Date: 20011210
Docket: S.H. No. 108819
1994

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Municipal Contracting Ltd. v. Nova Scotia (Attorney General), 2001 NSSC 192]

BETWEEN:

MUNICIPAL CONTRACTING LIMITED, AS AGENT FOR AND ON BEHALF OF MUNICIPAL ENTERPRISES LIMITED

Plaintiff

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA, REPRESENTING HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA

Defendant

D E C I S I O N

HEARD BEFORE: The Honourable Justice M. Heather Robertson, Supreme Court of Nova Scotia, on October 30, 31, November 1, 2, 3, 6, 7, 8, 9, 10, 2000 and March 12, 2001, at Halifax, Nova Scotia

POST-TRIAL SUBMISSIONS: April 17 and May 4, 8, and 16, 2001

WRITTEN DECISION: December 10, 2001

COUNSEL: Robert G. Bellieveau, Q.C. and Bruce S. Russell, for the plaintiff
Duncan R. Beveridge, Q.C., for the defendant

ROBERTSON, J.:

[1] Municipal Contracting (hereinafter called "Municipal") is a wholly owned subsidiary and agent for and on behalf of its parent Municipal Enterprises Limited. Municipal Enterprises Limited owns other wholly owned subsidiaries including Dexter Construction and Envirsoil Limited. In addition it owns and operates a quarry "Rocky Lake Quarry" (hereinafter called the "Quarry").

[2] At the Quarry, Municipal manufactures various sizes of crushed rock products for both third party sales and for internal consumption within the Municipal Enterprises Corporate group, such as for performance of road building and paving contracts to third parties.

[3] Municipal's manufacturing process at the Quarry commences with the drilling and blasting of solid mass rock into large pieces. This blasted rock is sold from time to time without any further manufacturing or production. The blasted rock which is not sold is transported within the Quarry to the primary crushing operation which reduces the rock to particles of a size no larger than six inches, known as six inch crusher run or surge. Much of this product is sold without further manufacture or production.

[4] The unsold product is transported within the Quarry to the secondary crushing operation which further reduces the product to four inch (class E) or two inch (class C) gravel, also sold to third parties. The balance of the product not sold or stockpiled is processed even further through the tertiary crushing operation to various smaller sizes of gravel which are available for sale. Approximately fifty percent of all the Quarry product is sold internally to the corporate group at prices which mirror the price list to third parties.

[5] The claim under consideration relates to fuel used by heavy machinery utilized in all aspects of the stone and gravel manufacturing process within the Quarry itself. Municipal purchased diesel fuel in the Province of Nova Scotia for these vehicles and paid tax on the fuel purchases pursuant to the provisions of the *Gasoline and Diesel Oil Tax Act*, R.S.N.S. 1989, c. 183, as amended, (the "*GDOTA*").

[6] The *GDOTA* contains various provisions allowing exemptions and refunds from the payment of fuel tax. The exemption provisions allow a purchaser to purchase fuel without the payment of tax to the supplier. The refund provisions apply once the taxpayer has paid tax to the supplier.

[7] Municipal did not claim an exemption from fuel tax paid to its suppliers. Accordingly, they made refund claims pursuant to the refund provisions of the *GDOTA*. The claim for refunds relate to the period from February 1, 1989 to March 31, 1996 in a total amount of $l,120,583. It has been agreed by the

parties that this sum is reduced by twenty percent to reflect correction for certain activities at the Quarry requiring consumption of diesel fuel that are admitted by both parties as not coming within the statutory exemption provisions. Thus the sum of refund sought by the plaintiff is $896,466.

[8] The basis for Municipal's refund claim was the exemption for diesel fuel purchased for machinery and apparatus which are used in the manufacture or production of goods for sale being stone and gravel. Municipal filed various applications pursuant to section 34 and paragraph 12 (1)(k)(iii) of the Regulations made under section 8 of *GDOTA* for refunds of the fuel tax previously paid (the "refund claims"). The refund claims were denied by the Nova Scotia Department of Finance who took the position that the quarrying and crushing operations were taxable pursuant to the *GDOTA* Regulations. Municipal filed a notice of objection to the denial of the initial refund application with the Provincial Tax Commission. The Provincial Tax Commission dismissed the objection by letter dated December 3, 1990. Municipal appealed that decision to the Nova Scotia Tax Review Board, who by a decision dated March 17, 1991 held that the Board did not have the jurisdiction to deal with an appeal from an application for a refund under the *GDOTA*.

[9] Following further refusal of refund claims, Municipal brought an application for *certiorari* and declaratory relief before the Nova Scotia Supreme Court to quash the Provincial Tax Commissioner's decisions of December 3, 1990 and June 14, 1991. Saunders J., as he then was, granted the relief sought, *inter alia* finding that Municipal did qualify under the applicable refund provision of the Regulations. The *Minister of Finance v. Municipal Contracting Limited* (1991), 110 N.S.R. (2d) 45 (N.S.S.C.T.D.).

[10] On appeal, the decision of Justice Saunders was reversed on the basis that there was no actual decision of the provincial Minister of Finance upon which to base the *certiorari* application. The Appeal Division did not revisit the substantive decision of Saunders, J., but made its decision on procedural grounds. *The Minister of Finance v. Municipal Contracting Limited* (1992), 113 N.S.R. (2d) 174 (N.S.S.C.A.D.).

[11] Municipal wrote to the Minister of Finance requesting the Minister's personal decision respecting the refund applications and in reply received the Minister's denial of each of the refund claims. In 1994 this proceeding was commenced, to obtain the refunds denied the plaintiff by the provincial Minister of Finance. By agreement this action includes refund claims to March 31, 1996.

ISSUES:

(A) What is the correct interpretation of the *GDOTA* Regulations as they may apply to Municipal's crushing and quarrying operation?

(B) Alternatively is Municipal entitled to restitution from the Province for fuel tax paid in connection with its operations at Quarry?

