Federal Court  Cour fédérale

Date: 20100121

Docket: T-1001-06

Citation: 2010 FC 72

Montréal, Quebec, January 21, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

LES PÉTROLES DUPONT INC. (#1A)
A body politic and duly incorporated according to law,
having its head office at
904 Route 202, C.P. 504 Bedford, Quebec
J0J 1A0

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] Les Pétroles Dupont Inc. (Dupont), a distributor of various types of diesel fuel, appeals to this Court, pursuant to section 81.28 of the *Excise Tax Act* (the Act), the Minister of National Revenue's (the Minister) decision of April 21, 2005 to deny its refund request in the amount of $544,777.41 representing the excise tax which it collected and remitted to the Minister, at the rate of

$0.04 per litre, on the sale and delivery to its customers, including farmers and business establishments of over 13 million litres of stove oil and furnace oil (the heating oil) as diesel fuel throughout the 2003 year, which its customers actually used in their internal combustion engines (such as tractors).

[2] There is no dispute between the parties the tax of $0.04 per litre is properly imposed on sales of "diesel fuel" pursuant to section 9.1 of the Schedule to the Act. "Diesel fuel" is defined in subsection 2(1) of the Act to include "any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel that is intended for use and is actually used as heating oil." There is no disagreement between the parties the furnace oil, the stove oil and the diesel oil sold by Dupont to its customers falls within the definition of "diesel fuel" in the Act. The parties agree that furnace oil and stove oil qualifies as "heating oil" which is an undefined term in the Act. The parties also agree the three types of oils (furnace oil, stove oil and diesel oil) can be used interchangeably either for heating purposes or to power an internal combustion engine of the compression engine type.

[3] The legal question in this case is not whether Dupont's sales to its customers qualified for the tax exemption as heating oil. Such sales are not exempt because the furnace and stove oil delivered by Dupont to its customers was not actually used as heating oil. The sole question which arises in this case is upon whose shoulders the obligation fell to collect and remit to the Minister the $0.04 per litre tax.

[4] Dupont argues the burden of collecting and remitting legally fell on the manufacturer of the diesel fuel, in this case Shell, when Dupont's trucks took delivery of the furnace or stove oil at Shell's refinery or depot. As a result, Dupont argues it was in error to have collected the $0.04 per litre from its customers. Counsel for the defendant HMQ argues Dupont was responsible for the collection and remittance of the excise tax, by virtue of section 23(9.1) of the Act, which, according to him, creates an exception to the normal rule in subsection 23(2) of the Act providing an excise tax imposed under subsection 23(1) is payable by the manufacturer or the producer of the diesel fuel, i.e. Shell, at the time of delivery of that fuel oil to the purchaser thereof, i.e. Dupont. Counsel for Dupont counters the Crown's reliance on section 23(9.1) of the Act is misplaced based on the wording of that provision and the legislative history behind several provisions of the Act. In particular, he argues the definition of diesel fuel in section 2 of the Act, which flows into section 23(9.1), sets up a two part test in order to shift the legal burden of collecting and remitting the excise tax from Shell to Dupont. That two part conjunctive test is: (1) the diesel fuel oil when purchased from the manufacturer must be intended for use as heating oil; and, (2) that diesel fuel so purchased must be actually used as heating oil. Because Dupont ordered the furnace or stove oil in question from Shell, counsel for Dupont concedes the intention to use it as heating oil has been made out. However, he argues Dupont did not and could not meet the actual use test because it is a distributor and not the actual user of the furnace oil.

[5] As will be seen, the determination of this issue is a narrow question of law which turns on when the two-step test of intended use and actual use as heating oil in the definition of diesel fuel must be applied and this in one of two ways: (1) either at the same point in time i.e. simultaneously; or, (2) whether the application of intended use and actual use as heating oil can be assessed

sequentially at different points in time. Dupont argues for the first interpretation; the Minister for the second. That issue has been the subject of judicial determination by my colleague Justice Beaudry in *W.O. Stinson & Son Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, 2005 FC 1427 (*Stinson*).

