Citation: 2011 TCC 554
Date: **20111219**
Docket: 2007-4997(EA)G

BETWEEN:

GRAND RIVER ENTERPRISES SIX NATIONS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bowie J.

[1] There are a total of 23 appeals before me, all from assessments for excise duty, and related interest. The assessments were made pursuant to section 188 of the *Excise Act, 2001*[1] (the *Act*), in respect of tobacco products manufactured by the appellant between September 2005 and July 2007. The appeals are brought pursuant to section 198 of the *Act*.

[2] The appellant manufactures and sells tobacco products at its manufacturing plant on the Six Nations of the Grand River Reserve in Ontario. In assessing the duty in question, the Minister of National Revenue relied on paragraph 42(1)(*a*) of the *Act*, the definition of the word "packaged" *(*« emballé ») found in section 2 of the *Act* (insofar as it pertains to tobacco), and paragraph 2(*b*) of the *Stamping and Marking of Tobacco Products Regulations*[2] (the *Regulations*). These read as follows:

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1 S.C. 2002, c. 22.

2 SOR/2003-288.

***Excise Act*, 2001**

42(1) Duty is imposed on tobacco products manufactured in Canada or imported and on imported raw leaf tobacco at the rates set out in Schedule 1 and is payable

(*a*) in the case of tobacco products manufactured in Canada, by the tobacco licensee who manufactured the tobacco products, at the time they are packaged; and

(*b*) in the case of imported tobacco products or raw leaf tobacco, by the importer, owner or other person who is liable under the *Customs Act* to pay duty levied under section 20 of the *Customs Tariff* or who would be liable to pay that duty on the tobacco or products if they were subject to that duty.

2 The definitions in this section apply in this *Act*

…

"*packaged*" means

(*a*) in respect of raw leaf tobacco or a tobacco product, packaged in a prescribed package;

Loi de 2001 sur l'accise

42(1) Un droit sur les produits du tabac fabriqués au Canada ou importés et sur le tabac en feuilles importé est imposé aux taux figurant à l'annexe 1 et est exigible :

a) dans le cas de produits du tabac fabriqués au Canada, du titulaire de licence de tabac qui les a fabriqués, au moment de leur emballage;

b) dans le cas de produits du tabac ou de tabac en feuilles importés, de l'importateur, du propriétaire ou d'une autre personne qui est tenue, aux termes de la *Loi sur les douanes*, de payer les droits perçus en vertu de l'article 20 du *Tarif des douanes* ou qui serait tenue de payer ces droits sur les produits ou le tabac s'ils y étaient assujettis.

2 Les définitions qui suivent s'appliquent à la présente loi.

…

« emballé »

a) Se dit du tabac en feuilles ou des produits du tabac qui sont présentés dans un emballage

…

réglementaire; …

Stamping and Marking of Tobacco Products Regulations

2 For the purpose of paragraph (*a*) of the definition "packaged" in section 2 of the *Act*,

(*a*) raw leaf tobacco is packaged in a prescribed package when it is formed into a hand for sale or when a hand of raw leaf tobacco or broken portions of the leaf are packaged for sale; and

(*b*) a tobacco product is packaged in a prescribed package when it is packaged in the smallest package — including any outer wrapping that is customarily displayed to the consumer — in which it is normally offered for sale to the general public.

Règlement sur l'estampillage et le marquage des produits du tabac

2 Pour l'application de l'alinéa *a*) de la définition de « *emballé* » à l'article 2 de la Loi, est un emballage réglementaire :

a) dans le cas du tabac en feuilles, toute manoque préparée pour la vente ou tout contenant dans lequel une manoque ou les parties brisées de la feuille sont empaquetées pour la vente;

b) dans le cas d'un produit du tabac, le plus petit emballage dans lequel il est normalement offert en vente au public, y compris l'enveloppe extérieure habituellement présentée au consommateur.

[3] The appellant's position, simply put, is that the *Act* and the *Regulations*, in the context of its business, do not impose any excise duty on its product. Because the law of Ontario and the terms of the permits under which the appellant operates its business provide that the product may only be sold to Indians on Indian reserves, it cannot be and is not "offered for sale to the general public" («offert en vente au public»). Therefore, the appellant argues, it is never "packaged" («emballé») within the meaning of that word as it is defined in paragraph 2(*b*) of the *Regulations*. Duty therefore can never become payable.

