Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-028

Automed Technologies Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, April 20, 2009

Canada

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IN THE MATTER OF an appeal heard on December 18, 2008, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated December 3, 2007, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

AUTOMED TECHNOLOGIES INC. **Appellant**

AND

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

DECISION

The appeal is dismissed. The goods should be classified under tariff item No. 3920.99.91.

Ellen Fry
Ellen Fry
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Diane Vincent
Diane Vincent
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 18, 2008
Tribunal Members:	Ellen Fry, Presiding Member Serge Fréchette, Member Diane Vincent, Member
Counsel for the Tribunal:	Jidé Afolabi
Research Director:	Audrey Chapman
Research Officer:	Michael W. Morden
Manager, Registrar Office:	Gillian Burnett
Senior Registrar Officer:	Stéphanie Doré

PARTICIPANTS:

Appellant	**Counsel/Representative**
Automed Technologies Inc.	Michael Kaylor
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Claudine Patry Lorne Ptack

WITNESSES:

Andrea Nosek
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Allan S. Hay
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McGill University

Allan Granville
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Automed Technologies Inc. (Automed) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether certain non-cellular plastic film (the goods in issue) is properly classified under tariff item No. 3920.71.00 of the schedule to the *Customs Tariff*[2] as other non-cellular plastic film of regenerated cellulose, as determined by the CBSA, or, as submitted by the CBSA in the alternative, under tariff item No. 3920.99.91 as other non-cellular plastic film of polymers of tetrafluoroethylene, of epoxide resins, of polyurethanes or of polyvinylidene chloride or should be classified under tariff item No. 3920.99.10 as other non-cellular plastic film of polyvinylidene chloride to be employed in the packaging of goods for sale, as submitted by Automed.

PROCEDURAL HISTORY

3. Automed imported the goods in issue from 2003 to 2005. The CBSA originally determined that the goods in issue were properly classified under tariff item No. 3920.10.90 as other film, of plastics, non-cellular, and not reinforced, laminated, supported or similarly combined with other materials of polymers of ethylene.

4. On February 21, 2006, Automed filed refund requests under section 74 of the *Act* and a request for re-determination. At that time, Automed requested that the goods in issue be classified under tariff item No. 9948.00.00.

5. On August 29, 2006, the CBSA determined, pursuant to section 59 of the *Act*, that the goods in issue did not qualify for the benefits of tariff item No. 9948.00.00. The goods in issue remained classified under tariff item No. 3920.10.90.

6. On May 23, 2007, Automed requested a further re-determination pursuant to section 60 of the *Act,* again claiming that the goods in issue were eligible for the benefits of tariff item No. 9948.00.00.

7. On December 3, 2007, the CBSA again determined that the goods in issue did not qualify for the benefits of tariff item No. 9948.00.00. The goods in issue remained classified under tariff item No. 3920.10.90.

8. On March 3, 2008 Automed filed this appeal with the Canadian International Trade Tribunal (the Tribunal).

9. On July 11, 2008, subsequent to the filing of the appeal, but prior to the hearing, Automed changed its position and argued that the goods in issue should be classified under tariff item No. 3920.99.10.

10. On September 17, 2008, the CBSA changed its position and argued that the goods in issue should be classified under tariff item No. 3920.71.00.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.

11. The Tribunal held a public hearing in Ottawa, Ontario, on December 18, 2008. Ms. Andrea Nosek, Director, Product & Solutions Management of AmerisourceBergen Technology Group, and Dr. Allan S. Hay, Emeritus Professor of Chemistry at McGill University, testified on behalf of Automed. Dr. Hay was qualified as an expert in organic and polymer chemistry. Mr. Alan Granville, Senior Chemist, Customs Analysis Section of the CBSA, testified on its behalf. Mr. Granville was qualified as an expert in polymer and plastic product analysis.

