Citation: Kingsclear First Nation et al v PNB 2021 NBQB 065
Date: March 19, 2021

FM-74-20

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

KINGSCLEAR FIRST NATION, MADAWASKA FIRST NATION, TOBIQUE FIRST NATION, WOODSTOCK FIRST NATION, OROMOCTO FIRST NATION and ST MARY'S FIRST NATION,

Applicants

- and -

THE PROVINCE OF NEW BRUNSWICK as represented by THE MINISTER OF FINANCE,

Respondent

Dates of Hearing:	January 27, 2021 and March 2, 2021
Date of Decision:	March 19, 2021
Before:	Justice Richard G. Petrie
At:	Fredericton, New Brunswick
Appearances:	Nick Kennedy for the applicants
	Michael L. Hynes and E. Rose Campbell for the respondent

DECISION

Petrie, J.

I. Introduction

1. The applicants are the six Wolastoqey First Nations in New Brunswick ("First Nations").

2. For a number of years, beginning in 1994, the respondent, the Province of New Brunswick, as represented by the Minister of Finance ("Province"), and each of the First Nations entered into a series of tax revenue collection and sharing agreements with respect to provincial taxes applicable to the sale of, mostly, gasoline, motive fuel and tobacco, taking place at First Nation Reserve retailers to individuals who were non-tax-exempt, i.e., non-Status First Nation individuals.

3. One of the primary stated purposes of these agreements included protecting "the integrity of the provincial administration of tax in the Province of New Brunswick" and in light of some challenges over tax exemptions applicable to those

qualifying under section 87 of the *Indian Act,* RSC 1985, c.I-5, for certain sales on-Reserves, i.e., Status Indians.

4. As reflected in the original agreements, the Province shared with each of the First Nations, 95 percent of the taxes remitted by their respective on-Reserve retailers on the sale of gasoline, motive fuel and tobacco. The subject taxes collected and remitted included initially, provincial sales tax ("PST"), then the Harmonized Sales Tax ("HST"), along with the tobacco tax, and gas and motive fuel taxes, as prescribed under the *Gasoline and Motive Fuel Tax Act*, RSNB 1973, c. G-3 ("*Act*").

5. The parties' current tax collection and sharing agreements were signed January 31, 2017. It is these agreements that are the focus of this application.

6. On or about March 17, 2020, the Province of New Brunswick adopted the tax on "carbon emitting products" purchased or consumed in New Brunswick ("carbon tax"). The Province adopted this carbon tax as part of the federal government climate

plan initiative first announced in October 2016 and which became federal law in June of 2018.

7. As a direct result of the Province's adoption of a carbon tax, and in an effort to reduce the overall impact of this additional tax on consumers, the Province, by way of amendments to the *Gasoline and Motive Fuel Tax Act*, enacted at the same time, reduced the specified amounts of tax on gasoline and tax on motive fuel.

8. By virtue of the Province's reductions in the gasoline and motive fuel taxes, the Province communicated to the First Nations in late March 2020 as to the forecasted reduction in tax revenues to be shared with First Nations under each of the agreements.

9. The First Nations responded and communicated their interpretation of the agreements to, in fact, require the Province to share "all tax revenues" including the carbon tax revenue. The Province responded, taking the position that the new carbon tax is not subject to the tax revenue and sharing agreements.

10. After attempts by the First Nations to have the Province agree to submit this disagreement to the dispute resolution procedure under the agreements, the Province, as it had the right to, declined.

11. As a result, the applicants filed their Amended Application on December 16, 2020 seeking declaratory relief.

12. In particular, the applicants seek a declaratory order that section 4(1) of the agreements require the Province to share with the applicants, in the ratios set out in Schedule "B" of the agreements, all taxes that the *Act* levies on gasoline and motive fuel which the applicants are required to remit to the Province, *including* the carbon tax.

13. The applicants also seek a declaratory order that the "gasoline and motive fuel tax" in Schedule "B" of the agreements includes all taxes levied on gasoline and motive fuel under the *Act*, *including* the carbon tax.

II. Preliminary Issues

14. The parties first appeared before the Court on January 27, 2021. With the encouragement of the Court, it was agreed by all to adjourn the hearing to allow the parties additional time to pursue settlement discussions. The hearing was adjourned until March 2, 2021. Unfortunately, the parties were unsuccessful in reaching a resolution and the hearing proceeded as scheduled.

Proposed New Amendment to Application

15. As discussed at the commencement of the hearing the Court addressed two preliminary issues. First, the applicants, just days before the resumption of the hearing, purported to file a second Amended Application. The amendment relates solely to them now claiming costs on a "full indemnity basis" from the previous "substantial indemnity basis". In addition, to support their claim the applicants filed an affidavit of Glykeria Prokos sworn February 24, 2021.

16. In short, the applicants' purported amendment is largely premised on allegations that the Province breached confidence and wrongly disclosed, by way of a press release, evidence on the parties' settlement discussions or positions. The Province objects to the proposed amendment. After some discussion, and after confirming with both sides that the proposed amendment was entirely irrelevant to the merits of the application, I indicated that I would rule on the proposed amendment, if necessary, subsequent to my decision on the merits.

Objection to Portion of Deputy Minister Couillard's Affidavit

17. The applicants raised an objection to the admissibility of the statement made by Deputy Minister Couillard found in the last sentence of paragraph 20 of his affidavit dated January 14, 2021. Specifically, the statement "At no time during the negotiations was it discussed or agreed that the 2017 Tax Collection Agreements would apply to taxes which did not exist at the time the agreements were signed".

18. The applicants' objection to the admissibility of this statement is that it offends the parol evidence rule. They argue that the statement purports to set out the Province's *subjective intention* at the time the agreements were entered and would thus run afoul of the parol evidence rule. In support, they cite the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at paragraph 59.

19. The Province argues that the statement reflects an objective fact and is thus not contrary to the parol evidence rule. Mr. Hynes conceded that Mr. Couillard's statement referring to the parties having not "agreed" was problematic, but that the Deputy Minister's statement that there was no discussions on taxes not then in existence is equally evidence of the surrounding circumstances of the negotiations and is thus admissible under the rationale of *Sattva.*

20. I am satisfied that the applicants' objection in particular to Deputy Minister Couillard's reference to the word "agreed" found in paragraph 20 is well made and I would specifically rely upon paragraphs 58 through 61 of *Sattva*, supra. The test

for the interpretation of contracts is objective. While the Court is directed to consider the "surrounding circumstances" in its search for the objective meaning of the words chosen by the parties to a contract, the subjective views or intention about the agreement or how it could work "later", not specifically agreed to by the other side, are wholly irrelevant.

21. In addition, during arguments the Court also raised concern with the words of Deputy Minister Couillard found at paragraph 21 of his brief, "I understand this provision to apply only to taxes collected at the time the agreement was signed, and therefore do not believe the Minister has the legal authority to share taxes such as the carbon tax created at a later date".

22. The concern here was that the statement amounted to Mr. Couillard's personal opinion. To his credit Mr. Hynes acknowledged as much. In my view the last statement at paragraph 21 referred above by Mr. Couillard reflects nothing more than his personal opinion about what the contract does or does not contemplate. Such opinion evidence is not relevant and is inadmissible.