[4] The appellant does not invoke section 87 of the *Indian Act*[3] or any aboriginal or treaty right in support of its claim to immunity from the section 42 tax. Its

[3] R.S.C. 1982 c. I-5.

argument would, presumably, be equally available to any other manufacturer of tobacco products who could show that its products are marketed only to a small and discrete group of people - for example senior citizens living in retirement residences, or soldiers in the Canadian army.

[5] The parties are in agreement that if the appellant is required by the *Act* and the *Regulations* to pay duty then that duty, and the interest on it, have been correctly computed by the Minister in the assessments under appeal, and the appeals must be dismissed. If the appellant does not come within the charging provisions of the *Act* and the *Regulations* then the appeals must be allowed and the assessments vacated.

[6] The parties have entered into an Agreed Statement of Facts which, along with copies of a number of documents referred to in it, became Exhibit A-1. The only other evidence was one unmarked pack and one unmarked bag of cigarettes that the parties agreed were illustrative of those described in paragraphs 12 and 13 of the Agreed Statement of Facts. The operative paragraphs of that Agreed Statement of Facts, numbers 1 to 22, are as follows:

> 1. Grand River Enterprises Six Nations Ltd. ("GRE") manufactures and sells tobacco products at its principal place of business located on the Six Nations of the Grand River Reserve located in the Province of Ontario.
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> 2. The Reserve is a "reserve" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*"),
>
> 3. GRE was incorporated on April 29, 1996 pursuant to the *Canada Business Corporations Act*, R.S.C, 1985, c. C-44.
>
> 4. GRE's shareholders, directors and officers are all "Indians" within the meaning of the *Indian Act*, are members of the Six Nations, and are aboriginal peoples of Canada within the meaning of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
>
> 5. GRE has held a federal tobacco licence since May 29, 1997. A copy of the federal tobacco license is attached as Exhibit "A". No material restrictions or conditions specific to GRE were attached to the federal tobacco licence it held during the Period.
>
> 6. On November 3, 1997, GRE submitted an application to the Ontario Ministry of Finance for provincial permit to sell tobacco products on reserve and off reserve. A copy of the application is attached as Exhibit "B".

7. In 1998, GRE was issued a Registration Certificate[4], and a Wholesale Dealer's Permit.[5] The 1998 Registration Certificate was expressly made subject to an October 6, 1998 agreement (the "Agreement"`), entered into between the GRE and the Ontario Minister of Finance pursuant to which GRE was restricted to only selling its Tobacco Products on the Reserve to First Nation retailers located on reserves. The Registration Certificate, the Wholesale Dealer's Permit and the Agreements are attached as Exhibit "C", "D" and E" respectively.

8. During the period from September 2005 to July 2007 (the "Period"), GRE held an Ontario manufacturer's registration certificate an Ontario wholesale dealer's permit and an Ontario unmarked cigarette dealer's permit[6] (the "Provincial Authorizations"). The Ontario unmarked cigarette dealers' permits for the period are attached as Exhibit "F".

9. There is an ongoing dispute between the Government of Ontario and GRE in connection with the Agreement. GRE takes the position that the Minister breached the terms of the Agreement when it denied GRE permission to sell tobacco products off reserve. GRE has outstanding constitutional challenges respecting the validity of the allocation system, which GRE challenges, *inter alia*, on the basis that it is *ultra vire*s the Province of Ontario as it impairs the status, capacities and rights of Indians on reserves in Ontario, which is a matter exclusively within the jurisdiction of the federal government pursuant to section 91(24) of the *Constitution Act*.

10. GRE also takes the position that as it did not receive a provincial permit to sell tobacco products off reserve it is not bound by the terms of the Agreement relating to the allocation system. During the period GRE sold cigarettes only to First Nation retailers on reserve, but without reference to the allocation system. These sales were made subject to GRE's capacity to supply the demands of the First Nation retailers.

11. GRE's registrations and permits issued pursuant to the *Tobacco Tax Act* remain in effect, and GRE has never been charged with breaching the *Tobacco Tax Act* or its regulations.

