Docket: 2003-4140(GST)G

BETWEEN:

TRIPLE G. CORPORATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 6, 2007, at Edmonton, Alberta.

Before: The Honourable Justice T. E. Margeson

Appearances:

Counsel for the Appellant:	Gordon D. Beck
Counsel for the Respondent:	Marta E. Burns

JUDGMENT

The appeal from reassessments made under Part IX of the *Excise Tax Act*, for the period between August 1, 1999 and July 31, 2002, notices of which were numbered 10BT119047413, 10BT-119147421 and 10BT-GL0322-5124-9216 is dismissed, with costs to the Respondent to be taxed.

Signed at New Glasgow, Nova Scotia, this 24th day of April 2008.

"T. E. Margeson"

Margeson J.

Citation: 2008TCC181
Date: 20080424
Docket: 2003-4140(GST)G

BETWEEN:

TRIPLE G. CORPORATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] This is an appeal from assessments of the Minister against the Appellant, notices of which were numbered 10BT119047413, 10BT-119147421 and 10BT-GL0322-5124-9216 ("three reassessments").

[2] By these three reassessments the Minister assessed the Appellant for tax collected/collectable on its supplies of custom meat cutting for the relevant period, between August 1, 1999 and July 31, 2002 pursuant to subsections 221(1), 225(1), and sections 228 and 296 of the *Excise Tax Act* ("*Act*").

ISSUES:

[3] Counsel for both parties agreed that the issue before the Court is whether or not the Appellant made a single supply for a single consideration or whether or not the Appellant made a supply of a basic food item, hence zero rated good and consequently non-taxable.

[4] Jason Gitzel testified that he was one of the owners of the Appellant, Triple G. Corporation Inc.

[5] The Appellant operates a full-service butcher shop, including a restaurant and deli. It sells frozen foods, fresh meats and also does custom cutting of meats. The Appellant was so engaged during the relevant period of time.

[6] Custom cutting is when a farmer or hunter brings an animal to the Appellant, they break it down, cut and wrap it and make it into a form that the owner can use at home such as sausages, hamburger, steaks, roasts and jerky. The carcases of the various animals such as beef, pork, deer, moose, elk and bear are brought in by the various hunters and farmers to the Appellant's premises. These patrons include owners of both domestic animals and wildlife.

[7] When a hunter comes into the business, he arrives at the shipping door and fills out a form that requires him to advise the Appellant as to his VIN number, his address and his tag number on the animal. He is given a number from the Appellant to identify the delivery. Hunters give instructions as to how they want the product cut and wrapped and as to the final form of the product.

[8] The animal is off-loaded at the receiving area, marked with a number supplied by the Appellant and is placed in the Appellant's cooler. When that number comes up for cutting, the Appellant's butchers bring the animal out, cut it into the desired product according to the instructions they received earlier and wrap it in accordance with those instructions. The product is then frozen, a bill is made up and the owner is called and advised that the product is ready for picking up.

[9] The witness identified Exhibit A-1 which was the form supplied to and completed by the customer at the time of the delivery of their animal. Both domestic and wild game are received and cut up in the same manner except that the domestic product is cut up first. When the Appellant is making value-added products, such as sausage, they add one-third pork to the products as well as their spices and sausage casing. Pork is added to the wild product because it tends to be dryer. The value-added product is provided by the Appellant. The end product is either brown wrapped or vac-sealed, depending on the customer's preference. Normally it would be frozen when finished.

[10] Due to the nature of the meat, wild meat being uninspected and the domestic meat being inspected, they are kept in separate coolers. The purpose for this is so that the cutting tables do not get contaminated from the uninspected meat. At the front of the store there is a sign posted which advises the public that the Appellant is not allowed to sell uninspected meat in Alberta. These rules are imposed by the

Canadian Food Inspection Agency. The establishment is inspected by Capital Health, which is a local office in Stoney Plane.

[11] The Appellant charges for the custom cutting on the basis of price per pound. The witness explained that the "VIN number" refers to a wildlife identification number that every hunter must possess which entitles him to buy tags to hunt wildlife every year.

[12] There was a further term, "Treaty/Métis number", which is a number provided to the Native population who do not require a VIN number but they do require a Band number or Treaty number when they are bringing wildlife in to the Appellant.

[13] There is no inspection of the carcass by any provincial or federal officer. This also applies to those who bring in domestic animals for cutting. If any animal is considered to be spoiled, the Appellant will refuse to receive it. Sometimes this identification does not take place until after they have commenced to cut it. If spoiled meat is found, it will be thrown away. It is the responsibility of the hunters to ensure that their animal is not spoiled. If it is spoiled, they can receive a fine.

[14] This witness indicated that, in his estimation, the carcass would be owned by the hunter.

[15] The Appellant never purchased carcasses. Sometimes a person other than the owner of the animal will bring it in to the Appellant for custom cutting. In order to do that, he has to have a letter giving him permission to transport the animal to the Appellant's facility. Sometimes this is a form letter provided by wildlife officers and sometimes it is a letter written by the owner of the animal simply stating that the person bearing the carcass can deliver it to the facility. This Exhibit was received as A-2.