III. Factual Overview

23. Both parties held the view that this dispute was appropriate for determination by way of application under Rule 16. The applicants filed an affidavit of Chief Patricia Bernard, the Chief of the Madawaska First Nation, sworn December 9, 2020. The respondent filed an affidavit of Danny Couillard, the (current) Deputy Minister of Finance, sworn January 14, 2021.

24. The facts are, by and large, not in any material dispute. As a result, I have chosen in places to accept and borrow quite liberally from the briefs filed by both parties and which provide necessary background to this dispute.

25. Beginning in about 1994, the Province became interested in entering into agreements with New Brunswick's First Nations with respect to the collection of tobacco taxes, gasoline taxes and motive fuel taxes, and the Social Services and Education Tax (i.e., the Provincial Sales Tax or "PST"). At that time, most First Nations retailers in New Brunswick were not collecting provincial taxes from sales on-Reserve, and as a result the taxes payable were not being remitted to the Province. It is evident that the on-Reserve sales were mostly identified as ones involving tobacco, gas and motive fuel such as diesel fuel. The tax collection agreements provided an agreed legal mechanism whereby such taxes would be collected from non-exempt individuals and remitted to the Province.

26. Beginning in or around 1994, the Province entered into a number of largely identical tax collection and revenue sharing agreements with each of the

applicants (collectively, the "original agreements") along with other First Nations located in New Brunswick.

27. Under these original agreements, the applicants agreed to, among other things, ensure that on-Reserve retailers collected applicable provincial taxes for on-Reserve sales of gasoline, motive fuel and tobacco to persons other than Status Indians (as defined under the *Indian Act*), and to remit those taxes to the Minister.

28. There were different types of provincial taxes on the sale of gasoline and motive fuel in New Brunswick when the original agreements were signed: a general sales tax; a tax on gasoline; and a tax on motive fuel. The latter two taxes were established under the *Act*. All of these taxes remain in effect today, subject to the modifications described below.

29. When the original agreements of the Madawaska, St. Mary's, Woodstock and Oromocto First Nations were signed, New Brunswick's provincial sales tax was imposed under the *Social Services and Education Tax Act*. Their original agreements

expressly required them to ensure that on-Reserve retailers collected and remitted that tax, and the Province to share it in the designated ratios.

30. On April 1, 1997, New Brunswick's provincial sales tax (PST) was replaced with the Harmonized Sales Tax (HST). The original agreements of the Kingsclear and Tobique First Nations were signed *after* the HST replaced the provincial sales tax. Their original agreements therefore required them to ensure that on-Reserve retailers collected and remitted HST (not the PST), and the Province to share the provincial portion of the HST in the same designated ratios.

31. After the HST replaced the provincial sales tax, the Province eventually started sharing the "equivalent" of the provincial portion of the HST with the Madawaska, St. Mary's, Woodstock and Oromocto First Nations, even though their original agreements did not expressly address the sharing of "HST".

32. According to the Province, when HST replaced Provincial Sales Tax, it had no legal authority to share the HST under those agreements, but it chose to

"voluntarily" compensate the affected First Nations with payments *equivalent* to the amount that would otherwise have been shared as Provincial Sales Tax. Then Minister of Finance, Peter Mesheau, in a letter to the affected First Nations, dated March 24, 2003, stated the following:

> With the introduction of the Harmonized Sales Tax, the Province ceased to have its own sales tax to share. However, this Government has decided that it is prepared to compensate your community for an amount equivalent to 95% of the provincial component of the HST collected from on reserve sales to non-natives from April 1, 1997 up to March 31, 2003.

33. The Province continued to make those payments for the duration of the original agreements. Attached as Exhibit "D" to Chief Bernard's affidavit is an example of a letter, dated April 27, 2006, whereby the Province enclosed a cheque representing 95 percent of the *equivalent* of the provincial portion of HST for Madawaska First Nation on-Reserve sales to non-tax-exempt persons for the period April 1, 2005 to September 30, 2005.

34. Under the agreements, in exchange for the First Nations ensuring on-Reserve retailers collected the agreed taxes, the Minister agreed to return 95 percent of this tax revenue to the applicant First Nations.

35. In or around August 2014, the Province gave the First Nations notice that it was exercising its right to terminate the original agreements on 90 days' notice as provided for under the agreement. Finance Minister at the time, now Premier Blaine Higgs, made statements to the media that concerns from off-Reserve retailers was a motivating factor for terminating the original agreements.

36. These tax collection and sharing agreements were viewed as beneficial to both the Province and the First Nations. In a slide presentation prepared by the Province and presented to the First Nations during the negotiations for new tax collection and sharing agreements, the Province characterized the "Intents of Tax Sharing Agreements" as follows:

- Improve relations with First Nations and protect the integrity of the provincial administration of taxes.

- Attract investment, stimulate on-reserve employment and generate earnings for band governments.
- Provide a mechanism to deliver the tax exemptions under Section 87 of the federal *Indian Act*.
- Cooperate with First Nations for the collection of the Provincial sales taxes for sales to non status.
- Increase cooperation with bands in combating illegal tobacco operations.
- Cooperate on fair pricing practices to create a fair operating environment for off reserve businesses.
- Improved information and communication with First Nations tobacco and gasoline licensed retailers.

(Exhibit "A" to Chief Bernard's Affidavit)

37. Negotiations for the updated and current tax revenue sharing agreements started in June 2016. During negotiations, the Province noted at least three concerns it had with the original agreements that it wanted to address in the updated agreements:

(a) The pricing of gasoline, motive fuel and tobacco sold on the First Nations' reserves. The Province was concerned that on-Reserve retailers could set prices for their products below the price offered by off-Reserve retailers.

(b) The duration of the agreements and the cancellation clause. The Province was concerned about the indeterminate length of, and the inability of the parties to easily amend, the agreements.

(c) The need for stable and predictable expenditures for the Province and revenues for First Nations. The Province was concerned about impacts on its revenues from the growing amount of tax revenue it was required to share with the First Nations.

38. In the following months, the parties exchanged a number of proposals for an updated agreement. By September 2016, the parties agreed to updated tax revenue sharing agreements and on or about January 2017, each of the applicant First Nations and the Province executed identical agreements titled the Collection of Provincial Tobacco Tax, Gasoline & Motive Fuel Tax, and Harmonized Sales Tax (the "current agreements").

39. Both parties made concessions to the other in signing the current agreements, which are described in part below.

40. Similar to the original agreements, the recitals to the current agreements state that a key purpose of the current agreements is to maintain the integrity of the administration of tax in New Brunswick by ensuring that applicable provincial taxes are collected and remitted to the Province:

> Whereas the Parties wish to cooperate with each other to facilitate the operation of Section 87 of the *Indian Act*, R.[C.]C. 1985, c. I-6, which exempts from taxation the personal property of an Indian or Band while protecting the integrity of the provincial administration of tax in the Province of New Brunswick.

41. In furtherance of this objective, the applicant First Nations agreed under subsection 3(b) of the current agreements that on-Reserve retailers (defined as "First Nation Vendors") would register with and obtain vendors' licenses from the Province.

