Docket: 2004-3308(GST)G

BETWEEN:

CENTRE HOSPITALIER LE GARDEUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre Hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal*** **(2005-3168(GST)G)**, ***Hôtel-Dieu de St-Jérôme*** **(2004-3309(GST)G)**, ***Cité de la Santé de Laval*** **(2004-3310(GST)G)**, ***Complexe hospitalier de la Sagamie*** **(2004-3721(GST)G)**, ***Centre hospitalier affilié universitaire de Québec*** **(2004-3722(GST)G)**, ***Centre hospitalier régional de Rimouski*** **(2004-3724(GST)G)**, on July 11, 12, and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated September 19, 2003, and numbered 032G0110145, for the period from January 12, 2001, to September 5, 2002, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for reconsideration and

reassessment on the basis that the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Docket: 2004-3309(GST)G

BETWEEN:

HÔTEL DIEU DE ST-JÉRÔME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal* (2005-3168(GST)G)**, ***Centre hospitalier Le Gardeur* (2004-3308(GST)G)**, ***Cité de la Santé de Laval* (2004-3310(GST)G)**, ***Complexe hospitalier de la Sagamie* (2004-3721(GST)G)**, ***Centre hospitalier affilié universitaire de Québec* (2004-3722(GST)G)**, ***Centre hospitalier régional de Rimouski* (2004-3724(GST)G)**, on July 11, 12 and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated September 19, 2003, and numbered 032G0110146, for the period from January 31, 2001, to March 31, 2002, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the

basis that the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Docket: 2004-3310(GST)G

BETWEEN:

CITÉ DE LA SANTÉ DE LAVAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal*** **(2005-3168(GST)G)**, ***Centre hospitalier Le Gardeur*** **(2004-3308(GST)G)**, ***Hôtel Dieu de St-Jérôme*** **(2004-3309(GST)G)**, ***Complexe hospitalier de la Sagamie*** **(2004-3721(GST)G)**, ***Centre hospitalier affilié universitaire de Québec*** **(2004-3722(GST)G)**, ***Centre hospitalier régional de Rimouski*** **(2004-3724(GST)G)**, on July 11, 12 and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated September 19, 2003, and numbered 032G0110144, for the period from November 27, 2000, to August 24, 2002, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for reconsideration and

reassessment on the basis that the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007,

Erich Klein, Revisor

Docket: 2004-3721(GST)G

BETWEEN:

COMPLEXE HOSPITALIER DE LA SAGAMIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal* (2005-3168(GST)G)**, ***Centre hospitalier Le Gardeur* (2004-3308(GST)G)**, ***Hôtel Dieu de St-Jérôme* (2004-3309(GST)G)**, ***Cité de la Santé de Laval* (2004-3310(GST)G)**, ***Centre hospitalier affilié universitaire de Québec* (2004-3722(GST)G)**, ***Centre hospitalier régional de Rimouski* (2004-3724(GST)G)**, on July 11, 12 and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated February 2, 2004, and numbered DGCAR-1969, for the period from February 15, 2001, to December 15, 2002, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that

the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Docket: 2004-3722(GST)G

BETWEEN:

CENTRE HOSPITALIER AFFILIÉ UNIVERSITAIRE DE QUÉBEC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal* (2005-3168(GST)G)**, ***Centre hospitalier Le Gardeur* (2004-3308(GST)G)**, ***Hôtel Dieu de St-Jérôme* (2004-3309(GST)G)**, ***Cité de la Santé de Laval* (2004-3310(GST)G)**, ***Complexe hospitalier de la Sagamie* (2004-3721(GST)G)**, ***Centre hospitalier régional de Rimouski* (2004-3724(GST)G)**, on July 11, 12 and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated May 30, 2003, for the period from April 1, 2001, to March 31, 2002, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for

reconsideration and reassessment on the basis that the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Docket: 2004-3724(GST)G

BETWEEN:

CENTRE HOSPITALIER RÉGIONAL DE RIMOUSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier de l'Université de Montréal, Campus Hôtel-Dieu de Montréal*** **(2005-3168(GST)G)**, ***Centre hospitalier Le Gardeur*** **(2004-3308(GST)G)**, ***Hôtel Dieu de St-Jérôme*** **(2004-3309(GST)G)**, ***Cité de la Santé de Laval*** **(2004-3310(GST)G)**, ***Complexe hospitalier de la Sagamie*** **(2004-3721(GST)G)**, ***Centre hospitalier affilié universitaire de Québec*** **(2004-3722(GST)G)**, on July 11, 12 and 13 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated January 7, 2004, and numbered DGCAR-1909, for the period from June 14, 2001, to March 3, 2003, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of

National Revenue for reconsideration and reassessment on the basis that the products listed in Schedule A to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Docket: 2005-3168(GST)G

BETWEEN:

CENTRE HOSPITALIER DE L'UNIVERSITÉ DE MONTRÉAL,
CAMPUS HÔTEL-DIEU DE MONTRÉAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of ***Centre hospitalier Le Gardeur* (2004-3308(GST)G)**, ***Hôtel-Dieu de St-Jérôme* (2004-3309(GST)G)**, ***Cité de la Santé de Laval* (2004-3310(GST)G)**, ***Complexe hospitalier de la Sagamie* (2004-3721(GST)G)**, ***Centre hospitalier affilié universitaire de Québec* (2004-3722(GST)G)**, ***Centre hospitalier régional de Rimouski* (2004-3724(GST)G)**, on July 11, 12 and 13, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), the notice of which is dated May 13, 2005, for the period from April 1, 2003, to January 31, 2005, is allowed, with only one set of costs for the seven appellants, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the products listed in Schedule A

to the Reasons for Judgment, also found in Exhibit A-3, and that were acquired by the appellant during that period, except for products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by the appellant, are drugs included in Schedule D to the *Food and Drugs Act* and as a result are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

Citation: 2007TCC425
Date: 20070720
Dockets: 2004-3308(GST)G
2004-3309(GST)G
2004-3310(GST)G
2004-3721(GST)G
2004-3722(GST)G
2004-3724(GST)G
2005-3168(GST)G

BETWEEN:

CENTRE HOSPITALIER LE GARDEUR,
HÔTEL-DIEU DE ST-JÉRÔME,
CITÉ DE LA SANTÉ DE LAVAL,
COMPLEXE HOSPITALIER DE LA SAGAMIE,
CENTRE HOSPITALIER AFFILIÉ UNIVERSITAIRE DE QUÉBEC,
CENTRE HOSPITALIER RÉGIONAL DE RIMOUSKI,
CENTRE HOSPITALIER DE L'UNIVERSITÉ DE MONTRÉAL,
CAMPUS HÔTEL-DIEU DE MONTRÉAL,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] The seven above-listed appeals, heard on common evidence, concern disputed goods and services tax amounts (hereinafter "GST") with the respect to the acquisition of in vitro diagnostic kits by the appellants.

THE FACTS

[2] The relevant facts in these appeals can be summarized as follows. They are not disputed.

[3] The appellants each operate a hospital. They are considered to be hospital authorities and therefore selected public service bodies within the meaning of section 259 of the *Excise Tax Act* ("ETA").

[4] Over certain periods of time specific to each of them, the appellants acquired in vitro diagnostic kits. On acquisition, they paid the suppliers of the kits the applicable GST for which they had been billed. On various occasions, the appellants also self-assessed GST on the goods in question, since they came from outside Canada.

[5] The appellants claimed and obtained with respect to the supplies of the in vitro diagnostic kits the partial GST rebate for public service bodies. This rebate is to 83% of the GST paid on those supplies, as prescribed by section 259 of the ETA and section 5 of the *Public Service Body Rebate (GST/HST) Regulations*.[1]

[6] Subsequently, the appellants, through their representative, Consultaxe Planification Ltée, filed with the respondent, through the Quebec Minister of Revenue (hereinafter the "Minister"), using the prescribed form (FP-189), a general application for GST rebate with respect to certain GST amounts they claimed to have paid by mistake or to have overpaid during the relevant periods. These amounts correspond to the 17% of the GST on the supplies in question that was not refunded with the partial GST rebate. In broad terms, the appellants argue that these supplies are zero-rated for the purposes of paragraph 2(*a*) of Part I of Schedule VI to the ETA, since they are drugs included in Schedule D to the *Food and Drugs Act* ("FDA").[2]

[7] The Minister later issued with respect to the appellants, under Part IX of the ETA, assessments for their respective periods in question refusing the rebates requested.

---

1 *Public Service Body Rebate (GST/HST) Regulations*, SOR/91-37, as amended by SOR/99-367.

2 *Food and Drugs Act*, R.S.C. 1985, c. F-27.

[8] The appellants listed 862 products for which they are claiming a tax rebate.[3] They filed an expert report (Exhibit A-4) and had Dr. Raymond Lepage testify as an expert. He explained that these products were all composed of drugs included in Schedule D to the FDA, to which certain substances were added in the in vitro diagnostic kits in order to, among other things, preserve the drug in its natural state. This, combined with other substances or special material, allows the results of the test to be seen or enables the performance of automated tests (a method that is more effective and more sure to meet the growing demand for diagnoses than would have been the case when everything was done manually by laboratory technicians), or allows more complex tests to be performed, tests which require the superimposing of several Schedule D drugs (called the "sandwich" technique, used to detect allergies, as in ELISA tests, or the presence of the AIDS virus antigen, to give but two examples). Moreover, there are control and calibration tests to ensure that test results are not completely non-standard. These control and calibration tests involve only Schedule D drugs (for example, animal serum (the liquid part of the blood)).

[9] The four groups analyzed by Dr. Lepage and included in Schedule D are:

(1) monoclonal and polyclonal antibodies;
(2) blood and blood derivatives;
(3) snake venom; and
(4) micro-organisms that are not antibiotics.