[12] Further, in its post-trial brief the plaintiff raised further issues arising from the 1991 decision of Saunders, J., as he then was. The plaintiff says first, the doctrine of issue estoppel precludes re-litigation of the issue between the parties herein. Second, the principle of judicial comity applies, again with respect to the said 1991 decision on this issue, requiring the court to direct that the same question be answered in favour of the plaintiff herein and third, that by straight forward legal interpretation, the plaintiff's interpretation should prevail.

STATUTORY REFUND PROVISIONS:

[13] The Regulations relevant to these issues are subsection 21 (1), section 34, subparagraph 12(l)(k)(iii) and paragraphs 14(d) and 1(1)(mc). They state as follows:

Subsection 21(1) of the Regulations states:

> 21(1) Except as provided by subsections (2) and (3) [dealing with diesel oil for use in aircraft or in a ship, boat or vessel operated for commercial purposes] on or before the purchase or delivery of diesel oil, every purchaser shall pay a tax at the rate of fifteen and four-tenths cents per litre on all diesel oil purchased by or delivered to such purchaser.

Section 34 of the Regulations states:

> 34 Where the tax has been paid in respect of diesel oil the Minister may make a refund in the in the [sic] amount equal to the tax paid to the persons and in the circumstances in which he may make a refund in respect of the tax paid on gasoline in accordance with Regulations 12 or 13.

Subparagraph (12)(l)(k)(iii) of the Regulations states:

> 12(1) Where the tax has been paid, the Minister may upon application from a purchaser, and upon the receipt of evidence satisfactory to the Minister, refund the tax on gasoline where
>
> ....
>
> (k) subject to Regulation 14, the gasoline has been used to operate
>
> ....
>
> (iii) machinery and apparatus which were used in the manufacture or production of good for sale...

Paragraph 14(d) of the Regulations states:

> 14 The exemption provision contained in paragraph (h) of subsection (2) of Regulation 11 and the refund provision contained in paragraph (k) of subsection (1) of Regulation 12 do not apply to gasoline purchased, stored and used
>
> ...
>
> (d) in the production of processing of non-renewable resources;

Paragraph 1(1)(mc) of the Regulations states:

> 1(1) In this Part [Part 1 - Gasoline]
>
> ...
>
> (mc) "production or processing" means exploration for, extraction of, or transformation or conversion of any non-renewable resource *to the extent and in the manner determined by these regulations;* [italics added]

ANALYSIS:

[14] The parties agree that the taxes required by subsection 21(1) of the Regulations were paid and that Municipal filed applications for refund of those taxes. It is also agreed that of the total of the taxes paid during the relevant period, the amount of $896,466 was paid in respect of diesel oil, "used to

operate...machinery and apparatus which were used in the manufacture or production of goods for sale," within the meaning of section 34 and subparagraph 12(1)(k)(iii) of the Regulations, dealing with refunds.

[15] Paragraph 12(k) of the Regulations is expressed as, "subject to Regulation 14... ." Thus, paragraph 14(d) of the Regulations would prohibit from application of subparagraph 12(1)(k)(iii) of the Regulations any refund of taxes paid in respect of diesel oil purchased, stored or used in the "production or processing" of non-renewable resources. As noted *supra*, paragraph 1(1)(mc) of the Regulations specifies that "production or processing" means "any non-renewable resource, to the extent and in the manner determined by these regulations." However, notwithstanding the concluding phrase, in fact no provision in the Regulations does determine or otherwise speak to either the "extent" or the "manner" of any activity in connection with any non-renewable resource. Accordingly, the ultimate issue is whether paragraph 14(d) of the Regulations, containing the defined phrase "production or processing," does operate so as to provide an exception of the exemption from tax and consequential entitlement to refund provided by subparagraph 12(1)(k)(iii) of the Regulations.

[16] The plaintiff's position is that the defined phrase "production or processing," does not at all limit the application of the tax exemption and consequential entitlement to refund provided by subparagraph 12(1)(k)(iii) of the Regulations. The defendant says it does.

[17] The defendant submits that the resolution of the issue depends to a large extent on the correct interpretation of the *GDOTA* Regulations. While at one time the strict or literal approach to interpreting taxation statutes was accepted, this is no longer the case. Dreidger on the Construction of Statutes (3Ed.) states:

> ***Modern rejection of strict literalism.*** In *Stubart Investments Ltd. v. R.* the Supreme Court of Canada announced a new approach to the interpretation of fiscal legislation. The court made two related points. First, the view that fiscal legislation is merely a revenue-raising mechanism is no longer tenable. In the hands of modern government, taxation has become a sophisticated and important policy tool. Second, in keeping with this new appreciation, fiscal legislation is to be interpreted in the same manner as other legislation, in an effort to discern and give effect to the legislature's policies. The words of a taxing enactment are not to receive a strictly literal interpretation but are to be read in their entire context, having regard to the legislative purpose and scheme.
>
> These points were reiterated and affirmed by the court if *R. v. Golden:*

In *Stubart*...the court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statues in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.

Although *Stubart* was not the first case to condemn excessive literalism in the interpretation of tax legislation, it did so definitively and conclusively. There is no going back to the old approach. In interpreting tax legislation today courts bring to bear the full range of principles and techniques relied on in interpreting other kinds of legislation.

[18] Section 9(5) of the *Interpretation Act*, R.S.N.S. 1989 c. 235 provides:

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters.

(1) the occasion and necessity for the enactment;

(2) the circumstances existing at the time it was passed;

(3) the mischief to be remedied;

(4) the object to be attained;

(5) the former law, including other enactments upon the same or similar subjects;

(6) the consequences of a particular interpretation; and

(7) the history of legislation on the subject.

