because it contains more than 5% milk solids, is not acidified and does not have a fruit flavour profile.

92. Bearing in mind its earlier comments regarding the usefulness of standards set out in domestic regulation in interpreting the terms of the tariff, the Tribunal notes that, although it has relied in part on the definitions of "sherbet" and "sorbet laitier" contained in the *Food and Drug Regulations*, unlike with the definition of "ice cream" discussed above, there is no evidence that there is any disagreement internationally regarding the meaning of these terms.[55]

93. Further, the Tribunal considers that it is more appropriate to use domestic regulations to interpret the terms of the tariff items, which are developed domestically, although caution should be exercised in order to avoid inconsistent interpretations of terms appearing in the headings and subheadings and terms appearing in the tariff items. The Tribunal must also bear in mind Rule 2 of the *Canadian Rules*, which was discussed earlier in these reasons.

94. The Tribunal accepts Dr. Goff's evidence that the good in issue is not "flavoured ice" ("glace aromatisée") as that term is understood in the industry, because it contains milk solids and is aerated.[56]

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50. *Merriam-Webster's Collegiate Dictionary*, 11th ed.
51. *Canadian Oxford Dictionary*, 2nd ed.
52. *Transcript of Public Hearing*, 9 August 2016, at 117.
53. *Canadian Oxford Dictionary*, 2nd ed.
54. *Merriam-Webster's Collegiate Dictionary*, 11th ed.
55. Dr. Goff's evidence is that this definition is similar to that used in the United States: Exhibit AP-2015-027-10A at para. 20, Vol. 1D.
56. Exhibit AP-2015-027-10A at paras. 14, 39, Vol. 1D; *Transcript of Public Hearing*, 9 August 2016, at 121.

95. The Tribunal notes that the definition of "flavoured ice" presented by Dr. Goff is more restrictive than required by the terms of the tariff, which leaves its meaning open to interpretation; further, it is more restrictive than an approach based on ordinary meaning would suggest. However, the Tribunal accepts that this term has a particular meaning in the industry and that it should therefore be defined as used in the industry, in accordance with the decision in *Olympia Tile*.

96. Finally, the Tribunal does not accept that "flavoured ice" must be interpreted in order to include any products that are not subject to supply management, for reasons that will be outlined in the next section.

97. As a result, the Tribunal finds that the good in issue is neither "flavoured ice" nor an "ice sherbet", and cannot be classified under tariff item No. 2105.00.10.

Tariff item Nos. 2105.00.91 and 2105.00.92

98. In oral argument, counsel for Nestlé conceded that the good in issue is edible ice, but maintained that it is not "other edible ice" of the type contemplated in tariff item Nos. 2105.00.91 and 2105.00.92 because it is not a product that was ever intended to be subject to supply management.[57]

99. As alluded to above, Nestlé provided a detailed overview of the legislative history of quotas on ice cream and ice milk products, and their regulatory definitions, from 1970 until tarrification in 1995.[58] Nestlé sought to establish that ice cream, ice milk, novelties and other goods manufactured mainly of ice cream and ice milk, as those terms have historically been defined by Canadian regulation, were the only products that were ever intended to be captured by item No. 134 of the ICL when it was enacted in 1995, as prior to the 1995 changes those products were explicitly listed on the ICL.

100. Nestlé argued that the presumption of statutory coherence requires that the same interpretation must be given to item No. 134 of the ICL and tariff item Nos. 2105.00.91 and 2105.00.92; accordingly, since in Nestlé's submission only ice cream, ice milk, etc., are included under item No. 134 of the ICL, tariff item Nos. 2105.00.91 and 2105.00.92 must be interpreted to include only those products.

101. Nestlé also submitted that this interpretation would give the appropriate effect to the "within access commitment" and "over access commitment" language contained within the tariff items.

102. First, the Tribunal notes that both the CBSA and GAC recognize that customs tariff classification governs inclusion on the ICL, rather than the inverse.[59] In its Notice to Importers regarding item No. 134 of the ICL, GAC encourages importers that are not sure about a product's inclusion on the ICL to seek an advance tariff classification ruling from the CBSA.[60] There is no indication from either the CBSA or GAC that the inclusion of a product on the ICL is meant to inform its customs tariff classification, except to give effect to subsection 10(2) of the *Customs Tariff*.

103. With respect to Nestlé's argument that it is necessary to give effect to the "within access commitment" and "over access commitment" language in the tariff items by restricting the products that can be classified within them to supply managed products, the Tribunal notes that the *Canadian Rules* do not allow for any distinction between classification of supply-managed and non-supply-managed goods. Again, the only restriction provided for is subsection 10(2) of the *Customs Tariff*, which prohibits classification in a "within access commitment" provision in the absence of a permit issued under section 8.3 of the *EIPA*.