[6] The other legal issue which arises in this case is whether the principle of judicial comity should apply and lead to a dismissal of this case since my colleague Justice Beaudry in *Stinson* on similar facts found the burden of collecting and remitting the $0.04 per litre fuel tax properly fell on *Stinson*, a distributor, because of section 23(9.1) of the Act. *Stinson* appealed that decision to the Federal Court of Appeal but it was discontinued by *Stinson* when the Minister refused its consent to join with the *Stinson* numerous other cases. A new case was started – the one before me now – but this time the Minister agreed Dupont should be the lead case upon which some 200 other cases are joined either by Prothonotary Morneau's order of February 16, 2009 or my order of January 19, 2010 (see Appendix A to this judgment).

[7] The parties agreed this appeal, pursuant to section 81.28 of the Act, is to be considered *de novo* and under the *Federal Courts Rules*, proceeds by way of an action and not a judicial review of the Minister's decision not to accede to Dupont's refund request. There is consequently no standard of review to be considered and applied. The facts upon which the appeal was heard, is contained in an agreed statement of facts and no witnesses were heard.

The Agreed Statement of Facts

[8] As noted, it was agreed between the parties Dupont is a distributor of various types of fuel oil "including coloured furnace oil and coloured stove oil (commonly known as heating oil) and coloured diesel oil and clear diesel oil." I was informed by counsel for HMQ, the reference to "coloured" has no significance in this appeal as it related to provincial enforcement requirements. In these reasons, no use will be made of the words "coloured" which appears throughout the agreed statement of facts.

[9] It was also agreed as follows:

1) Furnace oil, stove oil and diesel oil fall in the definition of "diesel fuel" in subsection 2(1) of the Act when they are not subject to the exclusionary clause thereof.

2) Dupont is not a manufacturer, producer or importer of furnace oil, stove oil or diesel oil.

3) Dupont is not licensed as a wholesaler (holder of a "W" licence) under the Act.

4) Dupont is not a person who is licensed for purposes of Part III of the Act (i.e. Dupont is not a holder of an excise licence, i.e. an "E" licence).

5) Dupont purchased the furnace oil and stove oil from various manufacturers (suppliers) who did not remit the $0.04 per litre excise tax as imposed pursuant to subsection 23(1) of the Act coupled with section 9.1 of Schedule 1 to the Act. This practice is in accordance with the policy of the Respondent in EP-001 dated April 29, 2002.

6) Furnace oil and stove oil are generally intended for use as heating oil but are also suitable for use in engines of the compression-ignition type.

7) Dupont is not the actual user of the furnace oil or stove oil as purchased by it from its suppliers.

8) Dupont did not provide any end-use certificates to its suppliers when it purchased stove oil or furnace oil.

9) Dupont also purchased diesel oil from its suppliers. The suppliers remitted the $0.04 per litre excise tax to the Government and charged same to Dupont at the time it took delivery.

10) Diesel oil is used in internal combustion engines of the compression-ignition type, but can also be used as heating oil.

11) Dupont is not the actual user of the diesel oil as purchased by it from its suppliers, nor did it provide any end-use certificates to its suppliers when it purchased diesel oil.

12) Dupont sends its own tankers to its suppliers' place of business to take physical delivery of the stove oil, furnace oil and diesel oil which it purchases from the suppliers.

13) Dupont's tankers have from three (3) to six (6) separate compartments, three (3) of which are used to store stove oil, furnace oil and diesel oil.

14) At the time Dupont takes delivery of the stove oil, furnace oil and diesel oil from its supplier, it does not know to which of its customers it will sell same, nor does it know how its customers will use same.

15) For the purposes of the present appeal, some of Dupont's customers are farmers and companies which use fuel oil to heat their buildings and to operate both off-road vehicles and equipment which incorporates an internal combustion engine of the compression-ignition type.

16) When a customer orders from Dupont heating oil, Dupont supplies either stove oil or furnace oil to the customer (when Dupont's tanker contains stove oil or furnace oil) and delivers same directly into a building, farm house or silo in which a furnace is located. In such cases, Dupont invoices stove oil or furnace oil to its customers as stove oil or furnace oil. Dupont does not charge excise tax to its customer at the time of delivery of the stove oil or furnace oil to its customers.