As pointed out by Driedger:

One of the most effective ways of establishing legislative purpose is to trace the evolution of legislation from its inception, through successive amendments, to its current form. Tracing may expose the legislature's past decision to adopt a new policy or strike out in a new direction; it may reveal a gradual trend or evolution of legislative policy; or it may reveal the original purpose of legislation and show that this purpose has remained constant through successive amendments to the present.

Dreidger p. 58

EVOLUTION OF THE *ACT* AND REGULATIONS

[19] The defendant traced the history of this legislation and the debate surrounding new tax measures affecting the non-renewable resource sector.

[20] The *Gasoline and Diesel Oil Tax Act* under consideration in this action can be traced to the *Gasoline Tax Act,* 1926, S.N.S. 1926 c. 2. Originally the tax was the responsibility of the Minister of Highways. Section 3 of the *Act* provided:

> 3. In order to the raising of a revenue for provincial purposes every purchaser shall pay to the Minister for the use of His Majesty in the right of the Province of Nova Scotia, a charge or tax at such rate not exceeding three cents a gallon as the Governor-in-Council from time fixes and determines on all gasoline purchased or delivery of which is received by such purchaser.

[21] The monies collected were designated to form part of the Provincial Highway Fund under the *Public Highways Act.* The Governor-in-Council was given power to make regulations, including the power to provide for rebating of the tax to any purchaser or class of purchasers:

> 5. (1) The Governor-in-Council may make regulations –
>
> (a) for the collection of the said charge or tax; designating the persons by whom the same shall be collected; fixing and determining the remuneration to be paid to or deducted by such persons from the moneys so collected;
>
> (b) for the accounting for and paying over of any sums of money so collected and the time and manner of such accounting and paying;
>
> (c) prescribing the returns and statements to be made by importers, manufacturers, vendors and purchasers of gasoline in Nova Scotia;
>
> (d) providing for rebating the said charge or tax to any purchaser or class of purchasers and prescribing the profits to be furnished upon any application for rebate;

(e) imposing penalties for the non-payment of the said charge or tax and for non-compliance with provisions of this Act or any of the regulations;

(f) generally for the better carrying out of the provisions of this Act.

[22] The *Act* was amended from time to time but has not really had significant changes in structure or substance. Throughout its legislative history the *Act* remained constant in delegating to the Governor-in-Council a broad authority to make regulations.

[23] Section 5 of the *Gasoline and Diesel Oil Tax Act* R.S.N.S. 1989 c. 183 required every purchaser to pay tax on all diesel oil purchased. As noted above, the Governor-in-Council was empowered to make regulations to rebate to any consumer or purchaser the tax or any portion thereof (s. 8(1)(d)) and further may exempt any consumer or purchaser from payment of the tax or portion thereof (s. 8(1)(e)).

[24] The Regulations with respect to rebates and exemptions, that were in force during the time period covered by the claims by the plaintiff are set out in Regulations 33 and 34. They state:

Exemption

33 (1) The provisions of Regulation 11 and with respect to the purchase or consumption of marked gasoline shall apply *mutatis mutandis* to the purchase or consumption of marked diesel oil

(2) No tax shall be payable by a purchaser or consumer in respect of the purchase or consumption of marked diesel oil used to heat any building.

(3) No tax shall be payable by a purchaser or consumer in respect of the purchase or consumption of marked marine diesel fuel when

(a) the marked marine diesel fuel is purchased within the Province and is pumped directly from an onshore refuelling facility or water borne refuelling vessel into a fuel system or a commercial vessel; and

(b) the marked marine diesel fuel is used for commercial shipping purposes.

Refunds

> 34 Where the tax has been paid in respect of diesel oil the Minister may make a refund in the amount equal to the tax paid to the persons and in the circumstances in which he may make a refund in respect of the tax paid on gasoline in accordance with Regulations 12 or 13.

[25] The modern day origin of present *Gasoline and Diesel Oil Tax Regulations* are the Regulations made under the *Gasoline and Diesel Oil Tax Act, S.N.S. 1965, c. 8* which came into force April 1, 1966.

[26] Regulation 14 gave an exemption for the purchase or consumption of marked gasoline. It went on to provide that marked gasoline could only be purchased, stored, or used by, *inter alia*, the Department of Highways, a city or town, or by a person who holds a marked gasoline permit. Subsection 3 of this Regulation provided a person who holds a marked gasoline permit may use marked gasoline for "industrial purposes only as approved by the Minister of ... ." Regulation 14.30(a) was amended on August 6th, 1974, by repealing it and placing it with the following clause:

> (a) For the purpose of operating machinery or apparatus which in the opinion of the Minister is used directly in the process of manufacture or production of goods for sale.

[27] By OIC 77-732 (June 28, 1977) Regulation 14 and 15 were repealed along with Regulation 38, bringing the rebate provision with respect to tax on diesel oil to be exactly the same as that with respect to tax on gasoline. The relevant portions of these Regulations are as follows:

> 14(1) No tax shall be payable by the purchaser or consumer in respect of:
>
> (a) the purchase or consumption of marked gasoline in accordance with these Regulations;
>
> (b) the purchase or consumption of naptha gasoline.
>
> 14(2) Marked gasoline may only be purchased, stored and used:
>
> (d) for the purpose of operation machinery and apparatus and parts thereof which are used directly or exclusively in the process of manufacture or production of goods for sale.

> 15(1) Where the tax has been paid, the Minister may upon application from a purchaser and upon the receipt of evidence satisfactory to the Minister, rebate the tax paid on gasoline where:
>
> (f) the gasoline has been used for the purpose of operating machinery and apparatus and parts thereof used directly or exclusively in the process of manufacture or production of goods for sale;

[28] Regulation 14(2)(d) was further amended within a few months (OIC 77-1380, November 15, 1977). 14(2)(d) was amended by changing "operation" to "operating" and inserting the requirement that the permitted use of marked gasoline was "subject to Regulation 15A." The same amendment was made for the rebate provision 15(1)(f).