[16] Other animals might be brought to the Appellant's premises by the hunter, natives or wildlife officials. Any cross-checking that is done with respect to ownership of a carcass is when the worker's match the tag number on the animal to the VIN number. The tags usually contain the person's name.

[17] In cross-examination, the witness indicated that the Appellant cuts and processes domestic animals for itself and that they can resell them. The animals are treated in the same manner as other custom cutting. The only difference is that all

domestic product is inspected before it is slaughtered as well as after it is slaughtered. The Appellant is not a slaughtering facility.

[18] He confirmed that the Appellant processes both the inspected and uninspected meat. Further, the non-inspected meat cannot be resold by them. Inspected meat has stamps and tags on it from the slaughter house. Inspected meat is marked by the Appellant with its own tags.

[19] Once the meat is cut and wrapped it still has to be identified as "uninspected". Further, there is a sign at the entrance of the premise that says: "The sale of uninspected meat is prohibited in Alberta. Uninspected meat is processed on these premises for the owner of the animal."

[20] When the carcass of the animal is brought into the Appellant, it is weighed and priced accordingly. With respect to the jerky and the sausages and the like, there is an extra or additional processing charge. At the end of the process a bill is produced which outlines the poundage at the beginning plus the extra processing charges.

[21] In redirect he said that the bill presented to the customer is one sheet and lists everything that the Appellant does from the cutting and wrapping to the types of different sausages they make, including the pork or beef that they add, and a poundage amount goes in each one of those categories that they use. The amount is then totalled at the bottom and says "plus GST". The witness admitted that this term was added after they had been assessed.

[22] Before July 31, 2002, the Appellant used the same format for the billing except it had no reference to GST on it.

[23] After the Court asked several questions the witness was redirected to an earlier issue with respect to the higher cost of domestic meat. The witness clarified that he was talking about domestic meat which was for sale in the front of their shop. What he was saying was that the charges for cutting and wrapping wild meat were greater because it was dirtier and therefore justified a marginally higher amount paid for the processing of it as opposed to a domestic animal.

ARGUMENT ON BEHALF OF THE APPELLANT

[24] Counsel for the Appellant took the position that this is the first opportunity this Court has to determine the issue whether, for want of a better description, a

food processor like the Appellant is to be regarded as making a supply of a good or a service. He considered this to be an important and precedent-setting appeal. He opined that this was not the first occasion whereby this Court was being asked to categorize a supply that arguably has various dimensions and represents a mixed supply of a number of constituent elements, some of which might have different GST treatment than others.

[25] He said that this case is not all fours with any of the other cases that have been decided such as those with respect to frozen blueberries, carrots, cattle and feedlots, elk hunting ranches or taxidermy. This case is distinguishable from all of those. None of the issues in those cases considered were as fundamental to the basic structure of the GST as the issue before this Court in this appeal, namely, whether the work product of the Appellant should be tax free because it is food or whether it should bear tax because it is more properly regarded as merely a service.

[26] Counsel's position was that there are only two relevant legislative positions that are applicable to this case and those are section 1, part 3, Schedule 6 to the *Act* and section 138 of the *Act*.

[27] Section 1 of part 3 of Schedule 6 to the *Act* zero rates the supply of food or beverages for human consumption. There are a dozen or so exceptions that do not apply to this case. Section 138 is a deeming provision, and it deems that where there is a bundle of separate supplies that are bundled together and made available for a single consideration, the so-called incidental supplies that are part of the bundle are deemed to be part of the primary or main supply being made. The most important consideration in deciding whether section 1, part 3 of Schedule 6 applies is the tax policy underlying that provision. That policy is that "food should not be taxed."

[28] He said that the approach of this Court regarding section 138 has been to first consider whether a supply is in fact properly characterized as a number of separate supplies or whether it is more properly regarded to be a single supply that just happens to have constituent elements.

[29] It was suggested that the evidence in this matter is relatively simple and uncontentious.

[30] Mr. Gitzel's testimony described the process of custom cutting a carcass, whether it is a wildlife carcass or a domestic animal. In both cases, the end product is edible meat. The witness indicated that there was no substantive difference, that

the same methodologies were employed using the same equipment and the inspected and uninspected meat would be essentially indistinguishable except to someone with Mr. Gitzel's expertise.

[31] However, the consideration that the Appellant charges for custom cutting for the sale of domestic meat products, either uninspected or inspected, is determined essentially that same way: by the pound. Mr. Gitzel regarded the carcass, an uninspected wildlife carcass that is brought into the Appellant's facility, to belong to the hunter whose tag is affixed to the carcass. He believed that the hunter is prohibited from making a sale of that carcass to anybody, including the Appellant.

[32] He did state that there were occasions where someone other than a hunter that had killed a wildlife animal would actually have possession of the carcass and deliver it to the Appellant but he had to have a document signed by a hunter to give the authority to that person to bring the carcass into the Appellant's facility. He agreed that the owner of that carcass would be the hunter and not the party who delivered it.

