C.A. No. 106766

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Cherubini Metal Works Ltd., 1994 NSCA 224

Freeman, Jones and Roscoe, JJ.A.

BETWEEN:	)	
	)	
THE ATTORNEY GENERAL OF NOVA SCOTIA	)	John D. Wood
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
CHERUBINI METAL WORKS LIMITED	)	Joel E. Fichaud, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	December 1, 1994
	)	
	)	
	)	Judgment Delivered:
	)	January 12, 1995

THE COURT: The appeal is dismissed, the order of the trial judge is affirmed and costs are awarded to the respondent in the amount of $3,000, plus disbursements as per reasons for judgment of Roscoe, J.A.; Jones and Freeman, JJ.A., concurring.

ROSCOE, J.A.:

The main issue on this appeal is whether the respondent taxpayer is entitled to a refund of an overpayment of sales tax. The respondent, a manufacturer

of structural steel, in an action for unjust enrichment claimed it had overpaid Health Services tax in an amount exceeding $400,000. over a period of seven years. Justice Anderson, after receiving a report from a court appointed referee respecting the exact amount of the overpayment, found that the Province had been unjustly enriched and ordered repayment in the amount of $380,018.66, plus pre-judgment interest and costs.

The respondent obtains most of its business by submitting low tenders in competitive bidding on construction projects. The tax overpayment arose as a result of errors described by the trial judge as follows:

> "Throughout the years covered by this claim, 1983 to 1990, and until mid 1990, Cherubini erroneously calculated its tax. When Cherubini calculated a bid for a job, Cherubini would prepare an abstract listing the elements which added up to the amount of the bid. Cherubini calculated this tax at 10% of the amount showing on this initial abstract. The amount shown on this abstract included Cherubini's profit. When Cherubini was awarded the tender, Cherubini through out the job would pay health services tax, calculated at 10% of the amount shown on the abstract. The result was that Cherubini made two errors in the calculation of its tax: (a) Cherubini paid tax on its profits, which is not taxable; and (b) Cherubini paid tax on its initial estimate of costs, i.e., its initial abstract which Cherubini prepared for its tender, as opposed to the actual cost which Cherubini incurred during the job. The first error meant that Cherubini paid too much tax on every job. The second error meant that Cherubini paid too much tax if its actual costs were lower than the original estimated costs, but too little tax if actual costs exceeded original estimated costs."

The relevant sections of the **Health Services Tax Act**, R.S.N.S. 1989, c.198 are as follows:

> "5 (1) Every purchaser shall pay to Her Majesty in right of the Province a tax
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> . . .
>
> (c) at the rate of ten per cent of the purchase price of all other tangible personal property purchased other than that referred to in clauses (a) and (b).

> (2) For the purposes of this Act, every user and consumer shall be deemed to have purchased the tangible personal property from a vendor at a sale in the Province, and such property shall be deemed to have passed at the sale.
>
> 2 In this Act,
>
> . . .
>
> (c) 'consumption' or 'use' includes the provision by way of promotional distribution of any tangible personal property and the incorporation into any structure, building or fixture, of tangible personal property including those manufactured by the consumer or further processed or otherwise improved by him;
>
> . . .
>
> (o) 'purchaser' means any person who acquires tangible personal property at a sale in the Province for his own consumption or use or for the consumption or use by other persons at his expense, or on behalf of or as agent for a principal who desires to acquire such property for consumption, ... ;
>
> . . .
>
> (x) 'user' or 'consumer' means any person who within the Province utilizes any tangible personal property for his own consumption or use, ... "

The trial judge found that the respondent "consumes" the steel and is therefore a consumer and a "deemed purchaser" under s.5(2) and is liable to pay the tax pursuant to s.5(1).

The trial judge also found that in seeking repayment of the overpaid tax, the cause of action for unjust enrichment was a proper cause of action, that the respondent established the elements to prove unjust enrichment, that the claim was a valid claim under the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c.360, and that the respondent's application to disallow the defence based on the limitation period should be granted.