42. Subsection 3(b) of the current agreements require those vendors to collect "any tax imposed by the Province on the sale of gasoline and motive fuel" to non-Status Indians, and to remit those taxes collected to the Province as follows:

> 3(b) Gasoline and motive fuel retailers on the Reserve will register with the Minister to obtain a retailer's license in accordance with the *Gasoline and Motive Fuel Tax Act* and will collect from persons other tha[t] Status Indians any tax imposed by the Province on the sale of gasoline and motive fuel, and will remit any such tax to the Minister in accordance with the provisions of the *Gasoline and Motive Fuel Tax Act* (R.S.N.B. 1973, c. G-3), and the *Revenue Administration Act*.

43. The Province, in turn, agreed, in subsection 4(a) of the current agreements, to "share" the taxes listed in subsection 3(b), with each of the applicant First Nations as follows:

> 4(a) Subject to subsection 4(b), the Minister will share the taxes listed in section 3 of this Agreement with the First Nation in accordance with Schedule "B".

44. Schedule "B" to the current agreements is entitled "EXTENT OF SHARING OF TAX" and provides as follows:

> Extent of Sharing of Tax
>
> Effective April 1st 2017, the Minister will share, upon the receipt, verification and approval of a return, the Tobacco Tax, the Gasoline and Motive Fuel Tax and the provincial portion of the Harmonized Sales Tax (HST) collected by the First Nation or retail vendors located on reserve, on sales of tobacco products, gasoline and motive fuel and any other goods or services which are taxable under the *Excise Tax Act* (Canada) sold on the Madawaska Maliseet First Nation Reserve to persons other than Status Indians using the following ratios:
>
> **For the portion of shared revenues received by the First Nation below $8.0 million in a given fiscal year:**
>
> Band's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 95%
>
> Minister's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 5%

For the portion of shared revenues received by the First Nation above $8.0 million in a given fiscal year:

Band's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 70%

Minister's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 30%

It should be noted that the tax revenue sharing ratios were renegotiated at the time of entering the current agreements and reflect a change from the original agreements where tax revenues exceed $8 million.

45. During the parties' negotiations, the parties did not discuss the applicability of any "new" taxes, i.e. taxes not then in existence, to the current agreements.

46. According to the applicant First Nations, they assumed a number of other obligations to the Province in exchange for tax revenue sharing. Those include commitments to:

(a) Accept a lower tax revenue sharing ratio for tax revenue above $8 million. Under the original agreements, the Province was required to share 95 percent of all tax revenues. Under the current agreements, the

parties maintained that ratio for all revenues below $8 million. For revenues above $8 million, the First Nations agreed to receive 70 percent of tax revenues.

(b) Regulate prices for the benefit of non-Status Indian retailers close to the Reserves: The applicant First Nations agreed to not permit any First Nation Vendor to post a price for tobacco products, gasoline and motive fuel that is lower than the "local market prices," which, for gasoline and motive fuel was defined as the lowest price offered by the five retailers closest to each of the Reserves (subsection 4(b) of the current agreements).

(c) Permit the Province to carry out audits: The applicant First Nations agreed to permit the Province to audit their records (on reasonable notice and justification from the Province), and the records of each First Nation Vendor, to ensure their compliance with the current agreements (sections 6 and 7 of the current agreements).

(d) Keep and provide records: The applicant First Nations agreed that every First Nation Vendor of gasoline or motive fuel would, among

other things, record prescribed information about sales, and provide the Province with information about gasoline and motive fuel sales on a monthly basis.

47. The current agreements are each for a 10-year term, subject to renewal on consent, and to review by the parties every five years.

48. Both the original agreements and current agreements set out, in schedules, an agreed quantity of tobacco, gasoline and motive fuel expected to be purchased each month tax-exempt by Status Indians on-Reserve. This exercise is said to ensure the volumes are "appropriate" for satisfying section 87 of the *Indian Act*.

49. Many of the original agreements and all of the current agreements include an agreed volume of tax-exempt motive fuel specifically identified as diesel.

IV. Carbon Pricing – Federal Government

50. In October 2016 the federal government introduced its climate change policy with a plan to reduce carbon emissions through carbon pricing. The policy was described as follows, in part, on pages 4 and 5 of the Federal Government's 2017 paper entitled *Technical Paper on the Federal Carbon Pricing Backstop*:

> In October 2016, the federal government published a benchmark for ensuring that carbon pricing applies to a broad set of emission sources throughout Canada by 2018 with increasing stringency over time. This benchmark provides provinces and territories with flexibility to implement their own carbon pricing systems. In the benchmark, the federal government also committed to implement a federal carbon pricing backstop system that will apply in any province or territory that does not have a carbon pricing system in place by 2018 that aligns with the benchmark.
>
> . . .
>
> The federal government plans to introduce new legislation and regulations to implement a carbon pollution pricing system – the backstop – to be applied in jurisdictions that do not have carbon pricing that align with the benchmark.
>
> All elements of the backstop will apply in a jurisdiction that does not have a carbon pricing system in place. The backstop will also supplement (or "top-up") systems that do not meet the benchmark. For example, the backstop could expand the sources covered by provincial carbon pollution pricing or it could increase the stringency of the provincial carbon price.

51. In June 2018, the Federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, received Royal Assent. It set minimum national standards for carbon pricing

and gave statutory effect to the Federal "backstop". To avoid being subject to the Federal backstop, each province or territory was required to submit a satisfactory carbon plan to the Federal Government.

52. As the Province did not have a federally approved carbon plan, the Federal backstop required that a federal fuel charge be collected by the Federal Government and subsequently rebated to New Brunswick tax payers.

53. The federal climate plan requires provinces to tax fossil fuel emissions at a set level. For the 2020-2021 fiscal year, fuel emissions are taxed at $30 per tonne, which translates to a rate of 6.63 cents per litre of gasoline and a rate of 8.05 cents per litre of diesel fuel.

54. In respect to the federal climate plan, New Brunswick developed its own carbon pricing system for which it sought federal approval. On November 14, 2019, the Province submitted its proposed carbon pricing system to the Government of Canada. Included in the Province's proposal was its intention to implement a carbon tax

equivalent to $30 per tonne on various fuels, including gasoline and diesel. The Province also requested that it no longer be subject to the Federal backstop.

55. On December 10, 2019, the Government of Canada approved the Province's November 14, 2019 proposal.

V. Carbon Tax – New Brunswick

56. On or about December 12, 2019, the Province introduced Bill 30, *An Act to Amend the Gasoline and Motive Fuel Tax Act*, in the Legislative Assembly of New Brunswick. Bill 30 proposed, among other things, to amend the *Act* by adding the carbon tax on every listed "carbon emitting product":

> 6.3(1) In addition to any other tax imposed under this Act, every consumer of a carbon emitting product listed in Column 1 of Schedule C shall pay to Her Majesty in right of the Province for the public use of the Government a tax on the carbon emitting product purchased or consumed by the consumer at the rate for that type of carbon emitting product as set out in Column 2 of Schedule C,

57. Approximately three months later the Province introduced Bill 32, *An Act to Amend the Gasoline and Motive Fuel Tax Act*. The accepted purpose of Bill 32 was to

mitigate the impact of the carbon tax on consumers by reducing the existing tax rates on gasoline and motive fuel as follows:

(a) Gasoline from 15.5 cents per litre to 10.87 cents per litre; and

(b) Motive fuel from 21.5 cents per litre to 15.45 cents per litre.