[29] The new Regulation 15A was:

> 15A The exemption provision contained in clause (d) of subsection (2) of Regulation 14 and the rebate provision contained in clause (f) of subsection (1) of Regulation 15 do not apply to gasoline purchased, stored or used:
>
> (a) in the manufacture of asphalt or ready-mix concrete;
>
> (b) in the repair of any thing or maintenance of any kind;
>
> (c) in the salvaging of any good or materials;
>
> (d) effective on, from and after the first day of April, A.D. 1978, in the quarrying and crushing of rock;
>
> (e) in construction, including but not so as to restrict the generality of this clause, road construction, land development, earth movement and building construction.

[30] The defendant submits that it is clear from the legislation that the consumption of marked gasoline or diesel oil was not permitted in quarrying and crushing of rock and the Minister was not permitted to make any rebate for tax paid on gasoline or diesel fuel consumed in the quarrying and crushing of rock. Regulations 14 (2)(d) and 15(A) were both amended by renumbering then 14(2)(d) to14(2)(c) and making the corresponding change in 15(A).

[31] The *Gasoline and Diesel Oil Tax Act Regulations* were replaced effective September 1, 1981, by OIC 81-973 (July 28, 1981). This resulted in a renumbering of the Regulations and a more detailed list of operations that could

use marked gasoline and diesel oil and to permit the Minister to refund the tax paid on gasoline or diesel oil. Regulation 12(1)(k) provided:

12 (1) Where the tax has been paid, the Minister may upon application from a purchaser, and upon the receipt of evidence satisfactory to the Minister, refund the tax on gasoline where: .

(k) subject to Regulation 14, the gasoline has been used to operate

(i) machinery and apparatus which was used directly in a commercial farming operation;

(ii) machinery and apparatus which was used directly in the production or harvesting of forest products for sale;

(iii) machinery and apparatus which was used directly in the mining of natural resources for sale;

(iv) machinery and apparatus which was used directly in the process of manufacture or production of goods for sale;

(v) machinery and apparatus which was used to develop electricity to the extent that the electricity was used to operate machinery and apparatus used directly in the process of manufacture or production of goods for sale;

[32] The same restriction with the quarry and crushing of rock was maintained. The renumbered Regulation became Reg. 14:

14 The exemption provision contained in paragraph (h) of subsection (2) of Regulation 11 and the refund provision contained in paragraph (k) of subsection (1) of Regulation 12 do not apply to gasoline purchased, stored and used:

(a) in the manufacture of asphalt or ready-mix concrete;

(b) in the repair of any thing or maintenance of any kind;

(c) in the salvaging of any goods or materials;

(d) in the quarrying and crushing of rock;

(e) in construction, including but not so as to restrict the generality of this clause, road construction, land development, earth movement and building construction;

(f) in the operation of motor-cycles, golf carts, or dunebuggies;

(g) in the operation of motor vehicles used to construct logging roads;

(h) in the handling, storage or distribution of manufactured, produced or harvested goods for sale.

[33] The phrase " manufacturing or production of goods for sale" has been the subject of considerable judicial consideration. It appears to have been accepted that the production of crushed stone fell within the meaning of that term and accordingly, equipment used to produce such stone products and fuel to power that equipment would not be taxed. For example, *Gateway Materials Limited v. A.G.N.S.* (1979), 35 N.S.R. (2d) 442 (N.S.C.T.D.).

[34] The defendant submitted that in 1982 the taxation scheme was expanded to include non-renewable resources. On April 30, 1982, the then Minister of Finance, the Honourable Joel Matheson, rose in the House of Assembly to present the budget (Debates of the Nova Scotia House of Assembly, Vol. 3, 1982, p. 2106 and following).

> Mr. Speaker, in assessing the Province's return on revenue generated by non-renewable resources, we have found it appropriate to remove, effectively immediately, the exemption under the *Health Services Tax Act*, on machinery, equipment and supplies used in the production and process of these resources.
>
> (p.2117)

and further:

> We are also removing the exemption under the *Gasoline and Diesel Oil Tax Act* for motor fuels consumed in the production and processing of non-renewable resources.
>
> (p.2118)

[35] Amendments to the *Health Services Tax Act* were passed as set out in S.N.S. 1982, c. 27. The *Act* was amended by imposing a different rate of sales tax on

personal property consumed or used in the production or processing of non-renewable resources. To apply the differential rate of tax of four percent to the non-renewable resource sector, a division had to be created between what would ordinarily be considered manufacturing and production of goods for sale and those activities in the non-renewable resources sector that would be subject to tax. This was accomplished by introducing statutory definitions of manufacture or production, non-renewable resource and production and processing. The statutory provisions were:

> (ca) "manufacture or production" means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally existed as raw or prepared material but does not include production or processing;
>
> (fb) "production or processing" means exploration for, extraction of, or transformation or conversion of any non-renewable resource to the extent and in the manner determined by the regulations;
>
> (ea) "non-renewable resource" means any naturally occurring inorganic substance, and includes coal, bituminous shales and other stratified deposits from which oil can be extracted by destructive distillation and including petroleum;

[36] The Governor-in-Council passed regulations, the Non-Renewable Resource Production or Processing *Health Services Tax Regulations* by OIC 83-163 N.S. Reg. 19/83, which provided that effective, June 15, 1982:

> 3. The following tangible personal property is hereby determined for the purpose of Clause 5(1) (b) of the Health Services Tax Act to be engaged in the production or processing of non-renewable resources:
>
> (a) surveying precision instruments and equipment which are used by a contractor, operator or any other person for the purpose of exploration for minerals and petroleum;
>
> (b) machinery and apparatus which is used by a contractor, operator or any other person for the purpose of:
>
> (i) exploration for minerals and petroleum;
>
> (ii) extraction and primary crushing of raw ores;
>
> (iii) extraction of petroleum at petroleum and natural gas production sites.

