Federal Court Cour fédérale

Date: 20190911

Docket: T-1006-17

Citation: 2019 FC 1163

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

HIGHLANDS FUEL DELIVERY G.P.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff, Highlands Fuel Delivery G.P. ("Highlands"), applied for refunds of excise tax under section 68.19 of the *Excise Tax Act,* RSC 1985, c E-15 ("*ETA*") relating to the fuel it sold to the Province of New Brunswick. The Minister of National Revenue ("Minister") initially refused the refunds on the basis that the exception in subsection 68.19(2) of the *ETA* applied. This provision states that no refund will be provided if the province and Federal Government have a reciprocal taxation agreement about all or any of the matters listed in section 32 of the

Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act (now the *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8).

[2] Eventually, the Minister conceded that there was no such agreement in place and abandoned that defence. The Minister now defends on the basis that Highlands could have included the price of the excise tax in the cost of fuel it sold to New Brunswick, but did not. Additionally, the Minister argues that section 68.19 is only intended to benefit the provinces.

[3] For the reasons that follow, I find that Highlands is entitled to a refund under section 68.19 of the *ETA*.

II. **Background**

[4] The Partial Agreed Statement of Facts is attached as Appendix A and will be relied on as the facts. It is important to go through the facts and procedural history in some detail in this case, and it will become obvious that such detail is important as the Minister's arguments have dramatically changed over time. In contrast, the Plaintiff's position has generally remained consistent throughout this proceeding.

[5] Highlands is a general partnership that is in the business of selling gasoline and diesel ("Fuel"). Its head office is in Saint John, New Brunswick. When doing business, Highlands uses the name "Irving Energy".

[6] Highlands purchases Fuel from Irving Oil Commercial G.P. ("Irving Oil"). Irving Oil is a licensed Fuel wholesaler and owns over 99 percent of Highlands in partnership.

[7] When Irving Oil sold the Fuel at issue in this matter to Highlands, it paid Part III tax under the *ETA*. In its payment to Irving Oil, Highlands included an amount equal to this Federal Excise Tax. Highlands then sold the Fuel to the province of New Brunswick.

[8] Under subsection 68.19(1) of the *ETA*, certain parties may receive a refund of excise tax on fuel sold for certain purposes to a province:

Payment where use by province	**Utilisation par une province**
68.19 (1) If tax under Part III has been paid in respect of any goods and Her Majesty in right of a province has purchased or imported the goods for any purpose other than	68.19 (1) Si la taxe a été payée en vertu de la partie III à l'égard de marchandises et si Sa Majesté du chef d'une province a acheté ou importé les marchandises à une fin autre que :
(a) resale,	a) la revente;
(b) use by any board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by the government of the province or under the authority of the legislature or the lieutenant governor in council of the province, or	b) l'utilisation par un conseil, une commission, un chemin de fer, un service public, une université, une usine, une compagnie ou un organisme que le gouvernement de la province possède, contrôle ou exploite, ou sous l'autorité de la législature ou du lieutenant-gouverneur en conseil de la province;
(c) use by Her Majesty in that right, or by any agents or servants of Her Majesty in that right, in connection with the manufacture or production of goods or use for other	c) l'utilisation par Sa Majesté de ce chef, ou par ses mandataires ou préposés, relativement à la fabrication ou la production de marchandises, ou pour

commercial or mercantile purposes,	d'autres fins commerciales ou mercantiles,
an amount equal to the amount of that tax shall, subject to this Part, be paid either to Her Majesty in that right or to the importer, transferee, manufacturer, producer, wholesaler, jobber or other dealer, as the case may require, if Her Majesty or the dealer applies therefor within two years after Her Majesty purchased or imported the goods.	une somme égale au montant de cette taxe doit, sous réserve des autres dispositions de la présente partie, être versée soit à Sa Majesté de ce chef soit à l'importateur, au cessionnaire, au fabricant, au producteur, au marchand en gros, à l'intermédiaire ou à un autre commerçant, selon le cas, si Sa Majesté ou le commerçant en fait la demande dans les deux ans suivant l'achat ou l'importation des marchandises par Sa Majesté.

[9] This reflects the federal and provincial governments' immunity to taxation on land or property (*The Constitution Act, 1867*, 30 & 31 Vict, c 3, section 125). Some provinces have a reciprocal taxation agreement with the Federal Government. For those provinces, an exception carved out in subsection 68.19(2) states that the excise tax will not be rebated by the Federal Government:

Exception	**Exception**
(2) No amount shall be paid pursuant to subsection (1) to an importer, transferee, manufacturer, producer, wholesaler, jobber or other dealer who supplies goods to Her Majesty in right of a province in respect of which there is in force at the time the goods are supplied a reciprocal taxation agreement referred to in section 32 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and*	(2) Aucune somme n'est versée en vertu du paragraphe (1) à l'importateur, au cessionnaire, au fabricant, au producteur, au marchand en gros, à l'intermédiaire ou à un autre commerçant qui fournit des marchandises à Sa Majesté du chef d'une province liée, à l'époque de la fourniture, par un accord de réciprocité fiscale prévu à l'article 32 de la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces et sur les*

Health Contributions Act.	*contributions fédérales en matière d'enseignement postsecondaire et de santé.*

[10] Two provinces—New Brunswick and Alberta—do not have a reciprocal taxation agreement. In addition, both parties agree that New Brunswick did not purchase the Fuel for any of the excluded purposes in subsection 68.19(1)(a) to (c).