[33] The processes for determining the consideration that the Appellant realizes is the same in both cases. The only distinguishing factor was the ownership of the carcass undergoing the processing. This factor was the one that has prompted the Respondent to issue the reassessment that is the subject matter of the appeal. Meat is an item of zero rated food according to section 1, part 3 of schedule 6 and that would necessitate that the Appellant be the owner of it. If he is the owner of it then indisputably it would be food. That concept of ownership of dead wildlife is really, wholly a function of provincial hunting and meat inspection or food safety legislation. That framework of legislation might accommodate a conclusion that there is a transfer of ownership of the carcass to the Appellant.

[34] The Appellant also put forth the proposition that the facts in this case demonstrate certain aspects of ownership of a wildlife carcass, especially if the concept of ownership might be regarded to transcend, to some degree, the statutory framework arising from the provincial wildlife meat inspection legislation.

[35] The third proposition put forward by counsel for the Appellant was that the starting point in ownership of a food item has to be established in order to make a determination whether section 1, part 3 of Schedule 6 of the *Act* applies. It does not necessarily flow from the wording of that section.

[36] With respect to the first proposition, ownership of wildlife is essentially a creature of provincial statute primarily governing hunting and food safety and is therefore potentially of limited relevance in deciding this appeal.

[37] He used the scenario whereby the Appellant would acquire a carcass from a hunter for a nominal amount, say $1. The Appellant would then perform the exact same process of custom cutting of the carcass as the Appellant here performs, the Appellant would then sell the final product back to the hunter for the same consideration as the Appellant currently charges, possibly for $1 or more to recover the cost of having acquired the carcass. In this scenario, there would be nothing to distinguish the process that the Appellant employs in performing custom cutting from the process the Appellant employs in the normal course of cutting and processing an inspected domestic animal and selling the final product. In this scenario there would be no basis for the Respondent to have reassessed the Appellant.

[38] He put forward the proposition that since there is no evidence that the Appellant is in breach of any federal or provincial statute with respect to the handling of the carcass and the regulations there under that the hunters who bring carcasses to the Appellant for custom cutting may not in fact be prohibited from transporting wildlife so as to offend section 62 of the provincial statute or regulations there under. This then leaves it open for the Court to determine that ownership of a carcass is conveyed to the Appellant in the course of the process of custom cutting, that the consideration for this conveyance is simply part of the price determined by the Appellant for the meat products that are delivered back at the end of the custom cutting process and that if the Court were to come to this conclusion, it would not necessarily cause the Appellant or the hunter to be in breach of the provincial statute.

[39] Regardless of whether the express purchase of a moose, elk or deer carcass by the Appellant for a nominal amount would be in breach of provincial statute, it should be observed that the GST status of what the Appellant does would change simply by virtue of the Appellant handing a loonie to every hunter that brings in a carcass. However, that is the ultimate manifestation of the Respondent’s position here, that food is not food unless the vendor owns all the constituent parts, including a constituent part that is essentially worthless.

[40] With respect to the second proposition, that if ownership of all constituent elements is an important determinant of whether a supply is a supply of food or is a

supply of a service, there was some evidence that the Appellant does display certain indicia of ownership in the carcass which is the subject of custom cutting.

[41] If the Appellant possessed the carcass and also completely transformed it, he must be regarded as achieving some degree of ownership, to the extent that ownership is a function of possession.

[42] The carcass undergoes conversion at the hands of the Appellant, such that it is no longer accurate to regard it to be the same property at the completion of the process as it was at the start. Can the hunter still be regarded as the owner of the converted carcass?

[43] Counsel appeared to be suggesting that where the Appellant was not able to comply 100% with the instructions given by the owner of the carcass due to spoilage, or some other fact, this might amount to conversion. Presumably then it is open for this Court to say whoever might have been the owner of the good at the start does not necessarily need to be considered to be the owner of the good at the end of it, that is the converted good at the end of it.

[44] The ultimate argument was that to the extent the Court accepted that there was a conversion of a carcass that occurs in the course of its processing by the Appellant, then the Court must conclude that the conversion that takes place gives the Appellant some claim of ownership in the converted goods and that this conclusion, would demolish the foundation of the Respondent's position, that the supply in question is a mere service and not a supply of a good.

[45] The third proposition of the Appellant was that even if he conceded that the only person who has any indicia of ownership whatsoever in the animal is somebody other than the Appellant, even if he conceded that the Appellant does not demonstrate any indicia of ownership, that does not necessarily mean that the Appellant cannot be regarded as supplying food.

[46] This comes about because of the Respondent's position that food is wholly a good and therefore property, and a person with no ownership in that property cannot make a supply of it. This is not at all self-evident from the wording of section 1, part 3 of Schedule 6. The section merely says that food for human consumption is zero rated. There is nothing at all about who owns the food. Certainly it says nothing at all about there being a requirement that a person own all of the constituent elements that are incorporated into a food product in order for him to be considered to be making a sale of food. To accept the Respondent's

position is to require that words be read into subsection 1 when there is no necessity to do so.

[47] Although section 1 applies to supplies made by the Appellant, the matter can be quite properly resolved by simply answering the question, is the hunter getting food from the Appellant? The answer is yes. “There is nothing in section 1 of part 3 of Schedule 6 that requires us to go any further, that requires us to analyze the provincial and federal statutes and regulations and consider the laws of bailment or conversion or trust or agency and essentially twist ourselves into a semantic pretzel.”