(c) repair services provided to tangible personal property referred to in clauses (a) and (b).

(8) "primary crushing" means that series of mining operations beginning with extraction of raw ore from its natural state and concluding with the removal, where applicable, or any extraneous materials preparatory to manufacture or production;

[37] Unlike the *Health Services Tax Act,* the *Gasoline and Diesel Oil Tax Act* had already delegated to the Governor-In-Council the necessary power to grant or limit relief from the tax. The Governor-in-Council, by OIC 82-790 (June 29, 1982) removed the ability of anyone to use marked gasoline or diesel oil in the production or processing of non-renewable resources and removed the power of the Minister to give a refund for tax paid on any such fuel.

[38] The Regulations were amended by adding the following definitions:

1. Section 1. of the Regulations is amended by

(1) adding immediately following clause 1(1)(j) thereof the following clause:

(ja) "manufacture or production" means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally existed as raw or prepared material but does not include production or processing;

(2) adding immediately following clause 1(1)(m) thereof the following clauses:

(ma) "non-renewable resource" means any naturally occurring inorganic substance, and includes coal, bituminous shales and other stratified deposits from which oil can be extracted by destructive distillation and including petroleum;

(mb) "petroleum" means, in addition to its ordinary meaning, any mineral oil or relative hydro-carbon and any natural gas including coal gas, existing in its natural condition in strata;

(mc) "production or processing" means exploration for, extraction of, or transformation or conversion of any non-renewable resource to the extent and in the manner determined by these regulations;

[39] In addition, Reg. 11(2)(e) which had before provided an exemption to any drilling equipment being used to explore for natural resources including the drilling of wells for water supply, was eliminated and only the fuel oil used to operate the drilling equipment for water remained. Gasoline or diesel oil used for machinery and apparatus in the mining of natural resources was removed. Regulation 14 was amended by repealing 14(d) "in the quarrying and crushing of rock" and replacing it with "in the production or processing of non-renewable resources."

[40] The defendant argued that it was abundantly clear by the evolution and history of these Regulations that the intention of the legislature from 1978 forward was that marked gasoline or diesel oil could not be used in the quarrying and crushing of rock. They submit that the Minister was not permitted to entertain applications for refunds for tax on fuel used in that activity. The intention of the legislature was to broaden these restrictions to the whole of the non-renewable resource sector. Since the quarrying and crushing of rock is, by statutory definition, a "non-renewable resource" the defendant says it was subsumed within the new provisions.

[41] The plaintiff relies on the decision of Saunders, J., as he then was, in *Municipal Contracting Limited v. N.S. (Minister of Finance), supra*, which makes no reference to the evolution of the Regulations and the history that led to the amendment in 1982. Saunders, J., as he then was, continued to adhere to the principal of strict or literal interpretation in dealing with fiscal legislation. Saunders, J. said:

> **[48]** As Section 11(2)(h)(iii) is intended to be an exception to the exemption from taxation of "manufacturing or production", the burden is on the Minister of Finance to establish the restriction.
>
> **[49]** Since these Regulations do not determine to what "extent" and in what "manner" the exploration, extraction, transformation and conversion process are intended to be taxable, the Minister has not satisfied this burden.
>
> **[50]** Unless and until additional Regulations are enacted, a taxpayer like Municipal is unable to determine the extent of the "production or processing" exception. In my opinion, until this is provided, there is no exception to the exemption. Municipal's crushing process must be considered "manufacturing or production of goods for sale". I find that the Provincial Tax Commissioner (and therefore the Minister) erred in his interpretation of the applicable regulations. I allow Municipal's application for certiorari. The decision of the Commissioner dated June 14, 1991 is quashed.

[42] The defendant argued that Saunders, J. adopted the literal approach to interpretation of fiscal legislation and had not considered the *Interpretation Act* and related authorities.

[43] In a subsequent decision by the Supreme Court of Canada in *Quebec v. Corp. Notre-Dame de Bon-Secours* [1994] 3 S.C.R. 3, the court confirmed the initiative started in *Stubart Investments Limited v. the Queen* that fiscal legislation was not merely governed by strict interpretation - in favour of the taxpayer requiring the tax authorities to be clear in imposing a tax obligation; and the converse where a taxpayer sought to claim an exemption that any doubt as to the applicability of it favoured the tax department. In giving the decision of the court, Gonthier J. wrote:

> In Canada it was Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, which opened the first significant breach in the rule that tax legislation must be strictly construed. This Court there held, per Estey J., at p. 578, that the rule of strict construction had to be bypassed in favour of interpretation according to ordinary rules so as to give effect to the spirit of the Act and the aim of Parliament:
>
>> . . . the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable.
>
> This turning point in the development of the rules for interpreting tax legislation in Canada was prompted by the realization that the purpose of tax legislation is no longer simply to raise funds with which to cover government expenditure. It was recognized that such legislation is also used for social and economic purposes. In *The Queen v. Golden*, [1986] 1 S.C.R. 209, at pp. 214-15, Estey J. for the majority explained Stubart as follows:
>
>> In Stubart . . . the Court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.

In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At page 87 of his text Construction of Statutes (2nd ed. 1983), Driedger fittingly summarizes the basic principles: ". . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. The following passage from Vivien Morgan's article "Stubart: What the Courts Did Next" (1987), 35 Can. Tax J. 155, at pp. 169-70, adequately summarizes my conclusion:

> There has been one distinct change [after Stubart], however, in the resolution of ambiguities. In the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the taxpayer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. Now an ambiguity is usually resolved openly by reference to legislative intent. [Emphasis added.]

The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation. I refer to the passage from Dickson C.J., supra, when he says that the effort to determine the purpose of the legislation does not mean that a specific provision loses all its strictures. In other words, it is the teleological interpretation that will be the means of identifying the purpose underlying a specific legislative provision and the Act as a whole; and it is the purpose in question which will dictate in each case whether a strict or a liberal interpretation is appropriate or whether it is the tax department or the taxpayer which will be favoured.