58. Bills 30 and 32 received Royal Assent on March 17, 2020, and both went into effect on the same day, April 1, 2020.

59. The practical net result of the enactment of Bills 30 and 32 was a relatively small increase in the *overall* provincial tax treatment for sales of gasoline and motive fuel such as diesel of just under 2 cents per litre.

60. On March 30, 2020, the Minister of Finance Ernie Steeves wrote to "All First Nations Chiefs of New Brunswick", including the Chiefs of each of the applicant First Nations, to advise them of the amendments to the *Act*. The Province's letter explained that a consequence of reducing the gasoline tax and the motive fuel tax was

that the amount of tax revenues forecasted to be shared under the current agreements with the applicant First Nations would decrease:

> As you may have noticed in the Main Estimates documents, a consequence of lowering the gasoline tax and motive fuel tax to help off-set the carbon pricing is a reduction in the amount forecasted for the First Nations Tax Revenue Sharing Agreements. While the budget documents show a difference of $8.4 million between the revised 2019-20 and the estimated 2020-21 amounts, some of this difference is related to timing of refunds and to adjustments for some communities from previous years. The actual difference to the Agreements due to the carbon pricing is estimated to be between $4.65 and $4.85 million (based on 2018-19 volumes).

61. The Finance Minister also communicated the government's decision, for the fiscal year 2020-2021, to effectively save harmless each of the First Nation communities by transferring funds equivalent to any shortfall experienced by virtue of the reduction in the taxes on gasoline and motive fuel and actual volumes reported.

62. The applicant First Nations responded on April 27, 2020. The First Nations informed the Province of their view that the carbon tax revenues were, in fact, subject to the current agreements.

63. The applicants asked for a meeting to address the disagreement, or that the parties submit the disagreement to a Dispute Resolution Committee under the current agreements. The applicant First Nations' letter concluded:

> Minister, the revenue generated through WFNTRSA [Wolastoqey First Nations Tax Revenue Sharing Agreements] is critical to our ability to deal with many socioeconomic issues, including issues arising as a result of the current pandemic, and lack of funding in areas such as housing, education, health, and social services will critically impact our communities. We agree it is crucial to continue to build our relationship and work together to address the social and economic challenges being faced by our Province at this time, even more so now during the COVID-19 crisis.

64. The Province responded on June 8, 2020. In its response, the Province chose to decline to participate in dispute resolution with the First Nations. It also asserted that the current agreements do not apply to the new carbon tax:

> Regarding the concerns you raised related to the status of the tax on carbon emitting products introduced by the Province on April 1, 2020 to replace the federally administered carbon levy, it is our Government's position that the Tax Sharing Agreement is specific and applicable only to the gasoline and motive fuel tax, the tobacco tax, and the provincial portion of the harmonized sales tax. I must also mention that our Government does not propose to submit this matter to a Dispute Resolution Committee or to a sole arbitrator.

65. According to Deputy Minister Couillard, tax revenue from both the gasoline tax and motive fuel tax has always been used for the "general purposes" of

government. In contrast, a significant portion of the carbon tax revenue is set aside for special purposes relating to climate change initiatives. In particular, in the 2020-2021 Main Estimates, the Province projected to receive about $129 million in carbon tax revenue in fiscal year 2020-2021, about $36 million of which is designed to fund programs targeted at climate change initiatives and $9 million to ensure the competitiveness of the natural gas distribution system.

VI. Summary of Arguments

66. Both parties filed helpful legal briefs in advance of the hearing supplemented by oral submissions at the hearing.

The Applicants

67. Mr. Kennedy, on behalf of the applicants, argues that the agreements are clear. The plain language of the current agreements, specifically subsections 3(b) and 4(a), requires the Province to share all tax revenues from "any tax" imposed by the Province on gasoline and motive fuel for which on-Reserve retailers are required to collect and remit. The carbon tax is such a tax and is therefore subject to sharing.

68. The applicants' position, they say, is buttressed by the factual matrix of surrounding circumstances at the time the current agreements were entered. More specifically, they rely upon the stated purpose of the said agreements as reflected in the preamble to the original and current agreements plus the Province's own representations made to them prior to entering the current agreements. The applicants' interpretation is most consistent with the commercial and business context. They say the manner by which the Province in the past handled changes to the tax system (PST & HST) within the agreements is evidence of their shared intention and supports their interpretation.

69. Mr. Kennedy argues that the carbon tax is to be considered part of "Gasoline and Motive Fuel Tax" expressly referred to in the agreements and as per the statutory language found in the *Gasoline and Motive Fuel Tax Act*.

70. The applicants say that they will suffer significant economic loss as a result of the Province's intentional exclusion of the carbon tax from its tax revenue sharing obligation under the agreements along with the Province's corresponding reduction in both the gas tax and motive fuel tax. The applicants will receive

significantly less than what they ought to have received under the agreements and they seek that compensation as being required under the agreements.

The Province

71. Mr. Hynes, for the Province, urges the Court to view the issue raised in the application as narrow. He argues that the carbon tax is not subject to the Province's obligation to share with the applicants under the agreements. He argues the agreements are specific and certain as to the types of tax required to be shared under the agreements, namely the gasoline tax and the motive fuel tax. The carbon tax is a new tax established some three years after the agreements were signed. The agreements are silent as to the carbon tax and there is no indication that the parties intended its sharing obligation under the agreements to apply.

72. The Province reinforces its argument by noting the significant differences between the Gas Tax, Motive Fuel Tax and the Carbon Tax.

73. Mr. Hynes cautions the Court from making too much of the term "any" in the phrase "any tax imposed by the Province . . ." under subsection 3(b) of the agreement. He goes on to emphasize that the word "any" needs to be read in the context of the entirety of the agreement and not in isolation.

74. Mr. Hynes makes the point that "any tax" would have had to be a tax that existed at the time the agreements were entered, i.e., that contracts must be interpreted as of the date they were signed. He also points to, what he characterized as, the historically strict application of the taxes identified in the original and current agreements. He says there is no indication in the contract of any reasonable basis for the expectation of the parties to share a tax that was not known to the parties at the time the agreements were entered.

VII. Issue

75. The issue is whether the Province is obligated to share revenues from the carbon tax collected and remitted by on-Reserve retailers under the current agreements. The issue necessarily requires the interpretation of the parties' agreements.

VIII. Law and Analysis

76. While the parties hold widely divergent views on the proper interpretation of their agreement they at least agree on the applicable legal principles. The principles of contractual interpretation in Canada are easily enough stated but often much more difficult to apply. This case is certainly no different.

77. The governing principles are articulated, at length, in the seminal decision of the Supreme Court of Canada in *Creston Moly Corp. v. Sattva Corp.*, 2014 SCC 53 (*Sattva*).

78. In *Sattva*, the Supreme Court of Canada summarizes some of the most pertinent of these principles at paragraphs 47, 48 and 57:

> 47. **Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"** (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). **To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.**

Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> **No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.**

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. [page658] v. Manitoba Motor League,* 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

....

57. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). **The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.** The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). **While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement** (*Glaswegian*

> *Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> (Emphasis added)

79. The Supreme Court of Canada more recently in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, took occasion to reiterate contractual interpretative principles arising from *Sattva* and beyond, as follows:

> 73. The Ontario Indemnity is a contract. Today's lawyers are fortunate to live in "an age when there is a galaxy of high appellate guidance on how to interpret contracts" (*Royal Devon and Exeter NHS Foundation Trust v. ATOS IT Services UK Ltd.*, [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, at para. 45). While not wishing to add more gas and dark matter to the "galaxy", we do find it helpful here to stress certain first principles which we see as important in interpreting this particular contract.
>
> 74. **This Court has described the object of contractual interpretation as being to ascertain the objective intentions of the parties (*Sattva*, at para. 55). It has also described the object of contractual interpretation as discerning the parties' "reasonable expectations with respect to the meaning of a contractual provision" (*Ledcor*, at para. 65). In meeting these objects, the Court has signalled a shift away from an approach to contractual interpretation that is "dominated by technical rules of construction" to one that is instead rooted in "practical[ities and] common-sense" (*Sattva*, at para. 47). This requires courts to read a contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract"** (*ibid.*).
>
> 75. **We recognize that this Court's references to the *objective intentions* of the parties at the time they entered into the contract, and to parties' *reasonable expectations*, may leave a degree of uncertainty respecting the objects of contractual interpretation (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 671-916). Since there is no suggestion here of a divergence**

between the parties' *intentions* and their *expectations*, we do not find it necessary to resolve this here, but we simply note the inconsistency.

76. **Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement** (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). **As this Court stated in *Sattva*, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations** (*Canadian Contractual Interpretation Law*, at p. 9).

77. This is not to say that the words of the contract are to be read in isolation. **This Court's direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances — sometimes referred to as the "factual matrix" — which consists of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting"** (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law*, at p. 9; see also *Sattva*, at para. 57). **Put simply, contractual text derives its meaning, in part, from the context.**

78. **We stress that text derives its meaning from context *in part*. This leads to an important caveat: the context — that is, the factual matrix — cannot "overwhelm the words" of the contract or support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement"** (*Sattva*, at para. 57). **The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder** (*Canadian Contractual Interpretation Law*, at pp. 33-34).

79. **As we will explain below, contractual interpretation also requires courts to consider the principle of commercial reasonableness and efficacy. Contracts ought therefore to be interpreted "in accordance with sound commercial principles and good business sense"** (*Scanlon v. Castlepoint Development Corp.* (1992), 1992 CanLII 7745 (ON CA), 11 O.R. (3d) 744, at p. 770). As Lord Diplock explained in *Antaios Compania Naviera S.A. v. Salen*

> *Rederierna A.B.*, [1985] 1 A.C. 191 (H.L.), at p. 201, **"if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense". The principle that requires contracts to be read in a commercially reasonable and efficient manner is therefore an important interpretive aid in construing contractual terms.**
>
> 80. **Ultimately, contractual interpretation involves the application of various tools — including consideration of the factual matrix and the principle of commercial reasonableness — in order to properly understand the meaning of the words used by the parties to express their agreement.**
>
> (Emphasis added)

80. The New Brunswick Court of Appeal has, on numerous occasions, adopted and applied these principles to contracts litigated before it such as in *Directcash ATM Management Partnership v. Maurice's Gas & Convenience Inc.,* 2015 NBCA 36; and, most recently, in *Hart Stores v. 3409 rue Principale Inc.,* 2020 NBCA 49.

81. Keeping in mind the above principles, I understand this Court's responsibility, in interpreting the parties' agreement before me, is to start with the express words chosen by them. The disputed language, of course, has to also be considered in context. That is both the context as understood by reference to the entirety of the agreement, but also to the surrounding circumstances or factual matrix reasonably

understood by the parties at the time the contract was entered. The ultimate goal is to discern and give effect to what the parties intended along with the scope of their understanding given the words they chose, consistent with the circumstances they were aware at the time the contract was entered.

82. At the root of this dispute the parties have a very different interpretation of the effect of key provisions of their contract. The parties' dispute boils down to the interpretation of the Province's tax sharing obligation found in subsection 4(a) and Schedule "B" of the agreement, which, to repeat, states:

> 4(a) Subject to subsection 4(b), the Minister will share the taxes listed in section 3 of this Agreement with the First Nation in accordance with Schedule "B".
>
> Schedule "B"
>
> Extent of Sharing of Tax
>
> Effective April 1st 2017, the Minister will share, upon the receipt, verification and approval of a return, the Tobacco Tax, the Gasoline and Motive Fuel Tax and the provincial portion of the Harmonized Sales Tax (HST) collected by the First Nation or retail vendors located on reserve, on sales of tobacco products, gasoline and motive fuel and any other goods or services which are taxable under the *Excise Tax Act* (Canada) sold on the Madawaska Maliseet First Nation Reserve to persons other than Status Indians using the following ratios:

> **For the portion of shared revenues received by the First Nation below $8.0 million in a given fiscal year:**
>
> Band's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 95%
>
> Minister's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 5%
>
> **For the portion of shared revenues received by the First Nation above $8.0 million in a given fiscal year:**
>
> Band's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 70%
>
> Minister's share of Provincial Tobacco Tax, Gasoline and Motive Fuel Tax and HST: 30%

83. Critical also to this interpretation, and indeed to the words expressed in subsection 4(a), of course, are the words expressed in subsection 3(b):

> 3(b) Gasoline and motive fuel retailers on the Reserve will register with the Minister to obtain a retailer's license in accordance with the *Gasoline and Motive Fuel Tax Act* and will collect from persons other that Status Indians **any tax imposed by the Province on the sale of gasoline and motive fuel**, and will remit any such tax to the Minister in accordance with the provisions of the *Gasoline and Motive Fuel Tax Act* (R.S.N.B. 1973, c. G-3), and the *Revenue Administration Act*.
>
> (Emphasis added)

84. The parties' dispute is over the Province's tax sharing obligation. In its simplest form, the parties' disagreement primarily concerns the phrase "*any tax* imposed

by the Province on the sale of gasoline and motive fuel" found in subsection 3(b) of the contract. While section 3 concerns the *tax collection* obligation, subsection 4(a) sets out the tax *sharing* parameters in specific reference to section 3, i.e., "share the taxes listed in section 3 of the Agreement . . . in accordance with Schedule "B"".

85. I wish to acknowledge the reality that this agreement is open to more than one interpretation. Indeed, I would go so far as to say that, on its face, both parties' interpretations may be considered themselves reasonable. The challenge before this Court is very difficult. This Court, though, does not have the luxury of deferring on the issue. It is my role to determine the most appropriate interpretation taking into consideration the authorities, the parties' submissions, the agreement itself, along with the applicable surrounding circumstances.

86. For the reasons that follow I am of the view that the applicants' position must prevail. In my view the applicants' interpretation is more supported by the words chosen by the parties in their agreements, having due regard to the contract as a whole

and its commercial reality. The applicants' interpretation most promotes a sensible commercial result and advances the stated objective of the parties.

87. Before addressing my interpretive outcome in more detail, I wish to address a few of the primary arguments most capably advanced by Mr. Hynes for the Province.

Only Taxes in existence at time contract entered?

88. First, the Province argues fundamentally that it can only be the taxes actually in existence at the time the contract was entered, which could have been intended to be captured by the agreement. Mr. Hynes emphasizes that contracts are to be interpreted as of the date they were signed. The Province also understandably relies on the fact that there was no discussion of any future taxes at the time of entering the current agreements. In further support of this Mr. Hynes points to a lack of statutory authority, via section 11.1 of the *Revenue Administration Act*, for the Minister to enter into an agreement for some "unknown tax" and not "actively being shared" at the time the contract was entered.