[10] From the outset, Dr. Lepage said that none of these drugs could be used in their pure state. They are necessarily mixed with another product to protect them and to place them in a human cell environment. So whether the test is done "in vivo" by injecting the drug directly into the human patient or "in vitro" in a laboratory by taking a blood sample from the patient and having it react in a tube with the monoclonal antibody, for example, in order to see or highlight the test result, either radioactivity must be used (in the in vivo method) or another substance must be added to the monoclonal antibody (in the in vitro method). In both cases, the radioactive isotope or the added substance (the substrate), are not necessarily listed in Schedule D. But these substances have only a secondary role, because in any event the reaction sought occurs with the Schedule D drug that is

---

[3] These products can be found in the summary (Exhibit A-3) and in the nine binders (filed as Exhibit A-2). They are also arranged in various categories (which are defined later on in these reasons) or according to the number of containers for the products (in Schedule A at the end of these reasons).

used. Dr. Lepage considers the products referred to in Exhibit A-3 to be Schedule D products since their essential or main reactant is itself a Schedule D product. Moreover, he eliminated from the list in Exhibit A-3 certain products whose essential reactant was not composed solely of a product from Schedule D. This is referred to in paragraph 19 of these reasons.

Preliminary question

[11] At the hearing, counsel for the respondent indicated that he did not object to the appellants' witness Dr. Lepage being recognized as an expert, but he challenged the filing of his report on the ground that it was not an opinion report. He argued that the report only addressed general issues whereas section 145 of the *Tax Court of Canada Rules (General Procedure)* states that the report must fully set out the points at issue in the pleadings. In counsel's opinion, the notices of appeal do not specify that the diagnostic test includes a main reactant that is a drug from Schedule D to the FDA. Moreover, the report does not specifically analyze each of the 862 products at issue.

[12] I overruled the respondent's objection raised at the hearing. Indeed, according to the authors and case law cited by the respondent,[4] the purpose of an expert's report is to inform the court on a subject that is complex and specialized and that is not general knowledge. The report deals with the use of the products and places them in four categories taking in the 862 products listed in Exhibit A-3. The report explains what the essential reactants are in each of the four categories and indicates that each of these essential reactants is associated with one or more substances, present in minimal quantities, that allow the essential reactants to be used for diagnostic or therapeutic purposes. Moreover, each of the products in Exhibit A-3 is associated with a data sheet, and these sheets were brought to the attention of counsel for the respondent at the latest when the expert report was filed. Counsel for the respondent could thus have asked the Court for leave to examine the expert, or a representative of the appellants, for discovery if he had found it appropriate to do so. This was not done. I therefore accept the expert report, which is considered read and filed as Exhibit A-4.

---

4 D. Ferland and B. Emery: *Le précis de procédure civile du Québec*, Témoin expert, page 487; *Parizeau c. Lafrance*, [1999] R.J.Q. 2399 (S.C.), p. 2401.

ISSUE

[13] Over the period of time specific to each appellant, did the acquisition of the products in question, called in vitro diagnostic kits in everyday language, constitute for the purposes of paragraph 2(*a*) of Part I of Schedule VI to the ETA (hereinafter "paragraph 2(*a*)") an acquisition of zero-rated supplies on which no GST is payable?

LEGISLATIVE PROVISIONS

[14] The relevant legislative provisions are sections 123 and 165 of Part IX of the ETA and section 2 of Part I of Schedule VI to the ETA. Schedule D to the FDA is also significant. At the relevant time, these sections and Schedule D read as follows:

Excise Tax Act

PART IX
GOODS AND SERVICES TAX

Division II
Goods and Services Tax

Subdivision a
Imposition of tax

S. 165. Imposition of goods and services tax. − (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.

(3) **Zero-rated supply.** − The tax rate in respect of a taxable supply that is a zero-rated supply is 0%.

S. 123. Definitions. − (1) In section 121, this Part and Schedules V to X,

"zero-rated supply" means a supply included in Schedule VI.

SCHEDULE VI

ZERO-RATED SUPPLIES

PART I

PRESCRIPTION DRUGS
AND BIOLOGICALS

S. 2. A supply of any of the following:

(*a*) a drug included in Schedule C or D to the *Food and Drugs Act*,

(*b*) a drug included in Schedule F to the *Food and Drug Regulations*, other than a drug or mixture of drugs that may, pursuant to the *Food and Drugs Act* or those Regulations, be sold to a consumer without a prescription,

(*c*) a drug or other substance included in the schedule to Part G of the *Food and Drug Regulations*,

(*d*) a drug that contains a substance included in the schedule to the *Narcotic Control Regulations*, other than a drug or mixture of drugs that may be sold to a consumer without a prescription pursuant to the *Controlled Drugs and Substances Act* or regulations made under that Act,

(*e*) any of the following drugs, namely,

(i) Digoxin,
(ii) Digitoxin,
(iii) Prenylamine,
(iv) Deslanoside,
(v) Erythrityl tetranitrate,
(vi) Isosorbide dinitrate,
(vii) Nitroglycerine,
(viii) Quinidine and its salts,
(ix) Medical oxygen,
(x) Epinephrine and its salts, and

(*f*) a drug the supply of which is authorized under the *Food and Drug Regulations* for use in an emergency treatment,

but not including a supply of a drug when it is labelled or supplied for agricultural or veterinary use only.

Food and Drugs Act

SCHEDULE D
(section 12)

. . .

Blood and blood derivatives
Sang et dérivés du sang

. . .

Drugs, other than antibiotics, prepared from micro-organisms
Drogues, sauf...

. . .

Monoclonal antibodies, their conjugates and derivatives
Anticorps monoclonaux et leurs dérivés et conjugués

. . .

Snake Venom
Venin de serpent

PARTIES' SUBMISSIONS

[15] Before presenting his submissions, counsel for the appellants reminded the Court of the various administrative interpretations adopted by the authorities over the years with regard to the treatment of in vitro diagnostic kits. In a letter dated May 1, 1995, Serge Bouchard replied to the first clear question put to the Quebec Ministry of Revenue on the taxation or non-taxation of in vitro diagnostic kits (Exhibit A-1, Tab 3; shorthand notes (hereinafter "s.n."), Volume 3, p. 3 et seq.). Mr. Bouchard confirmed the following at that time:

> [TRANSLATION]
> . . . the supply of in vitro diagnostic products that are drugs included in Schedule D to the FDA is a zero-rated supply under the provisions of paragraph 2(*a*) of Part I of Schedule VI to the federal Act [ETA]. . . .
>
> The fact that these products are not subject to the drug regulations in Part C of the *Food and Drug Regulations* but rather are subject to the *Medical Devices Regulations* does not make the supply of these products taxable. Indeed, the criterion set out in paragraph 2(*a*) of Part I of Schedule VI to the federal Act whereby the supply of drugs is zero-rated relates only to the fact that the drugs are

> included in Schedule D to the FDA and has nothing to do with the regulations that apply to them.[5]

Some time later, on May 14, 1997, Health Canada, through Lauraine Bégin from the Health Protection Branch, essentially confirmed Mr. Bouchard's statements (Exhibit A-1, Tab 3; s.n., Volume 3, p. 10 et seq.). Health Canada indicated that:

> If a substance listed, on Schedule D of the *Food and Drugs Act* is included in a kit which carries a claim or is sold or advertised for the diagnostic of a disease or disorder in humans or animals, the kit is considered to be a schedule D drug. . . . These products are subject to the medical device notification. The kit in this case is still however a schedule D drug.[6]

Less than seven months later, on December 9, 1997, Karolyn Lui of Health Canada confirmed Ms. Bégin's statement (Exhibit A-1, Tab 3, s.n., Volume 3, p. 11 et seq.). Finally, on September 8, 1999, Revenue Canada, through Susan Eastman, confirmed the preceding administrative interpretations by stating the following (Exhibit A-1, Tab 6; s.n., Volume 3, p. 12 et seq.):

> Under paragraph 2(*a*) of Part I of schedule VI to the *Excise Tax Act*, the supply of a drug included in Schedule C or D to the *Food and Drugs Act* is a zero-rated supply except where the drug is labelled or supplied solely for agricultural or veterinary use. The interpretation of whether a product is a "drug" and whether it is included in schedule D to the *Food and Drugs Act* falls within the purview of Health Canada. Revenue Canada will adopt that interpretation when determining whether a product is zero-rated pursuant to paragraph 2(*a*) of Part II of Schedule VI to the *Excise Tax Act*.
>
> Consequently, where a diagnostic kit is considered to be a Schedule D drug by Health Canada, i.e., the kit contains a substance included in Schedule D to the *Food and Drugs Act*, the supply of that kit will qualify for zero-rated status under the provisions of paragraph 2(*a*) of Part II of Schedule VI to the *Excise Tax Act*.[7]

However, as of March 29, 2001, the Canada Customs and Revenue Agency ("CCRA"), once again through Susan Eastman, changed its administrative position and indicated that thenceforth the supply of in vitro diagnostic kits would no longer be considered a zero-rated supply. Indeed, this was all confirmed again in a letter dated January 20, 2003, from the same source and the same person as the letter of March 29, 2001 (Exhibit A-1, Tabs 7 and 8; s.n., Volume 3, p. 13 et seq.).

---

5 Exhibit A-1, Tab 3.

6 *Idem*.

7 Exhibit A-1, Tab 6.

[16] The basis for the last administrative position adopted by the Canadian tax authorities can be summarized as follows:

- An in vitro diagnostic kit must be defined by the sum of its components, not by one alone;

- The sum of the components of an in vitro diagnostic kit results in a single or unique supply, a "new" product;

- An in vitro diagnostic kit is made subject by Health Canada to the *Medical Devices Regulations* and not the *Food and Drug Regulations* ("Regulations"). This would thus exclude the possibility of an in vitro diagnostic kit being considered a drug within the meaning of paragraph 2(*a*). The fact that Heath Canada adopted the administrative position that an in vitro diagnostic kit could be considered a drug within the meaning of the FDA is irrelevant because the regulations governing in vitro diagnostic kits have precedence over Health Canada's administrative position, for the purposes of the ETA;

- The fact that an in vitro diagnostic kit is a composite supply and is thus not covered by Schedule C or D to the FDA prevents the product from qualifying as a drug specifically included in those Schedules, as required by the ETA;

- Finally, under section 29 of Part II of Schedule VI to the ETA, testing strips are considered to be medical instruments and not drugs. It would therefore be inappropriate to use section 29 of Part II of Schedule VI for the testing strips that the CCRA characterizes as in vitro diagnostic kits when for other in vitro diagnostic kits section 2 of Part I of Schedule VI would be used.