[Emphasis added] p. 15-18

[44] The effect of these recent developments was summarized by Sullivan in Statutory Interpretation (1997).

The doctrine of strict construction is often invoked in the context of fiscal legislation. Like expropriation, taxation is generally considered a serious interference with the rights of subjects. In the past, courts have insisted on sticking to the literal meaning of fiscal legislation, ignoring purpose and context and construing the words of the text as narrowly as possible. In a series of recent cases, however, the Supreme Court of Canada has fashioned a new approach. From now on, the interpretation of tax legislation is to follow the ordinary rules of statutory interpretation. The court is to consider the purpose of the legislation, its context, and all relevant evidence of legislative intent. After exhausting these interpretive resources, if the intention of the legislature is still unclear, the court may then adopt the interpretation that favours

the taxpayer. On this approach, the policy of favouring the taxpayer, of protecting individual rights from interference by the state, comes into play only as a last resort when other means of resolving ambiguity have failed."

[45] The defendant submits that the available tools and principles of statutory interpretation point to one conclusion. That is, the legislature intended that the non-renewable resource sector, including the quarrying and crushing of stone, was not to be exempt at all under the *Gasoline and Diesel Oil Tax Act and Regulations* but would enjoy a limited or reduced tax burden under the *Health services Tax Act and Regulations*.

[46] Section 9(5)(f) of the *Interpretation Act* directs that the consequences of a particular interpretation be considered. This is sometimes referred to as avoiding absurd consequences. In referring to the relationship between purpose of analysis and absurdity, *Dreidger* concludes:

Governing principles. In the heyday of the literal construction rule, the courts purported to disregard the purpose of legislation if the literal meaning of the words to be interpreted was reasonably clear. However, this artificial constraint on interpretation long ago disappeared. In current practice, the purpose of legislation is taken into account in every case and at every stage of interpretation, including determination of the ordinary meaning. As explained by Duff C.J. in *McBratney v. McBratney:*

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute ...; and if one finds there are some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, through agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

In this passage Duff C.J. asserts two principles that govern judicial reliance on purpose in interpretation.

> (1) Where the ordinary meaning of legislation is ambiguous or otherwise unclear, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> (2) Where the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted.

> *Relation between purposive analysis and absurdity.* As Duff C.J. indicates, an interpretation that "runs counter to" the legislature's purpose should be avoided even though it is based on the ordinary meaning of the words. This proposition can be understood as an application of the golden rule. Interpretations that tend to defeat the purpose of legislation are often labelled absurd and rejected on that account. [Emphasis added]

[47] If the interpretation sought by the plaintiff is adopted, will the consequences be to produce absurd consequences? It will mean that even though the Regulations were plainly amended in 1982 to exclude from the exemption for manufacturing or production of goods for sale, any notion of production or processing of non-renewable resources, no such change occurred. The defendant says that to conclude that since there is no further definition in the Regulations with respect to the "extent" and "manner", there is therefore no restriction, cannot have been what was intended by the legislature. Is this simply an error, which this court is at liberty to correct? As noted in *Dreidger:*

> *Unacceptable absurdity.* Sometimes it is possible to give meaning to a provision, but that meaning is so absurd that, in the view of the court, it cannot have been intended. If there is no way to interpret the provision so as to avoid the absurdity, the court has no choice but to redraft. Ideally in such cases it will be apparent how the error came about - through careless amendment or "bad translation", for example. Ideally, too, it will be clear to the court what the legislature in fact meant to say. Where all three of these factors are present, namely (a) a manifest absurdity, (b) a traceable error, and (c) an obvious correction, most courts would not hesitate to correct the drafting mistake. In borderline cases, however, the response of the courts can be difficult to predict. Much depends of the individual court's conception of its institutional role.

[48] It is interesting to note that the phrase "to the extent and in the manner determined by these Regulations" was dropped from the definition of production or processing when new Regulations were implemented following the consolidation of the *Gasoline and Diesel Tax Act,* the *Health Services Tax Act* and the *Tobacco Act* into the *Revenue Act,* S.N.S. 1995-96 c. 17. In that *Act* the relevant provisions are:

> (o) "manufacture or production" means the transformation or conversion of raw or prepared material into a different state or form from that in which the raw or prepared material originally existed as raw or prepared material but does not include production or processing;

> (t) "non-renewable resource" means any naturally occurring inorganic substance, and includes coal, bituminous shales and other stratified deposits from which oil can be extracted by destructive distillation and includes petroleum;
>
> (v) "production or processing" means exploration for, extraction of, or transformation or conversion of any non-renewable resource;
>
> 25 The exemption provision contained in clause 22(2)(j) and the refund provision contained in clause 23(1)(j) do not apply to gasoline and diesel oil purchased, stored and used
>
> (d) in the production or processing of non-renewable resources, including but not limited to, the quarrying and crushing of rock, the mining of sandstone, coal, gypsum and limestone and oil exploration and processing;

[49] In light of the decision of Saunders, J., as he then was, I shall first deal with the issue raised by the plaintiff of *issue estoppel* and the doctrine of judicial *comity* arising from his interpretation of the relevant Regulations.