17) When a customer orders heating oil, but Dupont's tanker contains only diesel oil (Dupont's tanker does not have any stove oil or furnace oil), Dupont delivers diesel oil to its customer and Dupont invoices the diesel oil as stove oil or furnace oil to its customer. Dupont does not charge excise tax to its customer notwithstanding that, when Dupont purchased the

diesel oil from its supplier, the supplier remitted the $0.04 excise tax to the Defendant and included an amount equal to the $0.04 excise tax in the sale price to Dupont. The diesel oil referred to in this paragraph is not the subject of this appeal.

18) When a customer orders fuel oil for use in off-road vehicles or equipment with an internal combustion engine of the compression-ignition type, Plaintiff delivers diesel oil to the customer if Dupont has diesel oil [in its tankers].

19) When a customer orders fuel oil for use in off-road vehicles or equipment with an internal combustion engine of the compression-ignition type, but the Dupont's tanker contains only furnace oil or stove oil, Dupont delivers furnace oil or stove oil to its customer.

20) Dupont proceeded as follows:

(i) when Dupont delivers diesel oil to its customer, Dupont invoices same as diesel oil and does not charge or remit excise tax because excise tax was remitted by Dupont's supplier when Dupont bought the diesel oil from its supplier.

(ii) when Dupont delivers furnace oil or stove oil to its customer, Dupont invoices same as diesel oil and sells same at the price of diesel oil [which is at a higher price than furnace oil or stove oil]. Dupont includes excise tax in the sale price to its customer, and remits the excise tax to HMQ because no excise tax was remitted by Dupont's supplier

when Dupont bought the furnace oil or the stove oil from its supplier. Such sales are [the sole] the subject of the present appeal.

21) For the period extending from January 1, 2003 to December 31, 2004, the Plaintiff sold and delivered to its customers 13 619 435 litres of stove or furnace oil as diesel fuel.

22) As required by the *Excise Tax Act*, Dupont collected $544,777.41 of excise tax at a rate of $0.04/litre which it then remitted to HMQ.

23) The 13,619,435 litre of stove or furnace oil were actually used by Dupont's customers as diesel fuel in internal combustion engines. [All underlinings are mine.]

The Legislative Scheme

[10] For the purposes of this appeal, I set out below in both official languages, the following relevant provisions:

1) In subsection 2(1), the definition of diesel fuel:

"diesel fuel" includes any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel that is intended for use and is actually used as heating oil. [Emphasis mine.]	« combustible diesel » S'entend notamment de toute huile combustible qui peut être utilisée dans les moteurs à combustion interne de type allumage par compression, à l'exception de toute huile combustible destinée à être utilisée et utilisée de fait comme huile à chauffage. [Je souligne.]

2) Under Part III of the Act dealing with excise taxes, subsection 23(1) headed "Tax on various articles at schedule rates" reads:

23. (1) Subject to subsections (6) to (8), whenever goods mentioned in Schedule I are imported or are manufactured or produced in Canada and delivered to a purchaser of those goods, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other law, an excise tax in respect of the goods at the applicable rate set out in the applicable section of that Schedule, computed, if that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be. [Emphasis mine.]	23. (1) Sous réserve des paragraphes (6) à (8), lorsque les marchandises énumérées à l'annexe I sont importées au Canada, ou y sont fabriquées ou produites, puis livrées à leur acheteur, il est imposé, prélevé et perçu, outre les autres droits et taxes exigibles en vertu de la présente loi ou de toute autre loi, une taxe d'accise sur ces marchandises, calculée selon le taux applicable figurant à l'article concerné de cette annexe. Lorsqu'il est précisé que ce taux est un pourcentage, il est appliqué à la valeur à l'acquitté ou au prix de vente, selon le cas. [Je souligne.]