[11] On February 8, 2013, Highlands filed for a refund of the excise tax paid on Fuel it sold to New Brunswick from February 1, 2011 to January 31, 2013. Because of the two-year limitation period, only the Fuel sold from February 8, 2011 to January 31, 2013 was considered. The amount of the requested rebate, adjusted for the limitation period, was $2,409,784.50 ("first rebate claim").

[12] On April 12, 2013, the Canadian Revenue Agency ("CRA") issued a Notice of Determination, allowing the refund of $2,409,784.50. Subsequently almost four years later, on March 8, 2017, the Minister reassessed the first rebate claim and disallowed it on the erroneous belief that there was a reciprocal taxation agreement between New Brunswick and the Federal Government. Highlands filed a Notice of Objection, which is presently held in abeyance until the outcome of the Court's decision in this matter.

[13] At some point in mid-2013, New Brunswick issued a tender for the supply of Fuel. On July 22, 2013, Highlands submitted a bid to supply Fuel to New Brunswick from October 1, 2013 to August 31, 2015. After negotiations, Highlands agreed to reduce its price by $0.002 per

litre. It is undisputed that the Province of New Brunswick did not request a reduction or exemption relating to the Federal Excise Tax during negotiations.

[14] On April 23, 2014, Highlands filed a rebate application for the Federal Excise Tax relating to the Fuel sold during the period from March 1, 2014 to March 31, 2014 ("second rebate claim").

[15] On August 18, 2014, the CRA denied the rebate claim relating to the Fuel sold to New Brunswick during that period. According to a proposal letter, the CRA denied the refund for two reasons. First, the CRA believed that the Fuel was sold to an agency owned by New Brunswick, not to the province itself. Second, the CRA believed that New Brunswick was one of the provinces with a reciprocal taxation agreement with the Federal Government.

[16] On August 22, 2014, Highlands explained that the Fuel was in fact purchased by the province, and that there was no reciprocal taxation agreement between New Brunswick and the Government of Canada. The CRA then wrote to the Intergovernmental Relations Advisor for the Province of New Brunswick, to confirm this information. On September 5, 2014, the Intergovernmental Relations Advisor confirmed that there was no formal reciprocal taxation agreement.

[17] On September 25, 2014, the CRA wrote to Highlands and stated they were disallowing the rebate claim. The CRA explained that although there was no reciprocal taxation agreement, "since the 1990's both parties have acted as though an agreement is in place." The following

day, Highlands replied to the CRA, again arguing that there was no reciprocal taxation agreement.

[18] On November 14, 2014, Highlands filed a Notice of Objection relating to the second rebate claim. The CRA Appeals Division acknowledged receipt of the Notice of Objection on December 29, 2014.

[19] Highlands made a third rebate application on March 31, 2016, for the Fuel sold during the period from May 1, 2014 to February 29, 2016 ("third rebate claim"). The amount of the rebate requested was $2,095,864.12. On May 25, 2016, the CRA sent a Notice of Determination denying the third rebate claim. Again, the basis for the decision was the existence of a reciprocal taxation agreement between the Federal Government and New Brunswick. On August 5, 2016, Highlands filed a Notice of Objection, which was acknowledged by the CRA on October 13, 2016.

A. *The Minister of National Revenue's Decision*

[20] The Minister denied the second and third rebate applications on the basis that a reciprocal taxation agreement existed between the Federal Government and the Province of New Brunswick. This would have meant that the sale of Fuel to the Province of New Brunswick did not give rise to a rebate pursuant to subsection 68.19(2) of the *ETA*.

[21] According to a memorandum dated January 8, 2016 from the CRA Headquarters, an agreement exists between New Brunswick and the Federal Government. That agreement is dated

March 21, 1991, and signed by the Minister of Finance of New Brunswick on August 14, 1991 ("1991 Agreement"). Although this is not the type of agreement statutorily excepted in subsection 68.19(2), the CRA's position was that it had the same effect and meaning as the reciprocal taxation agreements statutorily described in subsection 68.19(2). A copy of the 1991 Agreement was provided to Highlands on March 2, 2017.

[22] On March 3, 2017, further information about the 1991 Agreement was requested by Highlands. It would be confirmed that the last reciprocal taxation agreement had expired on January 1, 1991. Even though a temporary reciprocal taxation agreement had been executed thereafter, that agreement expired on December 31, 1993.