[17] Counsel for the appellants submits that the position Revenue Canada adopted is tantamount to adding words to paragraph 2(*a*), which contains no reference at all to the above-mentioned regulations. The same applies to the definition of "drug" in the FDA, which does not specify that only the in vivo diagnostic kits are drugs and that in vitro diagnostic kits are not, but such, according to counsel, is the result of the latest administrative interpretation (s.n.,

Volume 3, p. 14 et seq.). Counsel relies on *Friesen*[8] and *Baird*[9] to support his submission that a court should not accept an interpretation that requires the addition of words when there is another acceptable interpretation that does not require any such addition.

[18] Accordingly, counsel for the appellants asks that we use the definition of "drug" found in the FDA (s.n., Volume 3, p. 27 et seq.) in interpreting the term "drug" in paragraph 2(*a*). Thus, to resolve the issue of whether these are zero-rated supplies or not, it would suffice to determine whether the in vitro diagnostic kits presented by the appellants are drugs included in Schedule D to the FDA, which determination is to be made in light of the definition of "drug" in the FDA. That definition is as follows:

> "drug" includes any substance or mixture of substances manufactured, sold or represented for use in
>
> (*a*) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals . . .
>
> « drogue » Sont compris parmi les drogues les substances ou mélanges de substances fabriqués, vendus ou présentés comme pouvant servir :
>
> *a*) au diagnostic, au traitement, à l'atténuation ou à la prévention d'une maladie, d'un désordre, d'un état physique anormal ou de leurs symptômes, chez l'être humain ou les animaux . . .[10]

According to counsel, this definition invites use of the "usable product" concept. In this regard, one would not consider as coming within the definition a situation where snakes were obtained and transported to a laboratory where their venom was extracted directly and immediately incorporated with other products. The drug must be obtainable in containers and be mixable with other substances to maintain its stability. Moreover, there is a reason that the definition of "drug" provides for mixtures of substances; mixtures are necessary in order for one to be able to make diagnoses. On that point, Dr. Lepage confirmed that no drug, whether in vivo or in vitro, comes in a pure state. He also testified that the Schedule D drug is the main and essential element of the diagnosis; and this holds true for almost all of the products presented by the appellants in Exhibit A-3 (s.n., Volume 3, p. 25 et seq.).

---

8 *Friesen v. Canada*, [1995] 3 S.C.R. 103.

9 *Minister of National Revenue (Customs and Excise) v. Baird (Tom) & Associates Ltd.* (1997), 221 N.R. 201 (F.C.A.).

10 *Food and Drugs Act*, R.S., c. F-27, section 2, "drug".

[19] With regard to the products presented by the appellants in Exhibit A-3, counsel for the appellants suggested dividing them into three categories, which the Court understands to be the following (s.n., Volume 3, p. 30 et seq.):[11]

> Category 1− Products coming exclusively in one or more containers with a Schedule D drug to which products to ensure the preservation and effective use of the drug have been added;
>
> Category 2− Products coming in one or more containers with a Schedule D drug to which is attached another substance, or which is accompanied by another substance, and serves solely to allow one to see the diagnosis found. Of course, products ensuring the preservation and effective use of the Schedule D drug have also been added. Category 2 products may include containers as described for Category 1;
>
> Category 3− Products coming in several containers including containers as described for Categories 1 and 2 and containers that are not Schedule D drugs. Accordingly, I accept among other things that, as specified by the appellants, mouse hemoglobins, control solutions and calibration solutions are also Schedule D drugs (s.n., Volume 3, p. 40).

[20] Counsel for the appellants submitted to this Court that, once the products are divided into three categories, using the definition of "drug" from the FDA confirms the zero-rating of the Category 1 and Category 2 products (s.n., Volume 3, p. 32 et seq.). This is because the definition of "drug" in the FDA includes "any substance or mixture of substances", which would take in the products in Categories 1 and 2. Moreover, according to counsel, even without this definition *The Cookie Florist*[12]

---

[11] In classifying the 862 products of Exhibits A-3 and A-2 in Schedule A to these reasons, I adopt as a first classification method the three categories the appellants suggested, and I will use as a second classification method the number of containers in each product. It is also noteworthy that, during his testimony, Dr. Lepage removed from the list of products at issue the products numbered 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704.

[12] *The Cookie Florist Canada Ltd. v. The Queen* (1995), 3 G.T.C. 2103 (T.C.C.).

decision would allow us to reach the same conclusion. In that case, although the value of the cookies was less than one third of the value of the gift bouquet (gift package), the Court held that if Parliament had wanted to place limits or conditions on the zero-rating of cookies, it should have done so explicitly (s.n., Volume 3, p. 33 et seq.). Thus, if Parliament had wanted to set restrictions on the zero-rating of Schedule D drugs, it should have specified in clear terms that a Schedule D drug combined with other substances is not zero-rated; Parliament did not do so. Accordingly, in this case, when one considers Dr. Lepage's statements that, for example, monoclonal antibodies will always represent a considerable part of the value of in vitro diagnostic kits, that these antibodies are what is used to make the diagnosis, and that the other substances are only there to show the result or ensure that the monoclonal antibodies can be used effectively, it is easy to understand why *The Cookie Florist* decision would apply *a fortiori* to the Category 1 and 2 products (s.n., Volume 3, p. 36 et seq.).

[21] With regard to the third category of products, counsel for the appellants puts forward an argument involving the interpretation of the definition of "drug" in the FDA and an argument based on a principle from the decision in *O.A. Brown*[13] (s.n., Volume 3, p. 45 et seq.). The argument involving the interpretation of the definition of "drug" in the FDA suggests a medical, practical and realistic approach to what is meant by Schedule D drug, that is to say, an approach like Health Canada's. Indeed, what is sought when acquiring a Category 3 product is the Schedule D drug and not the more or less important substance that serves only to show the result. That which is accessory must therefore follow its principal and insomuch as the incidental container is a substance or mixture of substances used for diagnosis, it should be included in the interpretation to be given to the definition, because drugs used for diagnoses are intended to be zero-rated; hence, substances and mixtures of substances used for this purpose should also be included (s.n., Volume 3, p. 42 et seq.). As for the principle from *O.A. Brown*, it would have the same effect as the preceding argument regarding interpretation. Thus, applying the principle from *O.A. Brown* to the Category 3 products, one would have in this case a single acquisition, namely, of a Schedule D drug, to which have been added other elements that cannot be removed, namely, incidental substances that are practical and realistic components required for a complete diagnosis, which leads to the conclusion that the Category 3 products are a single supply, that is, the supply of a Schedule D drug (s.n., Volume 3, p. 62 et seq.). This last category would therefore ipso facto be zero-rated pursuant to paragraph 2(*a*).

---

[13] *O.A. Brown Ltd. v. The Queen* (1995), 3 G.T.C. 2092 (T.C.C.), [1995] T.C.J. No.678 (QL).

[22] Adopting a practical and realistic approach, counsel for the appellants highlighted three points concerning the Category 3 products (s.n., Volume 3, p. 49 et seq.):

(a) The Schedule D drug is at the heart of the purchase;
(b) The other substances (incidental) are essential to the diagnosis process;
(c) It is unrealistic to require that the other substances be purchased separately.

Counsel went on to further explain what he meant by stating in point (c) that it is unrealistic to require that the other substances be purchased separately. For one type of product, namely, "plastic blocks" for the hospitals' machines, it is obvious, from a logical point of view, that the "plastic blocks" should contain, in order, all the substances for which the machine is configured so that a complete diagnostic test can be conducted. Therefore, it is absolutely unrealistic to require, or even contemplate, that the other substances be purchased separately. The advent of these machines in hospitals became necessary, moreover, with the explosion of requests for diagnoses, to which laboratory people and technicians could not respond using manual methods; a machine, on the other hand, could perform several thousand diagnoses per day. With regard to another type of product, not used in a machine — namely, well strips used for ELISA tests, to diagnose allergies for example — the kit contains several other substances that serve only to complete the test. All these other substances are present in quantities calculated so that there is no residual substance whatsoever when the number of diagnoses specified for the kit have been completed. Moreover, although these incidental substances could theoretically be purchased separately, hospitals do not have the financial means, the time required, or the expertise to calibrate the various incidental substances with the Schedule D drug (main reactant). Furthermore, hospitals cannot afford to take on the responsibility involved in appropriately calibrating all these incidental substances. Therefore, it is not a realistic option to ask hospitals to purchase incidental substances separately in the case of well strips used for ELISA tests (s.n., Volume 3, p. 50 et seq.).