GOODS IN ISSUE

12. According to the laboratory analysis report filed by the CBSA[3] and agreed with by Automed at the hearing,[4] the goods in issue are a clear, colourless non-cellular plastic film 0.44 mm thick and 14 cm wide. They have a 6-cm-wide white coating applied lengthwise on one surface near one of the edges and are constructed of the following three layers that are laminated, as opposed to chemically bonded:

(1) a clear, colourless layer (approximately 35 percent of the product by weight and 0.02 mm thick), composed of a polymer of ethylene;

(2) a clear, colourless layer (approximately 14 percent of the product by weight and 0.004 mm thick), composed of a polymer of vinylidene chloride and other additives; and

(3) a clear, colourless layer (approximately 51 percent of the product by weight and 0.02 mm thick), composed of regenerated cellulose. A white coating containing cellulose nitrate has been applied in a 6-cm-wide strip lengthwise near one of the edges.[5]

13. Automed filed the following two physical exhibits:

A-01, a roll of the goods in issue; and
A-02, packages made from the goods in issue.

14. The CBSA filed the following physical exhibit:

B-01, ATC Packaging Material, a sample of the goods in issue.

15. Automed manufactures the goods in issue and the machines used to convert them into packaging material for medication. The machines are typically located in pharmacies situated within health care facilities. The machines are used to: (1) form the goods in issue into pouches using heat to seal the pouches on three sides; (2) print, on the pouches, information relevant to the pharmaceutical item (typically prescription medication) to be dispensed into the pouches; (3) drop the medication into the pouches; and (4) seal the pouches at the top. These pouches are then passed on to the healthcare provider who, in turn, distributes the medication to the patient.[6]

3. Respondent's brief, tab 2.
4. *Transcript of Public Hearing*, 18 December 2008, at 5.
5. Since it covers only a fraction of the exterior surface and is very thin, this white coating was not taken into account when reporting the relative weights of the layers.
6. *Transcript of Public Hearing*, 18 December 2008, at 10, 11.

ANALYSIS

Law

16. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

17. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (Harmonized System) developed by the World Customs Organization.[7] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification.

18. Subsection 10(1) of the *Customs Tariff* provides as follows: "... the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[8] and the Canadian Rules[9] set out in the schedule."

19. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[10] Classification therefore begins with Rule 1, which reads as follows: "... for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions."

20. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[11] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[12] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected, unless there is a sound reason to do otherwise, as they serve as an interpretive guide to tariff classification in Canada.[13]

21. Once the Tribunal has used this approach to determine the heading in which the goods should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and Rule 1 of the *Canadian Rules* in the case of the latter.

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7. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
8. S.C. 1997, c. 36, schedule [*General Rules*].
9. S.C. 1997, c. 36, schedule.
10. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level.
11. World Customs Organization, 2d ed., Brussels, 2003.
12. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].
13. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), paras. 13, 17.

Relevant Provisions of the Customs Tariff, General Rules, Canadian Rules and Explanatory Notes

Tariff Classification at Issue

22. Both parties agree that the goods in issue should be classified in heading No. 39.20. The parties, however, disagree as to which subheading and tariff item within that heading are appropriate for the classification of the goods in issue.

23. Automed submitted that classification at the subheading level can only be done through the application of Rule 3 (c) of the *General Rules*, resulting in the classification of the goods in issue in subheading No. 3290.99. With regard to the tariff item, Automed submitted that classification at that level should be done through the application of Rule 3 (c), resulting in the classification of the goods in issue under tariff item No. 3290.99.10.[14]

24. The CBSA submitted that the application of Rule 1 of the *General Rules* at the subheading level suffices for the classification of the goods in issue in subheading No. 3920.71. However, the CBSA submitted in the alternative that, should the Tribunal find the application of that rule inconclusive, the application of Rule 3 (b) would be adequate for classification at the subheading level. Since there are no competing tariff items in this subheading, the CBSA's submissions would result in the goods in issue being classified under tariff item No. 3920.71.00.

25. The CBSA submitted in essence that, should the Tribunal find the application of Rule 3 (b) of the *General Rules* inconclusive for classification at the subheading level, the goods in issue should be classified at that level through the operation of Rule 3 (c). The CBSA submitted that the application of Rule 3 (c) at the tariff item level would result in the classification of the goods in issue under tariff item No. 3920.99.91.

26. The relevant sections of the nomenclature of the *Customs Tariff* read as follows:

Chapter 39

PLASTICS AND ARTICLES THEREOF

. . .

39.20	**Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.**

. . .

-Of cellulose or its chemical derivatives:

3920.71 .00	**- -Of regenerated cellulose**

. . .

3920.99	**- - Of other plastics**
3920.99.10	- - -Of polyvinylidene chloride to be employed in the packaging of goods for sale;

. . .

