

Ottawa, Thursday, September 24, 1998

Appeal No. AP-97-058

IN THE MATTER OF an appeal heard on May 6 and 7, 1998,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated June 26, 1997, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

FLORA MANUFACTURING & DISTRIBUTING LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-058

FLORA MANUFACTURING & DISTRIBUTING LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue. The issue in this appeal is whether St. John's wort oil extract is properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 3003.90.99 as other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale, as claimed by the appellant.

HELD: The appeal is allowed. In the Tribunal's view, the goods in issue are not included in the common understanding given to the term "food preparations." As a result, they are not properly classified under tariff item No. 2106.90.99. The Tribunal accepts the evidence of the appellant's witnesses that St. John's wort extract is used in the treatment of such things as mild to moderate depression, tension headaches, insomnia, gastrointestinal disorders and external wounds. The Tribunal attributes particular weight to the testimony of a family physician who testified that he often recommends St. John's wort extract to his patients and prescribes it for treating some or all of the above conditions. In the Tribunal's view, although it may be arguable that these "conditions" are not true diseases or illnesses, they clearly constitute various forms of disorders or ailments. Furthermore, there is no requirement in the relative Chapter Notes, the *Explanatory Notes to the Harmonized Commodity Description and Coding System* or the terms of the heading that a product must be scientifically proven to be an effective medicament in order to be classified in heading No. 30.03. In other words, it does not need to be shown that a product actually cures a disease or illness. However, in the Tribunal's view, there must be some "curative" properties shown in order for a product to be accepted as a medicament and for it to be classified in heading No. 30.03. The Tribunal finds that the appellant has met that burden in the present case. The goods in issue can, therefore, be described as a medicament.

Since, at the time of importation, the goods in issue were "not put up in measured doses or in forms or packings for retail sale," as specified by the terms of heading No. 30.03, all of the conditions of heading No. 30.03 are met, and the Tribunal finds that the goods in issue should be classified under tariff item No. 3003.90.99.

Place of Hearing: Vancouver, British Columbia
Dates of Hearing: May 6 and 7, 1998
Date of Decision: September 24, 1998

Tribunal Members: Charles A. Gracey, Presiding Member
Raynald Guay, Member
Robert C. Coates, Q.C., Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael A. Sherbo, for the appellant
Jan Brongers, for the respondent

Appeal No. AP-97-058

FLORA MANUFACTURING & DISTRIBUTING LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue dated June 26, 1997, made pursuant to section 63 of the Act.

The issue in this appeal is whether St. John's wort oil extract is properly classified under tariff item No. 2106.90.99 of Schedule I to the *Customs Tariff*² as other food preparations not elsewhere specified or included, as determined by the respondent, or should be classified under tariff item No. 3003.90.99 as other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale, as claimed by the appellant.

For purposes of this appeal, the relevant tariff nomenclature reads as follows:

21.06	Food preparations not elsewhere specified or included.
2106.90	-Other
2106.90.99	----Other
30.03	Medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.
3003.90	-Other
3003.90.99	----Other

Three witnesses testified on behalf of the appellant. The first witness, Mr. Jens Tonnesen, Operations Manager at Flora Manufacturing & Distributing Ltd. in Burnaby, British Columbia, described the goods in issue, which are imported from Europe in drums ranging from 18 L to 200 L in size. The appellant packages the oil extract in three different types of packaging for distribution to health food stores in Canada. It is either sold as an oil in a 100-mL bottle, put into gelatine capsules or manufactured into a cosmetic or topical oil. Mr. Tonnesen testified that the goods in issue have a drug identification number. He read the label on one of the packages. It states that "[t]his traditional remedy helps to relieve restlessness due to overwork, tiredness and fatigue." Under "Suggested use," it is stated that the product is "[f]or therapeutic

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. R.S.C. 1985, c. 41 (3rd Supp.).

and occasional use only.” Mr. Tonnesen explained that the appellant markets the goods in issue as a remedy or a medicament for moderate depression and for restlessness due to tiredness and fatigue.