[50] *Issue estoppel* is a subcategory of the doctrine of *res judicata* and forms part of the civil and criminal law in Canada. *Angle v. Minister of National Revenue*, [195] 2 S.C.R. *Issue estoppel* is not applicable in this case as Justice Saunders' decision was appealed and his judgment set aside. Accordingly, Justice Saunders' decision was not a final decision, as is required in order to satisfy the principle of *issue estoppel*. Spencer-Bower and Turner, authors of *Doctrine of Res Judicata* (2nd ed) comment specifically on a reversal of a decision on appeal:

> 62 When a judicial tribunal of competent original jurisdiction has granted, or refused, the relief claimed in an action or other proceeding, and an appellate tribunal reverses the judgment or order of the court of first instance, and either refuses the relief granted below, or grants the relief refused below, as the case may be, the former decision, till then conclusive as such, disappears altogether, and is replaced by the appellate decision, which thenceforth holds the field, to the exclusion of any other, as the *res judicata* between the parties.
>
> 63 Where, however, the appellate tribunal reverses, sets aside, or quashes a judgment or order, not on the ground that, having made within the jurisdiction of the tribunal appealed from, it was erroneous in law or fact, but on the sole ground that such tribunal had no jurisdiction to make it, or to entertain the question which it

> purported to decide, the result is that, from and after the reversal, there remains no judicial decision of that, or of any other question of law or fact, which can estop the parties from litigating again, since the judgment or order reversed, though as long as it stood it was a "decision", is pronounced to be a nullity, and the reversal, though a decision in a purely destructive and negative sense, in that it pronounces nullity, is not so in the sense of deciding the question of right, title, or liability (whether civil or criminal) in dispute, which question is thenceforth in the same position as if it had never been heard or determined at all.

[51] Similarly, the principle of judicial comity does not apply to Justice Saunders decision. Judicial comity can only apply where the decision has been made by a court of competent jurisdiction and where the decision is not appealed. In *Bell v. Cessna Aircraft* (1983), 149 D.L.R. (3d) 509 (B.C.C.A.) the appellants conceded that, when the British Columbia Court of Appeal overruled its previous decision in *Lewis Realty Ltd. v. Skalbania et al* (1981), 25 B.C.L.R. 17., then the appeal must fail. The appellants accordingly requested an adjournment of the hearing of the appeal and that the appeal be heard by a court composed of five judges. If that motion failed then the appellants conceded the appeal also failed. The court notes that as a general rule, it was bound to follow its own previous decision unless that decision was manifestly wrong, could no longer be followed because it failed to consider legislation or authorities which would have produced a different result, or would result in a severe injustice but found no basis to reverse its earlier decision.

[52] Similarly, in *R. v. Keeping* (1992), 116 N.S.R. (2d) 294 where the accused challenged the constitutionality of s. 86(2)(a)(i) of the *Criminal Code*, Judge Gibson addressed the issue of judicial comity, admonishing the Crown that where they failed to appeal the same issue in *R. v. DeYoung* Nov. 15, (1991) unreported, the Crown could be seen to accept the interpretation of s. 86(2) relative to the *Charter*, as decided by Judge Sherar in *R. v. DeYoung*, and that the Crown could not therefore ignore his decision and continue to charge or prosecute others where the section of the Statute had been declared unconstitutional.

[53] In the reasons of Saunders, J. in *Municipal Contracting Ltd. v. The Minister of Finance* it was argued that there was nothing manifestly wrong, nor were statutory provisions overlooked or cases not applied. However, that decision did not address the regulatory history that led to the amendments in 1982 nor consider s. 9(5) of *The Interpretation Act*. Principles of statutory interpretation have crystalized since that decision was successfully appealed. *Quebec v. Corp. Notre-Dame de Bon-Secours, supra.*

[54] On the issue of appropriate legal interpretation of the *GDOTA* and its Regulations, I find that the proper interpretation of paragraph 14(d) of the Regulations prohibits from application of subparagraph 12(1)(k)(iii) any refund of taxes paid in respect of diesel oil purchased, stored, or used in the "production or processing" of a non-renewable resource. The failure of the Regulation to further articulate "the extent" and "the manner" of production and processing should not defeat the very obvious intent of the legislation. Regulation 14(d) should be given its plain meaning and the restriction should be unlimited unless or until further regulations are made. Paragraph 14(d) cannot reasonably be interpreted to mean that the legislature intended to grant quarrying and crushing operations an exemption from paying tax on fuel in their operations. To do so would defeat the intended purpose of the legislation and create an absurd result.

[55] The significant legislative history of the *GDOTA* cannot be ignored. In keeping with the modern authorities of statutory interpretation cited herein the interpretation of tax legislation is to follow the ordinary rules of statutory interpretation. The strict or literal approach of the past is not appropriate in this case. The policy of the government in expanding the tax scheme to include all non-renewable resources is made clear by this legislation. Section 14(d) uses very clear language. Any ambiguity resulting from the definition of "production and processing" in s. 1(1)(mc) must be resolved in favour of the taxing authority in the context of the intent of the entire *Act* and its Regulations.

[56] I disagree with the plaintiff's position that s. 14(d) and the definition of "production and processing" in paragraph 1(1)(mc) of the Regulations creates a "reasonable doubt" as to its meaning, that cannot be resolved through the ordinary principles of statutory interpretation, thus allowing a residual presumption in favour of the taxpayer. This is not a matter of reasonable doubt, creating an issue of burden of proof. Rather the interpretation of s. 14(d) is a straight forward issue of statutory interpretation and a question of law for this court to decide.

[57] Gonthier, J. in *Quebec v. Corp. Notre-Dame de Bon-Secours, supra,* addressed the traditional rule of strict construction and the risk of confusion concerning that rule and the burden of proof. At p. 14-15 he stated:

> A. *Rules for interpreting tax legislation*
>
> In this Court the appellant argued that a provision creating a tax exemption should be interpreted by looking at the spirit and purpose of the legislation. In this

connection it is worth looking briefly at the development of the rules for interpreting tax legislation in Canada and formulating certain principles. First, there is the traditional rule that tax legislation must be strictly construed: this applied both to provisions imposing a tax obligation and to those creating tax exemptions. The rule was based on the fact that, like penal legislation, tax legislation imposes a burden on individuals and accordingly no one should be made subject to it unless the wording of the Act so provides in a clear and precise manner. The effect of such an interpretation was to favour the taxpayer in the case of provisions imposing a tax obligation, and the courts placed on the tax department the burden of showing that the taxpayer fell clearly within the letter of the law. Conversely, a taxpayer claiming to benefit from an exemption had "to establish that the competent legislative authority, in clear and unequivocal language, [had] unquestionably granted him the exemption claimed" (Fauteaux C.J. in *Ville de Montréal v. ILGWU Center Inc.,* [1974] S.C.R. 59, at p. 65). Any doubt was thus to be resolved in favour of the tax department. In view of this situation, it followed from the strict construction rule that in cases of doubt a presumption existed in the taxpayer's favour in taxing situations but against the taxpayer in those involving exemptions.