3920.99.91	- - - -Of polymers of tetrafluoroethylene, of epoxide resins, of polyurethanes or of polyvinylidene chloride

. . .

14. Appellant's brief, para. 14; *Transcript of Public Hearing*, 18 December 2008, at 134.

27. The Tribunal will first determine classification at the subheading level, followed by classification at the tariff item level.

Subheading Analysis

Rule 1 of the General Rules

28. The CBSA asserted that Rule 1 of the *General Rules* applies with regard to the classification of the goods in issue in subheading No. 3920.71. Rule 1 provides as follows:

> . . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

29. In support of its assertion, the CBSA argued that the language of Subheading Note 1(b)(1) to Chapter 39 can be interpreted or extended to cover the classification of composites made up of polymers, such as the goods in issue, based on the proportions of its constituent polymers. Subheading Note 1 to Chapter 39 provides as follows:

> 1. Within any one heading of this Chapter, polymers (including copolymers) and chemically modified polymers are to be classified according to the following provisions:
>
> (a) Where there is a subheading named "Other" in the same series:
>
> (1) The designation in a subheading of a polymer by the prefix "poly" (for example, polyethylene and polyamide-6,6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95% or more by weight of the total polymer content.
>
> (2) The copolymers named in subheadings 3901.30, 3903.20, 3903.30 and 3904.30 are to be classified in those subheadings, provided that the comonomer units of the named copolymers contribute 95% or more by weight of the total polymer content.
>
> (3) Chemically modified polymers are to be classified in the subheading named "Other", provided that the chemically modified polymers are not more specifically covered by another subheading.
>
> (4) Polymers not meeting (1), (2) or (3) above, are to be classified in the subheading, among the remaining subheadings in the series, covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series of subheadings under consideration are to be compared.
>
> (b) Where there is no subheading named "Other" in the same series:
>
> (1) Polymers are to be classified in the subheading covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series under consideration are to be compared.
>
> (2) Chemically modified polymers are to be classified in the subheading appropriate to the unmodified polymer.
>
> Polymer blends are to be classified in the same subheading as polymers of the same monomer units in the same proportions.

30. Disputing the CBSA's position, Automed relied on the Tribunal's decision in *EM Plastic & Electric Products Ltd. v. Deputy M.N.R.*[15] in support of the proposition that a product formed through lamination is a laminate, not a polymer.[16] Accordingly, Automed submitted that Subheading Note 1(b)(1) to Chapter 39 is inapplicable.

31. In the Tribunal's view, it is clear that Subheading Note 1 to Chapter 39 is only applicable with regard to the classification of single polymers based on the proportions of their constituent monomers, as the first sentence provides the following: "Within any one heading of this Chapter, polymers (including copolymers) and chemically modified polymers are to be classified according to the following provisions."

32. In this regard, the Tribunal found Dr. Hay's testimony compelling. He testified that the creation of polymers is only effected through the chemical bonding of monomers,[17] not by laminating polymers. Dr. Hay explained that the goods in issue consist of three different polymers joined by lamination.[18] Therefore, in light of Dr. Hay's testimony, the Tribunal concludes that the goods in issue are not polymers and that Subheading Note 1 to Chapter 39 does not apply.

33. The determination of tariff classification at the subheading level must therefore proceed beyond Rule 1 of the *General Rules*.

Rule 2 of the General Rules

34. Rule 2 of the *General Rules* provides as follows:

> 2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.
>
> (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

35. Rule 2 (a) of the *General Rules* does not apply because the goods in issue are not incomplete or unfinished.

36. Rule 2 (b) of the *General Rules* directs that goods consisting of more than one material or substance are to be classified according to the principles of Rule 3. Therefore, since the goods in issue consist of more than one material or substance, the Tribunal will proceed to classification pursuant to the principles of Rule 3.

15. (31 August 2000), AP-98-012 (CITT).
16. *Transcript of Public Hearing*, 18 December 2008, at 123.
17. *Ibid.* at 58, 60-61.
18. *Ibid.* at 62.