[48] The final submission was that what the hunter receives back at the end of the custom cutting process is fundamentally different than what the hunter provided at the start of it. In fact what the Appellant does is to subject the dead animal to the custom cutting which is a process that transforms that item into food for the purposes of section 1 of part 3 of Schedule 6. Further, there are some items that are contributed to the product by the Appellant itself.

[49] Counsel disagreed with the position that the Respondent took that you cannot regard the final product, edible as it might be, as being a saleable food product, unless somebody is demonstrably the owner of all of the constituent elements. There will be scenarios where an item is sold by somebody who does not happen to be the owner of it, and that does not change the fact that it is food.

[50] Counsel’s position was that what was delivered to the Appellant was not food at the outset. It was food when it was handed back to the owner.

[51] The question becomes, does what was handed back to the owner by the Appellant amount to the provision of food?

[52] He took the position that section 138 does not apply in this situation. This section deals with mixed supplies. It provides that where several supplies are bundled together and sold for a single consideration, the supplies that are incidental to the main supply are deemed to be part of the main supply. In the present case, the supply in question represents a single supply with several constituent elements rather than a multiple supply consisting of several distinct supplies that are bundled up and sold for a single consideration. He referred to the following cases:

- *O.A. Brown Limited v. Canada*, [1995] T.C.J. No. 678;

- *Great Canadian Trophy Hunts Inc. v. R.*, 2005 TCC 612;

- *Oxford Frozen Foods Limited v. Canada*, CarswellNat 2976 (sup nom), [1996] T.C.J. No. 1222; and

- *Robertson v. R.*, 2002 CarswellNat 186

[53] Each of these cases involved the consideration of whether the supply was a single supply with constituent elements, and if so, what was the proper GST treatment. The same issue is common to this appeal. Is the Appellant to be regarded as making a single supply? The Appellant is not just doing the activity of custom cutting, but he is adding some elements to that product in the form of pork, the spices, the casing and the packaging. If it is concluded that the Appellant here is making a single supply, notwithstanding those constituent elements, what is the proper GST treatment of the supply?

[54] In *O.A. Brown, supra*, the Court ruled that there was a single, not a multiple supply being made by O.A. Brown, and it was the supply of livestock, which again, was zero rated.

[55] In *Oxford Frozen Foods Limited*, *supra*, Justice Tesky decided that Oxford Frozen Foods was making a single supply, other than the fact that there was a separate charge calculated for the itemized constituent elements.

[56] In *Great Canadian Trophy Hunts Inc. v. R.*, the issue was whether or not they were dealing with a mixed supply or a single supply. The Court concluded that it is not necessary to make a determination as to whether there was a single or mixed supply because it concluded that there was an overriding provision, section 163 of the *Excise Tax Act*, that essentially deemed there to be separate elements notwithstanding that there was a single consideration.

[57] In *Robertson v. R.*, *supra*, the Court decided that there was a single supply and that the taxidermy services provided by the Appellant were for a single consideration and that the materials were only incidental to the provision of the main service. It found it to be a single supply of taxidermy services and it was unnecessary to consider the application of section 138.

[58] Counsel for the Respondent invited the Court to come to a different conclusion than it did in *Robertson v. R.*, *supra*, although openly admitting it to have strikingly similar facts, as he put it. He said that this Court should find that

there were sufficiently different facts to enable this Court to reach a different conclusion than it did there.

[59] One of those differences was the degree of talent displayed by Mr. Robertson in comparison to the degree of talent displayed by the Appellant here. The employees of the Appellant here were involved in the performance of custom cutting. Mr. Robertson could be regarded as an artist, and accordingly, that favours the characterization of the supply that he made as being the services of an artist, not unlike the services of a painter commissioned to create a painting by a customer. In spite of the fact that the workers for the Appellant here might take a great deal of pride in their work, they are not in the same category as the taxidermists, as in *Robertson*.

[60] The point of difference suggested by counsel for the Appellant was that in *Robertson v. R., supra,* it was accepted that "the value of the trophy was derived principally from the wildlife part …".That is not the case here.

[61] A third significant distinction according to counsel for the Appellant was the degree to which the property of the hunter was transformed in the course of processing by the Appellant. In the case at bar, nobody giving a carcass to the Appellant expects to receive back the property in the same condition as it was when it was handed over to the Appellant. That is where the conversion takes place and brings into question whether the hunter is receiving back the same property as he turned over.

[62] Counsel referred to David Sherman's comments on the *Robertson v. R, supra*, case and concluded that the person that processes a good so as to transform it into something different can thereafter be regarded as supplying a separate good for sales tax purposes and this is not a revolutionary concept.

[63] He raised the question as to when property becomes food. If the conclusion is that the property became food at some point during the custom cutting process, then it can not be said that the hunter bringing in the carcass is receiving back from the Appellant the same property as he brought in.

[64] A Fortiori, and in the present case, the actions of the Appellant result in the creation of a completely new product such that as, in using the words of Mr. Sherman, one could certainly say that the pre-existing carcass was incorporated into the new product.