89. In my view, in principle, it would certainly be open to the parties to arrive at an agreement that allowed for taxes, not then in existence at the time the contract was signed, to be within its scope. While the Province attempts to suggest it lacked statutory authority, by virtue of section 11.1 of the *Revenue Administration Act*, to share revenues from taxes not in existence at the time the agreements were entered, I do not accept that argument. It also seems circular.

90. Section 11.1(1) of the *Revenue Administration Act* states:

> 11.1(1)Notwithstanding any other provision in this Act or any provision in any revenue Act or any regulations under those Acts, the Minister may, on behalf of Her Majesty the Queen in right of the Province, enter into an agreement with a band with respect to the sharing of the revenue from the taxes referred to in the agreement that are collected on the band's reserve from taxpayers who are not Indians.

91. I interpret section 11.1(1) of the *Revenue Administration Act* as providing the Province authority to make agreements with First Nations to share revenues from all taxes contemplated within such an agreement. Section 11.1 of the *Revenue Administration Act* appears to simply reiterate the basic premise of the agreement of "sharing" of taxes referred in the agreement with those "collected". It is undisputed that

the parties view the First Nation retailers as obligated to collect the carbon tax. They disagree as to the Province's requirement to share it.

92. The Province's point is that as the gas tax and motive fuel tax were the only taxes (relevant to this dispute) in existence under the *Act* in 2017 then it could only be those taxes that were intended to be captured by the agreement. They view it as "black and white" – the only taxes referred to in the agreement were the ones in existence.

93. However, the necessary implication of this argument is that it potentially allows for that single fact or circumstance to overwhelm the meaning of the words actually chosen by the parties. For instance, there is also no indication from reading the full agreement that the parties intended to limit the scope of the plain words in dispute. While I fully accept the contracts are to be interpreted as at the time they were entered that does not necessarily provide the simple answer. In other words, the way circumstances may change can still allow for the subject matter to be found to be within the intent and scope of the parties' agreement.

94. On its face, the phrase "any tax imposed by the Province on the sale of gasoline and motive fuel . . ." appears rather straight forward. It is not in doubt that the carbon tax is a tax applied to the sale of gasoline and motive fuel such as diesel for which on-Reserve retailers are required to collect and remit from on-Reserve sales to non-Status Indians.

95. Certainly, the use of the words "any tax imposed" by the Province taken literally suggests a very broad and all-encompassing approach to capture even the possibility of future taxes. While the parties did not use the words such as "any taxes *established in the future*", nor did they use words such as "any tax *now in existence*".

96. While the literal or grammatical meaning of words such as "any tax imposed" in subsection 3(b) would support the applicants' interpretation, that would be far too restrictive or narrow an approach to ensure an appropriate or reasonable interpretation of the agreement as a whole. Provisions should not be read in isolation but, if possible, in sync with the agreement as a whole.

97. There are, of course, other provisions within the entirety of the agreements that must be considered. Perhaps most notably, the Province emphasizes that, under Schedule "B", its tax sharing obligation is made specific and applicable only to, in this dispute, the "Gasoline and Motive Fuel Tax", and not the carbon tax.

98. I am of the view that the interpretation advanced by the Province is one that unnecessarily departs from the plain meaning of the words of the agreement that requires the collection of "any taxes". Taken further it is more inconsistent with the overarching intent and purpose of the agreements as a whole, which is to collect *and share* taxes on consumer purchases of gasoline and motive fuel such as diesel, on-Reserve to non-Status, non-tax-exempt persons.

99. Parties to a contract could not reasonably expect an interpretation that could defeat its purpose.

100. For the Province to be successful in its interpretation of the tax *sharing* obligation with respect to carbon tax, it necessarily had to take the position that the

collection of carbon tax is entirely outside of the parameters of the agreement. While both parties acknowledge that carbon tax is being collected by on-Reserve vendors currently, the Province maintains that this would be pursuant to an independent obligation on all businesses to collect and remit taxes by law and not by virtue of the parties' agreement.

101. One has to ask then, why have these agreements in the first place? Is the Province no longer concerned about, for instance, the integrity of the provincial tax system and fair price competition? The agreements are premised, in part, on these very principles. In my view, as is plainly evident from the Province's slide show presentation as part of the negotiations for the current agreements, it views the agreements to include *both* tax collection and sharing obligations. It seems indisputable that the Province is collecting carbon tax on gasoline and motive fuel such as diesel on these sales currently. In my view the broad language chosen by the parties in subsection 3(b) of the agreement clearly has application to the carbon tax and reasonably reflects an intent to obligate carbon tax collection on-Reserves. It is plain and unambiguous. The carbon tax is, in fact, a tax on the sale of gasoline and diesel, indeed (almost) all motive fuels. It is

indisputable that on-Reserve vendors would be required to collect such a tax on consumer sales to non-Status persons *under this agreement.*

102. Keeping in mind the overarching purpose behind the agreements, but at the same time being cautious not to "make a new contract" for the parties, I view the applicants' interpretation as most consistent with the commercial reality of the agreements. The Province's position would seem inconsistent with this. To give an interpretation that departs from the plain words will only be done to avoid a commercial absurdity and the interpretation advanced by the applicants is not absurd, but rather would seem more consistent with the parties' reasonable expectations given the language they chose at the time the contract was entered.

103. The Province's interpretation also relies quite heavily on the term "Gas and Motive Fuel Tax" listed in Schedule "B". It says those specific words seem to limit the admittedly very general words of "any tax" found in subsection 3(b) and referred in subsection 4(a). It relies upon such authorities as the Supreme Court of Canada in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] S.C.J.

No. 1, [1993] 1 S.C.R. 12 and *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4. Mr. Hynes argues that the specific taxes referred in Schedule "B" serve to qualify or limit the more general term "any tax" to be the tax on gasoline and the tax on motive fuel.

104. Mr. Hynes concedes that the term "Gas and Motive Fuel Tax" is not expressly defined within the agreement but he makes the point that, under the *Act*, they are two separate taxes. The carbon tax is a third type of tax under that *Act* he argues. Mr. Hynes' argument requires the Court to conclude that the term "Gas and Motive Fuel Tax" infers only two taxes: gasoline tax and motive fuel tax "under the *Gas and Motive Fuel Tax Act*".

105. The interpretation of the Province whereby it attempts to limit its sharing obligation to the terms as found in Schedule "B", namely to "Gasoline Tax" and "Motive Fuel Tax" only, without any reference to carbon tax is not supported by the surrounding circumstances, nor is it consistent with commercial or business purposes of the agreement.

106. I view the entirety of the agreement, not just any one provision, to inform the proper interpretation. I start with the object of the agreements which seems plainly stated to be to ensure the collection of taxes for on-Reserve sales to non-tax-exempt individuals. The Province clearly had concerns about the enforcement of its tax collection objectives in the more complicated context of First Nation Reserves and personal tax exemptions applicable under section 87 of the *Indian Act*. The Province also recognized potential commercial concerns for businesses operating similar businesses in the area of the Reserves. Ensuring the First Nations' assistance in tax collection by on-Reserve retailers and resulting fairer competition, was a key goal and benefit of these agreements. The corresponding incentive to ensure this objective was for First Nations to share in the revenues generated. In this way the agreements purport to be truly mutually beneficial.