Rule 3 of the General Rules

37. Rule 3 of the *General Rules* provides as follows:

> 3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Rule 3 (a) of the General Rules

38. Both parties submitted that classification cannot be conclusively determined pursuant to Rule 3 (a) of the *General Rules* because two of the subheadings at issue, 3920.10 and 3920.70, refer to only a part of the substances that make up the goods in issue and, in so doing, provide equally specific descriptions of the goods in issue, while the third subheading, 3920.90, provides a general description. The parties submitted that, as a result, the provision of Rule 3 (a), directing that regard be had to Rule 3 (b), must be followed.[19]

39. The Tribunal agrees that it must proceed to Rule 3 (b) of the *General Rules* in order to determine in which subheading the goods in issue should be classified.

Rule 3 (b) of the General Rules

40. Rule 3 (b) of the *General Rules* requires a determination of the essential character of the goods in issue. According to Note (VIII) of the *Explanatory Notes* to Rule 3, "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

41. The CBSA submitted that the essential character of the goods in issue is packaging for the purposes of communicating information and containing medication, the latter purpose also serving to prevent contamination or tampering. In this regard, the CBSA submitted that each of the three layers provides the following important characteristics:

- the polyethylene film functions as a sealing layer and sterile environment for the contents;
- the polyvinylidene chloride acts as a vapour and gas barrier; and

19. Respondent's brief at 13; *Transcript of Public Hearing*, 18 December 2008, at 127-28.

- the regenerated cellulose contributes to the strength and dimensional stability of the goods and also provides a surface that offers good printability and good vapour barrier characteristics in low humidity conditions.[20]

42. The CBSA submitted that the characteristics provided by the regenerated cellulose layer contribute the most to the use of the goods in issue as packaging, since it is the component layer that provides support for the medication, protects the medication and allows information to be printed on to the packaging. The CBSA also noted that the regenerated cellulose layer predominates by weight over the two other component layers. As a result, it submitted that the regenerated cellulose contributes the most to the essential character of the goods in issue and should constitute the basis for classification.

43. Opposing the CBSA's position, Automed relied upon the Tribunal's reasoning in *Transilwrap of Canada, Ltd. v. Commissioner of the Canada Customs and Revenue Agency*[21] in support of the proposition that the weight of a component, without considering its impact on the essential character of goods, is not in itself sufficient with regard to classification pursuant to Rule 3 (b) of the *General Rules*. Automed indicated that there is no evidence that weight is relevant to the usability of the goods in issue for packaging and, thus, to its essential character.

44. Further, Automed submitted that each of the three component layers plays an important role, and that none of these roles can be determined to be the most important with regard to the use of the goods in issue for packaging. As a result, Automed concluded that Rule 3 (b) of the *General Rules* is not applicable and that resort must be had to Rule 3 (c).

45. The Tribunal notes Ms. Nosek's testimony with regard to why Automed laminates the three specific component layers to produce the goods in issue. Ms. Nosek indicated that the combination of the chosen layers allows Automed to meet specifications required in the industry with regard to the handling of pharmaceutical products.[22]

46. The evidence indicates that one important function of the goods in issue is to provide a vapour barrier, an important characteristic of the goods in issue, as, without it, some medication can degrade.[23] However, this function is served by more than one component layer. In this regard, according to the CBSA's laboratory analysis report, both the vinylidene chloride and regenerated cellulose polymers function as vapour barriers, with the latter providing that function in low humidity conditions.

47. The Tribunal is of the view that the evidence does not indicate which polymer, if any, gives the goods in issue their essential character. The evidence is clear on the relative weights of the three component polymers, but the component with the greatest weight is not the only factor to be considered and does not necessarily determine the essential character of goods.[24] The Tribunal agrees with Automed that each of the layers plays an important role, be it for the support, identification or protection of the medication. Without all three layers, the goods in issue could not accomplish their role. None of the three layers taken alone would appear to accomplish these functions. For instance, the evidence indicates that the vapour barrier function is an important characteristic of the goods in issue in preventing the degradation of the medication. However, as indicated earlier, both the vinylidene chloride and the regenerated cellulose provide that

20. Respondent's brief at 14, tab 2.
21. (11 September 2001), AP-2000-18 (CITT) [*Transilwrap*].
22. *Transcript of Public Hearing*, 18 December 2008, at 18-28.
23. Appellant's book of documents, tab 1.
24. See *Transilwrap*.

function but in different ambient humidity conditions. Although the identification and protection of the medication at low humidity conditions could be assured by the regenerated cellulose, the medication would not be properly protected against degradation in high humidity conditions if the vinylidene chloride were absent.