12. During the Period, the tobacco products that are the subject of this appeal (the "Tobacco Products") were manufactured by GRE on the Reserve and

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4 Under s. 7 of the Ontario *Tobacco Tax Act*, R.S.O. 1990, Chapter T.10.

5 Under s. 3 of the Ontario *Tobacco Tax Act*, R.S.O. 1990, Chapter T.10.

6 Under s. 9 of the Ontario *Tobacco Tax Act*, R.S.O. 1990, Chapter T.10.

sold by GRE at the Reserve to First Nation retailers located on reserves located within the Province of Ontario and were:

1) packs and bags of cigarettes that were not marked or stamped with an *indicium* under the Ontario *Tobacco Tax Act*, R.S.O. 1990, Chapter T.10 (the "Unmarked Cigarettes"); and

2) unmarked bags of fine cut tobacco.

13. The Unmarked Cigarettes had a federal peach coloured tear tape (stamp) around the sealed package[7] and the fine cut tobacco had a peach coloured stamp on the sealed bag both showing that the excise duty was paid. Scanned copies of these packs and bag are attached as Exhibits "G" and "H". GRE will bring to trial the actual packages.

14. GRE does not monitor retail sales by the First Nation retailers and as such does not know to whom retailers sell Tobacco Products.

15. During the period, the smallest packages in which the Unmarked Cigarettes were normally offered for sale to consumers were:

1) a sealed bag containing 200 cigarettes; and

2) a sealed pack containing 20 or 25 cigarettes.

16. Additional packaging steps were taken forthwith by GRE in respect of the Unmarked Cigarettes:

1) putting 8 sealed packs of 25 cigarettes each or 10 sealed packs of 20 cigarettes each in a package called "carton" which was foil wrapped;

2) putting 50 cartons in a case which was sealed up;

3) putting 32 cases of "King Size 25" cigarettes, 36 cases of regular size cigarettes, or 40 cases of "King Size 20" cigarettes on a skid which were wrapped together in cellophane; and

4) storing the skid in GRE's warehouse.

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[7] By contrast, marked cigarettes in Ontario have a yellow coloured tear tape around the package which provide notice that the excise duty and the provincial tobacco tax were paid.

17. During the period, the smallest package in which the fine cut tobacco was normally offered for sale by First Nations retailers was a sealed bag of 200 grams.

18. Additional packaging steps were taken forthwith by GRE in respect of the fine cut tobacco:

1) putting 30 sealed bags in a case which was sealed up;

2) putting 48 cases on a skid which were wrapped together in cellophane; and

3) storing the skid in GRE's warehouse.

19. GRE appeals from 23 assessments of excise duty plus interest (the "Assessments") made under the *Excise Act, 2001*, S.C. 2002, c. 22, (the "Act") relating to each monthly period from and including September 2005 to and including July 2007 (the "Period").

20. Up to and including August 2005, GRE remitted excise duty on its manufactured tobacco products.

21. During the Period, GRE remitted partial excise duty for each of the monthly periods.

22. In each of the Notices of Decision denying the objections, the Ministry of National Revenue (the "Ministry") made the following statement:

> "Your objection is disallowed and your assessment is confirmed on the basis that pursuant to sections 42 and 43 of the [Excise] Act. [2001] Grand River Enterprises Six Nations Ltd. (GRE), as a tobacco licensee who manufactures tobacco products in Canada, is required to pay a duties [*sic*] at the rates set out in Schedule 1. The fact that GRE is an on-reserve manufacturer provides no relief in respect of federal duties.

[7] In advancing the argument that the charging section of the *Act* does not reach the appellant, counsel relied on the proposition that the phrase "the general public" is not capable of denoting a relatively small and discrete group of people such as native people on reserves. Since native people on reserves are the only people to whom the appellant's products may be sold, those products can never be offered for sale to the general public. This proposition was supported by reference to about a dozen or more cases dealing with the words "public" or "general public" in quite unrelated contexts. A great many of these are cases, primarily in the context of prosecution under

provincial highway traffic laws, where the issue before the courts was whether a roadway on an Indian reserve was open to the public, and therefore was a highway for purposes of the provincial legislation.