107. The very structure of the agreements also supports the First Nations' position. First, while I note the agreements are entitled "Tax Collection" the Province in various correspondence contained within the Record, as well as their slide show presentation, also refers to tax sharing.

108. The agreements at section 3 deal with tax collection. It is very broadly worded. Section 4 addresses the Province's sharing obligation in specific reference to the "taxes listed in section 3 of the agreement". Again, seemingly very broadly worded. It also says the tax sharing will be in accordance with Schedule "B". Schedule "B" is entitled "Extent of Sharing of Tax". It sets out the sharing formula. I interpret Schedule "B" to reflect how the Province's sharing obligation is carried out.

109. Once again, critical to this dispute is the reference to "Gas and Motive Fuel Tax" found in Schedule "B". This is an undefined term. The Province says it must be interpreted as limited to the "gas tax" and "motive fuel tax". The First Nations' position is more nuanced. First Nations argue that the term is, in essence, a clunky expression of *the* tax imposed under the *Act* on gasoline and motive fuel. They argue the Province's introduction of the carbon tax amounts to an amendment to the single tax under the *Act* on gasoline and motive fuel and is thus captured by that phrase.

110. There is no doubt a real commercial connection between the new tax on carbon emitting products and the tax on gas and motive fuel. All of these terms are, in

my mind, intrinsically related. They are all established under the same *Act*. The Province argues that the recent "origin" of the carbon tax, along with the fact that portions of the carbon tax have been allocated for climate change initiatives make it different than the gas tax and motive fuel tax. However, it is noted that the revenue from all three of the taxes, by virtue of sections 3, 6.1 and 6.3 of the *Act* are all similarly designated for "public use", i.e., the Province's general revenues. It strikes me that any decision made by the Province on spending for climate initiatives is one of policy, and beyond the scope of this proceeding. There would seem to be no legal impediment to treat the revenue from all of the three taxes under the *Act* in the same manner.

111. It is admittedly confusing how Schedule "B" references the "Gasoline and Motive Fuel Tax". In fact, the gas tax and motive fuel tax were the applicable provincial taxes on the sale of gasoline and motive fuels such as diesel, at the time the contract was entered. However, I do not see that term as itself, in the context of the overall agreement, to be so limiting as the Province suggests. I interpret the phrase to simply be a statement as to the types of tax then being collected and remitted. Schedule "B" needs to be read in a harmonious way with subsection 3(b). I cannot interpret the words "any taxes

imposed..." in subsection 3(b), given the very purpose of the agreement, to be anything other than to reasonably capture a so-called "new" tax that is imposed under the same *Act* and importantly concerning the very same sales of gasoline and (mostly diesel) motive fuel on-Reserves. Once on-Reserve retailers, including First Nations themselves, are required to collect, remit and report the carbon tax on essentially the same sales, the Province would be expected to share those revenues as negotiated.

112. I hold the view that the reference to "Gasoline and Motive Fuel Tax" found in Schedule "B" is not so precise as to effectively limit the scope of the phrase "any tax" found in subsection 3(b). On the contrary, I view the above term in Schedule "B" to perhaps reflect the intended scope of the types of taxes *expected* to be collected. However, when read in conjunction with sections 3 and 4 it was not inserted to restrict the scope of the type of tax that could become applicable on the sale of gasoline or motive fuel such as diesel. That would not make business sense in the context of this agreement.

IX. Carbon Tax

113. The First Nations argue that the tax on carbon emitting products, i.e., carbon tax, was effectively an amendment to the tax on gasoline and tax on motive fuel under the *Act*. In an effort to support the applicants' position, Mr. Kennedy argues that the *Act* establishes only *one* tax. He indicates that the gasoline tax, the motive fuel tax, and the carbon tax are components of the one tax established under the *Act*. He points to the definition of tax under the *Act* in support. In fact, he views the introduction of the carbon tax to be, in essence, an amendment to the single tax on gas and motive fuel under the *Act*.

114. While an intriguing argument I do not necessarily accept that the tax on carbon emitting products is part of a single tax or the same tax as the tax on gasoline or the tax on motive fuels. Having said this, I am convinced that the tax on carbon emitting products remains one that is so deep-rooted with and connected to the tax on gasoline and tax on motive fuel as to be intended to be captured by virtue of the express terms of the agreements, especially after a consideration of the agreements' purpose.

115. The carbon tax was made law by way of an amendment to the *Act*. The gasoline tax, the motive fuel tax and now the carbon tax are all separately established under this same *Act*.

116. The carbon tax applies to twenty types of "carbon emitting products". Gasoline is identified as a carbon emitting product. It is, therefore, indisputable that the carbon tax applies to the sale of gasoline much like the gasoline tax does. By definition under the *Act* the carbon tax also applies to *almost* all motive fuels listed. It clearly applies to, for instance, diesel.

117. It cannot be reasonably ignored that the carbon tax was enacted/implemented at the very same time as the reduction of the gasoline tax and motive fuel tax. There is no dispute that these adjustments to the gasoline tax and motive fuel tax were intrinsically related to the introduction of the carbon tax. With the introduction of the carbon tax the cost to consumers on retail purchases of gasoline and motive fuel would increase. The Province made the policy decision to help offset this sticker shock by correspondingly reducing the gasoline tax and motive fuel tax.

118. To suggest that the treatment of these taxes is unrelated ignores the reality, and if I may say so, the commercial reality of their existence. As above, there is no question that the carbon tax applies to the sale of gasoline. There is no question it applies to the sale of motive fuel such as diesel. Both counsel before me acknowledged as much. Indeed, practically it would seem that these two fuels (gas and diesel) are the two fuels (and carbon emitting products) which are the focus of *most* of the original and *all* current agreements. For instance, this is expressly reflected in paragraph 3 of the March 30, 2020 letter from Minister Steeves, along with the Province's presentation at page 39 and 42 of the Record.

119. Furthermore, Schedule "A" to the current agreements establishes the agreed, expected volumes of "Gas and Motive Fuel" for purposes of tax-exempt purchases on-Reserve. Schedule "A" expressly refers to gas and diesel. Diesel is a motive fuel under the *Act.* Both gas and diesel, of course, are subject to carbon tax. I also note that certain and specified diesel sales are addressed at section 5 of each agreement as an exclusion to the agreement.

120. The Province makes a point that not each and every motive fuel is captured by the definition of carbon emitting products. For instance, Mr. Hynes points to heating oil being listed as a motive fuel but not as a carbon emitting product. While this may be the case, there is no suggestion that that is pertinent to the on-Reserve retail sales to non-Status Indians as the practical commercial reality of these agreements.

121. Section 6.3(1) of the *Act* expresses that carbon tax is to be imposed "in addition to *any other tax* imposed under the *Act*" on consumer purchases of carbon emitting product. While perhaps entirely coincidental that expression strikes me as similar to the wording found in subsection 3(b) of the agreements requiring on-Reserve retailers to collect from non-Status Indians "*any tax imposed on the sale of gasoline and motive fuel*" and to remit same in accordance with the *Act.* Gasoline and motive fuel such as diesel are such carbon emitting products sold at on-Reserve retail establishments including to non-Status First Nations.