48. In light of the above, the Tribunal concludes that no component layer of the goods in issue, considered apart from the others, gives the goods in issue their essential character. Thus, Rule 3 (b) of the *General Rules* does not apply, and the Tribunal must next consider Rule 3 (c)

Rule 3 (c) of the General Rules

49. Rule 3 (c) of the *General Rules* requires that the Tribunal classify the goods in issue in the subheading which occurs last in numerical order among those that equally merit consideration. Of the subheadings at issue, the one which occurs last in numerical order is subheading No. 3920.99.

50. Thus, the Tribunal agrees with Automed that the goods in issue should be classified in subheading No. 3920.99 as other non-cellular plastic film of other plastics. The Tribunal now turns its analysis to classification at the tariff item level.

Tariff Item Analysis

Rule 1 of the General Rules

51. The Tribunal will first consider whether the goods in issue are, as argued by Automed, classifiable under tariff item No. 3920.99.10 as other non-cellular plastic film of polyvinylidene chloride to be employed in the packaging of goods for sale.[25]

52. An essential condition for classification under tariff item No. 3920.99.10 is that the goods in issue be "employed in the packaging of goods for sale". In this regard, Automed made submissions regarding what constitutes a sale. In making those submissions, Automed relied on propositions in various jurisprudence, which can be summarized as follows:

- that the existence of a sale is not predicated on the earning of profit;[26]
- that the existence of a sale requires two parties in agreement with regard to the same proposition, as well as the exchange of title and consideration;[27]
- that the consideration required in establishing a sale can be extremely small (as little as a peppercorn) (*Commission Scolaire Des Chênes*);[28] and

25. The parties' submissions focussed solely on Rule 3 (c) of the *General Rules*, with Automed arguing for classification under tariff item No. 3920.99.10 and the CBSA arguing for classification under tariff item No. 3920.99.91.
26. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 (CanLII); *Transcript of Public Hearing*, 18 December 2008, at 135.
27. *Brunswick International (Canada) Limited v. Deputy M.N.R.* (14 December 1999), AP-98-100 (CITT); *Transcript of Public Hearing*, 18 December 2008, at 142. Also, *Anthes Equipment Limited v. M.N.R.*, 87 DTC 59; *Transcript of Public Hearing*, 18 December 2008, at 143.
28. *County of Lethbridge v. The Queen*, 2005 TCC 809 (CanLII); *Transcript of Public Hearing*, 18 December 2008, at 136. Also, *Commission Scolaire des Chênes v. Canada*, 2001 FCA 264 (CanLII) [*Commission Scolaire des Chênes*]; *Transcript of Public Hearing*, 18 December 2008, at 141.

- that for a payment to constitute consideration, it must be made pursuant to a legal obligation, and it must be closely linked to a supply. Both the obligation and the supply can be inferred from applicable legislation in the absence of a commercial contract.[29]

53. Automed argued that pharmacies of healthcare institutions that use the goods in issue are institutional settings, as contemplated in *Commission Scolaire des Chênes*, and that, despite the fact that patients do not use a method of direct payment for the medication packaged in the goods in issue, a sale occurs "through the mechanisms of the various health legislation which exists in Canada".[30]

54. The Tribunal is of the view that *Commission Scolaire des Chênes* simply supports the proposition that, in an institutional context, the specific legislation that applies, together with the associated administrative structure, provides a context that must be examined in order to determine whether or not a sale occurs.

55. As a result, in the Tribunal's view, it is important to consider the specific context in which the pharmacies of healthcare facilities that use the goods in issue operate. A blanket assumption cannot be made about whether the use of the goods in issue in the packaging of medication to give to patients as part of the medical services dispensed by those facilities meets the requirement of "the packaging of goods for sale". This analysis would require a specific examination of the various healthcare legislative regimes in existence in the locations in Canada where the goods in issue were used. In this regard, although Ms. Nosek testified that the goods in issue are sold by her company in Canada, the evidence does not indicate in which provinces and/or territories the goods in issue were sold, either generally speaking or during the time frame of the importations in issue. Accordingly, although Automed provided evidence concerning the legislative regimes in Ontario and Quebec, the evidence does not indicate to what extent, if any, the goods in issue were used within those regimes. Further, Automed did not provide evidence concerning the legislative regimes in the other provinces and territories of Canada.[31] Consequently, there is insufficient evidence to come to an adequate understanding of the context for the purposes of determining whether a sale has in fact occurred, as submitted by Automed.

56. Automed also made reference to a decision in which what constitutes a "sale" was considered.[32] *Will-Kare Paving* concerned an appellant operating a paving business. The appellant constructed its own asphalt plant to enable it to bid on larger contracts, with the intent that excess production from the plant would be sold. The appellant supplied approximately 75 percent of the plant's production to customers pursuant to contracts for work and materials.

57. The appellant in that case claimed an accelerated capital cost allowance in its income tax filings for the plant on the basis that, pursuant to the relevant legislation, the plant was used primarily in the "manufacturing or processing of goods for sale".

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29. *Commission Scolaire des Chênes*; *Transcript of Public Hearing*, 18 December 2008, at 138-42. Also, *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915 [*Will-Kare Paving*].
30. *Transcript of Public Hearing*, 18 December 2008, at 137. At 144-61, Automed further expounds upon this line of reasoning.
31. *Ibid.* at 161-63.
32. *Ibid.* at 143.

58. The Supreme Court of Canada noted in its reasoning that Canadian jurisprudence has adopted two divergent interpretations of the activities that constitute manufacturing or processing of goods for sale. One point of view is that the contract or arrangement at issue must purely be for the sale of goods. Under this interpretation, the manufacturing or processing of goods to be supplied in connection with the provision of a service is excluded.[33]

59. The second point of view is that the manufacturing or processing of goods to be supplied as part of a contract for the provision of a service is also covered by the concept of "sale".[34]

60. The Supreme Court of Canada reasoned that the former point of view offered a guide preferable to the latter.[35]

61. The reasoning of the Supreme Court of Canada was in relation to commercial transactions between private parties. In this appeal, the Tribunal must consider assertions made by Automed that the goods in issue are used in the packaging of goods for sale in institutional settings. Despite its different factual context, the Tribunal is of the view that *Will-Kare Paving* can provide some guidance in relation to the circumstances of this appeal. Pursuant to that decision, there is a clear distinction between contracts purely for the sale of goods and contracts for goods to be provided in connection with the provision of services. It is the Tribunal's view that, even if, contrary to the above analysis, circumstances exist in which a sale can be inferred, those circumstances relate to the provision of goods as part of a broad regime for the provision of services, rather than a regime purely for the provision of goods. Hence, such circumstances would not involve a sale as contemplated by *Will-Kare Paving*.

62. Thus, the Tribunal considers that the goods in issue do not meet the requirements of tariff item No. 3920.99.10, namely, goods of "polyvinylidene chloride to be employed in the packaging of goods *for sale*" [emphasis added].

63. As a result, the Tribunal must next proceed to consider the only remaining relevant tariff item, namely, tariff item No. 3920.99.91.

64. This tariff item covers goods of "polymers of tetrafluoroethylene, of epoxide resins, of polyurethanes or of polyvinylidene chloride". As indicated above, a layer composed of a polymer of vinylidene chloride is one of the components that make up the goods in issue.

65. The English version of this tariff item can be interpreted in two ways:

- first, of polymers of tetrafluoroethylene, of epoxide resins, of polyurethanes, of polyvinylidene chloride; and
- second, of polymers of tetrafluoroethylene, of *polymers of* epoxide resins, of *polymers of* polyurethanes, of *polymers of* polyvinylidene chloride.

66. While the first interpretation would cover the goods in issue, the second would not.

33. *Will-Kare Paving*, paras. 19-21.
34. *Ibid.*, paras. 22-25.
35. *Ibid.*, para. 37.

67. However, the French version of the tariff item ("*En polymères de tétrafluoroéthylène, en résines époxydes, en polyuréthannes ou en chlorure du polyvinylidène*") confirms that the first interpretation is the correct interpretation of the terms of the tariff item. Accordingly, the tariff item is applicable to the goods in issue.

68. The Tribunal therefore concludes that the goods in issue should be classified under tariff item No. 3920.99.91 as other non-cellular plastic film of polymers of tetrafluoroethylene, of epoxide resins, of polyurethanes or of polyvinylidene chloride.

DECISION

69. For the foregoing reasons, the appeal is dismissed. The goods should be classified under tariff item No. 3920.99.91.

Ellen Fry
Ellen Fry
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Diane Vincent
Diane Vincent
Member