[65] He referred to what he called “the broad context of the Court’s decision” in both *Robertson* and in the present case. In *Robertson v. R.*, *supra*, one potential consequence of the decision, according to him, was to subject non-resident hunters to GST and taxidermy services which might well have the result of curtailing the number of American hunters coming to Canada. He opined that he characterizes the broad context of the decision in the present case to be whether or not food should be taxed. A decision in favour of the Respondent in this appeal would result in the taxation of a subsistence food source according to him.

[66] Mr. Gitzel testified that in his estimation a considerable number of the Appellant’s custom cutting customers are subsistence hunters. A number of customers are First Nation’s persons. It was his understanding that a First Nation’s person could only hunt for subsistence. He submitted that widely held views – views of Canadians back in 1987 and 1989 has not changed in the last 20 years and the general principal therefore remains that basic food stuff should not be taxed.

[67] The appeal should be allowed and the Minister’s assessment quashed.

ARGUMENT ON BEHALF OF THE RESPONDENT

[68] Counsel for the Respondent agreed that there was not a great dispute with respect to the facts. The evidence was clear that the Appellant operated a meat processing shop which included custom cutting and processing of uninspected domestic meat and wild game animals, for customers and charged on a per pound basis. This has been referred to as “custom cutting”.

[69] The customer who killed the animal or brings in the animal’s carcass to be cut and processed remains the owner of that meat. Regulations require that the meat in this product be marked “uninspected”. Finally, the sign in the shop provides words to that effect.

[70] The Appellant in his custom cutting business provides the service of cutting up carcasses and processing meat into hamburger, sausages and other edible products for which an additional charge may be incurred, depending on the amount of pork added. Pork is listed in the bill as a separate item. However, the finished product is returned to the customer who brought it in, at the time of the payment.

[71] Counsel referred to the provisions of the *Excise Tax Act*, particularly section 123, defining “supply and service”, and definitions such as “taxable value”, “commercial activity”, “zero rated supply”. Subsection 165(1) provides that every

taxable supply attracts 100% tax on the consideration for the supply. Further, subsection 165(3) does have an exception, a zero rated supply is taxed at 0%.

[72] A service is anything other than property.

[73] Her position was that what we have here is an agreement for custom cutting and processing of the animal as entered into between the Appellant and the customer. At no time did the Appellant own the carcass, therefore, the Appellant does not provide a finished product by way of sale. The agreement with the customer was for the service of custom cutting, not the sale of goods. The supply is a supply of service under the definition and is therefore taxable at seven percent.

[74] It was the Appellant's customer who owned the carcass through this entire process. A hunter appropriately hunts and complies with the *Wildlife Act* and its regulations. He obtains the carcass and he is the owner of it.

[75] With respect to the law, she believed that the decision in *Robertson v. R.*, *supra*, is the correct decision. When looking at the scenario where a person brings his property to another person and that person does something to the property and returns the property, what that person does cannot be a sale of the property back to the original person. It must be a service. They did something to it, to improve, adjust, alter or restore it, et cetera. It could be any number of services but it was a service.

[76] As in *Robertson v. R.*, *supra*, the Appellant here was supplying a service in his custom cutting business, as was the taxidermist. As in *Robertson v. R.*, *supra*, he assumed possession of the wildlife part on behalf of the hunter. The hunter did not transfer ownership to the Appellant.

[77] In the business that the Appellant was in, it was a reality that it had no choice but to comply with the statute and regulations. Those *Rules* required that the meat be stamped as "uninspected meat" and it is not for resale. Another rule was that the business had to be posted and this was done in the case at bar. The reason for that was so that the service provider could not resell the product. Therefore this can not be the sale of goods, the legislation will not permit it.

[78] As in *Robertson v. R.*, *supra*, when the Appellant returns the wildlife part to the hunter, in its final form, he is not providing 'property' within the meaning of subsection 123(1) of the *Act*, to the hunter, because the hunter already has ownership of that property. In further discussion of the *Robertson* case counsel

suggested that the author was using a hypothetical situation referencing the bringing in of a bear claw and receiving back something substantially different. The important question is what is the contract all about? If he brought in a bear claw rather than the whole animal then the contract would be entirely different.

[79] In the case at bar, the Court must consider the facts that are before it not the facts that it wishes were before it or that might have been before it if the legislation was other than it is. Here we have the situation where the hunter is clearly coming in, dropping off his own property, having some custom cutting services done to it, and having it returned to him.

[80] Counsel opined that Mr. Sherman's analysis in *Robertson v. R, supra*, falls apart at that juncture because he does not consider what the contract was between the parties and what they were doing there. It is essential to do that in order to determine whether or not GST is payable because it is essential to determine what is being supplied.

[81] Counsel was not arguing that there were multiple supplies. That was the supply. It was the service of custom cutting. The supply of the pork in the making of the sausage was very much incidental to the overall supply of custom cutting and is deemed to form part of the service so supplied.

[82] The pork that is put into the sausage is a part of what the Appellant is giving back to the owner. It happens to be improved by the addition of the pork into the sausage. The Appellant's customer owns the carcass and the meat from it throughout the entire process. He acquires the supply of services. In the end, the Appellant returns the meat to the hunter or to the customer, so he is not providing property there. He is providing a service.