In cross-examination, Mr. Tonnesen explained that the goods in issue are a mixture of olive oil and St. John’s wort extract. He testified that, at the time of importation, the goods in issue contained approximately 70 percent olive oil and 30 percent St. John’s wort extract. Mr. Tonnesen explained that the labels from which he read during examination in chief are placed on the packages in Canada by the appellant. He said that there are labels on the drums in which the goods in issue are imported; however, these labels do not refer to the possible medicinal uses of the product. Mr. Tonnesen referred to some advertisements which market the goods in issue as an alternative to Prozac.

In answering questions from the Tribunal, Mr. Tonnesen testified that, when the goods in issue are shipped to Canada, the maceration process, which is essentially the sifting out of the plant from the oil, is complete, so that what is imported is pure oil. He testified that the appellant bottles the goods in issue itself in Burnaby, but that other companies do the actual encapsulating.

The appellant’s second witness, Ms. Suzanne Diamond, Director of Education at Flora Manufacturing & Distributing Ltd. and a researcher in its research and development department, was qualified by the Tribunal as an expert witness in the fields of botany and ethnobotany, which is the study of the traditional use of plants for treating diseases. She explained that the St. John’s wort plant is poisonous if eaten and is classified as a mild sedative under Canadian regulations. She testified that the plant has been used in medicine for more than 2,000 years and that, during the first century, it was used as a cure for poisonous snake bites and as a treatment for external wounds. The first London pharmacopoeia in 1618 recognized it as a treatment not only for external wounds but for warding off witches’ spells, which was another way of describing insanity. Ms. Diamond testified that St. John’s wort extract became popular in 1988 after it was found to be effective against a retroviral form of leukemia. Since then, it has been tried on patients with AIDS and has been found to have some benefits. She explained that one of the bioactive ingredients in St. John’s wort extract is a compound called *Hypericum*, which is very photoactive. Therefore, if a person takes St. John’s wort extract and is exposed to sunlight, that person may suffer extreme blistering. It depends on the dosage.

Ms. Diamond testified that the St. John’s wort plant is toxic if ingested by cattle, sheep or humans. She testified that, throughout the 2,000-year history of this plant, it has never been referred to as a food. She added that, in her view, it is strictly a medicine. Ms. Diamond explained that many countries, especially in Europe, recognize St. John’s wort extract as a drug for treating depression. It is also listed in the pharmacopoeia of several countries. She testified that, in Canada, St. John’s wort extract is accepted as a sedative, a nervine, a diuretic, an antispasmodic for gastric disorders and a topical agent for promoting wound healing and the soothing and shrinking of hemorrhoids. Ms. Diamond also referred to two peer-reviewed clinical trials on the uses of St. John’s wort extract for treating depression. They showed that St. John’s wort extract was effective in treating patients who suffer from mild to moderate depression. The overall conclusion was that St. John’s wort extract is as effective as synthetic antidepressants and that it has fewer side effects. Ms. Diamond also referred to a number of other studies and analyses with similar conclusions.

In cross-examination, Ms. Diamond testified that St. John’s wort extract is sold to relieve restlessness due to overwork, tiredness and fatigue. However, people also use it to cure and treat depression, tension headaches, insomnia and external wounds. She also noted that the Canadian government recognizes

St. John's wort preparations as sedatives and nervines, which are products used to treat nervous disorders, and as diuretics. They are also used to treat water retention problems, gastrointestinal disorders and hemorrhoids. Ms. Diamond testified that, normally, a person would take from 1 to 10 capsules a day to treat these conditions or ailments. In support of this, Ms. Diamond referred to several studies containing dosage information. She testified that, in her view, restlessness is a highly debilitating condition. She explained that, while, in some countries, St. John's wort extract is a prescribed medicine, in Canada, it is not.