[23] Thus, on the basis of *O.A. Brown*, points (b) and (c) above raised by counsel for the appellants justify in his opinion the conclusion that we are dealing with a single supply. Finally, by means of point (a) counsel is able to "connect" the incidental substances with that which is at the heart of the purchase of the product, that is, the Schedule D drug, and thus characterize the whole as a Schedule D drug,

as the courts did in *O.A. Brown*, *Hidden Valley Golf Resort*[14] and *Canada Trustco Mortgage*.[15] He also relies on *Hidden Valley Golf Resort* for the "common sense"[16] assessment of the facts and on *Canada Trustco Mortgage* for the "raison d'être of the transaction".[17]

[24] In the alternative, in the event that the Court were to find that one or more multiple supplies are involved in the present case, counsel for the appellants suggests that section 138 of the ETA should apply. That section reads as follows:

> **S. 138. Incidental supplies** – For the purposes of this Part, where
> *(a)* a particular property or service is supplied together with any other property or service for a single consideration, and
> *(b)* it may reasonably be regarded that the provision of the other property or service is incidental to the provision of the particular property or service,
> the other property or service shall be deemed to form part of the particular property or service so supplied.[18]

In his view, if there was a product more likely to give rise to the application of section 138, it would be the Category 3 product, which is not used in a machine. In support of his argument, he cites *Interior Mediquip Ltd.*[19] as illustrating the application of section 138 and of the principle that what is accessory must follow its principal, and refers to *Auberge La Calèche*[20] as illustrative of the application of Quebec's version of section 138 and for the definition of the concept of "incidental" (s.n., Volume 3, p. 64 et seq.).

[25] As regards the respondent, her counsel did not intend to challenge the appellants' conclusion that the products in question are single supplies acquired for a single consideration. This is in fact the conclusion that counsel for the respondent himself recommended (s.n., Volume 3, p. 80 et seq.).

[26] However, the parties differ in that counsel for the respondent asserts that although there is a single supply, in the end it is not a Schedule D drug but rather a different product, another product, a "new product", and it is such as soon as a

---

14 *Hidden Valley Golf Resort Association v. The Queen*, 2000 G.T.C. 4104 (F.C.A.).
15 *Canada Trustco Mortgage Company v. The Queen*, 2005 G.T.C. 697 (T.C.C.).
16 *Supra* note 14, at paragraph 20.
17 *Supra* note 15, at paragraph 20.
18 Section 138 of the ETA.
19 *Interior Mediquip Ltd. v. The Queen* (1995), 3 G.T.C. 2004 (T.C.C).
20 *Auberge La Calèche 1992 Inc. c. Québec (Sous-ministre du Revenu du Québec)*, [2004] R.D.F.Q. 26 (C.A.Q.).

substance that is not a Schedule D drug accompanies the Schedule D drug. Of course, one of the components of the "new" product is a Schedule D drug, but the decision to tax or to zero-rate should be based not on the components of a product but on the final product itself (s.n., Volume 3, p. 81 et seq.).

[27] Counsel for the respondent does not think that the definition of "drug" in the FDA should be used to interpret the same word found in paragraph 2(*a*). He states that the main principles of interpretation prescribe two ways of determining the meaning of a term in an Act. First, one must use the definition of the term found in the Act in which the term itself appears. This does not apply in the present case because "drug" is not defined in the ETA. Second, one must favour the ordinary meaning of the term while at the same time taking into account its context, namely the Act in which it is found (s.n., Volume 3, p. 94 et seq.). In this regard, counsel suggests two definitions (s.n., Volume 3, p. 106 et seq.). The first of these, a definition of the word "*drogue*", is as follows:

> Ingrédient, matière première employée pour les préparations médicamenteuses confectionnées en officine de pharmacie. [21]

The second is the following definition of "drug":

> A substance that is used as a medicine or narcotic.[22]

Coming back to the argument regarding the rejection of the FDA definition, counsel stated that when Parliament wishes to refer to a definition in another Act, it states that intent in very clear terms. As examples, he cites the words "release," "self-contained domestic establishment" and "capital property", all found in section 123 of the ETA, as instances where Parliament specifically indicates that the meaning of the term is to be that assigned to it in a particular Act or section of an Act (s.n., Volume 3, p. 98 et seq.). The word "drug" is also used a number of times in section 2 of Part I of Schedule VI. By giving to the term "drug" found in paragraph 2(*a)* the specific definition from the FDA, we would end up with different meanings for the same word in the same section. Parliament has not specifically expressed any such intent in the statute and using the ordinary meaning of the term "drug" would at least have the benefit of making its meaning uniform within the section in question.

---

21 CD-ROM of the *Petit Robert,* "*drogue*".

22 *Webster's Online Dictionary,* "drug".

[28] Counsel for the respondent argues that the reference in paragraph 2(*a*) to the FDA is of the type described as follows by Pierre-André Côté[23] (s.n., Volume 3, p.102):

> . . . If, on the other hand, the reference serves simply to incorporate certain provisions, the provisions referred to may acquire an autonomous character, and exist independently of the "parent" statute. . . . [24]

[29] As for using the definition of a term from one statute in another statute, as suggested by counsel for the appellants, counsel for the respondent says that, according to Pierre-André Côté, it is possible to do so, but only in a limited way and for statutes in the same field. In the present case, the ETA deals with taxation, which is absolutely not so for the FDA. The possibility therefore does not exist here (s.n., Volume 3, p. 104 et seq.).

[30] Counsel for the respondent then makes a comparison between paragraph 2(*a*) and paragraph 2(*d*) in Part I of Schedule VI (hereinafter "paragraph 2(*d*)"). Under paragraph 2(*d*), "a drug that contains a substance included in the schedule to the *Narcotic Control Regulations* . . .” is zero-rated. If Parliament had intended to zero-rate products having as a component a drug included in Schedule D to the FDA, it could have worded paragraph 2(*a*) as follows: "a drug containing a drug included in Schedule D to the FDA". In that hypothetical case, it would be clear that when a product contains a Schedule D drug it is zero-rated (s.n., Volume 3, p. 111 et seq.). Since Parliament did not word paragraph 2(*a*) this way, counsel for the respondent reiterates his main argument that once a component is added to a Schedule D drug, a "new product" is created which is not one that is included in Schedule D.

[31] While keeping in mind that the Court should favour using the ordinary meaning of "drug," counsel for the respondent asserts that the Court should not seek to find the logic of a statute; the statute should be applied, even if doing so leads to an absurd result. On this point, he refers to *Aliments Koyo Inc.*[25] (s.n., Volume 3, pp. 126-128).

[32] In support of his main argument that we have here "new products," counsel for the respondent refers to the leading case on the subject, namely,

---

23 P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough (Ont.): Carswell, 2000).

24 *Supra* note 23, page 76.

25 *Aliments Koyo Inc. v. The Queen*, 2004 G.T.C. 252 (T.C.C.).

W.T. Hawkins[26] (s.n., Volume 3, p. 131 et seq.). That case is the starting point for the argument that what is acquired is the final product and not each of its components. In *Hawkins*, the court upheld the view that it was a "new product" that the purchaser acquired, namely popcorn, rather than each of its components — corn kernels, salt and shortening — which were specifically zero-rated. Two other cases, *Charbonneau*[27] and *Walt Disney Music,*[28] are also cited by counsel and they support *W.T. Hawkins.*

[33] Counsel for the respondent distinguishes *The Cookie Florist*, which involved an exception to an exception. According to the judge in that case, Parliament should have enacted a specific exception to the exception, which was zero-rating a product, so as to return to the basic principle of taxing products. Thus, if Parliament had wanted to make an exception to the exception in paragraph 2(*a*), it would have done so in the same way as in paragraph 2(*d*). Since it did not do so, the product must be taxable. In regard to section 138 of the ETA, counsel submits that it does not apply because the component (the Schedule D drug) is absorbed into the new product (as an elevator that is an integral part of a building, or an egg that blends into a cake). This is not a case of that which is accessory following its principal. Counsel bases this argument on *Consolidated Canadian Contractors*[29], *Messageries Dynamiques*[30] and *Productions de la Métairie inc.*[31] (s.n., Volume 3, p. 136 et seq.).

[34] Lastly, counsel for the respondent submits that one cannot add to the wording of a statute, contrary to counsel for the appellants' contention based on *Friesen*, *supra*. As a result, since no reference to the FDA is made with regard to the meaning of the word "drug", the Act must be read as is, and applied accordingly. Counsel for the respondent adds that this Court does not have jurisdiction to interfere in tax policy matters or to question the reasons behind the taxation or non-taxation of certain products (s.n., Volume 3, p. 144 et seq.).

[35] Counsel for the appellants responds that in interpreting a statutory provision the Court must consider its purpose and its objective. The Court must also put the

---

26 *W.T. Hawkins Ltd v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1958] Ex. C.R. 152.

27 *Charbonneau v. The Queen*, [1979] CTC 82 (F.C.).

28 *Walt Disney Music of Can Ltd v. DMNR Customs Excise*, [1984] CTC 685 (F.C.A.).

29 *Consolidated Canadian Contractors Inc. v. The Queen*, [1997] 2916 ETC (T.C.C.).

30 *Dazé c. Messageries Dynamiques*, SOQUIJ AZ-90011478 (C.A.).

31 *Productions de la Métairie inc. c. Radiomédia inc.*, SOQUIJ AZ-50353688 (C.S.).

statutory provision in context. He then refers to the main decision on this point, *Stubart Investments Ltd.*[32] (s.n., Volume 3, p. 152).

[36] Counsel for the appellants suggests that when two interpretations are possible for the same statutory provision, the Court must favour the most logical interpretation. In support of this argument, he cites Pierre-André Côté[33] (s.n., Volume 3, p.152 et seq.).

[37] Counsel for the appellants continues with a few definitions of the word "drug." One, a rather legal one, is as follows (s.n., Volume 3, p.154):

> An article intended for use in the diagnosis, cure, medication, treatment, or prevention of disease in man or other animals . . . .[34]

Another, rather medical in nature, reads as follows (s.n., Volume 3, p. 154 et seq.):

> A therapeutic agent; any substance, other than food, used in the prevention, diagnosis, alleviation, treatment, or cure of disease in man and animal.[35]

As submitted by counsel for the appellants, it can be seen that these definitions are highly similar to the definition provided in the FDA. Moreover, counsel says that he does not see why the FDA definition of "drug" should not be preferred given that paragraph 2(*a*) is included in a section on medication, drugs and the field of medicine and that specific reference is made to the schedules to the FDA and that these are connected with the FDA, which defines the word "drug." This simply ties in with a logic that seeks Parliament's intent, which would be to zero-rate medical products, but not pure snake venom, for example (s.n., Volume 3, p. 153 et seq.).