[23] Highlands' legal counsel then began to engage in conversations with the CRA, pointing out that there was no reciprocal taxation agreement as contemplated in the *ETA*. On July 30, 2017, the CRA faxed two letters, confirming the denial of Highlands' second and third rebate claims. The basis for both denials was that: "as long as there is a mutual agreement between the parties, it has the same effect and meaning of a reciprocal taxation agreement referred to in 68.19(2) of the Act".

B. *Appeal to the Federal Court*

[24] On July 11, 2017, Highlands appealed the Minister's decision to the Federal Court by filing a Statement of Claim. This Court exercises its jurisdiction pursuant to section 81.28 of the *ETA*:

APPEALS TO COURT	APPELS A LA COUR
<u>Institution of appeal to Court</u>	**<u>Introduction d'un appel à la Cour fédérale</u>**
81.28 (1) An appeal to the Federal Court under section 81.2, 81.22 or 81.24 shall be instituted	81.28 (1) Un appel à la Cour fédérale en vertu des articles 81.2, 81.22 ou 81.24 doit être interjeté :
(a) in the case of an appeal by a person, other than the Minister, in the manner set out in section 48 of the Federal Courts Act; and	a) dans le cas d'un appel interjeté par une personne, autre que le ministre, de la manière énoncée à l'article 48 de la Loi sur les Cours fédérales;
(b) in the case of an appeal by the Minister, in the manner provided by the rules made under the Federal Courts Act for the commencement of an action.	b) dans le cas d'un appel interjeté par le ministre, de la manière prévue par les règles établies conformément à cette loi pour l'introduction d'une action.

[25] The Statement of Defence was filed on August 24, 2017, defending on the basis of the existence of an agreement between the Federal Government and the Province of New Brunswick.

[26] On March 8, 2018, this matter was ordered to continue as a specially managed proceeding. Prothonotary Tabib was assigned to be the Case Management Judge. After undertaking to provide answers regarding this reciprocal taxation agreement, the Minister dramatically changed its argument, filing an Amended Statement of Defence on March 26, 2018. The Amended Statement of Defence largely removed any reference to the informal agreement and abandoned the argument that it had the effect and meaning of a reciprocal taxation agreement pursuant to subsection 68.19(2) of the *ETA*. Indeed, the Minister conceded that there was no reciprocal taxation agreement in place. The Amended Statement of Defence relied on

entirely new arguments and different assumptions than the Minister of National Revenue had first made.

[27] On January 30, 2019, I ordered Mr. Allison Thomas Walker's Affidavit at exhibits A-E as well as the Confidential Joint Book of Documents be treated as confidential.

III. **Issue**

[28] Did the Minister err in refusing Highlands' second and third rebate claims?

IV. **Witnesses**

[29] The Plaintiff called two witnesses: Allison Thomas Walker and Darren Gillis.

- Mr. Walker is the Director of Tax and Insurance for Irving Oil Ltd. He provided testimony about the rebate application, interactions between the Plaintiff and the CRA, as well as the invoices for the sale of Fuel to New Brunswick.
- Mr. Gillis is the Chief Marketing Officer for Irving Oil Ltd. and has held this position since 2013. He has been employed by Irving Oil since 1987, at which time he was a branch manager. He provided testimony about how the rebate claim factored into the tender bid.

[30] The Minister did not call any witnesses.

[31] I found both Mr. Walker and Mr. Gillis were consistent, credible witnesses, who did not embellish or exaggerate details. At times their answers were not helpful to Highlands but they were nevertheless forthright in their answers and refrained from giving evidence about

circumstances they did not know, about despite being pressed by the Minister's counsel. Their testimony was helpful and appreciated by the Court.

V. **Analysis**

[32] Usually, these types of matters proceed to the Canadian International Trade Tribunal according to section 58(1) of the *ETA*. However, this matter proceeded by way of trial in the Federal Court because Highlands appealed under section 81.28 of the *ETA*, which deemed this proceeding to be an action under subsection 81.28(3).

[33] At trial, counsel for Highlands explained that in tax cases, the Minister makes assumptions of fact that are deemed to be true. The onus is on the taxpayer to refute those assumptions. In this case, the Minister assumed that there was a reciprocal taxation agreement. Highlands refuted that assumption, and the Minister now concedes there was no reciprocal taxation agreement. Highlands also pointed out that the Minister has an obligation to act fairly and honestly because the burden to refute assumptions is on the taxpayer.

[34] As Highlands established that there was no reciprocal taxation agreement, it submitted that it satisfied section 68.19 of the *ETA*. Having met the requirements of that provision, Highlands argued that the Minister could not deny its rebate claims and was required to approve them.

[35] The Minister's argument in this proceeding is that only the party bearing the ultimate burden of the tax can claim the rebate, and New Brunswick is the ultimate consumer on these

facts. In addition, the Minister has argued that the only party intended to benefit from the refund in section 68.19 is a province. The Minister argues that section 68.19 is only triggered when a province asks for a payment under section 68.19(1) from the Federal government, or by requesting a dealer to reduce its price by an amount equal to the amount of embedded tax. The Minister argues that the province never made any such requests, and therefore says this claim should be dismissed.