The issues raised on the appeal are as follows:

> "1. Is the Respondent's claim for unjust enrichment a valid claim within the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c.360?
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> 2. Did the learned Justice err in law in granting the Respondent's application to extend the limitation period to 1983, thus disallowing the Appellant's defence based on time limitation?
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> 3. Did the learned Justice err in law in his interpretation and application of the evidence to the principles of unjust enrichment and in so doing made a finding that the Respondent had established the elements of unjust enrichment?
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> 4. Did the learned Justice err in law in characterizing the overpayment of tax as a debt owed by the Province to the taxpayer and in so doing awarded pre-judgment interest ?
>
> 5. Did the learned Justice err in exercising his discretion with respect to the matter of costs by awarding the Respondent costs on Scale 5 which award was punitive having regard to the trial of this matter wherein the Appellant successfully challenged numerous claims in the Plaintiff's Statement of Claim and raised a valid defence on the limitation period which was only rejected at trial on the application of the Respondent (Plaintiff)?"

1. Proceedings Against the Crown Act:

The relevant section of the **Act** is as follows:

> "4 Subject to this Act, a person who has a claim against the Crown may enforce it as of right by proceedings against the Crown in accordance with this Act in all cases in which
>
> (a) the land, goods or money of the subject are in possession of the Crown;"

The appellant submits that no action for unjust enrichment is permissible against the Crown and that because the money was paid as taxes, it "loses any characterization which it might have had as 'money of the subject' ". Alternatively, he argues that if there is money of the subject in the possession of the Crown, the subjects would be the customers and not the respondent.

The respondent submits that this Court has in two previous cases already

determined that an action for unjust enrichment is a proper cause of action pursuant to the **Proceedings Against the Crown Act**. The cases referred to are **Johnson v. Nova Scotia (Attorney General)** (1990), 96 N.S.R. (2d) 140 and **Sobeys Inc. v. Nova Scotia** (**Attorney General)** (1993), 120 N.S.R. (2d) 392. Although both of those cases involve actions against the Crown pursuant to the **Act** for overpayment of taxes, the issue of whether an action for unjust enrichment was a case in which "money of the subject" is "in the possession of the Crown" was not expressly decided by the Court in either case.

The respondent also relies on the following statement by Professor Hogg in **Liability of the Crown**, 1989, at page 180:

> "The petition of right extended to all the causes of action covered by quasi-contract or restitution. In the United Kingdom, the petition of right was abolished by the Crown Proceedings Act, 1947, but the Act provided in s. 1 that the Crown remained liable in all circumstances where the petition of right would previously have been available. In that way, the Crown's liability in quasi-contract was preserved. In Canada, the same drafting technique was employed in seven provincial statues; in the federal jurisdiction and the other three provinces, other language is used which probably makes the Crown liable under all heads of quasi-contract."

In a footnote the author says that Nova Scotia is one of the provinces that used an alternate method of preserving the right, that is by allowing an action against the Crown "in which the land, goods or money of a person are in the possession of the Crown". Although several provinces had legislation permitting a person to apply for a petition of right for permission to sue the Crown, Nova Scotia did not. (See **McNeil v. Nova Scotia Board of Censors** (1974), 9 N.S.R. (2d) 483 (A.D.) at page 491). The **Proceedings Against the Crown Act** was first proclaimed in 1951. In **"The Crown as Litigant"**, (1936) 14 Can. Bar Rev. 606, C.C. McLaurin, Chairman of the Canadian Bar Association's Committee on Comparative Provincial Legislation and Law Reform, says at page 611:

> "The Provinces of Prince Edward Island, Nova Scotia, and New Brunswick appear to be in still a different position. They are without any statutory provisions as to petition of right. Unlike the other Canadian provinces, they have not enacted legislation patterned after the English Act, and petition of right seems an entire stranger to the practitioner in those provinces, even in cases where merely contractual obligations of the Crown are involved, and the profession in some of these provinces has been pressing for reform limited probably to legislation not embracing tort. As the remedy of petitioning the Sovereign is a very ancient one, the Committee would assume that the subject even in those provinces might have some remedy at common law, but it must be noted that prior to the statute of 1860, the practice in England was uncertain and cumbersome, and even there legislation was necessary to make the remedy more generally available."