3) Under the same Part, subsection 23(2) headed "By whom and when payable":

23. (2) Where goods are imported, the excise tax imposed by subsection (1) shall be paid in accordance with the provisions of the *Customs Act* by the importer, owner or other person liable to pay duties under that Act, and where goods are manufactured or produced and sold in Canada, the excise tax shall be payable by the manufacturer or producer at the time of delivery of the goods to the purchaser thereof. [Emphasis mine.]	23. (2) Lorsque les marchandises sont importées, la taxe d'accise prévue par le paragraphe (1) est payée conformément à la *Loi sur les douanes*, et lorsque les marchandises sont de fabrication ou de provenance canadienne et vendues au Canada, cette taxe d'accise est exigible du fabricant ou du producteur au moment de la livraison de ces marchandises à leur acheteur. [Je souligne.]

4) Under the same Part, subsection 23(9.1) headed "Diversion to taxable sale or use":

23 (9.1) Where fuel other than aviation gasoline has been purchased or imported for a use for which the tax imposed under	23 (9.1) Lorsque du combustible autre que de l'essence d'aviation a été acheté ou importé à une fin pour laquelle la taxe

this Part on diesel fuel or aviation fuel is not payable and the purchaser or importer sells or appropriates the fuel for a purpose for which the fuel could not have been purchased or imported without payment of the tax at the time he purchased or imported it, the tax imposed under this Part on diesel fuel or aviation fuel shall be payable by the person who sells or appropriates the fuel	imposée par la présente partie sur le combustible diesel ou le carburant aviation n'est pas payable et que l'acheteur ou l'importateur vend ou affecte le combustible à une fin pour laquelle il n'aurait pas pu alors l'acheter ou l'importer sans le paiement de la taxe au moment de l'achat ou de l'importation, la taxe imposée en vertu de la présente partie sur le combustible diesel ou le carburant aviation le devient au moment où il vend ou affecte le combustible :
(a) where the fuel is sold, at the time of delivery to the purchaser; and	a) lorsque le combustible est vendu, au moment de la livraison à l'acheteur;
(b) where the fuel is appropriated, at the time of that appropriation. [Emphasis mine.]	b) lorsque le combustible est affecté, au moment de cette affectation. [Je souligne.]

5) According to section 9.1 of Schedule I of the Act, a tax of $0.04 per litre is levied on the sale of "diesel fuel" as defined in section 2 above.

Justice Beaudry's decision in Stinson & Son Ltd.

[11] The parties agree the facts and legal issues in *Stinson* bear great resemblance to this case. In *Stinson*, however, there was no agreement as to the facts but *Stinson's* controller testified to the same facts as contained in the agreed facts before me. Moreover, counsel in that case were the same as appeared before me. *Stinson* is a distributor of furnace and stove oil and other types of diesel fuel. The issue before Justice Beaudry was whether *Stinson* was liable to remit the excise tax pursuant to subsection 23(9.1) of the Act on the sale of heating oil to customers who actually used that oil in their internal combustion engines of the compressor ignition type. It was said by *Stinson*, the manufacturers from whom it purchased the heating oil did not deduct and remit the excise tax on

diesel fuel because these manufacturers were acting in accordance with administrative practices issued by the Minister.

[12] The legal issue before me is the same as in *Stinson* – namely, whether under section 23(9.1) of the Act, Dupont was liable to collect and remit the excise tax to the Minister in identical circumstances – actual use by Dupont's customers of heating oil in their internal combustion engines. If the answer is yes, Dupont is not entitled to the refund it claims. Dupont claims Shell did not deduct and remit the excise tax on heating oil because it was acting in accordance with departmental administrative practices.

[13] The legal arguments put to Justice Beaudry were the same as argued before me. *Stinson* argued, as Dupont now does, the manufacturer of the fuel oil had an obligation to deduct because it was unable to prove, at the time it took delivery from the manufacturer, the fuel oil it was purchasing would actually be used as heating oil and section 23(9.1) was inapplicable to shift the legal burden on it of collecting and remitting the excise tax as subsection 2(1) of the Act – the definition of diesel fuel -- established the two-prong test of intended and actual use which must be met simultaneously, not sequentially.