[36] According to Highlands' read-ins, which I allowed to be entered into evidence, the Minister's position is that:

> The benefit under 68.19 is a benefit that belongs to the Province, nobody else. The fact that another person like a dealer can make a request under that provision, it is only in a situation where the Province has decided that it does not want to bother to make a request and has requested to buy the product on a tax-exempt basis.

[37] Highlands argues the Minister's interpretation of section 68.19 of the *ETA* is wrong and fails to satisfy the requirement that a provision be interpreted according to a textual, contextual, and purposive analysis (*Canada Trustco Mortgage Co v Canada,* 2005 SCC 54 at para 10; *Canada v Cheema,* 2018 FCA 45 at para 83).

[38] With regards to a textual analysis, Highlands argues that the Minister's interpretation requires the Court to read in a condition for New Brunswick to have made a request for the dealer to reduce the Fuel's purchase price by an amount equal to the Federal Excise Tax paid by Irving Oil. Highlands also points out that the condition in subsection 68.19(2) is expressly stated. Since subsection 68.19(2) is expressly stated, Highlands argues it could not have been Parliament's intent to read in the condition argued by the Minister. Rather, Highlands argues the

language of the provision clearly establishes that Parliament's intent was to prohibit rebate claims to third parties only where there is a reciprocal taxation agreement in force between the province and the Federal government.

[39] Highlands also argues that the Minister's interpretation is contrary to clear and unambiguous language of section 68.19, and would introduce inconsistency and unpredictability into tax legislation. According to Highlands, the Minister's interpretation would also be contrary to the Federal Court of Appeal's decision in *The Queen v Stevenson Construction Co Ltd* (1978), 24 NR 390 (FCA) [*Stevenson*], which considered section 44(2) of the *ETA*, the predecessor to section 68.19 of the *ETA*. In addition, although not binding on this Court, Highlands pointed out that the Canadian International Trade Tribunal, which normally hears these matters, did not require such a condition in *Blowey-Henry v Canada,* 1992 CanLII 4344 (CA CITT).

[40] In regards to a contextual analysis, Highlands argues that Parliament expressly restricted or added conditions in other provisions, such as in section 68.01 of the *ETA*. Highlands argues the lack of such express language in section 68.19 is further evidence that Parliament never intended for any additional condition.

[41] In regards to a purposive analysis, Highlands argues that the purpose of section 68.19 of the *ETA* is to "allow a refund to any one of a specific list of parties for an amount equal to the Federal Excise Tax paid by the original importer/wholesaler on goods that are ultimately sold to a province" except when the condition of section 68.19(2) is met. To support this argument, Highlands turns to the legislative history of section 68.19, which was originally enacted in 1923 as section 19G by *An Act to amend the Special War Revenue Act, 1915,* 1923, c 70, s 8. At that

time, the provinces could not request the refund, and the refund only applied if "His Majesty's Government of the province [was] exempt from taxes in respect of such goods."

[42] In 1935, this provision became section 105 and the condition that the Government be exempted from taxes was changed to a condition related to the province's use of the goods. An amendment in 1959 included the addition of the provinces as parties who could claim a refund. At that time, the provision became section 46(2). Then, in 1976, the provision was amended to become section 44(2) and provided that no rebate would be obtained where there was a reciprocal taxation agreement. Various other amendments occurred, renumbering the provision to subsections 68.19(1) and (2). In 2002, the section became 68.19(1) as it is now still known. According to Highlands, the Minister's interpretation does not accord with the legislative history.

[43] According to the Minister, the words "either to" and "or to the" as well as "as the case may require" indicates Parliament's intent that the circumstances of the transaction dictate who is eligible for a payment. The Minister also submits that Parliament only intended for provinces to obtain relief, but not third parties such as dealers.

[44] The Minister submits that *Stevenson* stands for the proposition that only the person who bears the ultimate burden of the tax can claim a rebate. In addition, the Minister submits that "[I]ndirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (*Saugeen Indian Band v Canada*, [1990] 1 FC 403 at paras 9-12). Therefore, the Minister argues that the ultimate consumer is New Brunswick, and therefore the wholesaler was simply required to mathematically add to the price per litre an amount equal to the amount of the tax. Thus, the Minister asserts that

Highlands must now assume the commercial risk it chose to incur by setting the Fuel's price with the anticipation that it would benefit from a rebate.

[45] In its closing arguments, Highlands disputed the Minister's focus on *Stevenson* and the use of the words "ultimate burden" to indicate a condition of entitlement. Highlands also pointed out that the Minister's comparison of the provisions did not take into account subsection 68.19(2). Highlands pointed out that if the Minister's interpretation of subsection 68.19(1) were correct, subsection 68.19(2) would be redundant.