[83] She referred to the argument of the Appellant where he asserted that food should not be taxed. But the Court has to interpret the *Act* as it is drafted. It is possible that the drafter's never thought of this particular scenario when they were drafting the statute but there is nothing in the *Act* that is particularly ambiguous with respect to the determination that the Court has to make here.

[84] Once the Court makes a determination that this was a service there is not a lot of dispute as to how the *Act* flows out there. Further, the determination whether this is a service or not can not be influenced by the argument that food should not be taxed. That is not a relevant consideration.

[85] There is nothing to be made of the argument that the meat was of little or no value or whether there was a market for it. It matters not that it might have been otherwise if the provincial and federal statutes were not in place. It may very well have been that the purpose of the *Wildlife Act*, was to make sure that there was not a market for wild meat so that the animals might be protected. Also, there is no point in treating the situation as if there was a market for the meat. There is no point in considering other hypothetical situations. We have very clear facts before us to which we can apply the law.

[86] She also took issue with the suggestion of counsel for the Appellant that this Court did not have the jurisdiction to consider provincial statutes. That is done all the time by the Court. This Court is certainly entitled to consider the provisions of this provincial statute which prevents the Appellant from selling uninspected meat. With respect to the argument on conversion, she said that the Appellant's argument in that respect is very flawed because it asks us to forget the fact that there was a contractual arrangement. There was a contract here. It was a contract for service.

[87] She also rejected the Appellant's argument that the carcass was not food until after it was cut. What the *Wildlife Act* does is regulate carcasses for human consumption versus non-consumable carcasses which must be thrown away. By definition, if it came in and got cut, it was consumable by humans, and therefore it was food, at least that portion that was returned to the owner. Also, with respect to the analogy drawn by counsel for the Appellant regarding the carrot grower case, the whole issue is what does the contract provide? The analogy is not an apt one in considering what actually happened in these particular circumstances.

[88] With respect to the case at bar and the four cases provided by the Appellant, *Robertson v. R., supra*, is the most relevant. The *O.A. Brown, supra* case was talking about whether it was a mixed supply or not and is not particularly helpful. *Great Canadian Trophy Hunts Inc. supra* is talking about a single or multiple supply and the factual situation was different because in that case there was actually a market for the elk as they were paying something for the meat. It was the hunter who paid the original owner of the elk, and so it was zero rated.

[89] With respect to *Oxford Foods, supra*, the question was whether it was making a single supply or not and that is not the issue before this Court. *Robertson v. R., supra* is basically indistinguishable from the present case.

[90] Counsel for the Appellant tried to distinguish the two on the basis that there was a different degree of talent required in the *Robertson* case. Generally, there

was no evidence in this case as to how much talent was required to do the job of custom cutting and the degree of talent is not determinative of anything. She submitted that meat cutting ought not to be discounted as a talent either. The degree of talent required by a meat cutter was not canvassed to any degree in this case. Although the meat cannot be looked at from a market value point of view, obviously it was of value to these families who were looking to it for subsistence.

[91] Further, these cases cannot be distinguished on the value of the wild product. The value of what the hunter brought to the taxidermist and the value of what the hunter brought to the meat cutter were not of any discernable distinction. Both of them had value.

[92] Counsel took issue with the Appellant's position of distinguishing the cases because of the degree to which the property is transformed. There was not a large amount of transformation in either case. In the case at bar, the transformation was not very radical. The degree to which the property is transformed is not a rational basis for distinguishing between the case at bar and the taxidermist case.

[93] With respect to the *UK Act* we do not have a section like that. If the Appellant wishes to obtain the same result here as in the UK, a section like the one that is in the value added taxes in the UK is needed. This jurisdiction does not have such a provision, and that UK statute is not applicable.

[94] With respect to the matter of costs, costs should be the same as in any other general procedure case. There is nothing extraordinary about this case which calls for any different consideration.

REBUTTAL

[95] It was the Appellant's position that property can take many forms. It can be real or personal. It can be tangible or intangible. It is not beyond the realm of possibility that to some extent the Appellant here was supplying intangible property as part of the process of preparing these meat products.

[96] He spent a considerable amount of time in his rebuttal on the issue of ownership of the carcass and whether or not that determined whether or not the article was a supply or service. Again, counsel reiterated his argument that what the Appellant delivered back to the hunter was a zero rated food item.

[97] With respect to the argument that the UK provision referenced statute was ultimately of no relevance is this jurisdiction because our legislation does not include such a provision, he took the position that because other sales tax systems or value added sales tax systems, such as GST, do treat supplies in a different way, is very relevant. He pointed out that there was evidence before the Court that the amount that the Appellant spent on spices and packaging was considerable. The evidence was that during the whole assessment period, the Appellant would have spent about $100,000 on that sort of material.

[98] It would be perverse if this appeal should boil down to the fact that the Appellant is prohibited from acquiring a carcass which has a market value of nil. Further, the Regulations may very well allow the Appellant to acquire ownership of the carcass. If they do not, then the issue will be determined on the basis of whether the Appellant cannot acquire ownership of the carcass and therefore he cannot be considered to be selling that property and it may be a service.

[99] Ultimately, he opined, that it would be perverse if this appeal should turn on the inability of the Appellant to acquire ownership of something that has no value.