The English statute of 1860 referred to above is the **Petition of Right Act** described in the following passage from **Proceedings By and Against the Crown in Canada** by D. Park Jamieson in (1948) 26 Can. Bar Rev. 374:

> "Procedure by petition of right for relief against the Crown can be traced back to the reign of Edward I (1272-1307). Under this procedure subjects, whose property or money was unjustly taken or detained by officers of the Crown, presented petitions to the King in Parliament. If favourably received, their petitions were referred for consideration to the Exchequer, the Chancellor or a Special Commission. By Chapter 34 of 23-24 Victoria, the procedure for petitions of right was simplified, but no change was made in the matters for which petitions could be maintained.
>
> Apart from special statutory authority, procedure by petition of right is only open to the subject in the following cases:
>
> (1) where the land or goods or money have found their way into the possession of the Crown and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money;
>
> . . ."

In the United Kingdom, overpaid duties and taxes were recoverable by a petition of right. See **Civil Proceedings By and Against the Crown**, G.S. Robertson, (1908) Stevens and Sons, pages 62 & 343.

It appears from the McLaurin comment that the 1860 English Statute was not in effect in Nova Scotia prior to the **Proceedings Against the Crown Act**. This view was evidently shared by Beamish Murdoch, "Nova Scotia's Blackstone", who in an essay presented in 1863 concluded:

> ". . . that all English Acts passed since 1758, the date of our first legislative assembly, may be rejected as not binding on us, except where there are clear words in it, or an inevitable implication from its tenor, shewing the intention of the Imperial Legislature to extend its operation to the dominions of the Crown in general, or to our Province in particular." (See **Law in a Colonial Society: The Nova Scotia Experience**, edited by Waite, Oxner & Barnes, Carswell, 1984, page 192).

However, even though prior to 1951 in Nova Scotia, there was no modern statutory method for bringing action against the Crown, it is obvious that the language of s. 4(a) was intended to include the same types of actions available under the English statute, that is those seeking restitution of the subject's goods or money.

The **Exchequer Court Act** was first passed by the Dominion of Canada in 1875. Section 18 (R.S.C. 1927, c. 34) thereof provided:

> "The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or **money of the subject are in the possession of the Crown**, or in which the claim arises out of a contract entered into by or on behalf of the Crown."
>
> (emphasis added)

Since the exact words are used in s. 4(a) of the Nova Scotia **Act,** it is useful to examine cases decided pursuant to the **Exchequer Court Act** for assistance in interpretation. In **The Breton Dress Incorporated v. The Queen**, [1953] Ex.C.R.83, the plaintiff had mistakenly paid export duties on goods exported from the country. After

realizing its error, it applied to have the amount paid refunded. The request was refused by the government agency because of the lateness of the request for repayment. Cameron, J. held that the action was properly brought under s. 18 of the **Exchequer Court Act** and ordered the money be repaid. See also **Massein v. The King**, [1933] Ex.C.R. 223.

With respect to the argument by the appellant that the monies once paid, lost its characterization as "money of the subject", Burbridge, J. in **Henry v. The King** (1905) 9 Ex. C.R. 417 said at page 441:

> "If the subject's money is in the possession of the Crown the Court has undoubted jurisdiction to declare that he is entitled thereto, and the amount so awarded him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada."