122. In this way, while the parties may not have specifically contemplated the introduction of the carbon tax, they have by virtue of the express words in subsection

3(b), in the very least, contemplated the possibility of a "new" tax not then in existence which would be required to be collected and remitted under the *Act* on sales of gasoline and motive fuel. The carbon tax is exactly such a tax.

123. Mr. Hynes made the fair point that an agreement which ties funding to tax collection and remission has an inherent risk. Tax rates may change over time and by way of legislation and policy choices of governments. However, to repeat, the manner by which the Province introduced and implemented the carbon tax, in this instance, is not at all disengaged from the gasoline tax nor the motive fuel tax. These are all connected. As Mr. Kennedy argued the effect of the amendments to the *Act* in this way, at least for the purposes of the agreement, was to essentially "reallocate" the taxes imposed and collected on consumer purchases of gasoline and motive fuel from two revenue streams to three streams and under the same *Act.* Section 6.3 of the *Act* actually expresses the carbon tax to be "In addition to any other tax imposed under this *Act* every consumer of a carbon emitting product shall pay".

124. While there is no specific allegation of a breach of good faith before me, the very manner by which the new carbon tax was implemented by the Province, and keeping in mind all of the purposes of the agreement, supports the most commercially reasonable interpretation to be that as advanced by the First Nations.

125. The First Nations point to the Province's prior treatment of the unanticipated introduction of HST by which it shared the revenues of the provincial portion of same, collected on applicable sales on-Reserve notwithstanding some of the original agreements being silent on HST. Given the Province's consistent communication maintaining it was voluntarily sharing the *equivalent* of such revenue I will not rely on that example and do not find it helpful to either side's position before me.

X. Additional Findings

126. While the focus of the parties' submissions has been on the recitals of the agreement, subsections 3(b), 4(a), and Schedule "B", I am convinced that other provisions of the agreement support my interpretation.

127. At the risk of some repetition, I have already discussed the seemingly broad nature of subsection 3(b) given the words chosen by the parties "any tax imposed...". It is important to keep in mind that these agreements are between the Province and First Nations. Indeed, on-Reserve retailers, other than First Nation retailers themselves, are not parties to the agreements.

128. According to both Chief Bernard and Deputy Minister Couillard, the genesis of these agreements is the fact that back in the early 1990's many of the First Nation retailers were not collecting nor remitting provincial taxes for on-Reserve sales. The agreements were intended to create a legal mechanism to assist the Province in its collection efforts. This is also occurring in the broader context of the practical complications of the tax exemption for Status First Nation individuals on these purchases under section 87 of the *Indian Act* and to thus ensure a more level playing field for non-First Nation retailers situated nearby.

129. These very issues are contemplated in the preamble to both the original agreements but more importantly also in the current agreements. Critical to these

agreements was for the Province to enlist the First Nations' assistance over on-Reserve retailers. In addition, the agreement recognizes that some First Nations themselves may operate retail establishments on-Reserve.

130. Under subsection 4(b) of the agreement the First Nation assumes an obligation to ensure First Nation Vendors post a price on tobacco/gas/motive fuel that is competitive (in accordance with subsection 4(c)). At section 6 the First Nations agree to allow the Province to inspect and audit the First Nations' sales accounts to ensure compliance with the *Act* when the First Nation itself operates as a vendor. The Province made its tax revenue sharing obligation expressly subject to these obligations.

131. Section 8 requires all First Nation Vendors to record applicable sales data along with the purchaser's Status Indian identification, all to support the tax-exempt sales. It also requires such First Nation Vendors to submit to the Province and the First Nation itself a record of sales information specifically over gasoline and motive fuel sales.

132. Both the original and current agreements begin with the parties identifying and monitoring values of tobacco, gas, and motive fuel that the parties viewed as reasonable amounts of such for on-Reserve sales in reference to First Nations and its members under section 87 of the *Indian Act*. The provision has a purpose. Presumably this is being done to have some understanding or yardstick to compare to actual sales and assist the Province in ensuring the tax exemption is not being abused or allowed to wrongly extend to non-tax-exempt sales. This would seemingly also ensure fairer competition.

133. Schedule "A" to the current agreements is titled "AGREED QUANTITY OF EXEMPT TOBACCO AND GASOLINE AND MOTIVE FUEL". The language of Schedule "A" in each agreement goes on to identify an agreed upon consumption of tobacco and gas and motive fuel. It is at least telling that the agreements identify a number of litres of gasoline and a number of litres of diesel. The word "diesel" does at least inform, in some small measure, the practical or reasonable expectations of the parties as to what type of product is being contemplated under these agreements and in

reference to motive fuel. Needless to repeat, diesel is both a motive fuel and a carbon emitting product.

134. Schedule "B" requires the Province to share "upon receipt, verification or approval of a return... of gasoline and motive fuel tax...". Two comments. While a "return" is not defined, in my view it is referring to a record of information to be provided by on-Reserve Vendors pursuant to section 8 of the agreement and Schedule "C" in the case of gasoline and motive fuel. I also note that the Regulations under the *Act* refer to a "return" of specified information required to be filed by retailers in accordance with section 12 of the *Act*.

135. While the result of the applicants' interpretation would likely amount to an increase in the anticipated revenues to be shared under the agreement of just under 2 cents per litre, the alternative is to result in a significant decrease in revenues to the First Nations. I would point out that this would also seem inconsistent and unexpected given the parties' expectations as reflected in the Province's presentation prior to the signing of

the current agreements. Revenues under the agreements had been significantly increasing and were expected to continue to increase.

136. The agreements do not seemingly prohibit a change in the tax rates and likely, nor could they. The agreements do not fix the tax rates, and nor do they guarantee a level of funding. However, an interpretation that would permit the Province to effectively reallocate an existing tax or taxes specifically in a way as to avoid its sharing obligation, while maintaining the requirement to collect same, would seem unreasonable and certainly at odds with the very purpose of these agreements.

XI. Conclusion

137. I wish to conclude by emphasizing the point that this case is not about the authority/propriety of the Province to implement a "new" tax. Nor does this decision in any way derogate from the Province's implementation of the carbon tax. This decision concerns only the resulting consequences of the Province's introduction of the carbon tax for the purposes of the parties' contractual obligations under their agreements.

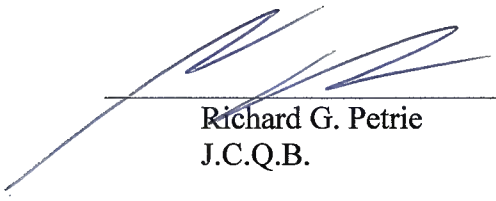
138. Given the above, I will allow the application, and in reference to the relief sought declare:

1. That subsection 4(1) of the agreements require the Province to share with the applicants, in the ratios set out in Schedule "B" of the agreements, all taxes that the *Act* levies on gasoline and motive fuel which the applicants are required to remit to the Province, *including* the carbon tax.
2. That the "Gasoline and Motive Fuel Tax" in Schedule "B" of the agreements includes all taxes levied on gasoline and motive fuel under the Act, *including* the carbon tax.

XII. Costs

139. The parties are encouraged to resolve the issue of costs. If the parties are unable to agree, they may file written arguments with respect to costs within 21 days of this decision. The parties' submissions will not exceed 5 pages and may include any

additional arguments they wish to make on the applicants' proposed amendment to the application seeking "full indemnity costs".



Richard G. Petrie
J.C.Q.B.