ANALYSIS AND DECISION

[100] The factual situation in the case at bar is neither complicated nor contentious. The evidence given by the knowledgeable representative of the Appellant is straight-forward and understandable. In essence a farmer or a hunter leaves an animal at the Appellant's premises, (be that animal a wild animal, a domestic animal, an inspected animal or an uninspected animal), and the Appellant and the deliverer of the animal (sometimes the owner and sometimes someone other than the owner that has the owner's permission to take the animal to the Appellant) and the parties make an agreement that the product is to be broken down, cut and wrapped and made into a form that the owner can use at home such as sausage, hamburger, steaks, roasts or jerky.

[101] The Court is satisfied in the present case that whenever such an animal is brought to the premises of the Appellant, the Appellant has express permission from the deliverer to produce the products that had been agreed upon. There was no evidence whatsoever that the Appellant at any time acted contrary to the express directions of the deliverer.

[102] When the Appellant was making products such as sausage, it added one-third pork to the products as well as their own spices and sausage casings.

Pork was added to the wild product because it tended to be dryer. The Appellant provided these extra ingredients as part of its agreement. At the end of the day the product was either brown-wrapped or vac-sealed, depending on the customer's preference. The product would then be frozen in due course and delivered to the person who brought it in or presumably someone acting on his behalf.

[103] The Appellant charges for the custom cutting on the basis of price per pound. The Court is satisfied that the deliverer would know what the basis of the charges were even though this was not specifically covered in the evidence.

[104] The question to be asked in this case is "What was the nature of the agreement between the deliverer of the animal and the Appellant with respect to the animals brought into the Appellant's premises?" Was the nature of the agreement that was created one for the "provision of services" as the Respondent contends or was it an agreement agreed to make a supply of a basic food item which was zero rated under the GST provisions of the *Excise Tax Act*, R.S.C. 1985, chapter E-15, and therefore non taxable as the Appellant contends?

[105] Counsel referred to the appropriate portions of the *Excise Tax Act* which were set out in their arguments.

[106] Counsel for the Appellant took the position that the Appellant was reassessed in this matter on the basis of ownership of the carcass but, since meat is an item of zero rated food according to section 1, part 3 of Schedule 6, the Appellant is the owner of the meat and what was provided by him was food. He concluded that the concept of ownership of dead wildlife is a function of provincial hunting and meat inspection or food safety legislation and that framework of legislation might accommodate a conclusion that there was a transfer of ownership of a carcass to the Appellant.

[107] However, the Court is satisfied that there was no such transfer of ownership of the carcass to the Appellant. It was not part of any agreement between the Appellant and the deliverer, hereinafter referred to as the "customer".

[108] It was clear from the evidence of Jason Gitzel that he never considered that there was a transfer of ownership, this never even crossed his mind and there was no evidence to support such a conclusion.

[109] The proposition of counsel for the Appellant that the carcass was sold to the Appellant for some minimal consideration and then the final product was sold back

to the hunter for the same consideration as the Appellant currently charges for its work, is of no import in this case because that scenario did not take place. On the basis of all of the evidence it can only reasonably be concluded that the customer remained the owner of the carcass from the time it was brought in to the Appellant's premises until it was returned to him in its final form.

[110] The Court is satisfied that the arguments of counsel for the Appellant with respect to whether or not the hunters who bring the carcasses to the Appellant for custom cutting are prohibited from trafficking wildlife so as to offend section 62 of the provincial statute or regulations are of no import here. The Court is satisfied that ownership of the carcass is not conveyed to the Appellant in the course of the process of custom cutting and that the consideration received by the Appellant in the performance of his part of the contract was not consideration for the transfer of the ownership of the carcass to the Appellant. This would be so whether or not the hunter would be in breach of the provincial statute.

[111] The contract did not dictate that the parties passed ownership of the carcass to the Appellant, the matter of the amount of the consideration was not a factor in whether or not the transfer did indeed take place. The value of the consideration in itself did not change the GST status of what the parties were doing.

[112] The Court is satisfied that the Appellant did not obtain any degree of ownership of the carcass by possessing it and changing its form in the manner that it did. It is not satisfied that any degree of conversion took place at the hands of the Appellant because the Appellant was merely doing what the customer asked it to do. At the completion of the process the Appellant would be delivering to the customer exactly what was received from the Appellant, albeit in a different form in accordance with the contract that the parties had entered into when the customer delivered the carcass to the Appellant.

[113] The Court concludes that this was not a converted carcass. The hunter was still the owner of what had been delivered to the Appellant and what had been delivered back to the Appellant.

[114] The Court is satisfied that this is the proper conclusion even though some of the meat might be lost due to spoilage. The Court is satisfied from the direct evidence of Jason Gitzel or any reasonable conclusion that it is entitled to draw from this evidence that the customer should have known that any spoiled meat would have to be discarded. That was part of the contract.

[115] The third proposition of the Appellant was that there was nothing in section 1, part 3 of Schedule 6 that says that a person who has no ownership in property cannot make a supply of it. There is nothing in that section which talks about the owner of the food product. The food product is zero rated.