[38] Regarding the decisions relied on by the respondent in support of her position, counsel for the appellants states that *W.T. Hawkins*, *supra*, is a decision from 1958, thus prior to the GST and prior to the principles of interpretation that are recognized and applied today. As for *Walt Disney Music*, he distinguishes it on the basis that it involved two items that did not really need to be sold together.

ANALYSIS

---

32 *Stubart Investments Ltd.* c. *The Queen*, [1984] 1 S.C.R. 536.

33 *Supra* note 23, page 447 et seq.

34 *Black's Law Dictionary*, 6th edition, 1990, West Publishing, St. Paul, Minn., *s.v.* "drug".

35 *Stedman's Medical Dictionary*, Fifth Unabridged Lawyers Edition, 1982, Jefferson Law Book Company, Washington, D.C., *s.v.* "drug".

[39] The analysis of the question at issue will be done in two parts. First (PART I), paragraph 2(*a*) will be interpreted to enable us to understand the meaning of zero-rated "drugs." Second (PART II), we must decide whether the products presented by the appellants are "drugs" included in Schedule D to the FDA or whether they are "new products."

PART I – Interpretation of paragraph 2(*a*)

[40] Since Parliament did not see fit to define in the ETA the term "drug" used in paragraph 2(*a*), thus leaving room for more than one interpretation, this Court will use the modern interpretation rule, which involves considering the terms of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament (see, in particular, *65302 British Columbia Ltd. v.* Canada, [1999] 3 S.C.R. 804, in which reference is made to *Stubart Investments Ltd.*, *supra*, p. 578).

[41] When it is a matter of clarifying a concept that is not defined in the Act under consideration, as is the case here, the courts are justified in intervening to give their interpretation, but without straying into the field of law-making (see *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147).

(A) Grammatical and ordinary sense of the words

[42] According to the French version of paragraph 2(*a*):

> 2. La fourniture des drogues suivantes [est détaxée] :
>
> *a*) les drogues incluses aux annexes C ou D de la *Loi sur les aliments et drogues*. [36]

[43] The appellants' contention is that "*drogue*" should be understood as having the meaning assigned to that term in the definition in section 2 of the FDA. The respondent, on the other hand, suggests that "*drogue*" means:

> [i]ngrédient, matière première employée pour les préparations médicamenteuses confectionnées en officine de pharmacie. [37]

---

[36] Paragraph 2(*a*) of Part I of Schedule VI to the ETA (French version).

[37] This definition will be referred to in the rest of these reasons as the "raw material" definition.

I also found the following definition of "*drogue*", which is in line with that suggested by the respondent:

> Matière première spécifique qui est essentielle à la fabrication d'un médicament officinal ou magistral. [38]

[44] According to the English version of paragraph 2(*a*):

> 2. A supply of any of the following [is zero-rated]:
>
> (*a*) a drug included in Schedule C or D to the *Food and Drugs Act*.[39]

The appellants submitted dictionary definitions that support the definition of "drug" given in section 2 of the FDA.

[45] Before attempting to understand what should be the grammatical and ordinary sense of the terms "*drogue*" and "drug", it is relevant to remind ourselves of the principle of interpretation that "[u]nless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained."[40]

[46] To begin with, I found a source that indicates how the dictionaries define "*drogue*" and it seems to exclude the definition proposed by Parliament in the FDA. According to the *Grand dictionnaire terminologique* of the Office québécois de la langue française (hereinafter the *Grand dictionnaire terminologique*),[41] the common meaning of the French term "*drogue*" and the English term "drug" is that given by the respondent. Indeed, it is stated in the *Grand dictionnaire terminologique* that, [TRANSLATION] "[t]he word *drogue* does not have the meaning of "medication" that the English word "drug" can have. In French, the term "*drogue"* means either a substance used abusively for non-medical purposes

---

38 *Le Grand dictionnaire terminologique*, Office québécois de la langue française, www.granddictionnaire.com/btml/fra/r_motclef/index1024_1.asp, definition of "*drogue*".

39 *Supr*a note 36 (English version).

40 P.-A. Côté, *supra* note 23, page 324.

41 *Le Grand dictionnaire terminologique*, *supra* note 38.

or the raw material of certain medications.[42] Thus, since in French, it is the term "*médicament* " that includes a [TRANSLATION] "[s]ubstance or composition that has curative or preventive properties with regard to illnesses or that can be administered for the purpose of establishing a medical diagnosis,"[43] and since the English term "drug" can also have this meaning, one might think that the only common meaning of "*drogue*" and "drug" would be that stated by the respondent, namely [TRANSLATION] "[i]ngredient, raw material used for medicinal preparations produced in the dispensary of a pharmacy".

[47] Next, I think it is useful as well to consider the definition of "drug" in the FDA, advocated by the appellants. Indeed, while dictionaries are an important source to consider, Pierre-André Côté discusses the possibility, when interpreting legislation, of using the definition that an Act provides for a term in order to understand its meaning in another Act.[44]

[48] We are thus faced with two legitimate sources that could be used to find the ordinary and grammatical sense of "drug" in paragraph 2(*a*). The modern rule of interpretation requires, however, that these two sources must be considered in a contextual analysis to determine which makes more sense. We will therefore look at which source is supported by the terms used in the context of paragraph 2(*a*).

[49] The example of paragraph 2(*d*) will help us in part understand the grammatical and ordinary meaning to be given to the term "drug" in paragraph 2(*a*). Paragraph 2(*d*) refers to "a drug that contains a substance included in the schedule to the *Narcotic Control Regulations*. . .". The Court therefore cannot see how it could give the word "drug" the restrictive meaning the respondent wishes to give it. Indeed, a drug is defined as a "raw material" as suggested by the respondent, how could it contain something else, such as a narcotic, as stated at paragraph 2(*d*)? A raw material is a substance entirely from nature or produced entirely by nature. Once you start integrating something else into it, it is no longer a [TRANSLATION] "naturally occurring material"[45] but is another product, a processed product. In that sense, the

---

42 *Supr*a note 38, found under the French term "*médicament*", for which the English equivalent given is "drug".

43 *Supr*a note 38, definition of "*médicament*".

44 *Supr*a note 23, page 342 et seq., under Subsection 1: Contextual Interpretation of Related Statutes (*in pari materia*).

45 A definition of the French term "*matière première*" may be found in *Le Petit Larousse illustré*, 2000, *s.v.* "*matière*". The complete definition is: "matériau d'origine naturelle qui est l'objet d'une transformation et d'une utilisation économique. (On distingue, communément, les matières premières agricoles [animales ou végétales], les matières

definition of "drug" as something that may contain a narcotic is that from the FDA.[46] Moreover, the same logic may apply to section 3 of Part 1 of Schedule VI, as this section deals with the "supply of a drug when the drug is for human use and is dispensed by a medical practitioner . . .". Under the respondent's definition, that section would apply to the supply of a "raw material used for medicinal preparations" when it is for human use. Under the appellants' definition, section 3 would apply instead to a mixture of substances sold as something that can be used to treat illness, that is, a drug within the meaning of the FDA. In my opinion, since the raw material is for use in producing a medication, it cannot at the same time be for human use. We should therefore prefer the definition of "drug" in the FDA in the case of section 3 of Part I of Schedule VI. Thus, considering the grammatical and ordinary sense of "drug" in paragraph 2(*a*) in light of its context and giving preference to a common meaning of "drug" within part I of Schedule VI, it would seem that the Court must favour the definition of "drug" found in the FDA, as suggested by the appellants, to the detriment of the "raw material" definition advocated by the respondent.

(B) Structure of the Act

[50] Paragraph 2(*a*) is found in of Part I of Schedule VI. The title of Part I of Schedule VI to the ETA is "Prescription Drugs and Biologicals" (in French: "Médicaments sur ordonnance et substances biologiques"). Pierre-André Côté states that the title of a part containing an ambiguous provision, as is the present case, is relevant when it comes to interpreting that provision.[47] Since the title of the part in question refers to prescription drugs and biologicals, it is logical to think that these two subjects will be dealt with in that part. As far as biologicals are concerned, we know that the reference thereto was added to the title because of the addition of

---

premières minérales et les matières premières énergétiques.)" ([TRANSLATION] "naturally occurring material that is subjected to processing and economic use. (They are generally classified as agricultural raw materials [animal or plant], mineral raw materials and energy raw materials,)"

46 The dictionary definition of "drug" when this term is the equivalent of "*médicament*" is to the same effect. The *Oxford English Dictionary* defines "drug" as follows:

> drug, *n.*
> **1. a.** An original, simple, medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament. Formerly used more widely to include all ingredients used in chemistry, pharmacy, dyeing, and the arts generally, as still in French.

47 *Supr*a note 23, page 56.

section 5 to the part in question.[48] As for the other sections of Part I, it can be deduced that the intent was to deal therein with prescription drugs. Since Parliament did not use the term "*médicament*" ("drug") anywhere in the French version of Part I, it can be assumed that other terms have that meaning. In our opinion, as the appellants have suggested by referring to the definitions of "*drogue*" and "drug" in the FDA, and the dictionary definitions of "drug", the word "*drogue*" as used in paragraph 2(*a*) means "*médicament*" ("drug"). This is a logical conclusion that would reconcile the French title of Part I with the content of that part. In English, the question does not really arise because "drug" can signify "medication" both according to its dictionary meanings and under the FDA.