[46] I agree with Highlands that the Minister's interpretation is incorrect. A textual, contextual, and purposive analysis of section 68.19 of the *ETA* indicates that rebates are not limited to provinces, as the Minister has argued. Parliament clearly and expressly set out its intent in the language of subsection 68.19(1), and clearly and expressly carved out an exception in subsection 68.19(2) for circumstances where there is a reciprocal taxation agreement. It is undisputed that no reciprocal taxation agreement exists in this case. Moreover, subsection 68.19(1) of the *ETA* allows a rebate to more parties than just wholesalers; rebates may be provided to "to the importer, transferee, manufacturer, producer, wholesaler, jobber or other dealer". In *Stevenson,* the Federal Court of Appeal held that the word "dealer" was broad, and included those respondents in a very similar situation as Highlands is in this matter.

[47] Both of the parties have argued about the application of *Stevenson.* The facts before the Federal Court of Appeal in *Stevenson* involved the federal sales tax on construction materials that were used to build ferry terminals. When the respondents in that case bought the materials, the federal sales tax paid by their suppliers was included in the price. The ferry terminals were

then purchased by the Government of British Columbia. One question at issue was whether the respondents could claim a refund under subsection 44(1) of the *ETA* (as Highlands has submitted, this was a similar provision to section 68.19). The Federal Court of Appeal held that it did not matter that the respondents were not the initial payers of the tax, as the *ETA* contemplated that the refund would be given to the party to whom the tax had been passed on to. The contract between the respondents and the province also stipulated that the federal sales tax would not be included in the cost paid by the government. Therefore, the Federal Court of Appeal found that the respondents qualified for the refund.

[48] In the present case, was the excise tax included in the cost paid by the province to Highlands? In that respect, the Minister made the following assumptions of fact:

> k) the plaintiff did not collect on behalf of Her Majesty in right of Canada any Part III tax when it resold the fuel to the Province of New Brunswick;
>
> l) the plaintiff charged to and collected from the Province of New Brunswick an amount equal to the Part III tax as if the amount was being collected on behalf of Her Majesty in right of Canada;
>
> m) the amount so collected was for the sole benefit of the plaintiff;
>
> n) an amount of $2,195,726.70 was so collected by the plaintiff from the Province of New Brunswick;
>
> o) the refunds are for that amount;
>
> […]

[49] I note that the Minister made no other specific assumptions of fact leading to the conclusion that the burden of the excise tax had been passed on to the Province of New Brunswick, such as the factual assumption that the excise tax was included in the cost paid by the province to Highlands.

[50] With respect to the assumptions specifically made by the Minister, Mr. Walker testified that although a dollar amount appeared next to "Fed. Excise Tax" on the invoices, no amount was actually paid by the province to Highlands with respect to excise tax. According to Mr. Walker, this amount appeared on the invoice only to indicate to the buyer that the Fuel had not been purchased exempt from the excise tax, but instead, that the excise tax had already been paid on it. I have reproduced below the relevant portion of the transcript:

> Q. And was the Province of New Brunswick charged federal excise tax?
>
> A. No, they weren't.
>
> Q. So can you help me understand why there is an item called federal excise tax, if they were never charged for that?
>
> A. Certainly. The way this system works is for each of the taxes that are paid somewhere in the chain – in other words, in this case federal excise tax is paid by Irving Oil Commercial GP – were remitted to the federal government. For visibility purposes for each party through the chain of transactions, including in this case the end customer being the Province of New Brunswick, this amount is carved out for disclosure purposes so that the customer can clearly see that the product was not purchased exempt of federal excise tax. So this is telling the customer that through the chain of custody, federal excise tax was paid on this product, being off-road dye diesel.
>
> Q. And so why [does] the amount of total taxes, $824.09, include both the HST and the federal excise tax?
>
> A. It is just the way the form adds it down. It basically takes the price and works backwards, and carves out essentially for disclosure purposes.
>
> Q. I want to make sure the court understands this, Mr. Walker. How much federal excise tax was actually charged to the province?
>
> A. None.
>
> (Confidential Transcript at 5-6)

[51] In my opinion, the testimony of Mr. Walker establishes that Highlands did not charge an amount equal to the Part III tax to the Province of New Brunswick. The Plaintiff having rebutted this assumption of the Minister on which the taxation rested, the Respondent had to establish that the decision to deny the refund was nevertheless correct.

> […] Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. […]
>
> (*Pollock v The Queen*, [1993] FCJ No 1055 (FCA) at 9)

[52] However, the Respondent did not present any additional evidence that would allow this Court to determine that the burden of the Part III tax passed on to the Province of New Brunswick. Nor was there any admission by the Plaintiff's witnesses that this was the case. In fact, Mr. Walker stated it was impossible to tell from the invoices how much of the excise tax was passed on to the province:

> Q. Based on this invoice, can you tell how much of the amount equal to the federal excise tax was passed on to the Province of New Brunswick?
>
> A. No, you can't, because the way the system works, it defaults to the statutory rate. So on every one of these invoices, irrespective of whatever price was agreed and charged to the customer, in this case diesel, it will carve out always four cents out of that price and show it as a separate line, because the statutory rate is four cents, if it is not exempt. If it is exempt, it is zero.
>
> (Confidential Transcript at 6)

[53] Since the Plaintiff rebutted the Minister's assumption and no additional evidence was presented by the Minister to support the decision to deny the refund, the Plaintiff must succeed in its action.