[116] However, the Court is satisfied that the customer is receiving back from the Appellant that food product which was supplied by the Appellant. The food which was supplied by the customer has been worked upon by the Appellant and returned to the Appellant as food, albeit in a different form. However, it cannot be said that the Appellant is delivering to the customer anything but the food that the customer delivered to the Appellant. This form was dictated by the terms of the contract.

[117] The Court rejects the argument of counsel for the Appellant that what the hunter received back at the end of the custom cutting process was fundamentally different from what the customer provided at the start of it.

[118] The Court is satisfied that what was delivered to the Appellant at the outset was food and then when it was returned to the owner it was still food although in a different form.

[119] Under this scenario when it was handed back to the customer by the Appellant it did not amount to the provision of food as the food belonged to the customer. All that the Appellant did was to change the form of that food.

[120] Counsel for the Appellant referred to a number of cases that have been decided in this area and asked the Court to come to a different conclusion than that reached by this Court in *Robertson v. R., supra*, even though he agreed that the factual situation was strikingly similar. He urged this Court to find that the facts were sufficiently different so as to enable it to reach a different conclusion. This Court is satisfied that the decision reached in *Robertson v. R., supra*, is similar to the factual situation in the present case, even though counsel argued that the degree of talent displayed by Mr. Robertson was greater than the talent displayed by the Appellant and his workers in the present case. There was no evidence suggesting that the amount of talent required by a taxidermist would be much greater than the degree of talent by a custom meat cutter. In any event, the Court is satisfied that the degree of talent, although it may be a factor, is not dispositive of the issue.

[121] Counsel referred to David Sherman’s comments on this case and concluded that if the process had the effect of transforming the goods into something different, it may have to be regarded as having supplied a separate good for sales

tax purposes and that that is not a revolutionary concept. But the Court in this case has indicated that the Appellant did not transform the goods into something different from what it had received. Therefore the Appellant here cannot be regarded as having supplied a separate good for sales tax purposes.

[122] In *Robertson, supra,* the Court made its decision based upon the facts that were shown in that case. It was not satisfied that what was received back from the taxidermist was so different that it could have been regarded as a separate good from that which it had received from the customer.

[123] This Court is cognisant of the position of the Appellant that there could be serious consequences of an unfavourable decision here for the Appellant. His position was that it would result in the taxation of a substance food source. The Court is satisfied that that is not the result. What is being taxed in this case is not food, it is a service.

[124] The Court agrees with counsel for the Respondent's submission that what we have is an agreement for custom cutting and processing of the animals entered into between the Appellant and the customer. At no time did the Appellant own the carcass and nothing in the evidence suggests that at the end of the day the Appellant provided the finished product by way of sale to the customer. The basis of the contract was a supply of a service under the appropriate definition in the statute and it is therefore taxable at seven percent.

[125] The Court is satisfied that here, as in *Robertson, supra,* when the Appellant returned the wildlife part to the customer in its final form, he was not providing (a new) "property" within the meaning of subsection 123(1) of the *Act*, because the customer was only receiving back what he had delivered to the Appellant and nothing more.

[126] The argument of counsel for the Respondent is well-taken where she states that the important question is, what is the contract all about? The question is not what the contract might have been in the event that the customer had brought in something different than that which was brought in in the present case. As in *Robertson, supra*, this Court must consider the facts that are before it. The customer came to the Appellant's premises, brought his own property and reached an agreement with the Appellant as to what custom cutting services he wanted done. At the end of the day he had his property returned to him.

[127] The Court is satisfied that what was provided in the present case was a service, a service of custom cutting. The supply of pork and the making of the sausage together with the supply of spices for the jerky are very much incidental to the overall supply of the custom cutting services and are deemed to form part of this service so supplied. This is so even though at any given period, such as the period in question, the cost of such supplies to the Appellant which were ultimately charged to the customers, were significant.

[128] The Court has to interpret the statute as it finds it. If the statute works a hardship on any particular group, that is not for this Court to remedy.

[129] Counsel for the Respondent argued that the determination of whether this was a service cannot be influenced by the argument that food should not be taxed. The Court agrees that this is not a relevant consideration. Again the Court is in agreement with counsel for the Respondent's position that whether or not the meat was of little or no value or whether or not there was any market for it is not relevant.

[130] It is trite to say that the Court is satisfied that it is entitled to look at the provincial legislation in considering its decision. It is satisfied that these statutes are not determinative of the issue here.

[131] The Court is satisfied that when it comes to the United Kingdom statute it is not helpful to the Appellant's cause because the applicable legislation here does not contain the same provisions.

[132] With respect to the Appellant's rebuttal, the Court is satisfied that the Appellant was not supplying a tangible property as part of the process of preparing these meat products. It is satisfied that what was delivered back to the customers was not a zero rated food item.

[133] The Court is satisfied that the basis of the decision in this case does not turn on the ability of the Appellant to acquire ownership of something that has no value. It turns on the terms of the contract entered into between the Appellant and the customer. That contract was clearly for the supply of a service.

[134] The appeal is dismissed with costs to the Respondent to be taxed.

Signed at New Glasgow, Nova Scotia, this 24th day of April 2008.

“T. E. Margeson”

Margeson J.

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