In determining this issue, I agree with the following statement made by E.R. Cameron, K.C., in **Petition of Right Actions Against the Crown, A Review of the Law**, [1894-95] 24 S.C.R. 44 at page 59. Although he was specifically referring to the problem of suing the Crown for negligence, the statement should also apply to actions pursuant to the **Proceedings Against the Crown Act**.

> "In construing such legislation, the judgments of the Privy Council and of the majority of the Supreme Court of Canada favour the view expressed by Chief Justice Strong [in **City of Quebec v. The Queen**, 24 S.C.R. 420] that in construing statutes giving a right of action to the subject where none theretofore existed, "it would appear to be proper that a wide and liberal construction should be placed upon the language of the legislature: a construction calculated to advance the right of the subject by giving him an extended remedy."

In light of this historical perspective of the law respecting actions against the Crown for money of the subject in the possession of the Crown, I am of the view that the present action against the Crown is a valid action pursuant to the **Proceedings Against the Crown Act**, and that the trial judge did not err in so finding. A similar conclusion was reached in New Brunswick, a province which according to Hogg and

McLaurin had a similar history in this area of the law. In **L. M. Berry (Canada) Ltd. v. Provincial Secretary of the Province of New Brunswick** (1978), 23 N.B.R. (2d) 695, Stevenson, J. in dealing with an action to recover overpaid sales tax, held that the action should be brought under the **Proceedings Against the Crown Act** of New Brunswick as a claim against the Crown in which goods or money of a person are in the possession of the Crown.

The appellant's submission that if there is money of a subject in the possession of the Crown, the subjects are the respondent's customers, will be discussed under the third issue.

2. Limitations of Actions Act:

The claim by the respondent is for taxes paid in error from July 22, 1983. The limitation period of six years therefore expired on July 22, 1989. The Statement of Claim was issued on October 17, 1991, two years and three months beyond the limitation period. The amount included in the claim for the period before October 17, 1985 is $46,097.91, roughly 12% of the total claim allowed by the trial judge.

At the commencement of the trial, the respondent made an application under s. 3(2) of the **Limitations of Actions Act**, R.S.N.S. 1989, c. 258 which is as follows:

> "3 (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
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> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person."

The appellant submits that the trial judge erred in allowing the

respondent's application to disallow the defence based on the limitation period especially since no reasons were given for that decision. The appellant stresses that a letter was sent to the respondent in 1982 by the Tax Commissioner advising it of the correct method of calculating the sales tax. The respondent submits that the appellant has not shown that it suffered any prejudice in the presentation of its case as a result of the extension of the time period. Furthermore, the respondent indicates that it provided information regarding its improper inclusion of tax on profits to the Commission by letter in September, 1989. As well, formal application for a refund was made to the Commissioner in June, 1990. Five months later, the Commissioner rejected the application and advised the respondent that it could appeal to the Tax Review Board, which it did. The appeal was dismissed in March, 1991 on the basis that the Board lacked the requisite jurisdiction.

In view of the fact that the appellant has not claimed any prejudice as a result of the delay, and the history of dealings between the parties prior to the commencement of the action, I am unable to find that the trial judge improperly exercised his discretion in disallowing the defence based on the limitation period.

3. The Elements of Unjust Enrichment:

The appellant submits that the trial judge erred in law by finding that the respondent had proven one of the three elements of unjust enrichment: that there was a deprivation to the respondent that corresponded to the enrichment of the appellant. Specifically, the appellant says that the respondent passed the burden of overpaid taxes on to its customers and therefore it suffered no loss. The appellant contends that to refund the overpaid taxes to the respondent would provide it with a "windfall profit" and that is the reason given by the Tax Commissioner for refusing the refund.

The respondent argues that it proved at the trial that it suffered the economic burden of the overpaid taxes both because of jobs it lost as a result of having

a slightly higher bid than its competitors and because in instances where it won the job, it would have won it whether it had calculated the tax properly or not. In some of these cases the respondent reduced the amount of profit included in the bid in order to ensure it was the lowest bidder. The respondent also argues that since it is the taxpayer, pursuant to the Act, it has borne the burden of the tax.