[51] As indicated in paragraph 2(*a*), Schedules C or D to the FDA must be consulted to find out which of the drugs included are zero-rated. If we focus on Schedule D to the FDA, we can see that it came into being because of section 12 of the FDA. Section 12 is subject to the definitions found in section 2 of the FDA. Section 2 of the FDA defines drug. Section 12 of the FDA makes reference to Schedule D "drugs". These drugs must therefore be considered as having the meaning given in the FDA definition. As a result, there is no doubt that the Schedule D drugs are those that are defined in section 2 of the FDA. In this Court's opinion, Parliament could not have been unaware of this fact when it made the reference in paragraph 2(*a*) to Schedule D to the FDA. While the respondent's argument on this point is interesting, I do not believe either that the reference in paragraph 2(*a*) has the effect of severing Schedule D from the Act in which it is found, namely the FDA, and more specifically, from section 12 of the FDA. Schedule D, section 12 and the definition of "drug" in the FDA are so closely interconnected that, in this Court's opinion, if Parliament had wanted to cast aside the FDA definition of "drug" it would have done so explicitly so as to remove all doubt as to the possible meanings of that term. My understanding of Côté's comments with regard to a schedule having force of law only strengthens me in this conclusion.[49] Indeed, that Schedule D to the FDA is so named is a mere matter of form. Schedule D drugs could have been included in the body of the statute; the content of Schedule D has force of law, is mandatory and is defined restrictively; the intent is not simply to suggest drugs regulated by section 12 of the FDA. In this regard, it can be said that "A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part" (footnote omitted).[50] Thus, if

---

48 According to the explanatory note of Part I of Schedule VI dealing with *Bill C-112* (C.S. 1993, c. 27), "[t]he title of Part I of Schedule VI is amended following the addition of section 5 in this Part".

49 *Supr*a note 23, page 69 et seq.

50 *Supr*a note 23, page 69.

Schedule D to the FDA is part of that statute, it is directly subject to the definition of "drug" in the FDA since this definition applies to the entire FDA. We can therefore go directly from the definition of "drug" in the FDA to Schedule D without having to consult section 12 of the FDA.

[52] For all these reasons, it seems that, given the structure of the Act, the Court must give preference to the FDA definition of "drug" over the respondent's "raw material" definition.

C Purpose of the Act and Parliament's intention[51]

[53] In counsel for the respondent' submission it is not for this Court to consider the purpose of the Act or Parliament's intention in adopting paragraph 2(*a*). In this case, that argument cannot be accepted. In the first place, the only cases where a court has chosen not to consider the purpose of a statute and Parliament's intention are ones in which the statue was clear and the court felt that it was not its role to "create" legislation. In the second place, I have indicated how the statute in question here was not clear and why we must favour the modern rule of interpretation. In the third place, according to various judgments of the Supreme Court of Canada, even if a statute is clear, it is possible to look at the purpose of the statute and its context while observing the principle that where the statute is clear courts of justice must refrain from legislating.

[54] According to counsel for the appellants, we should adopt the premise that the products to be zero-rated must be usable products. Thus, Dr. Lepage indicated, for example, that monoclonal antibodies cannot be used in their pure state because they would stick to the interior of the container and would be of no use. The same can be said of blood, which, in its pure state would create problems related to coagulation. As for snake venom, counsel indicated that Parliament surely did not wish to zero-rate this product when just extracted from the snake's fang. That would clearly be overly restrictive considering the part in which paragraph 2(*a*) is found, namely that relating to health and drugs. As for the argument that in vitro diagnostic kits are covered by other parts of the ETA or the FDA, counsel for the appellants submits that Parliament could not have intended to zero-rate only a

---

51 "…if the enactment is not clear. Then it is perfectly proper to look at the general purpose and intent in order to choose among several possible meanings that which appears more consonant with the general intent." See in this regard P.-A. Côté, *supra* note 23, page 392, keeping in mind the statement by Pigeon J. in *The Queen v. Sommerville*, [1974] S.C.R. 387.

minimal proportion of diagnostic kits (namely, in vivo kits) when, as Dr. Lepage noted, the majority of the kits used are in vitro diagnostic kits.

[55] The explanatory notes to section 2 of Part I of Schedule VI may be useful in attempting to determine Parliament's intent. According to Pierre-André Côté, at a time when the Supreme Court is making increasing use of legislative debates in interpreting statutes, it is difficult to justify excluding the consideration of explanatory notes.[52] Proceeding in chronological order, here, first of all, is an explanatory note to Bill C-62:

> This section contains a listing of drugs to be unconditionally zero-rated at all levels of production and distribution. Paragraphs (a) to (d) enumerate drugs that may only be sold on prescription pursuant to the *Food and Drugs Act* and regulations thereunder and the *Narcotic Control Act* and regulations made thereunder. A number of non-prescription drugs used to treat life-threatening illnesses, enumerated in paragraph (e) of the section, are also zero-rated.[53]

This explanatory note thus indicates that paragraph 2(*a*) lists drugs that may only be sold by prescription pursuant to the FDA. As I understand it, in order to determine what these drugs are, we have no choice but to refer to the definition of drug in the FDA. This, in my opinion, is also the only suggested definition that is consistent with the notion of "drugs to be unconditionally zero-rated at all levels of production and distribution" because "drugs" within the meaning of the FDA can be produced, but the same cannot be said of raw materials.

[56] Here is another explanatory note, this one to Bill C-24:

> Section 2 of Part I of Schedule VI lists zero-rated supplies of a broad range of drugs that are regulated under federal legislation. This section is amended to update cross-references as a result of changes to the *Food and Drugs Act* and the *Narcotic Control Act* and regulations made under those Acts.
>
> Specifically, drugs formerly listed in Schedule G to the *Food and Drugs Act* are now found in the schedule to Part G of the *Food and Drug Regulations.* In addition, substances previously listed in the schedule to the *Narcotic Control Act* are now set out in the schedule to the *Narcotic Control Regulations*.
>
> In addition, amended paragraph 2(d) cross-references the *Controlled Drugs and Substances Act* instead of the *Narcotic Control Act* to reflect current federal drug regulation legislation.

---

52 *Supr*a note 23, page 435 et seq.

53 Explanatory note to Bill C-62 (S.C. 1990, c. 45): Federally-controlled drugs.

> These amendments are effective May 14, 1997, when the corresponding changes to the cross-referenced legislation came into effect.[54]

This explanatory note is interesting for its statement that section 2 of Part I of Schedule VI lists zero-rated supplies of a broad range of drugs that are regulated under federal legislation. Consequently, to establish which drugs are regulated under federal legislation, we must know what is meant by "drug" in that legislation. Given the reference to drugs covered by a specific federal statute such as the FDA, it seems logical to me to conclude that Parliament intended to give the word "drug" found in paragraph 2(*a*) the meaning the reference Act gives it, namely, the meaning that "drug" has in the FDA.

[57] In conclusion, the analysis of paragraph 2(*a*) using the modern rule of interpretation leads to the conclusion that we must accept the appellants' argument and give preference to the FDA definition of "drug". Applying the three branches of the modern rule of interpretation, namely the ordinary and grammatical meaning of the words (in their context), the scheme of the Act, and the purpose of the Act and Parliament's intent, the Court concludes that it is the suggestion of counsel for the appellants, namely, that we use the definition of "drug" from the FDA, that should be accepted. The reasoning is logical: in English, according to the usual dictionaries, the term "drug" can signify "medication" as well as "raw material essential to the production of a medication." In French, although, in the usual dictionaries, the term "*drogue*" is defined as a "raw material essential to the production of a medication," I am of the opinion that, considering the reasoning set out above, Parliament truly meant "medication" in paragraph 2(*a*) and not "raw material essential to the production of a medication." All these findings together lead me to believe that it is the definition of "drug" in the FDA that we should use.

[58] Moreover, a comparison of the definition of "*drogue*" in the FDA with the definitions of "drug" in its "medication" sense and the definitions of "*médicament*" encompasses this concept. So to summarize, the Court considers it appropriate to use the definition of "drug" from the FDA to interpret the same term found in paragraph 2(*a*) and will accordingly give that paragraph the meaning that results from this conclusion.

PART II – Are the products presented by the appellants "drugs" within the meaning of Schedule D to the FDA or are they "new products"?

---

54 Explanatory note to Bill C-24 (S.C. 2000, c. 30).

[59] The object of this second part of these reasons for judgment is to determine who, the appellants or the respondent, is correct, in whole or in part, regarding the issue of whether the products presented by the appellants are "drugs" within the meaning of Schedule D to the FDA or "new products". On the one hand, counsel for the appellants suggests an approach by category of product, as described in paragraph 19 of these reasons. He states that the FDA definition of "drug", which I adopted in the first part of these reasons for judgment, encompasses the category 1 and 2 products. He adds that even without this definition, *Cookie Florist*, *supra*, would lead to the same result. As for the category 3 products, counsel for the appellants argues that the FDA definition of "drug" applies in the same way as for category 1 and 2 products, but also takes in substances or mixtures of substances that are not Schedule D drugs because they are used solely for diagnosis. He adds as well that even without this conclusion, *O.A. Brown*, *supra*, among other cases, would produce an identical result. Counsel for the respondent, on the other hand, counters that there is a "new product" as soon as a substance that is not a Schedule D drug is included with such a drug. He refers in this regard to *W.T. Hawkins*, *supra*, among other cases.

[60] What I understand from paragraph 2(*a*) when the word "drug" is taken as defined in the FDA is that supplies of substances or mixtures of substances are zero-rated if they are used for diagnoses and if they are covered by Schedule D to the FDA. For the purposes of this analysis, I consider it more advisable to talk of mixtures of substances because Dr. Lepage confirmed that Schedule D drugs cannot be found in a container in their pure state.[55] The combination of the pure Schedule D drug and the other substances that must accompany it thus results in a mixture of substances. Moreover, there is no doubt that all the mixtures of substances found in the products presented by the appellants were for diagnostic purposes, whether they were covered by Schedule D or not. The issue is therefore whether what we have is a mixture of Schedule D substances. In my opinion, if the main substance of a mixture is a substance referred to in Schedule D to the FDA, then that mixture of substances will be considered a whole and, accordingly, as a zero-rated supply. As stated in *O.A. Brown*, *supra*, at paragraph 29 (QL), if the alleged separate supplies are interconnected with the zero-rated supply to such a degree that the extent of their interdependence is an integral part of the composite

---

[55] It might be interesting to ask whether a Schedule D drug that comes with the other substances that must accompany it is not just one substance instead of a mixture of substances, since these are necessary to the basic effect of the pure Schedule D drug. It is not necessary, however, to answer this question in the present case, because it would not have any impact on the rest of this judgment.

whole, they can be considered to be a zero-rated single supply. Thus, in the absence of statutory provisions to the contrary, a mixture of substances will be characterized according to its main substance for the purposes of paragraph 2(*a*). As a result, the supply of a mixture of substances, of which the main substance is from Schedule D to the FDA, is zero-rated.

