



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-028

Neptune Wellness Solutions

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, May 31, 2019*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 INTRODUCTION 1

 PROCEDURAL HISTORY 1

 GOODS IN ISSUE..... 1

 LEGAL FRAMEWORK 1

 POSITIONS OF THE PARTIES 4

 ANALYSIS..... 4

 Conclusion 6

 Classification at the subheading and tariff item levels 6

DECISION 6

IN THE MATTER OF an appeal heard on March 14, 2019, 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 June 28, 2018, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

NEPTUNE WELLNESS SOLUTIONS

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Ann Penner
Ann Penner
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 14, 2019
Tribunal Panel: Ann Penner, Presiding Member
Support Staff: Sarah Perlman, Counsel

PARTICIPANTS:

Appellant	Counsel/Representative
Neptune Wellness Solutions	Michael Kaylor
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Luc Vaillancourt

WITNESS:

Melody Harwood
Director, Scientific and Regulatory Affairs
Neptune Wellness Solutions

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Neptune Wellness Solutions (Neptune) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA) dated June 28, 2018, made pursuant to subsection 60(4).

2. The issue in this appeal is whether frozen krill whole round (the goods in issue) are properly classified under tariff item No. 0306.19.00 of the schedule to the *Customs Tariff*² as other frozen crustaceans, including flours, meals and pellets of crustaceans, fit for human consumption, as determined by the CBSA, or under tariff item No. 0511.91.00 as dead animals of Chapter 3, unfit for human consumption, as claimed by Neptune.

PROCEDURAL HISTORY

3. The goods in issue were imported by Neptune between December 2013 and July 2017 by way of 14 separate transactions. Neptune filed requests for re-determination under section 74 of the *Act*, seeking the reclassification of the goods in issue under tariff item No. 0511.91.00. Between October 2017 and January 2018, the CBSA denied Neptune's requests.

4. On December 13, 2017, Neptune requested a further re-determination under section 60 of the *Act*. The CBSA denied the request on June 28, 2018.

5. On August 13, 2018, Neptune filed this appeal with the Tribunal under subsection 67(1) of the *Act*.

6. On March 14, 2019, the Tribunal held a public hearing in Ottawa, Ontario. Neptune called one witness, Melody Harwood, who is employed by Neptune as the Director of Scientific and Regulatory Affairs. The CBSA did not call any witnesses.

GOODS IN ISSUE

7. The goods in issue are raw Antarctic krill, which are small crustaceans, in their shells. The krill are imported in frozen blocks.

LEGAL FRAMEWORK

8. 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).³ 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.

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

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

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

9. 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*⁴ and the *Canadian Rules*⁵ set out in the schedule.

10. 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.

11. 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*⁶ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁷ 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.⁸

12. 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. As the Supreme Court of Canada indicated in *Igloo Viski*, it is “only where Rule 1 does not conclusively determine the classification of the good that the other General Rules become relevant to the classification process”.⁹

13. 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.¹⁰ The final step is to determine the proper tariff item.¹¹

14. The nomenclature for tariff item No. 0306.19.00, the classification determined by the CBSA, reads as follows:

SECTION I: LIVE ANIMALS; ANIMAL PRODUCTS

...

CHAPTER 3

**FISH AND CRUSTACEANS, MOLLUSCS
AND OTHER AQUATIC INVERTEBRATES**

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

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

6. World Customs Organization, 4th ed., Brussels, 2017.

7. World Customs Organization, 6th ed., Brussels, 2017.

8. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 at para. 4.

9. *Canada (Attorney General) v. Igloo Viski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

10. 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 [Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

11. 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.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

...

03.06 Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; smoked crustaceans, whether in shell or not, whether or not cooked before or during the smoking process; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine; flours, meals and pellets of crustaceans, fit for human consumption.

-Frozen:

...

0306.19.00 --Other, including flours, meals and pellets of crustaceans, fit for human consumption

15. Note 1(c) to Chapter 3 reads as follows, in relevant parts:

1. This Chapter does not cover:

...

(c) . . . crustaceans, molluscs or other aquatic invertebrates, dead and unfit or unsuitable for human consumption by reason of either their species or their condition (Chapter 5); . . .

16. The explanatory notes to Chapter 3 provide as follows, in relevant parts:

This Chapter covers all fish and crustaceans, molluscs and other aquatic invertebrates, whether live or dead, presented for direct consumption, or for industrial purposes (canning, etc.), for spawning, for aquaria, etc., with the **exception** of dead fish (including livers and roes thereof), crustaceans, molluscs and other aquatic invertebrates which are unfit or unsuitable for human consumption by reason of either their species or their condition (**Chapter 5**).

17. The nomenclature for tariff item No. 0511.91.00, the classification supported by Neptune, reads as follows:

SECTION I: LIVE ANIMALS; ANIMAL PRODUCTS

...

CHAPTER 5

**PRODUCTS OF ANIMAL ORIGIN,
NOT ELSEWHERE SPECIFIED OR INCLUDED**

...

05.11 Animal products not elsewhere specified or included; dead animals of Chapter 1 or 3, unfit for human consumption.

...

-Other:

0511.91.00 --Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3

18. Note 1(a) to Chapter 5 provides as follows:

1. This Chapter does not cover:

(a) Edible products (other than guts, bladders and stomachs of animals, whole and pieces thereof, and animal blood, liquid or dried); . . .

19. The explanatory notes to Chapter 5 provide as follows, in relevant parts:

This Chapter covers a variety of materials of animal origin, unworked or having undergone a simple process of preparation, which are not normally used as food (**except** certain blood, guts, bladders and stomachs of animals) and which are not dealt with in other Chapters of the Nomenclature.

20. The explanatory notes to heading No. 05.11 provide as follows, in relevant parts:

This heading includes:

. . .

(12) **Dead animals** of Chapter 1 or 3 and their meat or meat offals unfit for human consumption **other than** products of **heading 02.09** or of one of the preceding headings of this Chapter.

POSITIONS OF THE PARTIES

21. Neptune submitted that the CBSA erred in classifying the goods in issue in heading No. 03.06 as frozen crustaceans, fit for human consumption. In its view, the goods in issue are not fit for human consumption and are therefore correctly classified under heading No. 05.11.

22. The CBSA submitted that the goods in issue are properly classified under heading No. 03.06. It argued that the goods in issue are fit for human consumption as they are imported to be processed for human consumption.

23. The parties agreed that the only issue in this appeal is whether the goods in issue are excluded from Chapter 3 (and classified in Chapter 5) by reason of being unfit or unsuitable for human consumption at the time of importation based on their condition. The parties also agreed that the goods in issue are frozen crustaceans (krill) not excluded from Chapter 3 by reason of their species. Finally, they agreed that the Tribunal's analysis should begin with heading No. 03.06 given that the goods must be "dead animals of Chapter 3" to be classified in heading No. 05.11.

ANALYSIS

24. As the parties agreed that there is only one determinative issue under appeal, and that the Tribunal should begin its analysis with heading No. 03.06, the Tribunal will proceed by considering whether the goods in issue are fit for human consumption. Only if it determines that they are not will it turn to the applicability of heading No. 05.11.

25. On that point, the CBSA submitted dictionary definitions of "unfit" and "unsuitable". Definitions of "unfit" include the following: (1) "not fit, proper, or suitable for some purpose or end"; and (2) "not adapted to a purpose, unsuitable".¹² Definitions of "unsuitable" include as "not fitting or right for a use or purpose: not suitable."¹³

26. Neptune argued that the goods in issue contain high levels of fluoride at time of importation, which makes them unfit or unsuitable for human consumption by reason of their condition. To support that view, Ms. Harwood testified that fluoride can be toxic if consumed above a certain threshold, as it is easily

12. *Oxford English Dictionary*, online, *sub verbo* "unfit"; *Merriam-Webster*, online, *sub verbo* "unfit".