The leading cases on this issue are **Air Canada v. British Columbia**, [1989] 1 S.C.R. 1161 and **Canadian Pacific Air Lines Ltd. v. British Columbia**, [1989] 1 S.C.R. 1133. The **Air Canada** case concerned a gasoline tax imposed by the Province of British Columbia. The Supreme Court of Canada held that the taxing statute was unconstitutional as it existed in 1974 but that an amendment made in 1976 changing the tax from an indirect to a direct tax was valid, as was another amendment in 1981 which made the 1976 amendment retroactive to 1974. LaForest, J., for the majority held that the 1981 amendment was a valid retroactive provision imposing a tax that just "by good fortune" happened to precisely match the amount collected under the **ultra vires** statute. Since the issues respecting the 1981 amendment "were not strongly pursued" LaForest, J. found "it better to base his decision on considerations raised in relation to the 'mistake of law' " argument. (p.1194) On the issue of whether the airlines could recover the taxes paid under the unconstitutional act, LaForest, J. said: (p. 1202)

> "While it will take some time for the courts to work out the limits of the developing law of restitution, it is useful on this point to examine the American experience. Professor George E. Palmer, in his work, **The Law of Restitution**, makes the following comment (1986 Supp., at p. 255):
>
> > 'There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same

enrichment to the taxpayer.'

> In my view there is merit to this observation, and if it were necessary I would apply it to this case as the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense.
>
> This alone is sufficient to deny the airlines' claim. However, even if the airlines could show that they bore the burden of the tax, I would still deny recovery. It is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, but in this kind of case, where the effect of an unconstitutional or **ultra vires** statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area."

After a discussion of the American experience with repayment of **ultra vires** taxes and the concern of possible "fiscal chaos" if the general rule favoured recovery, he says: (p. 1206)

> "All in all, I have become persuaded that the rule should be against recovery of **ultra vires** taxes, at least in the case of unconstitutional statutes. It seems best to function from the basis of that rule with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances. However, this case does not call for departure from the general rule. The tax levied in this case, though unconstitutional, comes close to raising a mere technical issue. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed. Though specific evidence was not led on this point, were recovery to be allowed, the airlines would receive a windfall, and fiscal chaos could well result. Many others could well bring suit, for this is a general tax applying to all purchases of gasoline in the province. It is true that many of these would not be in a position to establish their

> claims but it would be odd if this factor were taken into account since its general effect would be to favour the strong against the weak. Finally, there is not the element of discrimination, oppression or abuse of authority which would warrant recovery."

The **Canadian Pacific** case which was argued and decided in conjunction with the **Air Canada** case, involved taxes on aircraft parts brought into the province and alcoholic beverages sold during flights over British Columbia air space. Both taxes were found to be improperly collected from the airlines. In the case of the tax on the aircraft parts, the amounts paid were ordered to be refunded but on the issue of the tax on the beverages, LaForest, J., for the majority said at page 1157:

> ". . . Air Canada seeks to recover the money paid by its passengers for the tax on alcoholic beverages. It argued that the province had unjustly enriched itself by collecting the tax and that it alone was in a position to rectify the wrong by returning the money to the passengers by way of reduced fares. Like Macdonald, J. and Taggart J.A., I can see no basis on which Air Canada is entitled to receive this money. The tax was imposed on the passengers, not Air Canada. Air Canada was simply an agent to collect it under the Act and, in fact, obtained a fee for doing so. I am unable to see how it could identify the passengers who consumed the liquor, so its repayment to Air Canada would simply amount to a windfall to the airline."