57. *Transcript of Public Hearing*, 9 August 2016, at 151, 153.
58. Exhibit AP-2015-027-14A, Tab A, Vol. 1E; *Transcript of Public Hearing*, 9 August 2016, at 160-80.
59. Exhibit AP-2015-027-04B, Tab D at para. 5, Vol. 1; Exhibit AP-2015-027-04B, Tab F at 42, 45, Vol. 1.
60. Exhibit AP-2015-027-04B, Tab H at para. 3.2, Vol. 1.

104. Nestlé is correct that the presumption of statutory coherence would require that item No. 134 of the ICL (which is a regulation enacted under the *EIPA*) be interpreted consistently with the *Customs Tariff*, unless the terms of either statute require otherwise.

105. However, the Tribunal does not accept that either item No. 134 of the ICL or tariff item Nos. 2105.00.91 and 2105.00.92 should be given the restricted meaning put forward by Nestlé. Although the Tribunal accepts that this was not the case prior to 1995, the plain wording of item No. 134 of the ICL does not restrict the types of products that can be considered "other edible ice", except the explicit statement that it does not include flavoured ice or ice sherbet. The ICL also does not offer definitions of the terms "ice cream", "edible ice", "flavoured ice" or "ice sherbets".

106. Nestlé has provided GAC's *Handbook of Export and Import Commodity Codes*,[61] which refers to item No. 134 as covering "ice cream and ice cream novelties; ice milk and ice milk novelties, and products manufactured mainly of ice cream or ice milk", as support for its argument that item No. 134 of the ICL is restricted to those products. However, this is an administrative policy statement and does not provide a legal interpretation that is binding on the Tribunal.

107. With respect to Nestlé's legislative history argument, the Tribunal cannot ignore the fact that Parliament chose to alter the language of the tariff item and item No. 134 of the ICL in 1995 so that it no longer explicitly limits the supply managed products to ice cream, ice milk and products derived from them. The Tribunal cannot agree that the legislative history supports an argument that Parliament nevertheless intended that these provisions should continue to be restricted in this way.

108. Instead, the fact that the products subject to supply management are captured in a residual tariff item, rather than being explicitly described, suggests that Parliament's intention was only to carve out flavoured ices and ice sherbets, and ensure anything else falling within the subheading was subject to the supply management scheme.

109. Finally, there is evidence that frozen dessert products where the milk fat has been replaced by vegetable fat were not widely available in the market until 2006, subsequent to a regulatory change in Ontario that made this type of replacement permissible.[62] Frozen dessert products in general, and the good in issue in particular, were referred to as "innovative" during the hearing.[63] In other words, the legislative history surrounding the enactment of item No. 134 of the ICL and tariff item Nos. 2105.00.91 and 2105.00.92 is of limited use in establishing Parliament's intent with respect to the good in issue, since these products did not exist in 1995.

110. As the Tribunal recently stated in *J. Cheese*, it is the government's responsibility to ensure that the terms of the tariff and the ICL keep pace with changes in technology that may cause products that are intended to fall within the TRQ system to be classified in non-TRQ tariff items.[64] Similarly, if the government does not wish products such as the good in issue to be subject to the TRQ system, there are several avenues it can take to remedy this situation, for example, by creating a new tariff item. However, even if Nestlé had clearly established that the good in issue was never intended to be subject to the TRQ system, the Tribunal cannot in the meantime strain its tariff classification exercise to give effect to this intention when the wording of the legislation cannot support such an interpretation.

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61. Exhibit AP-2015-027-04B, Tab F, Vol. 1.
62. Exhibit AP-2015-027-10A at para. 28, Vol. 1D; *Transcript of Public Hearing*, 9 August 2016, at 114.
63. *Transcript of Public Hearing*, 9 August 2016, at 8, 10, 65, 66, 141, 167-68.
64. Para. 62.

111. As a result, the Tribunal finds that the good in issue is properly classified under either tariff item No. 2105.00.91, within access commitment, if imported under the authority of a permit issued under section 8.3 of the *EIPA*, or under tariff item No. 2105.00.92, over access commitment, if not imported under the authority of a permit issued under section 8.3 of the *EIPA*, as other ice cream and other edible ice, whether or not containing cocoa.

DECISION

112. The appeal is dismissed.

Jean Bédard

Jean Bédard
Presiding Member