[14] The Minister's counsel in *Stinson* made the same arguments as he did before me and, in particular, submitting subsection 23(9.1) was specifically designed to reflect the possibility of the diversion of heating oil to use other than heating and clearly imposes on the person who sells fuel oil that was otherwise acquired exempt from tax the obligation to collect and remit in the case of

diversion. He further argued the two steps must be sequential for the reasons found by Justice Beaudry in *Stinson*.

[15] Justice Beaudry, in his decision, was of the view there were no questions of fact or credibility in the case before him and that it resolved around the statutory interpretation of the definition of diesel fuel in subsection 2(1) and subsection 23(9.1) of the Act. He applied the principle of statutory interpretation stated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27.

[16] Justice Beaudry's main findings are contained in paragraphs 27, 28 and 29 of his judgment which I will quote:

> **27** A contextual approach to the wording of the relevant provisions of the *Excise Tax Act* reveals that the purpose of subsection 23(9.1) of the Act was to address situations involving intermediary purchasers such as the plaintiff between manufacturers of fuel oil and consumers. Indeed, by placing the responsibility for the payment and remittance of the excise tax on the person who diverts tax-exempt fuel oil from the purpose the exemption in subsection 2(1) stemmed from, subsection 23(9.1) of the Act carves out an exception to the taxation scheme laid out in subsections 23(1) and (2), which makes excise tax payable by the manufacturer or importer of the fuel oil.
>
> **28** The two-step test included (i.e. intended use and actual use) in the definition of "diesel fuel" in subsection 2(1) of the Act would be absurd if it were to be applied simultaneously, as the plaintiff suggests, since manufacturers and importers would practically always be unable to verify that the goods in issue are actually used for their intended purpose by consumers. In my opinion, manufacturers and importers can rely on prima facie indications of "intended use" of resellers and distributors like the plaintiff to meet the "intended use" test and not include the $0.04 excise tax per litre sold. Resellers and distributors are in a much better position to ensure that the "actual use" test is met, because

> they interact with the end-users. This is precisely why Parliament chose to enact subsection 23(9.1) of the Act.
>
> **29** The two-step test cannot be applied simultaneously in a transaction between a manufacturer and a reseller, and the reseller thus becomes responsible for the payment of the excise tax if the intended use of the goods in issue upon resale is incompatible with the intended use that rendered the purchase exempt from the payment of the excise tax of $0.04 per litre in the first place. Furthermore, and though this has no direct bearing on the present case, subsection 23(9.1) of the Act would also apply to consumers whose use of tax-exempt heating oil do not meet the "actual use" test when they divert the oil from a furnace's tank to power a diesel combustion engine. [Emphasis mine.]

Analysis

[17] For the reasons that follow, I am of the view these appeals must be dismissed for the reason that the *Stinson* case is not distinguishable and, in my view, was correctly decided.

[18] In *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1025, I had the opportunity of canvassing the law with respect to judicial comity. At paragraph 61 of my reasons, I stated as follows:

> **61** The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. I cite the following cases:
>
> - *Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 470, 2006 FC 372;
>
> - *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631, 2006 FC 461;
>
> - *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 596, 2007 FC 446;

- *Aventis Pharma Inc. v. Apotex Inc.*, [2005] F.C.J. No. 1559, 2005 FC 1283;

- *Singh v. Canada (Minister Citizenship and Immigration)*, [1999] F.C.J. No. 1008;

- *Ahani v. Canada (Minister Citizenship and Immigration)*, [1999] F.C.J. No. 1005;

- *Eli Lilly & Co. v. Novopharm Ltd.* (1996), 67 C.P.R. (3d) 377;

- *Bell v. Cessma Aircraft Co.* (1983), 149 D.L.R. (3d) 509 (B.C.C.A.)

- *Glaxco Group Ltd. et al. v. Minister of National Health and Welfare et al*, 64 C.P.R. (3d) 65;

- *Steamship Lines Ltd. v. M.N.R.*, [1966] Ex. CR 972.