VI. **Costs**

[54] I would award solicitor-client costs to the Plaintiff until the date of the amended defence, March 28, 2018, to reflect the fact that the Minister took the position that there was a reciprocal taxation agreement between the Federal Government and the Province of New Brunswick, while this clearly was not the case.

[55] I would award costs to the Plaintiff in accordance with Column V of Tariff B of the *Federal Courts Rules*, SOR/98-106 after that date.

JUDGMENT in T-1006-17

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed.
2. The Plaintiff is entitled to a rebate under subsection 68.19(1) of the *ETA* for the second rebate claim and the third rebate claim.
3. Costs, payable forthwith, are awarded to the Plaintiff on a solicitor-client basis until March 28, 2018, and in accordance with Column V of Tariff B after that date.

"Shirzad A."

Judge

Appendix A

BETWEEN:

HIGHLANDS FUEL DELIVERY G.P.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

PARTIAL AGREED STATEMENT OF FACTS

(footnotes omitted)

The parties admit, for the purposes of this proceeding only, the truth of the following facts and the authenticity of the documents referred to in the Partial Agreed Statement of Facts and consent to their admission into evidence only for the purposes of this claim.

The parties agree that this Partial Agreed Statement of Facts does not preclude either party from calling evidence to supplement the facts agreed to herein or to establish other facts not set out herein, it being accepted that such evidence may not contradict the facts agreed to herein.

The business of Highlands Fuel Delivery G.P. (“Highlands”)

1. Highlands is a general partnership doing business under the name Irving Energy.

2. Highlands’ head office is located in Saint John, New Brunswick.

3. Highlands is a dealer that sells gasoline and diesel (“**Fuel**”).

4. Highlands purchased Fuel for resale from Irving Oil Commercial G.P.

5. Irving Oil Commercial G.P. is a licensed wholesaler of the Fuel.

6. Irving Oil Commercial G.P. paid Part III tax under the *Excise Tax Act* (the "**Act**") ("**Federal Excise Tax**") on the Fuel sold to Highlands.

7. Irving Oil Commercial G.P. was the only party that paid Federal Excise Tax on the Fuel.

8. Irving Oil Commercial G.P. collected from Highlands, and Highlands paid to Irving Oil Commercial G.P., an amount equal to the Federal Excise Tax on the Fuel.

9. Highlands sold the Fuel to the Province of New Brunswick.

10. The Province of New Brunswick did not purchase the Fuel for the purpose of:

    a) resale,

    b) use by any board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by the Province or under the authority of the legislature or the lieutenant governor in council of the Province, or

    c) use by the Province, or by any agents or servants of the Province, in connection with the manufacture or production of goods for other commercial or mercantile purposes.

Highlands' First Rebate Claim

11. By letter dated July 17, 2012, Mr. Craig Wilmot wrote to Mr. Al Walker about a public ruling from the Canada Revenue Agency ("**CRA**") dated July 14, 2008 regarding the Federal Excise Tax on fuel sold to the Provinces of Alberta and New Brunswick and the application of a rebate under section 68.19 of the Act ("**2008 Ruling**"). The 2008 Ruling, which has never been revoked, rescinded or amended, states that "Alberta and New Brunswick are the only provinces that do not have a reciprocal taxation agreement with the federal government".

12. By letter dated February 8, 2013, Highlands filed a rebate claim in the amount of $2,432,373.71 for an amount equal to the Federal Excise Tax which was imbedded in the

amount charged by Irving Oil Commercial G.P. to Highlands in respect of the Fuel sold by Highlands to the Province of New Brunswick from February 1, 2011 to January 31, 2013 (the "**First Rebate Claim**").

13. Neither the Province of New Brunswick, Irving Oil Commercial GP, nor any other person other than Highlands has made or filed a rebate claim in respect of the sale of Fuel by Highlands to the Province of New Brunswick for the period February 1, 2011 to January 31, 2013.

14. The CRA issued a notice of determination dated April 12, 2013 for the First Rebate Claim, allowing a rebate of $2,409,784.50. The amount allowed by the CRA was reduced because Highlands was only allowed to claim a rebate within the two-year period prior to the rebate application being made. As the rebate application was made on February 8, 2013, the period covered under the First Rebate Claim started on February 8, 2011 and not February 1, 2011.