[61] Category 1 and 2 products may consist of one or more containers. Each container creates a physical division inside the product, meaning that each container holds a mixture of substances. A product with several containers therefore has as many mixtures of substances as it has containers.

[62] For the category 1 and 2 products with only one container, we have a mixture of substances within the product. Dr. Lepage indicated that each of the products presented had a Schedule D drug as its essential drug. Thus, we can state with certainty that if a product with only a single mixture of substances has a Schedule D drug as its essential drug, the main substance of the mixture of substances will necessarily be this Schedule D drug. We could have come to the same conclusion by looking at the description of the categories of products. The other substances accompany the pure Schedule D drug or are attached thereto. Moreover, the value and importance of these other substances were stated to be minimal compared to the pure Schedule D drug. The only logical conclusion, therefore, is that these category 1 and 2 products in a single container are zero-rated because they are a mixture of substances, of which the main substance is from Schedule D to the FDA.

[63] For the category 1 and 2 products with many containers,[56] we have, in all, as many mixtures of substances as we have containers. I have said that each mixture of substances is to be categorized according to its main substance. It must therefore be determined whether we have a single or multiple supply according to the criteria set out in *O.A. Brown*, *supra*. At this point, it can be stated that if I find that there were multiple supplies, each mixture of substances in category 1 and 2 products with more than one container will be zero-rated. This is the same reasoning as for mixtures of substances in category 1 and 2 products having one container. However, if we have a single supply, it will have to be classified either as a Schedule D drug or as a "new product". It is then that we will know if the category 1 and 2 products having more than one container will be zero-rated or not.

---

[56] I am referring here to containers with various mixtures of substances. Double containers are not considered as more than one container.

[64] Furthermore, since we know that the category 3 products necessarily comprise at least two containers, they must also pass the *O.A. Brown* test.

[65] According to *O.A. Brown*, the first question to answer is: what was supplied in consideration of the payment?

[66] In *O.A. Brown*, the appellant purchased and sold livestock. The appellant fed, inoculated and branded the livestock for its own purposes, then resold it to its client, including in the price all costs and a 1% commission on the value of the livestock purchased. The appellant did not charge GST on these amounts or on insurance and transportation costs. Since the purchase of livestock is zero-rated, the Minister took the position that all the other costs related to the livestock and charged to the clients were taxable. The issue was thus whether the expenses other than for transportation and insurance represented separate supplies or were part of a single supply.

[67] Judge Rip of this Court stated the following at paragraphs 21 et seq.:

> 21 In deciding this issue, it is first necessary to decide what has been supplied as consideration for the payment made. It is then necessary to consider whether the overall supply comprises one or more than one supply. The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. The test was set out by the Value Added Tax Tribunal in the following fashion:
>
> > In our opinion, where the parties enter into a transaction involving a supply by one to another, the tax (if any) chargeable thereon falls to be determined by reference to the substance of the transaction, but the substance of the transaction is to be determined by reference to the real character of the arrangements into which the parties have entered.
>
> 22 One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive but is a factor that assists in determining the substance of the transaction. The position has been framed in the following terms:
>
> > What should constitute a single supply of services as opposed to two separate supplies, is not laid down in express terms by the value added tax enactments. It would therefore be wrong to attempt to propound a rigid and precise definition lacking statutory authority. One must, it seems to us, merely apply the statutory language, interpreting its terminology, so far as the ordinary

> meaning of the words allows, with the aim of making the statutory system of value added tax a practical workable system. For this purpose one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but for the reasons given above are not conclusive. Taking the nature, content and method of execution of the services, and all the circumstances, into consideration against the background of the value added tax system, particularly its methods of accounting for and payment of tax, if the services are found to be so interdependent and intertwined, so much integral parts or mere components or items of a composite whole, that they cannot sensibly be separated for value added tax purposes into separate supplies of services, then Parliament, in enacting the value added tax system, must be taken to have intended that they should be treated as a single system, otherwise, they should be regarded for value added tax purposes as separate supplies.
>
> 23 The fact that a separate charge is made for one constituent part of a compound supply does not alter the tax consequences of that element. Whether the tax is charged or not charged is governed by the nature of the supply. In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful article or service. For if it is not possible then it is a necessary conclusion that the supply is a compound supply which cannot be split up for tax purposes.

[68] The same reasoning has also been used in many other tax cases.[57] As Judge Rip stated, the first thing to be determined is what was supplied in consideration of the payment made. Judge Rip answered this question through a common-sense assessment of the facts.

[69] In my opinion, with regard to the products in this case, on a common-sense assessment of the facts, what was supplied in consideration of the payment made

---

[57] *Oxford Frozen Foods Limited v. The Queen* (1996), 4 GTC 3180 (T.C.C.) (single supply); *Club Med Sales Inc. v. The Queen* (1997), 5 GTC 1067 (T.C.C.) (single supply); *Winnipeg Livestock Sales Ltd. v. The Queen*, 1998 GTC 2224 (T.C.C.) (multiple supply); *Sterling Business Academy Inc. v. The Queen*, 1999 GTC 3038 (T.C.C.) (single supply); *Hidden Valley Golf Resort Association v. The Queen*, 2000 GTC 4104 (F.C.A.) (single supply); *Municipality of Lorrainville v. Canada*, [2003] T.C.J. No. 705 (QL), 2004 GTC 79 (Fr.) (T.C.C.) (multiple supply); *Canada Trustco Mortgage Company v. The Queen*, [2005] GTC 697 (T.C.C.) (single supply).

was the container, whose mixture of substances was characterized as the essential Schedule D drug used to establish a precise diagnosis.

[70] Dr. Lepage's testimony indicated that the appellants included all the products that contained Schedule D drugs that were essential for establishing a diagnosis (as opposed to products that were used solely for a secondary reaction) (s.n., Volume 1, p. 105). These can be found under the heading "Description" in the summary of the appellants' data sheets (Exhibit A-3). Where there was a single container with a Schedule D drug used in a main reaction, for example product 32 described in Exhibit A-3, it was easy for Dr. Lepage to confirm that it was the essential drug in the product, which he classified under the heading [TRANSLATION] "Schedule D" in Exhibit A-3. He was able to come to this conclusion by judging the role of the containers in the diagnosis (main or secondary role).

[71] The situation becomes somewhat complicated where there are two containers each with a Schedule D drug used in a main reaction, for example product 23. In that case, if there were two Schedule D drugs that were different, here monoclonal antibodies and polyclonal antibodies (that are direct derivatives of blood), Dr. Lepage decided on the basis of certain criteria which of the two was the essential drug. For example, the monoclonal antibodies have priority over the polyclonals because of their specificity, their cost and the complexity of their preparation (Dr. Lepage's report, Exhibit A-4; s.n., Volume 1, p. 114, 166 and 167). It can thus be seen that Dr. Lepage took his reasoning a bit further and determined which drug was essential for diagnosis. Since he could only consider the role of the Schedule D drugs in determining which was essential to diagnosis, he looked at the categories of Schedule D drugs to see which appeared to him to be more important.

[72] The situation is even more complicated where there are two containers each with a Schedule D drug that is used in a main reaction, when these drugs are in the same category, as is the case with product 50 (two monoclonal antibodies). In my opinion, one need only go one step further, as Dr. Lepage did, and examine the importance of each mixture of substances in order to determine which contains the Schedule D drug that is essential for diagnosis. To that end, we could use the same criteria of specificity, cost and complexity that Dr. Lepage used in determining which category of drug should take precedence over another. That said, it is not necessary to determine for the product 50 example which of the two containers

holds the Schedule D drug that is essential for diagnosis; we know that it is one of the two, and that is enough to decide the present case.[58]

[73] So what did the suppliers provide to the hospitals in exchange for the payment made by the hospitals? The only logical answer to this question posed in another way is that the suppliers provided a container with an essential Schedule D drug used to establish a precise diagnosis. It may well be that some of the containers are more complete because they come with other containers, making life easier for everyone, but the raison d'être of the transaction[59] between the suppliers and the hospitals is the purchase of a container with the essential Schedule D drug to be used to make a precise diagnosis. Product 31 (Exhibit A-3) is an eloquent example of this. It is a container of monoclonal antibodies labelled with an acridinium ester (classified as the essential Schedule D drug used to establish a precise diagnosis) and a solution of [TRANSLATION] "paramagnetic particles coupled to T3". The container of antibodies is surely the raison d'être of the purchase because it is what carries out the entire main reaction of the diagnosis. The solution of particles only serves to reveal the result of the diagnosis that has already been performed. The solution of particles is therefore only incidental. It is the antibodies that one wants to purchase because they are of interest by virtue of their value, specificity and complexity and the role they play in the diagnosis.

[74] Having answered the first question in *O.A. Brown*, *supra*, it must now be determined whether the containers that accompany the container with the essential Schedule D drug used to establish a precise diagnosis are separate supplies (multiple supply) or are an integral part of that container (single supply).