[19] At paragraph 62 of that case, I set out the exceptions to the principal of judicial comity. I wrote:

> **62** There are a number of exceptions to the principle of judicial comity as expressed above they are:
>
> 1. The existence of a different factual matrix or evidentiary basis between the two cases;
>
> 2. Where the issue to be decided is different;
>
> 3. Where the previous case failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and,
>
> 4. The decision it followed would create an injustice.

[20] In this case, I cannot see how any of the exceptions to the principle of judicial comity are applicable. The factual matrix or evidentiary basis is the same as in *Stinson*; the issue to be decided is identical. Justice Beaudry interpreted, correctly in my view, the same two sections I am called upon to do and, by following *Stinson*, no injustice would be created, quite to the contrary.

[21] I touch briefly on the last exception. Counsel for the Minister, in his opening remarks stressed accurately that, in this case, nobody is losing anything. Dupont collected and remitted the excise tax from persons who under the law, it was properly deductible – Dupont's customers who did not use the heating oil for that purpose but rather for a use where the tax applied. Dupont is not a loser because, in the normal course, it would have charged the tax to its customers. The Minister does not gain anything more than what the law provides he is entitled to.

[22] Counsel for Dupont recognized the importance of comity doctrine in its application to judicial decisions by members of the same Court. He argued this doctrine did not apply in this case because Justice Beaudry did not have the benefit of the legislative history behind certain provisions of the Act. The legislative history, according to him, makes a difference because it impacts upon statutory interpretation and, in particular, the purpose of subsection 23(9.1) which is the central provision relied upon by the Minister in this case.

[23] There were several elements to Mr. Kaylor's submission the legislative history behind relevant sections of the Act which Justice Beaudry did not have the benefit of should make a difference in the result. Some background is useful in order to appreciate his argument.

[24] The excise tax on diesel fuel was first imposed in 1981 which necessitated the following amendments to the Act:

(1) The addition of a definition of "diesel fuel" to subsection 2(1). Its wording has never been changed by Parliament.

(2) The definition of “manufacturer” or “producer” in that same subsection 2(1) was amended to include in its paragraph (e):

> (e) any person who sells gasoline, diesel fuel or aviation fuel, other than an person who sells such goods exclusively and directly to consumers, and

This paragraph was repealed in 1988:

(3) Section 27 was amended to add the following subsection whose marginal note reads “Division of fuel purchased for heating or lighting”:

> “(5) Where fuel has been purchased or imported for use for heating or lighting and the purchaser or importer, as the case may be, sells or appropriates the fuel for a purpose for which the fuel could not have been purchased or imported exempt from tax under this Part at the time he purchased or imported it, the tax imposed under this Part shall be payable by the person who so sells or appropriates the fuel, on the sale price
>
> (a) where the fuel is sold, at the time of delivery to the purchaser, and
>
> (b) where the fuel is appropriated, the time of such appropriation,
>
> and the Minister may determine the value of the fuel for the purpose of calculating the tax imposed under this Part.”

Subsection 27(5), with modified wording, became the current section 23(9.1) by an amendment to the Act – Statutes of Canada 1986, chapter 9.

[25] In his oral argument, counsel for Dupont focused on the addition to the definition "of manufacturer or producer" in paragraph (e) when the excise tax on diesel fuel was first imposed. He labeled this paragraph as "the deemed manufacturer clause" and argued it conferred manufacturer status on a distributor like on Dupont which made it such that when the distributor purchased from the manufacturer of the diesel fuel oil, the manufacturer did not have to collect or deduct the tax because that burden legally was shifted to the distributor who now had the obligation to collect and deduct the excise tax in appropriate circumstances based on the actual use by its customers. This circumstance, according to him, casts a different light on the interpretation to be given to now section 23(9.1). Its purpose was not to shift the legal burden of collecting and remitting from the manufacturer of the diesel fuel to its distributor; that was the purpose of the deemed manufacturer provision.

[26] According to Dupont's counsel, this workable scheme was destroyed when, for reasons unknown, the deemed manufacturer clause was repealed in 1988. This repeal, according to counsel, forced the Government to adopt illegal means to try to repair the damage done – administratively shift the burden back to the distributor. He points to ET/SL Policy Statement EP-001 and the notice by the Minister of Finance of proposed legislation to enact proposed section 68.01 into the Act for the purpose of allowing a refund on diesel fuel for end users and unlicensed vendors.