Highlands' Bid to Sell Fuel to New Brunswick for 2013 to 2015

15. New Brunswick issued a tender for the supply of Fuel.

16. On July 22, 2013, Highlands bid on the ability to sell Fuel to the Province of New Brunswick from October 1, 2013 to August 31, 2015.

17. During the negotiations with the Province of New Brunswick, Highlands agreed to a reduction of $0.002 per litre.

18. The Province of New Brunswick did not request from Highlands any reduction or exemption relating to the Federal Excise Tax.

19. As of August 8, 2013, the CRA had given no notice of any kind to Highlands to indicate that it believed that Highlands was not entitled to claim a rebate for an amount equal to the Federal Excise Tax embedded in the cost of the Fuel it had purchased for sale to the Province of New Brunswick.

The sale of Fuel to the Province of New Brunswick between 2014 to 2016

20. From March 1, 2014 to February 29, 2016, Highlands purchased Fuel from Irving Oil Commercial G.P. and paid to Irving Oil Commercial G.P. an amount equal to the Federal Excise Tax on the Fuel. Highlands resold the Fuel to the Province of New Brunswick.

21. Highlands issued invoices to the Province of New Brunswick pursuant to its invoicing system.

Highlands Second Rebate Claim

22. On April 23, 2014, Highlands made a rebate application for the period March 1, 2014 to March 31, 2014, a portion of which related to the sale of Fuel to the Province of New Brunswick ("**Second Rebate Claim**").

23. Neither the Province of New Brunswick, Irving Oil Commercial GP, nor any other party other than Highlands has made or filed a rebate claim of an amount equal to the Federal Excise Tax in respect of the sale of Fuel to the Province of New Brunswick for the period March 1, 2014 to March 31, 2014.

24. On August 4, 2014, the CRA proposed to deny the portion of the March 2014 Rebate Application pertaining to the sale of Fuel to the Province of New Brunswick in the amount of $99,862.58. The initial basis of the denial was that the Fuel was being purchased by an agency owned by the Province of New Brunswick and not by the Province of New Brunswick.

25. By notice of determination dated August 18, 2014, the CRA denied the portion of the Second Rebate Claim pertaining to the sale of Fuel to the Province of New Brunswick.

26. By letter dated August 22, 2014, Highlands wrote to the CRA to address the two concerns raised by the CRA auditor. First, the letter explained that the Fuel was being purchased by the Province of New Brunswick and not an agency owned by the Province and included a letter from the Province to this effect. Second, the letter explained that the Government of Canada and the Province of New Brunswick had no reciprocal taxation agreement.

27. By email dated September 4, 2014, the CRA wrote to the Province of New Brunswick asking whether the Province of New Brunswick has a formal agreement with the federal government to pay each others' taxes. The Province of New Brunswick responded in an email dated September 5, 2014 that "NB still does not have a formal agreement with the federal government regarding the reciprocal payment of taxes".

28. By email dated September 25, 2014, the CRA wrote to Highlands stating that: "According to the information received from the Tax Commission of New Brunswick, 'there is no Reciprocal Tax Agreement with the federal government regarding the reciprocal payment of taxes. However, since the 1990's both parties have acted as though an agreement is in place'." The email stated that the CRA would disallow the rebate claims pursuant to subsection 68.19(2) of the Act.

29. By e-mail dated September 26, 2014, Highlands stated that there was no reciprocal taxation agreement in force between the federal government and New Brunswick and requested a ruling from the CRA Appeals Division.

30. On November 14, 2014, Highlands filed a notice of objection pertaining to the portion of the Second Rebate Claim that was denied in respect of the sale of Fuel to the Province of New Brunswick. The basis of the notice of objection was that, the CRA was incorrect, there was no reciprocal taxation agreement in force between the federal government and the Province of New Brunswick between March 1, 2014, and March 31, 2014, and that Highlands was entitled to a rebate under section 68.19 of the Act.

31. On December 29, 2014, the CRA Appeals Division acknowledged receipt of the notice of objection.

Highland's Third Rebate Claim

32. On March 31, 2016, Highlands made a rebate application for $2,095,864.12 for the period May 1, 2014 to February 29, 2016, pertaining to the sale of Fuel to the Province of New Brunswick ("**Third Rebate Claim**").

33. Neither the Province of New Brunswick, Irving Oil Commercial GP, nor any other party other than Highlands has made or filed a rebate claim for Federal Excise Tax in respect of the sale of Fuel to the Province of New Brunswick for the period May 1, 2014 to February 29, 2016.

34. By notice of determination dated May 25, 2016, the CRA denied the Third Rebate Claim. The sole basis of the notice of determination was that there was a reciprocal taxation agreement in force between the federal government and the Province of New Brunswick between May 1, 2014 and February 29, 2016.

35. On August 5, 2016, Highlands filed a notice of objection in respect of the denied Third Rebate Claim.

36. By letter dated October 13, 2016, the CRA Appeals Division acknowledged receipt of the notice of objection in respect of the denied Third Rebate Claim.