13. *Merriam-Webster*, online, *sub verbo* "unsuitable".

absorbed by the human intestinal tract.¹⁴ Neptune also provided a technical paper from the Food and Agriculture Organization of the United Nations stating that “[a]ll species of krill so far examined contain high levels of fluoride in their shells . . . and this has proved a problem for producing products for human consumption and for many domestic animals”.¹⁵

27. However, Ms. Harwood was also unequivocal that the goods in issue are imported for the purpose of extracting oil for human consumption. She explained that Neptune undertakes the extraction process for two reasons: (1) to decrease the fluoride content given that fluoride can be toxic to humans if consumed above certain levels, and (2) to make the krill more palatable to human taste as it has an unpleasant taste and odour.¹⁶ In this, the Tribunal finds that the goods in issue can be (and are intended to be) consumed by humans. Furthermore, it accepts the CBSA’s argument that if the goods are fit for human consumption after processing, they must be fit for human consumption before processing as well, including the time of their importation.

28. Even though the form of the goods in issue may change during processing, their purpose, from the moment of importation to the time they are ready for human consumption, does not. They are imported to be sold as a natural health product for human consumption, notwithstanding their taste and fluoride content.

29. The Tribunal notes that other fish, crustaceans, molluscs and aquatic invertebrates that fall within Chapter 3 also need to be subjected to some form of process to transform them into goods fit or suitable for human consumption (e.g. cooking, drying, salt treatments, smoking, etc.). As such, the Tribunal finds that the phrase “fit for human consumption” needs to be broad enough to include a variety of processes for food sources that will ultimately be consumed in whatever form is necessary, beneficial, palatable and/or suitable from a dietary point of view.

30. In addition, the explanatory notes to Chapter 3 provide that goods may be presented for direct consumption, but also for industrial purposes, among others. The parties agreed that Chapter 3 includes goods that are for immediate (i.e. direct) and for future consumption (i.e. industrial purposes).

31. In this regard, Neptune argued that “industrial purposes” should be interpreted restrictively to mean “preservation” because the expression “industrial purposes” is followed by “(canning, etc.)”, where “canning” is a process used to preserve food for consumption at a later time. Neptune submitted that the addition of “etc.” after a single process (i.e. canning) does not expand the scope of processes which are part of the expression “industrial purposes”.

32. The Tribunal disagrees. The inclusion of “etc.” indicates that other industrial purposes are possible. In this case, the goods in issue are imported frozen and then processed through a multi-step procedure to develop a natural food product for human consumption. Indeed, Ms. Harwood testified that, since 1998, krill oil has been identified as a good source of omega-3 fatty acids, which are important for human health.¹⁷ In order to extract the oil, the goods in issue are ground and mixed with acetone. The mixture is filtered to remove the oil from the remaining parts of the krill, which are comprised of protein and of chitin from the

14. *Transcript of Public Hearing* at 10, 23. Ms. Harwood testified that adequate daily intake of fluoride for adults ranges from 0.5 mg per day to 10 mg per day.

15. Exhibit AP-2018-028-10, Vol. 1 at 29.

16. *Transcript of Public Hearing* at 9-10, 22-23.

17. *Ibid.* at 14.

exoskeleton. The acetone is then evaporated to leave behind a bright red krill oil. Finally, the oil is encapsulated in soft gel to be sold as a natural health supplement for human consumption.¹⁸

33. The Tribunal finds that this process of extraction of oil from krill is included in the term “industrial purposes” of the explanatory notes to Chapter 3. The goods in issue are thus for industrial purposes and may be classified in Chapter 3.

Conclusion

34. On the basis the foregoing, the Tribunal finds that the goods in issue are properly classified in heading No. 03.06 as frozen crustaceans fit for human consumption. As such, the Tribunal need not determine whether the goods in issue could be classified under heading No. 05.11 as dead animals of Chapter 3, unfit for human consumption, as Neptune claimed.

Classification at the subheading and tariff item levels

35. Having determined that the goods in issue should be classified in heading No. 03.06 as frozen crustaceans fit for human consumption, the Tribunal must next determine the proper classification at the subheading and tariff item levels.

36. Heading No. 03.06 has no specific subheading or tariff item pertaining to krill. Pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, it follows that the goods in issue should be classified under tariff item No. 0306.19.00 as other frozen crustaceans, including flours, meals and pellets, fit for human consumption.

DECISION

37. The appeal is dismissed.

Ann Penner
Ann Penner
Presiding Member

18. *Ibid.* at 10-12.