[8] Typical of this line of cases is the decision of the Saskatchewan Court of Appeal in *R. v. Bigeagle*.[8] Chief Justice Culliton, writing for the Court, concluded that a road constructed on an Indian reserve for the use and benefit of the Indians living on the reserve did not come within the definition of a "road" in the *Vehicles Act* because it was not "… open to the public for the passage of vehicles." Numerous other cases decided by courts at various levels reach a similar conclusion in a similar context.

[9] Two other cases relied on by the appellant require special mention. *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*[9] concerned whether certain transmissions of ringtones by a cellular wireless carrier to various of its customers was a transmission "to the public". In the course of giving the unanimous reasons of the Court, Sharlow J.A. said this at paragraph 32:

> The group consisting of all of the customers of a wireless carrier is a group that is sufficiently large and diverse that it may fairly be characterized as "the public."

From this the appellant argues that Indians on a reserve, not being a group that is large and diverse, can never be "the public" or, *a fortiori*, "the general public".

[10] In *Johnson v. Nova Scotia (Attorney General)*[10] the Nova Scotia Court of Appeal considered the entitlement of the appellant retailers to a rebate of tobacco tax paid. In the course of giving the unanimous judgment of the Court, Flinn J.A. contrasted sales to Indians on a reserve with sales to the general public at paragraph 46:

> While status Indians may purchase tobacco products, on a Reserve, for their own consumption and use, without being required to pay health services tax, the appellants did not purchase the tobacco products in question for their own

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8 [1978] 6 WWR 65.

9 2008 FCA 6, 64 C.P.R. (4th) 343.

10 [1998] N.S.J. No. 508, 172 N.S.R.(2d) 16.

> consumption and use. The tobacco products were purchased for resale, and were sold to the general public.

[11] On the basis of these authorities the appellant argues that the words "… offered for sale to the general public" have a plain meaning that is not ambiguous, and therefore are not susceptible of interpretation. They must be given their plain meaning, which does not include being offered for sale only to Indians on a reserve. Therefore the time for payment of the duty imposed by section 42 of the *Act* can, in the appellant's view of it, never arrive.

[12] This "words and phrases" approach to the statutory language simply disregards the evolution of the principles of statutory interpretation that is to be found in three decades of Supreme Court of Canada jurisprudence beginning with the adoption by Estey J. in *Stubart Investments Ltd. v. The Queen*[11] of Professor Driedger's modern approach to statutory interpretation. Specifically, it ignores both context and purpose. The appellant seeks to justify this purely textual approach on the basis that the words in question are incapable of bearing any meaning other than that of a large and diverse population. In particular they are said to be incapable of applying to a group consisting only of Indians on a reserve – the market for the appellant's products.

[13] **In *University of British Columbia v. Berg*,[12] Lamer C.J.C., writing for the majority, discussed at length the meaning to be applied to the word "public" as it appears in the *Canadian Human Rights Act*[13] and the analogous statutes of most of the provinces and territories.**[14] He rejected the notion that for a service to be available to the public it must be available to every member of the public, preferring a relational approach that defines the public in terms of those members for whom the service is intended. He concluded that:

> [u]nder the relational approach, the "public" may turn out to contain a very large or very small number of people.[15]

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11 1984 1 SCR 536.

12 [1993] 2 SCR 353.

13 R.S.C. 1985, c. H-6

14 *Berg*, @ p.p. 374-388.

15 *Ibid*. @ p. 386.

[14] In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*,[16] LeBel J., writing for a unanimous Court, explained the evolution of statutory interpretation since *Stubart* at paragraphs 21 to 24.

> B. *Interpretation of Tax Statutes*
>
> (1) General Principles
>
> 21 In *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "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" (p. 578): see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (CanLII), [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.
>
> 22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the *Act* may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
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> 23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the *Act*. Thus,

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16 [2006] 1 SCR 715; 2006 SCC 20.

> legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
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> 24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the *Mining Tax Act* can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.