It should at once be noted that there is a risk of confusion between the rule that a taxing provision is to be strictly construed and the burden of proof resting upon the parties in an action between the government and a taxpayer. Accordingly to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption. It will be noted that the presumptions mentioned earlier tend in more or less the same direction. This explains why these concepts have been at times superimposed to the point of being confused with each other. With respect, they are nevertheless two very different concepts. In any event, the rule of strict construction relates only to the clarity of the wording of the tax legislation: regardless of who bears the burden of proof, that person will have to persuade the court that the taxpayer is clearly covered by the wording of the legislative provision which it is sought to apply.

[58] The residual presumption in favour of the taxpayer where the language of the Regulations leaves doubt as to its meaning must nevertheless be "reasonable" and recourse to this presumption is clearly residual. Gonthier, J., in *Quebec v. Corp. Notre-Dame de Bon-Secours, supra,* referring to Estey, J.'s discussion of the residual presumption in *Johns-Manville Canada Inc. v. The Queen* 85 DTC 5373 2 S.C.R. 46 said:

Two comments should be made to give Estey, J.'s observations their full meaning: first, recourse to the presumption in the taxpayer's favour is indicated when a court is compelled to choose between two valid interpretations, and second, this

presumption is clearly residual and should play an exceptional part in the interpretation of tax legislation. In his text The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 412, Professor Pierre-André Coté summarizes the point very well:

> If the taxpayer receives the benefit of the doubt, such a 'doubt' must nevertheless be 'reasonable'. A taxation statute should be 'reasonably clear'. This criterion is not satisfied if the usual rules of interpretation have not already been applied in an attempt to clarify the problem. The meaning of the enactment must first be ascertained, and only where this proves impossible can that which is more favourable to the taxpayer be chosen.

[59] Here two interpretations have been advanced, the plaintiff's interpretation that s. 14(d) intended to grant an exemption from paying tax on fuel in its quarrying and crushing operation and the defendant's position that the drafts persons sloppily borrowed language from the *Health Services Tax Act* regime. I cannot accept that the plaintiff's interpretation is a valid interpretation or one that can be reasonably sustained and agree with the defendant's views on the drafting error.

[60] In any event, the court clearly has the jurisdiction to correct an error. *Dreidger* at p. 106 states:

> The jurisdiction to correct errors applies only to obvious drafting mistakes. It must be apparent to the court that, only the drafters carelessness or lack of skill, the text of the legislation does not express what the legislature meant to say. This standard is generally met one of two ways: (a) the words chosen by the drafter are meaningless, contradictory, or incoherent or (b) the provision leads to a result that cannot have been intended.

[61] To interpret s. 14(d) in favour of the plaintiff would indeed lead to a result that cannot have been intended by the legislation.

[62] Further, I cannot accept the plaintiff's reliance on *Morgard Properties Limited et al v. City of Winnipeg* (1983) 3 DLR (4th) 1 (S.C.R.) and *Corbett v. R.,* 1999 Carswell Nat 1678, [1999] 4 C.T.C. 231, 21 C.C.P.B. 278, 99 OTC 5624, 248 N.R. 3, [2000] 2 F.C. 81 (FCA). By the legislative amendment of 1982 the plaintiff's rights were not adversely affected. Before 1982, the plaintiff was not exempt from tax on fuel used in quarrying and crushing. The 1982 amendment merely broadened application of the gasoline and fuel tax to the whole of the non-renewable resource sector. These cases are distinguishable.

[63] Section 14(d) of the Regulations prohibits the plaintiff claim for refunds under s. 12(l)(k)(iii). Municipal's quarrying and crushing operation is by definition

"the extraction of, or transformation or conversion of" a non-renewable resource in the course of "production and processing." The Regulations have been correctly and properly interpreted and administered by the Province of Nova Scotia.

[64] The plaintiff made an alternate claim for a statutory refund but subsequently withdrew this claim in its reply to the defendant's post-trial brief. However, the plaintiff distinguished its claim for a statutory refund from its continuing claim for restitution as a separate and distinct basis for recovery of tax overpayment made under compulsion of the tax regime pursuant to the *Act* and Regulations. And finally, the plaintiff makes the equitable claim of restitution asserting that by retaining tax moneys for which Municipal was entitled to a refund, the Province of Nova Scotia was unjustly enriched. The plaintiff relies on the cases of *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.), *Cherubini Metal Works Limited v. Nova Scotia (Attorney General)* (1995), 137 N.S.R. (2d) 197 (C.A.), *Truro Carpet Outlet v. Nova Scotia* (1991), 103 N.S.R. (2d) 214 and *Johnson et al v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 140 (N.S.C.A.) and other authorities.

[65] However, these claims must fail. The plaintiff does not qualify under the Regulations for a refund of taxes it paid on diesel fuel. The Province of Nova Scotia neither misinterpreted or misapplied the *GDOTA* or improperly retained tax at the plaintiff's expense. Accordingly, there is no necessity to determine if the plaintiff has established that it bore the burden of the tax and did not pass it on to its customers.

[66] In the result, the plaintiff's action is dismissed. The defendant shall have its costs. In the event the parties cannot agree, I will be available to hear submissions.

J.