[75] For category 3 products, and those from categories 1 and 2 having more than one container, since certain containers in these products could be considered as separate supplies, it is useful to apply the previously mentioned criteria from *O.A. Brown*. The Court is dealing essentially with two types of products having more than one container of substances. The first type of product is the "plastic block" used with the machines. The second type is the product with the well strips used for ELISA tests, done without machines. As regards these two types of products, I consider the arguments made by counsel for the appellants to be correct; these are set out in paragraphs 22 and 23 of these reasons.

---

58 Moreover, I am unable to make such a precise determination on the basis of the documents, information and expertise the Court has at its disposal.

59 *Supra*, notes 15 and 17.

[76] The various containers which the "plastic block" comprises cannot realistically be left out of the overall supply of the product. Indeed, the machines are specifically configured to accept exactly all the containers of the "plastic block". The containers are therefore necessarily part of a whole. Moreover, it is impossible to acquire each of the various containers separately and still receive useful service with respect to the operation in question, since the containers come in a "plastic block" and cannot be purchased separately (s.n., Volume 3, p. 51). The interdependence of the various containers is also very important since each is adjusted in relation to the others and is necessary to satisfactorily complete the operation in question, namely, the process of making a diagnosis. The essence and reality of things is such that we have no choice but to consider the "plastic block" type of products as a single supply under *O.A. Brown*.

[77] As for the second type of product, the type with well strips used for ELISA tests, which is used without machines, none of the various containers can be omitted from the overall supply of the product. Indeed, all the containers in this type of product are necessary to carry out a complete and safe diagnostic test. The containers are therefore necessarily part of a complete whole. Such is the completeness of the whole that each container has the specific quantity of substance required to carry out a specific number of tests. Moreover, it is impossible to acquire each of the various containers separately and to still receive useful service with respect to the operation in question, because the containers are all calibrated in relation to each other so that a reliable diagnosis may be made. Although hypothetically, some containers could be purchased separately, the service received by so doing would not be useful because the hospitals would have to calibrate their various individual purchases using their own means. It was stated that the hospitals did not have the time or the resources to do so. As for the interdependence of the various containers, the situation is analogous to that of the "plastic block". Accordingly, the essence and reality of things is such that I consider the products with well strips used for ELISA tests to be single supplies under *O.A. Brown*.

[78] I therefore conclude that, in the case of the category 3 products and of those from categories 1 and 2 with more than one container, there is a single supply, and the containers that could have been considered as separate are an integral part of that which was supplied in consideration of the payment, namely, the container with the essential Schedule D drug used to make a precise diagnosis. The category 3 products and the products from categories 1 and 2 with more than one container are therefore considered Schedule D drugs and are consequently zero-rated. The same is true of the products from categories 1 and 2 having one container.

[79] Counsel for the respondent states, however, that although there is a single supply in the case of all the products the appellants presented, what we have ultimately is not a Schedule D drug but a different product, another product, a "new product", and this is so as soon as a substance that is not a Schedule D drug accompanies that drug. There are some judgments supporting his argument.

[80] The first case cited by counsel for the respondent is *W.T. Hawkins*, *supra*, which involved a product called "Magic-Pop". This product contained three ingredients, corn kernels, salt and shortening. The three ingredients were zero-rated when taken individually. Here are the relevant excerpts showing the judge's analysis in determining whether the product should be taxed or not:

> . . . The basic question is therefore – what is being sold? If it is salt that is being sold, the article is exempt from tax as salt is named in the schedule. The same result, of course, follows if shortening is sold or if grains and seeds in their natural state are sold.
>
> In this case, it cannot be said that the appellant was selling salt or that it was selling shortening, or that it was selling popping corn. What it sold was a single article composed of three ingredients in carefully selected proportions and to which it had given the name "Magic-Pop". It was an entirely new product differing in appearance, form and function from those of the three original ingredients. . . .
>
> In my opinion, the appellant was producing an entirely new article – an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn – in effect a "ready-mix" article. . . .
>
> Finally, it is submitted that the article sold by the appellant is popping corn – a grain or seed in its natural state. I cannot think that such is the case. If I attended at a store to purchase popping corn, I would expect to receive popping corn alone and not such an article as Exhibit 1-A – a slab of shortening filled with popping corn and with salt added.[60]

What I take from that judgment is that the judge determined there was an "entirely new product" differing in appearance, form and function from each of its three ingredients. The "new product" therefore had to be taxed because there was no statutory provision to the contrary.

---

60 *Supra* note 26, paras. 12-14 and 16.

[81] Applying the criteria used by that judge to the facts in this case, I cannot see how we could have a "new product" differing in appearance, form and function from each of the containers of the product. First, the appearance, form and function of each container are preserved even when they are sold together. Nothing changes; each container remains distinct and independent within the whole. The containers therefore retain their characteristics and the whole is merely a reflection of these. In my opinion, we are thus very far from a "ready-mix article". Moreover, I believe that here, unlike the situation depicted in the last paragraph of the above-cited passage from *W.T Hawkins*, a person ordering a container with an essential Schedule D drug used to make a precise diagnosis could expect to receive a container such as those listed in evidence, given the complexity of the methods of analysis and the fact that there are certain constraints to work within (machine, time, resources, etc.).

CONCLUSION

[82] For these reasons, with respect to the products listed in Schedule A to these reasons, whether under the heading "Classification by category" or "Classification by number of containers", which products correspond to the numbers attributed to them in Exhibit A-3, I would allow the appeals and refer the assessments back to the Minister for reconsideration and reassessment on the basis that all these products, with the exception of products 120, 127, 128, 138, 139, 360, 366, 383, 409, 586, 651, 652 and 704, which were eliminated by Dr. Lepage, are zero-rated supplies within the meaning of paragraph 2(*a*) of Part I of Schedule VI to the ETA.

[83] There will be one set of costs to the seven appellants against the respondent.

Signed at Ottawa, Canada, this 20th day of July 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 30th day of November 2007.

Erich Klein, Revisor

SCHEDULE A

Results of the classification of the products presented by the appellants in Exhibits A-3 and A-2

Classification by category:

Category 1: 1-22, 101, 167, 180, 185-223, 228, 229, 247, 254, 326-329, 344, 346, 348, 349, 351, 352, 354, 355, 358, 359, 362, 363, 365, 367, 369-371, 373, 374, 377-379, 384-408, 410-567, 569-581, 583-585, 587-592, 596-598, 601-609, 611, 615-619, 640, 642-650, 653, 655, 656, 684, 746, 747, 761-764, 769-773, 778, 807-816, 818-827, 835-839, 844, 849-851, 854, 856, 857, 859, 860.

Category 2: 23-28, 37-44, 47-52, 54, 57-58, 83, 104-107, 111, 140-150, 153, 155, 158, 160, 170, 226, 238-240, 245, 246, 252, 253, 325, 335, 337-340, 582, 593-595, 600, 610, 612, 614, 621, 659, 735, 736, 751-760, 765, 766, 775, 781,

Category 3: 29-36, 45, 46, 53, 55, 56, 59-82, 84-100, 102, 103, 108-110, 112-119, 121-126, 129-137, 151, 152, 154, 156, 157, 159, 161-166, 168, 169, 171-179, 181-184, 224, 225, 227, 230-237, 241-244, 248-251, 255-324, 330-334, 336, 341-343, 345, 347, 350, 353, 356, 357, 361, 364, 368, 372, 375, 376, 380-382, 568, 599, 613, 620, 622-639, 641, 654, 657, 658, 660-683, 685-703, 705-734, 737-745, 748-750, 767, 768, 774, 776, 777, 779, 780, 782-806, 817, 828-834, 840-843, 845-848, 852, 853, 855, 858, 861, 862.

Classification by number of containers:

One container: 1-22, 101, 140-150, 153, 167, 180, 185-216, 221-223, 226, 228, 229, 240, 246, 254, 325-329, 346, 348, 349, 351, 352, 354, 355, 358, 359, 362, 363, 365, 367, 370, 371, 373, 374, 377-379, 384-408, 410-566, 569-581, 583-585, 587-592, 594-598, 600, 602-609, 611, 615-619, 621, 640, 642-650, 653, 655, 656, 735, 736, 746, 747, 751-766, 769, 772, 773, 775, 778, 807-816, 818-827, 835-839, 849-851, 854, 856, 857, 860.

More than one container: 23-100, 102-119, 121-126, 129-137, 151, 152, 154-166, 168-179, 181-184, 217-220, 224, 225, 227, 230-239, 241-245, 247-253, 255-324, 330-345, 347, 350, 353, 356, 357, 361, 364, 368, 369, 372, 375, 376, 380-382, 567, 568, 582, 593, 599, 601, 610, 612-614, 620, 622-639, 641, 654, 657-703, 705-734, 737-745, 748-750, 767, 768, 770, 771, 774, 776, 777, 779-806, 817, 828-834, 840-848, 852, 853, 855, 858, 859, 861, 862.

CITATION:	2007TCC425
COURT FILE NOS.:	2004-3308(GST)G, 2004-3309(GST)G, 2004-3310(GST)G, 2004-3721(GST)G, 2004-3722(GST)G, 2004-3724(GST)G et 2005-3168(GST)G
STYLE OF CAUSE:	CENTRE HOSPITALIER DE L'UNIVERSITÉ DE MONTRÉAL, CAMPUS HÔTEL-DIEU DE MONTRÉAL, CENTRE HOSPITALIER LE GARDEUR, HÔTEL-DIEU DE ST-JÉRÔME, CITÉ DE LA SANTÉ DE LAVAL, COMPLEXE HOSPITALIER DE LA SAGAMIE, CENTRE HOSPITALIER AFFILIÉ UNIVERSITAIRE DE QUÉBEC and CENTRE HOSPITALIER RÉGIONAL DE RIMOUSKI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	July 11, 12 and 13, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	July 20, 2007

APPEARANCES:

Counsel for the Appellants:	Claude Nadeau
Counsel for the Respondent:	Benoît Denis

COUNSEL OF RECORD:

For the Appellants:	
Name:	Claude Nadeau
Firm:	Laflamme Nadeau Montreal, Quebec
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada