Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2022-001

9311-3652 Québec Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, March 26, 2024

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IN THE MATTER OF an appeal heard on September 19 and November 2, 2023, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency pursuant to subsection 60(4) of the *Customs Act*, dated January 19, 2022, with respect to a request for re-determination.

BETWEEN

9311-3652 QUÉBEC INC. **Appellant**

AND

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

DECISION

The appeal is allowed. The goods in issue are properly classified under tariff item 1901.90.39 of the schedule to the *Customs Tariff*.

Eric Wildhaber

Eric Wildhaber
Presiding Member

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	September 18 and November 2, 2023
Tribunal Panel:	Eric Wildhaber, Presiding Member
Tribunal Secretariat Staff:	Yannick Trudel, Counsel Claire Hall, Counsel Badih Abboud, Registry Officer Geneviève Bruneau, Registry Officer

PARTICIPANTS:

Appellant	**Counsel/Representative**
9311-3652 Québec Inc.	Fatah Mekideche
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Michaël Fortier Patrick Visintini

WITNESSES:

Martin Michaud Professional Agriculture and Agri-Food Specialist MMNA Consultants	Andrea O'Brien Chief Science Officer Canada Border Services Agency
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STATEMENT OF REASONS

OVERVIEW

[1] This is an appeal filed with the Canadian International Trade Tribunal, pursuant to subsection 67(1) of the *Customs Act*[1] (Act), with respect to the importation of food preparations marketed as "La Jeune Vache" (the goods in issue), a product that is sometimes described as "la Vache qui rit algérienne."[2] A description of the goods in issue, the background of the proceeding and the relevant legislation can be found in the annex.

[2] Information only shared at the hearing allowed the Tribunal to note that the Canada Border Services Agency (CBSA) could have resolved the issue without the Tribunal's involvement. In short, the CBSA's principal position in this case is that the goods in issue must be classified under tariff item 1901.90.39. That said, under this tariff number, no customs duty is payable.[3]

[3] The classification under tariff item 1901.90.39 was therefore obviously favourable to 9311-3652 Québec Inc., because it necessarily implied that the CBSA would refund the full amount of the customs duty at issue. Unsurprisingly, 9311-3652 Québec Inc. consented to this outcome. However, the CBSA did not see fit to inform it of this outcome before the hearing. Instead, the CBSA allowed the case to continue on the premise that the Tribunal had to shed light on an alleged controversy resulting from short statements in two appeals previously heard before the Tribunal ("the alleged jurisprudential controversy").[4]

[4] Since the dispute could have been resolved without addressing the alleged jurisprudential controversy, this issue is irrelevant and consequently moot. If the CBSA had realized prior to the hearing the unusual situation it created by allowing the case to proceed before the Tribunal, it could have saved 9311-3652 Québec Inc. significant costs. It must be noted that 9311-3652 Québec Inc. is a self-represented party.[5]

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1 R.S.C. (1985), c. 1 (2nd Suppl.).

2 At the hearing, 9311-3652 Québec Inc. recognized that in its beginnings in the industry, the product was marketed as a sort of Vache qui rit®, but that today, it is a different food preparation. The Tribunal does not challenge 9311-3652 Québec Inc.'s position and makes this observation solely for descriptive purposes and not to determine the composition of the product. See Exhibit AP-2022-001-18 at p. 84–88; see also *Transcript of September 19, 2023, hearing* at p. 123–126.

3 The CBSA's primary position is that the goods in issue should be classified as "other 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" in under tariff item 1901.90.39 (see Exhibit AP-2022-001-30, in particular at paras. 5, 21, 76 and 89). Alternatively, the CBSA recommended the classification as "other food preparations containing 50% or more in weight of dairy products, over access commitment" under tariff item 2106.90.94 (see Exhibit AP-2022-001-30, in particular at paras. 6, 77, 88 and 90). The goods in issue are originating from Algeria; this county is in the accession process to the World Trade Organization and is therefore not yet a member (see WTO | Accessions: Algeria, wto.org), which in principle does not grant it access to the benefit of the Most-Favoured-Nation Tariff. However, Canada nonetheless grants goods from Algeria the benefit of this tariff: see www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2018/html/countries-pays-eng.html.

4 *CDC Foods v. President of the Canada Border Services Agency* (December 21, 2016), AP-2015-035 and AP-2016-015 (CITT) [*CDC Foods*] and *Cool King Refrigeration Ltd. v. President of the Canada Border Services Agency* (March 11, 2020), AP-2019-004 (CITT); see Exhibit AP-2022-001-30 at para. 3 for a summary of the issue.

5 Clarifications on this status are needed. 9311-3652 Québec Inc. was represented by a first counsel for a certain period during some of its interactions with the CBSA (but likely not all) *before* filing this appeal with the

[5] The CBSA's approach not only hindered 9311-3652 Québec Inc., but also impacted the proper functioning of the quasi-legal system, because it committed the Tribunal's limited resources when the CBSA should have resolved the issue itself. Since the CBSA did not exercise its administrative power by acting in a timely manner, the Tribunal has no other choice but to issue this decision and these reasons because once a case like this is before the courts, the Act no longer allows the CBSA to issue the appropriate decision. At this stage, only the Tribunal has jurisdiction, and must therefore act to close the case.

[6] For the reasons that follow, the Tribunal notes that the parties agree on the classification of the goods in issue under tariff item 1901.90.39 of the schedule of the *Customs Tariff*[6] as "other 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". The Tribunal has no reason to question this classification and would have classified the goods in issue in the same manner as the parties, even though it disagrees with the reasoning of either party to reach this conclusion.

[7] The appeal is therefore allowed.

ANALYSIS

THE CBSA should not have let the Tribunal hear the appeal

[8] The CBSA appeared at the hearing with the principal position that the goods in issue should be classified under tariff item 1901.90.39.[7]

[9] This tariff item number allows the importation of the goods free of duty (no customs duty to pay).

[10] The CBSA has no legitimate reason to let a business continue an appeal in such circumstances. The CBSA was not claiming anything from 9311-3652 Québec Inc. and therefore recognized that it had to refund 9311-3652 Québec Inc. the customs duties that should never have been collected. This means that the CBSA let 9311-3652 Québec Inc. continue an appeal when the CBSA owed it money. This is very likely an unfortunate and unusual situation that will go down in the Tribunal's history books.

Tribunal. 9311-3652 Québec Inc. was not represented by counsel at the time the notice of appeal was filed on April 18, 2022. A second counsel then represented 9311-3652 Québec Inc. between June 10 and November 7, 2022 (exhibits AP-2022-011-03 and AP-2022-011-12). No act of proceeding was filed during that period. It must be recalled that 9311-3652 Québec Inc. was not represented by counsel when it filed its brief, when the CBSA filed its brief and during the hearing of the case. At the hearing, the CBSA raised the issue of whether M. Michaud was acting as representative for 9311-3652 Québec Inc. and as an expert witness. The Tribunal ruled that M. Michaud did not hold these two incompatible roles, even though he supported 9311-3652 Québec Inc. to a certain extent at various times during this case; see *Transcript of September 19, 2023, Hearing* at p. 26–34.

6 S.C. 1997, c. 36.

7 This position is different from the classifications imposed by the CBSA to the goods in issue during the challenges that arose during the administrative process. See the Procedural History section in the annex.

The CBSA should have issued the appropriate decision in a timely manner

[11] The fundamental problem in this case stems from the fact that once the CBSA had determined that the goods in issue could enter Canada free of duty under tariff item 1901.90.39, it had only to issue a decision in this regard.

[12] Indeed, subparagraph 61(1)(a)(i) of the Act allows the CBSA, on the recommendation of the Attorney General of Canada, to review a decision on the tariff classification of imported goods in the case where the revision would reduce the applicable duties. Even more so, this option was necessarily available to the CBSA for the goods in issue because tariff number 1901.90.39 results in the complete elimination of the duties owing considering that this tariff number allows for duty-free importation.

[13] However, this power conferred by the Act is conditional: the review or re-determination is allowed "at any time…but before an appeal is heard" [emphasis added] by the Tribunal.[8]

[14] Ultimately, the CBSA essentially appeared before the Tribunal when the outcome of this case was already decided. The CBSA should therefore have issued the appropriate decision in a timely manner. However, the CBSA can no longer act in a timely manner, as a hearing has now taken place. The Tribunal is therefore forced to carry out the work that the CBSA should have done itself.

The CBSA's unusual position was hidden

[15] Prior to the hearing of the case, the Tribunal might have noticed the CBSA's unusual position regarding the interests of 9311-3652 Québec Inc. and it is sorry it did not do so earlier.

[16] The Tribunal does not usually pay particular attention to the percentage of customs duties applicable to the tariff item numbers in issue. Normally, there is no case before the Tribunal unless the parties have a genuine commercial interest at stake; this interest necessarily results from the applicable customs percentages of the tariff items in question because that is the basis on which the duties payable are calculated when there is a dispute that is limited to the tariff classification of goods.[9]

[17] The Tribunal does not engage in the tariff classification of goods simply for the sake of conducting an analysis under sections 10 and 11 of the *Customs Tariff*. In the abstract, a tariff number is of no interest in itself. In reality, a tariff classification exercise only makes sense because the tariff numbers in the *Customs Tariff* schedule have a customs tariff that applies to the goods

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8 Ultimately the CBSA did not even have to contact 9311-3652 Québec Inc. to end the appeal. The CBSA had only to act on its own in a timely manner and simply issue the administrative decision that was consistent with the principal position it favoured before the Tribunal: classify the goods in issue under tariff item 1901.90.39 and issue the resulting refund. If the CBSA had acted using the logic that necessarily results from its position in this dispute, the case would have been rendered irrelevant and entirely moot. As a result, the appeal would have been summarily dismissed by the Tribunal if 9311-3652 Québec Inc. had subsequently refused to withdraw its appeal. But the Tribunal and the parties would never have reached that point: 9311-3652 Québec Inc. would undoubtedly have been more than happy to withdraw its appeal if the CBSA had refunded the full amount of the customs duties paid since 2018. Moreover, 9311-3652 Québec Inc. was not even asking for that much; it had voluntarily paid customs duties at the time of importation.

9 It is different in a dispute involving both the tariff classification and the origin or indication of the origin of the goods, as the origin of goods is also a factor with financial implications for an importer in dispute with the CBSA.

according to their origin. If the CBSA favours the classification of goods under a tariff item that is free of duty (meaning a zero customs tariff), then there is no possible dispute between the CBSA and the importer, and the Tribunal has no reason to intervene.

[18] In the case of an appeal under subsection 67(1) of the Act, the Tribunal does not engage in theory; its sole purpose is to resolve a dispute that has a concrete commercial implication.[10] This is so elementary that usually the Tribunal takes for granted that there is a genuine commercial interest at stake between the parties. It did the same in this case since, from the beginning, the parties behaved as if there were indeed a financial interest at stake. However, in fact, the Tribunal was made aware too late that the CBSA favoured a tariff item number that would ultimately require it to refund 9311-3652 Québec Inc. If the CBSA acknowledges that it owes money to a taxpayer, it does not need the Tribunal's permission to proceed with the refund.

[19] This case shows that the CBSA should not let a dispute reach the Tribunal unless there is a concrete commercial implication. A question that only involves an issue of law, with no impact on the outcome of a case, is not usually sufficient to engage the Tribunal's time and attention under section 67 of the Act. The CBSA's ambition regarding the alleged jurisprudential controversy had no place being discussed in this case. As examined below, the situation could have been very differently dealt with under section 70 of the Act.

[20] Ultimately, it was only at the very end of the hearing on September 19, 2023, that the Tribunal noted that the CBSA seemed to have let this dispute continue solely to obtain a response about the alleged jurisprudential controversy. However, if the dispute could have been resolved otherwise, this issue was of no interest in the immediate term and therefore moot. When the Tribunal questioned and pressed the CBSA to identify the concrete reason it had not resolved this dispute without the Tribunal's involvement, counsel for the CBSA provided responses at the September 19, 2023, hearing.[11] They did not satisfy the Tribunal.

[21] In order to shed light on the subject, the Tribunal contacted the parties between September 26 and October 17, 2023, and called the parties back to a resumed hearing that took place on November 2, 2023. Moreover, the Tribunal requested and received from the parties a table indicating the customs tariffs that apply to each of the tariff items each had suggested.[12] The Tribunal was able to confirm the primary and secondary positions of the parties. Lastly, the Tribunal was also able to confirm that there was agreement on the classification of the goods under tariff item 1901.90.39.[13]

[22] In short, the CBSA and 9311-3652 Québec Inc. no longer had any interest in having a hearing before the Tribunal once the CBSA had determined that the importation of the goods in issue would be free of duty, and that 9311-3652 Québec Inc. would then obtain a refund of the customs

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10 International trade and customs law does not operate in a vacuum; on the contrary, ultimately, the Tribunal functions in a real and concrete framework that requires an analysis of trade and the law from an economic angle to determine whether the Act allows the collection of customs duties on behalf of the Crown, by officials who "keep the books" for the Crown.

11 *Transcript of September 19, 2023, Hearing* at p. 165–168.

12 See Exhibit AP-2022-001-51. These processes would undoubtedly not have been necessary if the *Canadian International Trade Tribunal Rules* included a provision on the matter. In the absence of such a provision, the Tribunal suggests that the parties that appear before it provide this information in their briefs. This practice would likely prevent this unfortunate situation from arising again because it would be used as an indicator to identify whether there is a genuine interest in having the Tribunal intervene in a dispute.

13 *Transcript of November 2, 2023, Hearing* at p. 48.

duties the CBSA acknowledged were never owing. In such circumstances, the alleged jurisprudential controversy, the CBSA's only motivation, no longer had any value to the outcome of the case, was moot and as a result should not have been submitted to the Tribunal.

The CBSA did not seem to understand the consequences of its approach for 9311-3652 Québec Inc.

[23] The Tribunal counts on the CBSA to judiciously conduct cases in which it faces a self-represented party, which is the case here.

[24] The Tribunal is therefore willing to accept that the CBSA showed temporary and exceptional blindness in this case and it was not intentional for it to appear before the Tribunal in a case that it knew (or should have known) was moot, without, in all likelihood, considering what this could imply for the importer. Ultimately, the Tribunal does not believe that the CBSA understood the impact of its unusual position nor the scope of the consequences of its approach for 9311-3652 Québec Inc.

[25] The CBSA seems to have become aware that the situation made no sense at the hearing when the Tribunal questioned it on the apparent incongruence of its approach. The mootness of the dispute seems to have escaped the CBSA by error or omission in good faith.

[26] As a result, the Tribunal concludes that it was an error by the CBSA due to an unfortunate set of circumstances. The Tribunal nonetheless suggests that the CBSA conduct a review of its internal control practices to prevent such a situation from arising again, however exceptional it may be.

9311-3652 Québec Inc. was entitled to an explanation

[27] In order to encourage access to justice, the Tribunal must occasionally offer some level of support or fair assistance to self-represented businesses and individuals who appear before it.[14] The Act already imposes an economic barrier to access to justice. Indeed, importers must pay amounts allegedly owed before they can access the administrative remedies and the Tribunal.[15] Moreover, the Act and the *Canadian International Trade Tribunal Act* do not allow the Tribunal to compensate, even partially, the successful party in an appeal for their judicial or extrajudicial fees incurred when arguing its case against the opposing party.[16] However, the *Canadian International Trade Tribunal Act* nonetheless advocates accessibility to justice.[17]

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14 Certain jurisdictions have legislated on this concept of a fundamental right to access to justice: any person who appears before a court of justice has the right to understand what is happening and to be heard and treated with respect. The decision maker must therefore occasionally accompany a party, if only to clarify legal jargon. See Quebec's *Act Respecting Administrative Justice*, R.S.Q. c. J-3, sections 9 to 13 and in particular subsection 12(3) for the concept of "fair assistance".

15 The provisions relating to payment in the event of an appeal were deemed legal; see *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency)*, 2022 FCA 92 in which an application for leave to appeal to the Supreme Court of Canada was denied on March 16, 2023; that case reviewed paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a) and 58(2)(a) of the *Special Import Measures Act*, R.S.C. (1985), c. S-15; these provisions are similar to subsection 60(1) of the Act.

16 See *Bri-Chem Supply Ltd. v. President of the Canada Border Services Agency* (September 18, 2015), AP-2014-017 (CITT) at para. 36.

17 See in particular section 35 of the *Canadian International Trade Tribunal Act*, R.S.C. (1985), c. 47 (4th Suppl.), and sections 6 and 7 of the *Canadian International Trade Tribunal Rules*.

[28] The reality for individuals and businesses that appeal to the Tribunal under the Act can be summarized as follows: these rational economic players believe they have good reason to not pay an import tax. However, when it comes to self-represented parties, they often are not used to legal affairs or the unique environment of a courtroom. They therefore deserve to be accompanied to a certain extent through the steps of the quasi-judicial system when they are unsure of the process or do not immediately understand the situation in which they find themselves. During the proceedings, the Tribunal offered some guidance or fair assistance to 9311-3652 Québec Inc. such that it could understand the steps of the hearing process and the nature of the issues addressed.[18]

[29] In this case, there was an inconsistency that the Tribunal almost missed and that 9311-3652 Québec Inc. likely did not understand at all. As a result, the Tribunal had the duty to clarify the situation when it arose, otherwise it would have endorsed the CBSA's unusual approach. Indeed, the CBSA's position in this case amounted to holding 9311-3652 Québec Inc. hostage in order for the CBSA to obtain clarification from the Tribunal about the alleged jurisprudential controversy.

[30] Ultimately, the Tribunal realized that something was not quite right only when it noticed at the last moment that 9311-3652 Québec Inc. agreed with the CBSA's principal tariff classification proposal under tariff item 1901.90.39 (duty free) *only if* the Tribunal did not retain the principal classification position 9311-3652 Québec Inc. favoured under tariff item 2106.90.95 (8% duty).[19] Once this clarification was made, the obvious question was the following: why would 9311-3652 Québec Inc. insist on paying 8% duty (tariff item 2106.90.95) when the CBSA was offering a duty-free tariff (tariff item 1901.90.39)? Usually, taxpayers do not insist on contributing to the public purse when the government is not asking it for anything.

[31] This situation was irregular and, as a result, it was important for the Tribunal to explain it to 9311-3652 Québec Inc. It would likely be thrilled to learn that the CBSA's position was favourable to it: the CBSA would refund all customs duties it had paid since 2018, as the CBSA was now advocating for the duty-free importation of the goods. Indeed, 9311-3652 Québec Inc. could not have asked for a better outcome. When the Tribunal explained the situation to 9311-3652 Québec Inc. in these terms, it noted that 9311-3652 Québec Inc. agreed to not pay any customs duties, to receive a full refund and to bring the dispute to an end.

[32] Thus, any discussion about the alleged jurisprudential controversy is inexorably moot and theoretical for concluding the case since the Tribunal noted that the parties shared the same view that the goods in issue could be classified under tariff item 1901.90.39 (duty free). 9311-3652 Québec Inc. obtains the most favourable outcome it could have hoped for (refund of all amounts paid), and the CBSA obtains, on its own authority, the classification under the tariff item number it favours.

The CBSA cannot hold an importer hostage for a jurisprudential issue

[33] The Tribunal notes that in this case, the CBSA saw an opportunity to debate the alleged jurisprudential controversy. The Tribunal therefore understands that the CBSA did not consider how it unnecessarily prolonged this dispute for 9311-3652 Québec Inc. However, the Tribunal is of the opinion that the CBSA should always be aware of the fundamental interest of a business considering that the CBSA primarily works for the good of taxpayers. The Tribunal therefore considers that the

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18 For example, see *Transcript of September 19, 2023, Hearing* at p. 10–12 (explanation of "voir-dire") and p. 30–33 (explanation of counsel for the CBSA's objection to the expertise of the appellant's expert witness).

19 *Transcript of September 19, 2023, Hearing* at p. 167–170.

CBSA should have understood that pursuing this case was causing harm to 9311-3652 Québec Inc.[20] and that it would be better to wait to raise the issue of the alleged jurisprudential controversy.

[34] Thus, if the CBSA wanted to debate the alleged jurisprudential controversy, it should have waited for a dispute in which the issue might be determinative. When asked whether there was another case in the Tribunal's docket where such an issue might be the subject of a debate between the CBSA and another party with an interest at stake, the CBSA was unable to identify one.[21] In the Tribunal's view, therefore, there was no interest or urgency in addressing this issue in the context of this case.

[35] Moreover, it must be noted that until such a case arises, the issue remains theoretical and does not warrant engaging the resources of the Tribunal or of a party such as 9311-3652 Québec Inc. through a case like this one.

[36] Here, the issue was not determinative considering the tariff number favoured by the CBSA. As a result, the CBSA should have corrected its error and made a decision on the classification of the goods in issue under the duty-free tariff number 1901.90.39 and, pursuant to section 61 of the Act, refunded 9311-3652 Québec Inc. for the customs duties it should ultimately never have collected, thereby releasing 9311-3652 Québec Inc. such that it could continue its usual commercial activities.[22]

[37] The Tribunal cannot accept that the debate the CBSA sought should come up before it, as this would amount to condoning the CBSA holding 9311-3652 Québec Inc. hostage with regard to an issue that never should have been addressed through an appeal under subsection 67(1) of the Act. As a result, for reasons of judicial economy, the Tribunal did not consider the issue of the alleged jurisprudential controversy raised by the CBSA.

[38] The Tribunal notes that section 70 of the Act provides a procedure allowing the CBSA to refer to the Tribunal for "any questions relating to the … tariff classification … of any goods or class of goods." This procedure does not involve a third party unless the third party voluntarily joins the proceeding. This consultation procedure provided for in section 70 of the Act cannot occur through an appeal made under section 67 of the Act. These are two distinct procedures. 9311-3652 Québec Inc. had no stake in the CBSA's goals or questions regarding the alleged jurisprudential controversy;

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20 Regarding the scope of the costs incurred by 9311-3652 Québec Inc. in this case, see *Transcript of November 2, 2023, Hearing* at p. 33–44.

21 *Transcript of November 2, 2023, Hearing* at p. 45.

22 At the hearing, the Tribunal asked the CBSA why it had not considered discussing a settlement of the dispute with 9311-3652 Québec Inc.; see *Transcript of November 2, 2023, Hearing* at p. 24–25. In fact, it was inaccurate to talk about a settlement because 9311-3652 Québec Inc. would not have suffered harm if the CBSA had issued a unilateral decision pursuant to section 61 of the Act, by reviewing of its own accord the classification under tariff item 1901.90.30 (a duty-free importation of the goods in issue). In this scenario, which the CBSA should have followed instead of appearing before the Tribunal, this appeal would have been moot and the case closed. Indeed, 9311-3652 Québec Inc. would no longer have been able to consider itself "aggrieved" by a CBSA decision within the meaning of subsection 67(1) of the Act because it would have obtained a favourable outcome. At any rate, and clearly, it would have received more than it was claiming since, we must recall, 9311-3652 Québec Inc. had already paid 6% in customs duties and alleged that it did not need to pay any more *but* was not claiming a refund of the duties already paid. Ultimately, the CBSA's position was unexpected by 9311-3652 Québec Inc. because, ironically, this classification of duty-free goods under tariff item 1901.90.39 resulted in 9311-3652 Québec Inc. being entitled to a full refund of the customs duties paid rather than the amounts already paid being withheld in the scenario where the CBSA had not verified the transactions at issue.

9311-3652 Québec Inc. should not have been dragged into this dispute by the CBSA because the debate was of no interest to 9311-3652 Québec Inc. since the goods in issue could have been otherwise classified, as the Tribunal notes below.

[39] When an importer is drawn into a dispute that does not concern it, the reputation of the public administration is undermined in the eyes of the importer and the public. If the CBSA wanted to discuss the alleged jurisprudential controversy, it could have made a request through a procedure pursuant to section 70 of the Act. Undoubtedly, that procedure would not have concerned 9311-3652 Québec Inc. as shown here; it would have gladly let others debate the issue.

The Tribunal classifies the goods under heading 19.01

[40] The Tribunal nonetheless analyzed the evidence and the arguments presented by the parties in this case with regard to the classification of the goods in issue.

[41] Without adopting the reasoning expressed by either party on the subject, the Tribunal classifies the goods in issue under heading 19.01. The Tribunal's reasoning in support of this decision follows.

[42] The Tribunal is of the opinion that the goods in issue can be classified under heading 19.01 following Rule 1 considering they meet the terms of that heading.[23]

[43] The Tribunal is not convinced that the goods in issue also meet the terms of heading 21.06, as argued by the CBSA.[24]

[44] As a result, on the basis of Rule 1 and Canadian Rule 1, considering that only heading 19.01 warrants consideration in this case, the goods in issue are correctly classified under tariff item 1901.90.39 because there is no other subheading or tariff item under heading 19.01 that is relevant.

Conclusions

[45] The Tribunal notes that the parties agree on the classification of the goods in issue under tariff item 1901.90.39 of the *Customs Tariff* schedule as "other food preparations of headings 04.01 to 04.04, containing more than 10% but less than 50% on a dry weight basis of milk solids" [translation]. Moreover, after its own analysis, the Tribunal concludes, as do the parties, that the goods in issue are correctly classified under tariff item 1901.90.39.

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23 Exhibit AP-2022-001-30 at paras. 58–62.

24 The issue of whether headings 19.01 and 21.06 are residual was addressed in paragraph 53 of *CDC Foods*. The Tribunal is not convinced of the application in this case of the statements in that paragraph and is not willing to adopt them, as it is not convinced of their accuracy. Because the issue is theoretical, the Tribunal is not required to elaborate on this subject. With regard to the present case, the elements the Tribunal relied on to reach its conclusion about the tariff classification in issue are: (i) the terms of heading 19.01 specifically refer to food preparations under headings 04.01 and 04.04; (ii) the goods in issue are precisely such preparations; (iii) indeed, the experts who testified on both sides confirmed to the Tribunal that the goods in issue are constituted in such a manner as to meet the description of heading 19.01; (iv) therefore, it follows that the terms of heading 19.01 describe the goods in issue, whereas the terms of heading 21.06 do not. In short, the Tribunal is of the opinion that the goods in issue must, at first glance, solely be classified under heading 19.01 according to Rule 1 and no other analysis is required. In short, a significant portion of the opinions the parties sought from their experts was off topic for the purposes of the Tribunal's classification approach.

DECISION

[46] The appeal is allowed. The goods in issue are classified under tariff item 1901.90.39 of the *Customs Tariff* schedule.

Eric Wildhaber

Eric Wildhaber
Presiding Member

ANNEX

GOODS IN ISSUE

[1] The goods in issue, "La Jeune Vache" products, are food preparations packaged for retail sale. The import transaction(s) took place during the verification period from November 1, 2018, to April 30, 2019. The products originate in and are exported from Algeria. They are delivered in packages in four formats: 8 portions, 16 portions, 400 g and 1 kg.[25]

[2] By agreement between the parties, the goods in issue consist of the following:[26]

Ingredients	Proportion
Cheddar	12.5%
Milk powder	9%
Vegetable fat	15.5%
Milk protein	3.5%
Polyphosphates	2.6%
Citrates INS 331	0.5%
Citric acid INS 330	0.4%
Gelling agent INS 407	2%
Thickener INS 1422	5%
Water	49%
Total	**100%**

PROCEDURAL HISTORY

[3] On December 3, 2018, 9311-3652 Québec Inc. imported 14,263.60 kg of goods and classified them under tariff item 2106.90.41 as "[c]heese fondue", which was subject to a customs tariff of 6% using the Most-Favoured-Nation Tariff.[27] 9311-3652 Québec Inc. paid the applicable customs duties.

[4] On August 8, 2019, the CBSA informed 9311-3652 Québec Inc. that it was conducting verifications of certain goods imported between November 1, 2018, and April 30, 2019, including the goods in issue, pursuant to sections 42 and 42.01 of the Act.[28] On that date, the evidence on the record suggests that the CBSA's laboratory had already analyzed the goods in issue and documented its findings in a report dated June 20, 2019—around one and a half months before the CBSA wrote to 9311-3652 Québec Inc. on August 8, 2019, to inform it that it was conducting verifications of its imports.

[5] On December 4, 2019, the CBSA sent 9311-3652 Québec Inc. a document called "[First] Trade Compliance Verification Final Report—Tariff Classification" [translation]. In that report, the CBSA concluded that the goods in issue were classified under tariff item 0406.30.20 as "processed cheese, not grated or powdered, over access commitment" since 9311-3652 Québec Inc. does not

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25 Exhibit AP-2022-001-18 at paras. 18-20; Exhibit AP-2022-001-18 at p. 2 and 4. See also Exhibit AP-2022-001-18 at p. 84–88.

26 Exhibit AP-2022-001-30 at p. 6.

27 Exhibit AP-2022-001-18 at p. 16.

28 Exhibit AP-2022-001-30 at para. 12.

have a licence granting it access commitment under subsection 32(1), (3) or (5) of the Act.[29] With this new classification decision, the applicable customs tariff became 245.5% (but not less than $4.34/kg).

[6] On January 23, 2020, the CBSA laboratory produced a second analysis report correcting an important finding in the first analysis report. The second report noted that the goods in issue contained vegetable fat (oleic type).[30] On January 28, 2020, the CBSA sent 9311-3652 Québec Inc. an "AMENDED Final Verification Report" [translation] that stated that the goods in issue would not be classified under tariff item 0406.30.20 since they contain vegetable fat (oleic type), which excluded them at the outset from Chapter 4 of the *Customs Tariff* and, as a result, from tariff item 0406.30.20.

[7] The "AMENDED Final Verification Report" also indicated that the goods contained more than 50% by weight of dairy content. As a result, the CBSA once again modified the tariff classification of the goods: they were now classified under tariff item 2106.90.94 as "other food preparations containing more than 50% milk content, over access commitment." With this new classification decision, the applicable customs tariff became 274.5% (but not less than $2.88/kg).

[8] As a result, on February 11, 2020, the CBSA sent 9311-3652 Québec Inc. a detailed statement of adjustment confirming the findings of the January 28, 2020, "AMENDED Final Verification Report".

[9] On April 15, 2020, 9311-3652 Québec Inc. submitted a request for further re-determination of the tariff classification under subsection 60(1) of the Act. This request was corrected more than one year later, on April 28, 2021. At that time, 9311-3652 Québec Inc. was represented by a first counsel. That counsel argued, on behalf of 9311-3652 Québec Inc., that the goods in issue should instead be classified under tariff item 1901.90.20 as "preparations containing more than 10% but less than 50% on a dry weight basis of milk solids." It is essential in this case to understand that the reference to tariff item 1901.90.20 made by counsel for 9311-3652 Québec Inc. is erroneous because this tariff item number does not correspond to the text just cited. The text corresponds instead to tariff item 1901.90.39, which falls under the so-called "deleted" tariff item 1901.90.30. The CBSA identified this error in paragraph 17 of its brief, but not when it considered the April 15, 2020, request for reconsideration of 9311-3652 Québec Inc. Nonetheless, the customs tariff applicable to tariff item 1901.90.39 allows for the duty-free importation of products (meaning zero customs tariff).

[10] On January 19, 2022, the CBSA denied the request for reconsideration and confirmed the classification of the goods under tariff item 2106.90.94.[31]

[11] On April 18, 2022, 9311-3652 Québec Inc. filed a notice of appeal with the Tribunal pursuant to subsection 67(1) of the Act. 9311-3652 Québec Inc. again argued, as it did on April 28, 2021, in its request for a further re-determination, that the goods in issue should be classified under tariff item 1901.90.20. It is not clear whether the notice of appeal was prepared by 9311-3652 Québec Inc. or counsel. Nonetheless, this is a reproduction of the same identification error of tariff item 1901.90.39 noted above.

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29 Exhibit AP-2022-001-30 at p. 167–172.
30 Exhibit AP-2022-001-30 at p. 173–177.
31 Exhibit AP-2022-001-30 at p. 198–202.

[12] On May 16, 2023, 9311-3652 Québec Inc. filed its brief, which contained the report of its expert witness Martin Michaud.

[13] On July 17, 2023, the CBSA filed its brief. It was now recommending that the goods in issue be classified under tariff item 1901.90.39. This unusual position, as described in these reasons, went unmentioned until it became fully known during the resumed hearing on November 2, 2023 (as discussed in these reasons and below).

[14] On August 18, 2023, the CBSA filed the report of its expert witness Jacques Goulet.

[15] On August 20, 2023, 9311-3652 Québec Inc. filed a revised version of the report of its expert witness M. Michaud.

[16] On September 19, 2023, a hearing was held by videoconference to address the merits of this case. The parties called their respective witnesses and made arguments. The witnesses and the parties answered the Tribunal's various questions.

[17] Certain elements of this case led the Tribunal to contact the parties between September 26 and October 17, 2023, and to summon the parties to a resumed hearing on November 2, 2023.[32]

[18] During the resumed hearing on November 2, 2023, the Tribunal was finally able to ask all its pending questions and fully understand the respective positions, motivations and arguments of the parties. The Tribunal took the matter under advisement that day.

LEGAL FRAMEWORK AND TARIFF PROVISIONS

[19] The tariff nomenclature is set out in detail in the *Customs Tariff* schedule,[33] which conforms to the Harmonized Commodity Description and Coding System (Harmonized System) developed by the World Customs Organization (WCO).[34] The schedule is divided into sections and chapters, and each chapter contains a list of goods classified in a number of headings, subheadings and tariff items.

[20] Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods must, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[35] (General Rules) and the Canadian Rules[36] set out in the schedule.

[21] The General Rules comprise six rules. Classification begins with Rule 1, which provides that classification must 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.

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32 The correspondence between the parties and the Tribunal describes this meeting as a case management conference; it would be more accurate to describe it as a resumed hearing; Exhibit AP-2022-001-55; this term was therefore used in these reasons.

33 S.C. 1997, c. 36.

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

35 S.C. 1997, c. 36, annex.

36 *Ibid.*

[22] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard must be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[37] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System,*[38] published by the WCO. While the classification opinions and explanatory notes are not binding on the Tribunal, it applies them unless there is a sound reason to do otherwise.[39]

[23] The relevant tariff provisions are the following:

Chapter 4 **DAIRY PRODUCE; BIRDS' EGGS; NATURAL HONEY; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED**	**Customs tariff applicable at time of importation**
…	
4. This Chapter does not cover: …	
(b) Products obtained from milk by replacing one or more of its natural constituents (for example, butyric fats) by another substance (for example, oleic fats) (heading 19.01 or 21.06);	
…	
04.01 Milk and cream, not concentrated nor containing added sugar or other sweetening matter.	
…	
04.04 Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or sweetening matter, not elsewhere specified or included.	
Chapter 19 **PREPARATIONS OF CEREALS, FLOUR, STARCH OR MILK; PASTRYCOOKS' PRODUCTS**	
…	

37 World Customs Organization, 4th ed., Brussels, 2017.
38 World Customs Organization, 6th ed., Brussels, 2017.
39 See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20 at para. 4.

19.01 Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.	
…	
1901.90 - Other - - - 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;	
…	
1901.90.39 - - - - Other	Duty free
Chapiter 21 **MISCELLANEOUS EDIBLE PREPARATIONS**	
…	
21.06 Food preparations not elsewhere specified or included.	
2106.90 – Other	
2106.90.94.00 - - - - Containing 50% or more by weight of dairy content, over access commitment	274.5% but not less than $2.88/kg
2106.90.95 - - - - Other preparations containing, in the dry state, over 10% by weight of milk solids but less than 50% by weight of dairy content	8%

[24] The relevant explanatory notes for heading 04.02 state the following:

> This heading covers milk (as defined in Note 1 of this Chapter) and cream, concentrated (for example, evaporated) or containing added sugar or other sweetening matter, whether liquid, paste or solid (in blocks, powder or granules) and whether or not preserved or reconstituted.
>
> Milk powder may contain small quantities of starch (not exceeding 5% by weight), added, in particular, to maintain the reconstituted milk in its normal physical state.

The heading **does not cover**:

(a) Curdled, fermented or acidified milk or cream (**heading 04.03**).

(b) Beverages consisting of milk flavoured with cocoa or other substances (**heading 22.02**).[40]

[25] The relevant explanatory notes for heading 04.04 state the following:

This heading covers whey (i.e., the natural constituents of milk which remain after the fat and casein have been removed) and modified whey (see Subheading Note 1 to this Chapter). These products may be in liquid, paste or solid (including frozen) form and may be concentrated (e.g., in powder) or preserved.

This heading also covers fresh or preserved products consisting of natural milk constituents, which do not have the same composition as the natural product, provided they are not more specifically covered elsewhere. Thus the heading includes products which lack one or more natural milk constituents, milk to which natural milk constituents have been added (to obtain, for example, a protein-rich product). Apart from the natural constituents and additives mentioned in the General Explanatory Note to this Chapter, the products of this heading may contain added sugar or other sweetening matter.

The powdered products of this heading, particularly whey, may contain small quantities of added lactic ferments, with a view to their use in prepared meat products or as additives for animal feed.

This heading **does not cover:**

(a) Skimmed milk or reconstituted milk having the same qualitative and quantitative composition as natural milk (**heading 04.01** or **04.02**).

(b) Whey cheese (**heading 04.06**).

(c) Products obtained from whey, containing by weight more than 95% lactose, expressed as anhydrous lactose, calculated on the dry matter (**heading 17.02**).

(d) Food preparations based on natural milk constituents but containing other substances not allowed in the products of this Chapter (in particular, **heading 19.01**).

(e) Albumins (including concentrates or two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter) (**heading 35.02**) or globulins (**heading 35.04**).[41]

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40 Exhibit AP-2022-001-30 at p. 102.

41 Exhibit AP-2022-001-30 at p. 104–105.