[27] I am not persuaded by Mr. Kaylor's able arguments for the following reasons:

1) I agree with counsel for the Minister, on the facts of this case, the deemed manufacturer clause would not have applied to a distributor like Dupont because, based on the agreed

statement of facts, the furnace and stove oil which was sold was sold exclusively and directly to consumers. I have no evidence otherwise.

2) The interpretation he urges would in effect repeal section 23(9.1), which is directly aimed at the problem which underlies this case – diversion of use.

3) The refund scheme in now section 68.01 would not be applicable to Dupont because it refunds excise tax-paid diesel fuel used for heating purposes, which is the reverse of the situation before me.

[28] Mr. Kaylor made another argument which was not put to Justice Beaudry – the argument the excise tax imposed under the Act is a single incidence tax. He relies on the Federal Court of Appeal's decision in *Her Majesty the Queen v. Suncor Inc.*, (1996) 4 G.T.C. 6060 and specifically on the following extract from Justice Hugessen's reasons:

> **20** The tax imposed by section 23 is a single incidence tax. It is charged upon manufacturers, producers, importers and wholesalers at the time that their goods are released into the stream of commerce leading to their distribution to the ultimate consumers thereof. Unlike a value added tax, which is imposed at multiple stages along the way, the scheme of exemptions built into section 23 of the statute is carefully designed to avoid the tax attaching to any given product more than once. Thus, subsection 23(6) provides that a manufacturer or producer who sells to a licensed wholesaler is freed from payment of the tax; manifestly, this is because it is the wholesaler who is made responsible for the tax by subsection 23(4). Subsection 23(7) is an integral part of this same scheme. Its clear intent is to avoid the taxation of constituent or component parts of goods which are themselves going to attract payment of the tax. [My emphasis.]

[29] Mr. Savary did not dispute the fact the excise tax in question was a single incidence tax – one which is charged only once – unlike GST. In this case, the evidence is that it was only charged once. I agree with Mr. Savary's submission.

[30] As a result, Dupont has failed to convince me any of the exceptions to the rule of judicial comity have any application. Having made this finding, I also conclude the administrative policy referred to by Mr. Kaylor was not tainted with any illegality because it was validly based on section 23(9.1) of the Act.

[31] I conclude by expressing the view Justice Beaudry's interpretation of section 23(9.1) is clearly correct applying the principle of statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*. In that case, Justice Iacobucci wrote there was only one principle or approach to statutory interpretation namely: "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."

[32] Applying that principle to section 23(9.1), it is abundantly clear the two step test of intended use and actual use cannot be applied simultaneously because it speaks to two separate transactions: (1) a prior purchase of diesel fuel on a tax exempt basis because it was for a non taxable use (the purchase by Dupont from Shell of furnace or stove oil) and a subsequent sale by Dupont to its customers who told Dupont the use was for a taxable use, i.e. for use in their internal combustion engine. Section 23(9.1) then provides that the tax imposed on diesel fuel shall be payable by the

person who sells the diesel fuel (Dupont) at the time of the delivery to the purchaser (Dupont's customer). The statutory scheme is very clear in my view.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this action is dismissed with costs as are all of the joined actions (appeals) listed in Appendix A to this judgment but, in their case**,** without costs.

"François Lemieux"
Judge

APPENDIX "A" TO THIS JUDGMENT

1. Pursuant to the Order of Prothonotary Morneau, dated February 16, 2009:

T-1623-05	T-1624-05	T-1625-05	T-1626-05	T-1627-05	T-1629-05
T-1630-05	T-1631-05	T-1632-05	T-1635-05	T-1636-05	T-1637-05
T-1639-05	T-1641-05	T-1650-05	T-1652-05	T-1653-05	T-1654-05
T-1655-05	T-1656-05	T-1657-05	T-1658-05	T-1659-05	T-1660-05
T-1661-05	T-1662-05	T-1663-05	T-1664-05	T-1665-05	T-1667-05
T-1668-05	T-1669-05	T-1673-05	T-1674-05	T-1678-05	T-1714-05
T-1715-05	T-1716-05	T-1717-05	T-1718-05	T-1720-05	T-1731-05
T-1733-05	T-1734-05	T-1736-05	T-1737-05	T-1738-05	T-1852-05
T-1854-05	T-1855-05	T-1856-05	T-1857-05	T-1859-05	T-1860-05
T-1861-05	T-1862-05	T-1863-05	T-1864-05	T-1865-05	T-1866-05
T-1867-05	T-1869-05	T-1871-05	T-1875-05	T-1876-05	T-1877-05
T-1879-05	T-1893-05	T-1894-05	T-1895-05	T-1896-05	T-1897-05
T-1898-05	T-1899-05	T-1900-05	T-1901-05	T-1902-05	T-1903-05
T-1904-05	T-1905-05	T-1906-05	T-1907-05	T-1908-05	T-1909-05
T-1910-05	T-1911-05	T-1912-05	T-1927-05	T-1928-05	T-1929-05
T-1930-05	T-1931-05	T-1932-05	T-1933-05	T-1934-05	T-1935-05
T-1936-05	T-1937-05	T-1938-05	T-1939-05	T-1940-05	T-1941-05
T-1942-05	T-1944-05	T-1946-05	T-1947-05	T-1948-05	T-1953-05
T-1959-05	T-112-06	T-113-06	T-114-06	T-115-06	T-116-06
T-117-06	T-118-06	T-119-06	T-120-06	T-226-06	T-234-06

T-618-06	T-706-06	T-1001-06	T-1002-06	T-1003-06	T-1005-06
T-1006-06	T-1007-06	T-1009-06	T-1010-06	T-1011-06	T-1012-06
T-1016-06	T-1017-06	T-1019-06	T-1020-06	T-1307-06	T-1308-06
T-1309-06	T-1310-06	T-1313-06	T-1314-06	T-1316-06	T-1317-06
T-1318-06	T-1319-06	T-1320-06	T-427-07	T-441-07	T-442-07
T-443-07	T-444-07	T-445-07	T-446-07	T-447-07	T-448-07
T-449-07	T-450-07	T-451-07	T-452-07	T-453-07	T-454-07
T-769-07	T-1641-07	T-1781-07	T-1782-07	T-1783-07	T-1784-07
T-1785-07	T-1786-07	T-1789-07	T-469-08		

The joined files

2. Pursuant to my order dated January 19, 2010 as amended:

T-1835-08	T-1836-08	T-1837-08	T-1838-08	T-1839-08	T-1841-08
T-1842-08	T-214-09	T-215-09	T-216-09	T-217-09	T-218-09
T-219-09	T-220-09	T-221-09	T-222-09	T-223-09	T-224-09
T-225-09	T-226-09	T-227-09	T-232-09	T-481-09	T-482-09
T-484-09	T-486-09	T-487-09	T-488-09	T-489-09	T-491-09
T-492-09	T-493-09	T-494-09	T-495-09	T-496-09	T-497-09
T-498-09	T-499-09	T-870-09	T-872-09	T-873-09	T-874-09
T-875-09	T-876-09	T-877-09	T-878-09	T-879-09	T-880-09
T-1009-09	T-1010-09	T-1011-09	T-1012-09	T-1718-09	T-1734-09
T-1735-09	T-1736-09	T-1737-09	T-1738-09	T-1740-09	T-1741-09

T-1742-09 T-1743-09 T-1744-09 T-1745-09 T-1746-09 T-1747-09

T-1748-09 T-1749-09

The joined files

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1001-06
STYLE OF CAUSE:	LES PÉTROLES DUPONT INC. (#1A) v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal
DATE OF HEARING:	October 27, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	January 21, 2010

APPEARANCES:

Michael Kaylor	FOR THE PLAINTIFF
Jacques Savary	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Lapointe Rosenstein , L.L.P. Montréal (Quebec)	FOR THE PLAINTIFF
John H. Sims, Q.C., Deputy Attorney General of Canada	FOR THE DEFENDANT