The appellant's third witness, Dr. Zoltan P. Rona, a family physician, was qualified by the Tribunal as an expert in the diagnosis, prevention and treatment of human diseases and ailments. He testified that he often recommends St. John's wort extract to his patients and prescribes it for treating depression, anxiety, nervousness and insomnia. He testified that the product's active ingredient, *Hypericum*, has a modulating effect on the nervous system, which is why it can affect many different areas of the body. He explained how bad nerves can cause irritability, ulcers, thyroiditis, rashes, gastrointestinal upsets, etc. St. John's wort extract can, therefore, be used to treat a large number of different conditions. Dr. Rona testified that, in his view, the word "cure" in medicine is verbose. He said that, in the practice of conventional medicine, one can only hope to control symptoms and to return people to a normal state of health. He testified that this applies equally to traditional or synthetic drugs, such as Prozac, Luvox, Zolof or Paxil, which are excellent antidepressants. The only difference is that St. John's wort extract has fewer side effects. Dr. Rona testified that St. John's wort extract has been effective in treating mild to moderate depression, anxiety and insomnia in well over 80 percent of the people to whom he prescribed it. He said that very few drugs work at such a high percentage. He testified that he knows several psychiatrists and general practitioners in the Toronto, Ontario, region who prescribe St. John's wort extract on a regular basis.

Dr. Rona testified that, in his view, St. John's wort extract is a medical remedy despite the fact that it comes from a natural source or plant. He added that nobody takes it as a food. He testified that there are many drugs on the market which are prescribed, but which have virtually no effects or have poor effects, for example, chemotherapeutic drugs, which have a 10 to 20 percent effectiveness rate. He said that, similarly to St. John's wort extract, there are a number of prescribed drugs which are recommended for the treatment of numerous ailments, for example, Prozac. Dr. Rona testified that the reason that the label on the goods in issue only identifies "restlessness" is probably because, in Canada, manufacturers are prevented from putting any kind of claim on a label. He could not understand why even restlessness was indicated.

In cross-examination, Dr. Rona confirmed that St. John's wort extract is not a prescribed drug. He reiterated that it is used to treat depression, anxiety, anxiety neurosis and different types of nervous conditions, such as restlessness and insomnia. He said that there is also evidence that it has some antiviral effects. He testified that he usually recommends that a patient who is suffering from anxiety take between 300 and 600 mg of St. John's wort extract three times a day. He said that his conclusion on the recommended dosage is based on studies on the effectiveness of St. John's wort extract, some of which were presented into evidence in the present appeal and which, in his view, are pretty overwhelming, and based on textbooks on nutrition and botanical medicine. According to Dr. Rona, restlessness is a symptom rather than a disease. It could be a symptom of depression or anxiety, for example. He explained that depression is a psychiatric diagnosis, which can be labelled mild, moderate or severe. The most severe case would be where a person is psychotic and completely irrational, while the mildest case would be where a person is having problems sleeping.

In answering questions from the Tribunal, Dr. Rona testified that St. John's wort extract has been used for a long time in Canada and the United States by naturopaths and herbalists, but that it is only in the

past 5 to 10 years that it has become extremely popular in the medical profession. He said that this is due to the latest research that has been published and to just good marketing in the Time and Newsweek magazines. Dr. Rona testified that the drug companies are incredibly interested in St. John's wort extract. He said that the heavy dosage is due to the fact that it takes a few weeks for St. John's wort extract to build up in a patient's system. However, he explained that this is no different from Prozac, for example. He added that, for such things as insomnia and nervousness, St. John's wort extract may work right away.

One witness testified on behalf of the respondent, Dr. Sam Kacew, a toxicologist and professor of pharmacology at the University of Ottawa. He was qualified by the Tribunal as an expert witness in the field of pharmacology to give expert evidence on whether or not the documentary evidence presented by the appellant constitutes reliable evidence that St. John's wort extract is a medicament. Dr. Kacew was led through most of the documents and testified that none of them demonstrated the efficacy of St. John's wort extract for different reasons. He testified that some of the documents were simply newspaper articles that obviously have no persuasive impact. The substance of Dr. Kacew's testimony was that the research trials were seriously flawed in their statistical design. As a result, the conclusions could not be relied upon. Some of the flaws identified by Dr. Kacew were lack of replication, lack of balancing by age group, sex, etc., lack of a control or "placebo" group and lack of "double blind" provisions.

In cross-examination, Dr. Kacew testified that the *Merck Index* is a reference document generally accepted by the scientific and medical communities. Dr. Kacew was shown an excerpt from this document, which described St. John's wort extract as an antidepressant. In response, he said that, though the *Merck Index* is a useful reference, it is not "the Bible."

The appellant's representative referred to the evidence which showed that the goods in issue have a drug identification number, that the label on the bottle indicates "[f]or therapeutic ... use" and that *Hypericum* is listed as a medicinal ingredient. Furthermore, it is marketed as a remedy against depression and as an alternative to Prozac. The representative referred to the numerous studies and the pharmacopoeia of different countries presented into evidence, which, in his view, all demonstrate that St. John's wort extract is a medicament and that it is effective in treating mild to moderate depression. He also referred to the testimony of Dr. Rona who said that he and other general practitioners prescribe St. John's wort extract regularly to patients who suffer from mild to moderate depression, as well as from a number of other ailments. Furthermore, Dr. Rona testified that there are a number of conventional drugs that have never been scientifically proven to be effective. In the representative's view, this demonstrates that there does not have to be scientific proof of effectiveness in order for a product to be considered a medicament in heading No. 30.03. The representative argued that the testimony of Dr. Kacew with respect to the accuracy of the various studies on the effectiveness of St. John's wort extract should be disregarded, since Dr. Kacew himself had no experience with regard to St. John's wort extract. He noted, however, that Dr. Kacew did acknowledge that the *Merck Index* lists St. John's wort extract as an antidepressant and that he would not take St. John's wort extract as a food.

On the basis of the above evidence, the appellant's representative argued that the goods in issue fall within the terms of heading No. 30.03. He argued that they meet the four conditions which must be met in order to be classified in that heading. The first condition is that the product must fall within the definition of a "medicament," that is, it must be used for medical treatment. The second condition is that the product must consist of a mixture of two or more constituents, a point which was unchallenged by the respondent. The third condition is that the goods must be for therapeutic or prophylactic use. According to the representative, the testimonies of the appellant's three witnesses clearly established that the goods in issue met this

condition. Furthermore, he pointed to the evidence which showed that the words “[f]or therapeutic ... use” are found on the label of the bottle in which the goods in issue are sold. The fourth and final condition is that the goods not be put up in measured doses or in forms or in packings for retail sale, another point which was unchallenged by the respondent.

In support of his argument, the appellant’s representative referred to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*³ (the Explanatory Notes) to heading No. 30.03, which provide that “[t]his heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments.” He argued that the following definition of “medicinal,” “of, relating to, or having the properties of medicine,⁴” is much broader than the definition of “medicament” and that it should be relied upon by the Tribunal. In his view, the evidence clearly showed that the goods in issue have medicinal properties. Furthermore, they are for use in the treatment of human ailments. He argued that the following definition of “ailment,” “an illness of a trivial nature,⁵” is also very broad. In the representative’s view, the use of the word “ailment” brings into question the respondent’s position that scientific proof is required. With respect to this issue, the representative noted that the words “scientifically proven effective” are not found anywhere in the Explanatory Notes. He referred to the decision of the Supreme Court of Canada in *Friesen v. The Queen*⁶ and argued that the Tribunal cannot add words to the Explanatory Notes which have not been put there by Parliament. The representative referred to certain Department of National Revenue publications, which, in his view, confirm that scientific proof of efficacy is not required.

In addition, the appellant’s representative argued that none of the exclusions listed in the Explanatory Notes, namely, tonic beverages, food supplements and herbal teas, apply to the goods in issue. He submitted that it is clear that the goods in issue are not tonic beverages or herbal teas. He referred to the testimonies of the expert witnesses in support of his argument that the goods in issue are not foods or food supplements. Even if the Tribunal found that the goods in issue were foods, the representative argued that they would be excluded from heading No. 21.06 because they are for therapeutic use. He referred to the Tribunal’s decisions in *Hung Gay Enterprises Ltd. v. The Deputy Minister of National Revenue*⁷ and *Yves Ponroy Canada v. The Deputy Minister of National Revenue*⁸ in support of his argument. Finally, the representative referred to Customs Notice N-413,⁹ which provides that “throat pastilles or cough drops which are assigned a GP or DIN number are considered to have medicinal properties and are classified under tariff item 3004.90.99,” in support of his argument that St. John’s wort extract, which also has a drug identification number, should be classified under tariff item No. 3003.90.99.

Counsel for the respondent argued that, in order for an imported product to be classified as a “medicament,” the importer must provide some evidence that the product does indeed treat or prevent a disease. In his view, the product must be shown to be truly effective in combating a particular disease. It is not enough to show that it merely contributes to general well-being. Counsel referred to the Tribunal’s

3. Customs Co-operation Council, 1st ed., Brussels, 1986.

4. See Appellant’s Aid to Argument.

5. *Ibid.*

6. 95 D.T.C. 5551, Court File No. 23922, September 21, 1995.

7. Appeal No. AP-96-044, June 5, 1997.

8. Appeal No. AP-96-117, December 5, 1997.

9. *Tariff Classification of Throat Pastilles and Cough Drops*, Department of National Revenue, Customs and Excise, February 23, 1990.

decision in *Yves Ponroy*, where it was decided that an importer has no obligation to demonstrate that the product has been scientifically proven to be an effective medicament in order for it to be classified as such. According to counsel, this decision establishes that it must only be shown that it is indicated on the label that the product is to be used in the treatment or prevention of a disease. In other words, whether or not the substance actually works is irrelevant. Counsel argued that the Tribunal applied the wrong test in *Yves Ponroy*. He requested that the Tribunal reconsider its decision and rule that “medical efficacy” is relevant to the determination of whether a health food or an herbal remedy should be classified as a food preparation as opposed to a medicament. Counsel argued that the appellant has not shown that the goods in issue are medically effective or, for that matter, that there is even an indication that they are used for the prevention or treatment of a disease. In other words, the goods in issue do not meet the *Yves Ponroy* test.

According to counsel for the respondent, the goods in issue are properly classified under tariff item No. 2106.90.99 as other food preparations not elsewhere specified or included. In counsel’s view, the evidence clearly showed that the goods in issue are simply a mixture of olive oil and a plant extract, specifically, St. John’s wort extract. He argued that this is no different from an olive oil which contains garlic extract or some other flavourful herb. Accordingly, the goods in issue fall under the very broad category of “food.” He referred to the following definition of the word “food” in support of his argument: “a nutritious substance, esp. solid in form, that can be taken into an animal or a plant to maintain life and growth.”¹⁰ Counsel also referred to the Tribunal’s decision in *Flora Distributors Ltd. v. The Deputy Minister of National Revenue*,¹¹ where the Tribunal found that a similar product known as “No-Odour-Garlic” capsules, which were made up of 90 percent canola oil and 10 percent essential oil of garlic, met the general description of food preparations and had been properly classified in heading No. 21.06. The Tribunal held that the goods in that case were food supplements, based on extracts from plants, i.e. garlic cloves. Counsel argued that the same reasoning applies to the goods in issue, except that the plant is St. John’s wort. The Tribunal also held in *Flora Distributors* that the purpose of the garlic capsules was to maintain general health or well-being, which, in counsel’s view, the evidence showed is also the purpose of the goods in issue.

Counsel for the respondent submitted that it is clear from reading the Explanatory Notes to heading No. 21.06 that the goods in issue are the type of products that are intended to be covered by that heading. Counsel referred, in particular, to paragraphs 14, 15 and 16 of those explanatory notes, which provide for the inclusion in heading No. 21.06 of products consisting of a mixture of plants with other substances used for making herbal infusions or herbal teas and food supplements based on extracts from plants, fruit concentrates, honey, fructose, etc., the purpose of which is to maintain general health or well-being.

According to counsel for the respondent, in order for a product to be classified in heading No. 30.03, there must be actual scientific proof of efficacy. Counsel acknowledged that heading No. 30.03 does not explicitly contain those words; however, in his view, they are implicitly contained therein. Counsel argued that, in order to meet this standard, it must be shown that a product contains an active ingredient which works in treating or preventing a disease. He referred to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*,¹² where, in his view, products similar to the goods in issue were not classified in heading No. 30.03 because they did not contain an active ingredient. Counsel argued that it is not sufficient for an importer to simply claim that a product is effective in treating or preventing a disease. In his view, an importer must show that a product actually does so. Counsel referred to

10. *The Concise Oxford Dictionary of Current English*, 8th ed. (Oxford: Clarendon Press, 1990) at 457.

11. Appeal No. AP-94-199, October 8, 1996.

12. Customs Co-operation Council, 1st ed., Brussels, 1987.

the Tribunal's decision in *Baxter Corporation v. The Deputy Minister of National Revenue*¹³ and argued that, in that case, the Tribunal clearly wanted more than a mere claim that the goods in issue could be used to treat a disease. In his view, the Tribunal found that the goods in that appeal were indeed effective in treating the disease, which, he argued, is the proper test to be applied.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*¹⁴ (the General Rules) is of the utmost importance. This rule states that classification is first determined according to the terms of the headings and any relative Chapter Notes. Therefore, the Tribunal must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein, subject to any relative Chapter Note. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, the Tribunal shall have regard to the Explanatory Notes.

Heading No. 21.06 provides for the classification of “[f]ood preparations not elsewhere specified or included.” The Explanatory Notes to heading No. 21.06 further provide that “[p]reparations, often referred to as *food supplements*, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins ... are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are **excluded (heading 30.03 or 30.04).**” In the Tribunal's view, the goods in issue are not included in the common understanding given to the term “food preparations.” The Tribunal relies on its decision in *Shaklee Canada Inc. v. The Minister of National Revenue*¹⁵ in support of this conclusion. The goods in that case were certain vitamins, minerals and fibre products. Applying the test enunciated in *Shaklee*, the Tribunal is of the view that the person on the street, being well informed of the prescribed conditions and dictionary definitions, would not conclude that the goods in issue are “food.” Several witnesses testified that the goods in issue would not be eaten as “food.” Further, there was no evidence before the Tribunal to allow it to conclude that the goods in issue are “food supplements.” Indeed, the evidence shows that they have no nutritional value. There is also no evidence that they have ever been used as a food additive. Therefore, the goods in issue are not properly classified under tariff item No. 2106.90.99.

In the Tribunal's view, the present case can be distinguished from its decision in *Flora Distributors* that dealt with “No-Odour Garlic” capsules. In that case, the Tribunal found that the goods in issue were food supplements, based on extracts from plants, i.e. garlic cloves, which obviously are edible. The situation is different in the present case in that the goods in issue are based on extracts from the St. John's wort plant, which, the evidence shows, is not edible. Indeed, it is toxic if ingested by animals or humans. For this reason, the Tribunal does not accept counsel for the respondent's argument that it should follow its decision in *Flora Distributors* in order to find that the goods in issue are food supplements.

Heading No. 30.03 provides for the classification of “[m]edicaments ... consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.” In *Baxter Corporation*, the Tribunal relied on its decision in *UpJohn Inter-American Corporation v. The Deputy Minister of National Revenue for Customs and Excise*¹⁶ and held that, “[w]ith regard to heading No. 30.04, the Tribunal interprets this provision as referring

13. Appeal No. AP-93-092, July 26, 1994.

14. *Supra* note 2, Schedule I.

15. Appeal No. 2940, September 6, 1990.

16. Appeal No. AP-90-197, January 20, 1992.

to substances used to treat or prevent diseases. This is indicated by the dictionary definitions of the word ‘therapeutic,’ which means ‘curative; of the healing art’ and the word ‘prophylactic,’ which means ‘tending to prevent disease or other misfortune.’” In the Tribunal’s view, the same reasoning applies in interpreting heading No. 30.03.

The Explanatory Notes to heading No. 30.03 provide that “[t]his heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments.” The words “disease” and “ailment” are not defined in the tariff nomenclature. However, as stated in *Yves Ponroy*, the word “disease” is defined in *The New Lexicon Webster’s Dictionary of the English Language*¹⁷ as “an unhealthy condition; a particular malady.¹⁸” The word “ailment” is defined as “an illness of a trivial nature.¹⁹” The Tribunal also notes that the word “disorder” is defined as an “ailment.²⁰”

The appellant’s witnesses testified that St. John’s wort extract is used in the treatment of such things as mild to moderate depression, tension headaches, insomnia, gastrointestinal disorders and external wounds. The Tribunal attributes particular weight to the testimony of Dr. Rona, who testified that he often recommends St. John’s wort extract to his patients and prescribes it for treating some or all of the above conditions. In the Tribunal’s view, although it may be arguable that these “conditions” are not true diseases or illnesses, they clearly meet the above definitions and, therefore, constitute various forms of disorders or ailments.

The Tribunal agrees with the appellant’s representative that there is no requirement in the relative Chapter Notes, the Explanatory Notes or the terms of the heading that a product must be scientifically proven to be an effective medicament in order to be classified in heading No. 30.03. In other words, it does not need to be shown that a product actually cures a disease or illness. However, in the Tribunal’s view, there must be some “curative” properties shown in order for a product to be accepted as a medicament and for it to be classified in heading No. 30.03.²¹ The word “curative” is defined in *The New Lexicon Webster’s Dictionary of the English Language* as “having remedial properties, helping to cure.²²” In the Tribunal’s view, the appellant has met that burden in the present case. The evidence shows that the goods in issue have remedial properties which help “cure” or “treat” such things as mild to moderate depression, tension headaches, insomnia, gastrointestinal disorders and external wounds, which are clearly various forms of disorders or ailments. Indeed, Dr. Rona testified that the goods in issue contain an active ingredient, namely, *Hypericum*, which has a modulating effect on the nervous system and can, therefore, affect many different areas of the body. Dr. Rona explained how bad nerves can cause irritability, ulcers, thyroiditis, rashes, gastrointestinal upsets, etc. He also testified that St. John’s wort extract has been effective in treating mild to moderate depression, anxiety and insomnia in well over 80 percent of the people to whom he prescribed it.

In light of the foregoing, the Tribunal finds that St. John’s wort extract is a medicament. In addition, the Tribunal notes that, at the time of importation, the goods in issue were “not put up in measured doses or in forms or packings for retail sale,” as specified by the terms of heading No. 30.03.

17. Encyclopedic ed. (New York: Lexicon Publications, 1987).

18. *Ibid.* at 271.

19. *Ibid.* at 17.

20. *Ibid.* at 272.

21. See, for example, *Flora Manufacturing & Distributing Ltd. v. The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-97-002, July 24, 1998.

22. *Supra* note 17 at 236.

All of the conditions of heading No. 30.03 having been met, the Tribunal finds that the goods in issue should be classified under tariff item No. 3003.90.99.

Accordingly, the appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member