Another case that must be considered on this issue is **Allied Air Conditioning Inc. v. British Columbia** (1994), 87 B.C.L.R. (2d) 207; 5 W.W.R. 62 (B.C.C.A.). In that case a number of air conditioning contractors had mistakenly paid sales tax on purchases of equipment that was exempt. In a special case, based on an agreed statement of facts, they sought the opinion of the court on the question of whether they were entitled to restitution. Legg, J.A., with Proudfoot, J.A. concurring, held that the contractors were not entitled to recover the overpaid tax because they had not proven that they had borne the burden of the tax. He said: (p. 218, B.C.L.R.)

> ". . . If a tax expense has been included generally in the calculation of the price to a customer, the tax has been passed on and the taxpayer has not shown that he has

> borne the burden of the tax. In my opinion, on the facts of the special case, B.C. Comfort did not meet the burden of proving that it had borne the burden of the tax. The fact that its invoices to its customer for payment of part of a lump sum bid or price did not refer to the payment of the tax was not proof that the tax had been absorbed by B.C. Comfort. Paragraph 14 of the special case stated that the cost considered in arriving at the amount of the bid included the amount of the social service tax that B.C. Comfort expected to pay. The facts stated in paras. 15 to 18 did not show that the tax was excluded from the bid price."

In concurring reasons, Taylor, J.A, with Proudfoot, J.A. concurring, concluded as follows at page 223:

> "I am of the view that the manner in which the tax on equipment incorporated by the present respondents in improvements to their customers' premises was included in calculating bid prices shows that there was here a 'passing-on' of the tax burden, in the sense described by Mr. Justice La Forest in the **Air Canada** case. The present seems, indeed, a clearer case than **Air Canada**, in that here the tax cost was more precisely charged to the actual customer for whose ultimate benefit it had been incurred.
>
> **Unless prices were established by competition with suppliers who did not have to pay the tax**, it is difficult to see how it could be said in such a trade as this that the burden fell on the contractor, rather than the customer."
>
> (emphasis added)

It is within the context of these cases that the facts of the present case must be examined. It must also be kept in mind that the question of whether the tax was passed on to the customers is one of fact. (See **Truro Carpet Factory Outlet Ltd. v. Nova Scotia** (1991), 103 N.S.R. (2d) 214 (C.A.)).

The evidence establishes that prior to submitting a bid on a tender call, the practice of the respondent was to have one of its estimators prepare an abstract of its expected costs to produce the fabricated steel for the construction. This process was described by the court appointed referee in his report as follows:

> ". . . This abstract includes an estimate of the material that will be required for the contract, the cost of fabricating the

> material for the contract including shop labour and the cost of erecting the superstructure of the real property if that is part of the contract plus an estimate for overheads, federal sales tax, provincial sales tax and profit. The estimates for all large contracts are reviewed by the owners, Renato and Danilo Gasparetto. After reviewing the request for proposal, shop diagrams and the estimator's abstracts for all large contracts (and many of the smaller contracts when the plant is not busy), the owners will modify the proposed pricing of the contract taking into account how busy Cherubini is at the time, whether this is a one-off contract that Cherubini can produce better than any of its competitors and whether the owners contemplate efficiencies in carrying out both the fabrication of the structural steel and the erecting of the superstructure where this is part of the contract."

Some witnesses described the process of determining the bottom line price of the contract as "intuitive" or "instinctive", that is, it was not simply a matter of adding the various components, there was also an element of guessing the amount necessary to be the lowest bidder in order to win the job. When the plant was busy, the final price was more likely to be higher than the sum of the parts included in the estimate; when they were not busy, it was more likely to be lower.