The Minister's decision on the Second and Third Rebate Claims

37. By memorandum dated January 8, 2016, the CRA appeals officer made a referral request to CRA Headquarters ("**CRA Referral Request**") asking whether Highlands was entitled to a rebate of Federal Excise Tax. The CRA Referral Request included a copy of an agreement between the federal government and New Brunswick dated March 21, 1991 but signed by the Minister of Finance of New Brunswick on August 14, 1991 (the "1991 Agreement").

38. By memorandum dated February 2, 2017, CRA Headquarters responded to the CRA Referral Request ("**CRA Referral Response**"). The CRA Referral Response confirmed that the CRA auditor "disallowed the refund claim in accordance with subsection 68.19(2)" of the Act. The CRA Referral Response determined that the 1991 Agreement "is a mutual agreement between the parties, [and] has the same effect and meaning of a reciprocal taxation agreement referred to in subsection 68.19(2)" of the Act.

39. On March 2, 2017, the CRA Appeals Officer provided a copy of the 1991 Agreement to Highlands. The 1991 Agreement states that the "arrangements remain in effect until December 31, 1993".

40. By email dated March 3, 2017, Mr. Wilmot wrote to Mr. George McAllister of New Brunswick to confirm when the last reciprocal taxation agreement between the federal government and New Brunswick expired and asked whether there was a reciprocal taxation agreement in effect between March 1, 2014 to February 29, 2016. Mr. McAllister of New Brunswick wrote to Mr. Wilmot indicating that the last reciprocal taxation agreement expired in January 1, 1991 and that a temporary agreement regarding the payment of each government’s fuel taxes was executed in 1991 and expired on December 31, 1993.

41. On March 17, 2017, Osler, on behalf of Highlands, wrote to the CRA Appeals Officer regarding the Second Rebate Claim, explaining that there was no reciprocal taxation agreement in force between the federal government and New Brunswick during the period in which the refund claims were made.

42. On June 23, 2017, Osler, on behalf of Highlands, wrote to the CRA Appeals Officer, regarding the Second Rebate Claim as the objection had been outstanding for almost three years.

43. By letter dated July 4, 2017 (but faxed June 30, 2017), Ms. Anne Duggan, the CRA appeals officer, confirmed the notice of determination dated August 18, 2014 in respect of the Second Rebate Claim, denying a rebate claim of $99,862.58 in respect of the sale of Fuel to the Province of New Brunswick. The confirmation letter states that the 1991 Agreement “remained in effect until December 31, 1993” but that “this administrative agreement was never cancelled and it still in effect today”. The confirmation letter concludes that “as long as there is a mutual agreement between the parties, it has the same effect and meaning of a reciprocal taxation agreement referred to in 68.19(2) of the Act”.

44. By letters dated July 4, 2017 (but faxed June 30, 2017), the CRA Appeals Officer, confirmed the notice of determination dated May 25, 2016 in respect of the Third Rebate Claim in respect of the sale of Fuel to the Province of New Brunswick. The confirmation letter states that the 1991 Agreement “remained in effect until December 31, 1993” but that “this administrative agreement was never cancelled and it still in effect today”. The confirmation letters conclude that “as long as there is a mutual agreement between the

parties, it has the same effect and meaning of a reciprocal taxation agreement referred to in 68.19(2) of the Act".

Reciprocal taxation agreement

45. The Federal Minister of Finance had between March 1, 2014 and February 29, 2016 and currently has reciprocal taxation agreements in force with the provinces of Newfoundland, Prince Edward Island, Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, and British Columbia. Each of those reciprocal taxation agreements contain an explicit provision where each province agrees that no refund or payment in respect of tax paid under Part III of the Act can be granted under section 68.19 to the province or a third party.

46. The federal government has publicly published documents stating that, during the relevant periods, there was no reciprocal taxation agreement between the Province of New Brunswick and the federal government. None of these documents have been revoked or rescinded.

47. The 1991 Agreement expired on December 31, 1993 and was not extended.

48. There currently is, and was no reciprocal taxation agreement between the federal government and New Brunswick within the meaning of section 32 of the *Federal-Provincial Fiscal Arrangement Act*, RSC 1985, c. F-8, between 1994 and present.

49. For the relevant periods, there is no written agreement between the federal government and the Province of New Brunswick dealing with taxation. In particular, there is no written agreement which contains an explicit provision where the Province of New Brunswick agrees that no refund or payment in respect of tax paid under Part III of the Act can be granted under section 68.19 to the Province of New Brunswick or a third party.

The Minister subsequently denies Highlands' First Rebate Claim

50. On March 8, 2017, the Minister subsequently reassessed Highlands to deny Highlands' First Rebate Claim on the basis that there was a reciprocal taxation agreement between the federal government and the Province of New Brunswick. Highlands filed with the Minister a notice of objection, which is being held in abeyance pending the final outcome of this claim.

DATED at Toronto, Ontario, this 21 day of January, 2019

(s)

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FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 26 AND 27, 2019
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