[15] The appellant relies on the majority judgment of the Supreme Court of Canada in *R. v. McIntosh*[17] for the proposition that courts have no licence to interpret legislation, however harsh or absurd a result it may lead to, until it is first shown that the words in question are capable, in the context in which they are used, of having more than one meaning. That principle may be found repeated in the unanimous judgment of the Court in *Bell ExpressVu Limited Partnership v. Rex*[18]. Iacobucci J. referred to the adoption by the Court in *Stubart*[19] of Professor Driedger's modern approach to the interpretation of statutes, and went on to say at paragraphs 27 to 30:

> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v.*

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17 [1995] 1 S.C.R. 686; [1985] S.C.J. No. 16.

18 [2002] 2 S.C.R.; [2002] SCC 42.

19 *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536.

Quebec (Labour Court), 1997 CanLII 390 (SCC), [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

28 Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, 1974 CanLII 1 (SCC), [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, 1993 CanLII 90 (SCC), [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, 2001 SCC 53 (CanLII), [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

[16] The judgments of the Federal Court of Appeal in *Wireless Telecommunications Assn.* and of the Supreme Court in *Berg* demonstrate that the word "public" is capable of conveying very different meanings, depending upon the context in which it appears. The same may be said of the expression "general public". It therefore becomes necessary to consider the expression in the light of

the purpose of the regulation and the whole statutory context in which the expression appears.

[17] The purpose of the *Act* is to raise revenue through the imposition of duties on wine, spirits and tobacco products. The majority of its provisions are oriented towards regulating the importation and manufacture of these, and the handling and distribution of them, with a view to ensuring that the duties are assessed and collected. Section 42, as we have seen, imposes the duty on tobacco; it is made payable when the products are packaged, with the definition of when the product is packaged left to be determined by the Governor in Council. The purpose of the definition of the word "packaged" in section 2 of the *Regulations* is simply to define the point in time at which the duty, which has been imposed by subsection 42(1) of the *Act*, becomes payable. It would be beyond the purpose of section 2, and beyond the regulation making authority of the Governor in Council, to confer exemptions from the duty that subsection 42(1) imposes.

[18] The authority of the Governor in Council to make regulations is found in section 304 of the *Act*. Nothing there, or elsewhere in the *Act*, suggests that Parliament intended that the governor in Council should have the power to exempt any manufacturer from the duty imposed by the *Act.* Certainly section 42 does not suggest that. It is unequivocal in imposing the duty at the time of packaging; it leaves to the Governor in Council only the determination of the point in time at which the product is to be considered packaged. Significantly, sections 45, 46, 47 and 48 specifically provide relief from the duty imposed by section 42 in carefully defined circumstances. It is inconceivable that Parliament intended to empower the Governor in Council to confer an exemption from duty by the exercise of the power to define the time at which duty would be payable. It is equally inconceivable that the Governor in Council by the use of the phrase "the general public" intended to confer any such exemption.

[19] Considered only textually, the expression "the general public" might be taken to mean everyone in North America, or everyone in Canada, or simply a large and diverse group of persons. It was known to Parliament and to the Governor in Council at the time the *Act* and the *Regulations* were enacted that tobacco products could not legally be offered for sale to everyone in Canada. For example, section 8 of the *Tobacco Act*[20] prohibits their sale to persons under the age of 18, which excludes a large segment of what might, in another context, be considered the general public.

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[20] S.C 1997, c. 13.

When the *Act* and the *Regulations* are considered as a whole, and paragraph 2(*b*) of the *Regulations* is considered in light of its purpose, it is evident that the expression "offered for sale to the general public" is intended simply to mean "offered for sale to those members of the general public to whom they may legally be offered", or to put it another way, 'offered for sale at the retail level", or, as the parties expressed it in paragraph 15 of their Agreed Statement of Facts, "… offered for sale to consumers …".

[20] It follows from this conclusion that duty became payable on the appellant's products when they were packaged in bags of 200 or packs of 20 or 25 cigarettes, as described in paragraph 15 of the Agreed Statement of Facts. The appeals must therefore be dismissed. The respondent is entitled to costs, including the costs of the motion before Mr. Justice Archambault which he reserved to be dealt with by the trial judge.

Signed at Ottawa, Canada, this **19th** of **December, 2011.**

"E.A. Bowie"

Bowie J.

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APPEARANCES:

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