The evidence presented by the respondent, which was accepted by the trial judge, was that it lost many jobs by an amount that was less than the amount of tax it had mistakenly calculated when preparing its bid. The evidence established that the market was very competitive and that many bids submitted by the respondent were within one percent of the amount bid by their competitors. In an exhibit tendered by the respondent, listing a sample of six specific jobs, it is shown that it lost jobs because it over-calculated the tax it should pay. For example, in one instance, involving the University of Ste. Anne tender, the respondent's bid was $159,950. and the lowest bidder who obtained the contract submitted a bid of $159,768, a difference of $182. The exhibit demonstrates that in that case, the respondent had miscalculated the tax it would have to pay by $1713. It is apparent that the respondent could have obtained the job if its bid had been $182. lower, in which case its profit could have been $1531.

higher. The total value of the contracts awarded for the jobs shown in the sample was $1,451,073. One of the employees of the respondent estimated that it lost business worth between a half and three-quarters of a million dollars a year on jobs in which they were the second lowest bidder and their bid was within $1000. of the lowest bidder. The evidence also established that the average overpayment of taxes was 2.29% of the contract price, or an average of $3,089. per job.

As indicated, the trial judge accepted the evidence of the respondent's witnesses, and described the comptroller as an "honest, straight forward and truthful witness". He said:

> ". . . The province was paid money by the taxpayer, Cherubini, which the province was not entitled to. It seems fairly obvious that this money should have been returned to the taxpayer when the Commission was given proper documentation and their auditors admitted an overpayment and suggested that it should be returned to the plaintiff, in this instance. It would appear from considering all of the evidence, that Mr. Lavers just didn't want to pay the money back and was looking for any reason he could to achieve that end."

The trial judge found, in effect, that the respondent suffered the economic burden of its errors and I agree that there was an abundance of evidence to support that finding. The enrichment of the Province, receiving funds it was not entitled to, is directly related to the respondent's deprivation. There would not have been one without the other. In this case, the burden was not shifted to the customer, so there would be no windfall if the respondent recovers the overpayment.

This is a case where "prices were established by competition with suppliers who did not have to pay the tax", to use the words of Taylor, J.A. in **Allied Air Conditioning**. There was in that case, no evidence of lost contracts because of the errors. It appears from the heading of the proceeding in **Allied**, that at least thirteen air conditioning contractors were claiming refunds, from which it can be inferred that there would not have been a loss of a competitive edge as a result of the error, if indeed the

error was industry-wide.

The respondent was not the vendor, receiving a fee for collecting the tax from its customers, as was the case of the airlines in **Canadian Pacific** and the carpet seller in **Truro Carpet**; it was the taxpayer. The claim in this case is analogous to the claim of the airlines for the taxes paid on the aircraft parts, which were ordered to be refunded to them by the Supreme Court of Canada. In my view, the trial judge did not err in finding that the respondent proved its claim for unjust enrichment.

4. Pre-judgment Interest:

The appellant submits that the trial judge erred in concluding that the overpayment is a "debt" owed by the Province and that it therefore is subject to pre-judgment interest. The appellant relies on the trial court decision in **Sobeys Inc**., **supra** reported at 112 N.S.R. (2d) 205. The respondent lists seven other decisions of the Supreme Court of Nova Scotia in which pre-judgment interest was ordered to be paid in actions for unjust enrichment. However, it does not appear that the issue was contentious in any of those cases.

If pre-judgement interest is payable, it would have to be under the authority of s. 41(i) of the **Judicature Act**, S.N.S. 1989, c. 240:

> "
>
> . . .
>
> in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;"

In **Coughlan et al. v. Westminer Canada et al.** (1994), 127 N.S.R. (2d) 241 this Court dealt extensively with the meaning of "debt or damages" as used in s. 41(i) and concluded that the following statement of the House of Lords in **B.P. Exploration Co. v. Hunt (No. 2)**, [1982] 1 All E.R. 925 at page 992 was applicable:

> ". . . in my opinion the words 'any debt or damages', in the

> context in which they occur, are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned."

Regarding the purpose of awards of pre-judgment interest, this Court said in **Westminer** at page 310:

> ". . . The purpose of pre-judgment interest is as explained by La Forest, J.A., in **Maryon (John) International Ltd. et al. v. New Brunswick Telephone Co.** (1982), 43 N.B.R. (2d) 469; 113 A.P.R. 469; 141 D.L.R. (3d) 193 (N.B.C.A.), at 238-239:
>
> > '. . . Damages are intended to place a person, so far as money can do it, in the same position as if the wrong of which he complains had not occurred. Now it is obvious that a person who suffers $100 worth of damage in 1974 cannot be adequately compensated by awarding him that amount in 1982 . . . So it was to preserve the fruits of a litigant's judgment that the courts were empowered to award interest. Speaking of the English Act of 1934, Lord Wright had this to say in **Riches v. Westminer Bank Ltd.**, [1947] A.C. 390 at p. 400:'
> >
> > > '. . . the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.'
>
> More recently, Lord Wilberforce indicated that interest on judgments 'was intended to compensate for being kept out of the "real" value of money': see **Pickett v. British Rail Engineering Ltd.**, [1979] 1 All E.R. 774 at p. 782. It would seem to follow that in commercial matters at any rate interest should ordinarily be awarded. Lord Denning M.R. expressed a similar sentiment in **Panchaud Freres v. Pagnon and Fratelli**, [1974] 1 Lloyd's Rep. 394 at p. 411, as follows:
>
> > 'In a commercial transaction, if the plaintiff has

> been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason. '
>
> There may, it is true, be exceptions to the rule. That is why (along with the need for precise computation of interest) a discretion is given to the courts. But that discretion must, as it seems to me, be exercised in accordance with the purposes of the statute giving the power. Otherwise the judge cannot be said to be acting judicially. His discretion must be related to the task of putting the plaintiff in the same position, so far as money is concerned, as he would have been if he had not suffered the loss. "

The respondent also points out that in the **Canadian Pacific** case, in a supplementary decision reported at (1989), 102 N.R. 75, the Supreme Court of Canada allowed pre-judgment interest in respect of the return of the taxes on the aircraft parts.

In this case the money in question is to use the words in **B.P. Exploration** "money which is recoverable by one party from the other". The Province has had the use of the money during the time the respondent was deprived of its use and in order to compensate it for that loss of use, it is appropriate that the discretionary order of the trial judge in this respect be upheld.

5. Costs:

The appellant submits that the trial judge erred by awarding costs on Scale 5, especially since the respondent was not successful in recovering the full amount of its original claim. The respondent in its factum lists eight factors which would justify costs on an increased scale, which no doubt influenced the trial judge's exercise of his discretion in this respect. It was obviously a complicated case and one in which the actions of officials in the Tax Commission added to the expense of bringing it to a conclusion. It should be noted that the Federal Government refunded the overpaid federal sales tax without dispute.

This Court has on numerous occasions indicated that it will not interfere

with an award of costs unless the trial judge has acted on wrong principles, most recently in **Hawker Siddeley Canada Inc. v. Superintendent of Pensions (NS)** (1994), 129 N.S.R. 194 (C.A.) as follows: (at p. 210)

> "Interference by this court in the exercise of the discretion of the trial judge in the award of costs at trial is not to be lightly entered upon. This is reflected in the recent decision of this court in **Turner- Lienaux v. Nova Scotia (Attorney General) et al.** (1993), 122 N.S.R. (2d) 119; 338 A.P.R. 119, where Mr. Justice Chipman wrote at p. 134, para. 55:
>
> > 'In dealing with the question of costs, the trial court was exercising its discretion vested in it. Having regard to the principle which so sharply limits the scope of our review of such an exercise of discretion, I am satisfied that no error in that respect has been shown. I would not disturb the order as to costs at trial.' "

The appellant has not shown that the trial judge improperly exercised his discretion in this case, and I therefore would not disturb the costs order.

Conclusion:

I would dismiss the appeal, affirm the order of the trial judge and order costs to the respondent in the amount of $3000, plus disbursements.

Roscoe, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.