Ottawa 1968
June 27
July 16

BETWEEN:

THE JOHN BERTRAM AND SONS COMPANY LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Courts—Judicial comity—Decision of Supreme Court of Ontario construing contract re liability for federal sales tax—Subsequent claim for refund of sales tax—Whether Exchequer Court bound by decision—Res judicata—Stare decisis.

By a contract made in April 1963 governed by the laws of Ontario suppliant agreed to sell a planetary mill to another company for $5,100,000 subject to adjustment for any federal sales tax imposed by law. Such mills became subject to federal sales tax under a statute (S. of C. 1963, c. 12) which contained a saving clause for a mill sold under a contract signed before 14th June 1963 if such contract did not permit the tax to be passed on to the purchaser. Suppliant paid sales tax of $451,735 under protest. The purchaser then applied to the Supreme Court of Ontario for construction of the contract and that court (Landreville J) after hearing full argument held that under the contract suppliant was liable for the tax. Suppliant then demanded refund of the tax paid.

Held, suppliant was entitled to the refund. While the judgment of the Ontario court was not *res judicata* since the Queen was not party to the proceedings in that court, nor did the principle of *stare decisis* require this court to follow the decision of another court of co-ordinate jurisdiction, nevertheless judicial comity required that this court follow the judgment of the Ontario court in the absence of a strong reason to the contrary; the fact that this court would not have construed the contract as Landreville J. had done was not a sufficient reason.

Canada Steamship Lines Ltd. v. M.N.R. [1966] C.T.C. 255; *R. v. Northern Electric Co.* [1955] 3 D.L.R. 449; *Woods Mfg. Co. v. King* [1951] 2 D.L.R. 465, referred to.

PETITION OF RIGHT.

Gordon F. Henderson, Q.C. and *Brian A. Crane* for suppliant.

Derek H. Aylen and *J. E. Smith* for respondent.

CATTANACH J.:—The suppliant, by its petition of right, seeks to recover from the respondent the sum of $451,735.48 paid by it to the Receiver General of Canada on three divers dates in the years 1965 and 1966 by way of sales tax under the *Excise Tax Act*[1] as amended, upon the sale of one Sendzimir type planetary hot mill pursuant to a

[1] R.S.C. 1952, c. 100.

written agreement made on April 15, 1963, between the suppliant and Atlas Steels Company, a division of Rio Algom Mines Limited, for a purchase price of $5,150,000, subject to change for causes set out in the agreement, together with interest at the rate of 5 per cent per annum on the amount so paid to the Receiver General from the three respective dates of payment.

The suppliant seeks to recover the sum so paid, by way of a refund or deduction of tax pursuant to section 10 of chapter 12 of the Statutes of Canada 1963 being an Act to amend the *Excise Tax Act*. Prior to the enactment of this amendment the mill, which fell under the heading of "Machinery and Apparatus to be Used in Manufacture or Production" in Schedule III of the *Excise Tax Act,* had been exempt from federal sales tax. By virtue of section 7(6) of this amendment all that portion of Schedule III under the immediately foregoing heading was repealed so that the mill so sold was made subject to the federal sales tax.

However, section 10 of the foregoing amendment (the pertinent portion of which is reproduced in the footnote hereunder)[2] provided that where any tax has become payable in respect of designated goods that were, not later than December 31, 1964, sold and delivered pursuant to a *"bona fide"* contract in writing that provided for the sale of those goods for a fixed amount stated in the contract

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[2] 10. (1) Where any tax under Part VI of the *Excise Tax Act* has become payable by any person in respect of any designated goods that were, not later than December 31, 1964, sold and delivered by that person, or applied by that person to a use resulting in the property in the goods passing from that person, pursuant to a *bona fide* contract in writing

(*a*) that provided for the sale of those goods or their application to that use for a fixed amount stated in the contract and that did not permit the adding of the tax to the amount payable to that person under the contract, and

(*b*) that was signed by the parties thereto

(i) on or before June 13, 1963,

. . .

a refund, or deduction from any of the taxes imposed by the said Act, of the tax or such part thereof as could not under the contract be added to the amount payable to that person thereunder may, where application therefor is made to the Minister of National Revenue by that person within two years from the time the goods were delivered by that person or applied by him to that use, be granted to that person

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and that did not permit the adding of the tax to the amount payable to the taxpayer under the contract, and that was signed by the parties thereto on or before June 13, 1963, a refund or deduction from any of the taxes imposed by the said Act of the tax or such part thereof as could not under the contract be added to the amount payable to the taxpayer thereunder may, where application therefor is made to the Minister of National Revenue by the taxpayer, within two years from the time the goods were delivered by the taxpayer, be granted to the taxpayer.

There is no dispute between the parties hereto that the mill here in question fell within the category of "designated goods" within the meaning of those words as they appear in section 10 of the statute amending the *Excise Tax Act,* nor that the mill was sold and delivered prior to December 31, 1964, pursuant to a written contract signed by the parties thereto prior to June 13, 1963. Neither is it disputed that the three amounts were paid by the suppliant under protest since the suppliant maintained that it fell within the precise terms of the exemption outlined in section 10 and that the tax was paid by the suppliant to avoid penalties being assessed against it if the tax were not paid. It is also agreed between the parties that the suppliant made application to the Minister of National Revenue for refund of the tax paid within the time prescribed in the statute.

The sole controversy between the suppliant and the officials of the Department of National Revenue was whether, under the terms of the written contract dated April 15, 1963 between the suppliant as vendor of the mill and Atlas Steels Company as purchaser, the suppliant was permitted thereby to add the amount of the tax imposed to the amount payable by the purchaser under that contract. Obviously the officials of the Department were adamant in their opinion that the contract between the contracting parties did permit the tax to be passed on to the purchaser while the suppliant was equally adamant that the contract with its purchaser did not so permit.

Prior to trial the parties agreed upon a statement of facts as follows:

> 1. The Suppliant (hereinafter referred to as "Bertram"), a corporation incorporated pursuant to the laws of Canada, having its head office in the Town of Dundas, in the Province of Ontario, entered into a bona fide contract in writing with Atlas Steels Company

(hereinafter referred to as "Atlas"), a division of Rio Algom Mines Limited, which contract was signed by the parties thereto on or about the 15th day of April, 1963, whereby Bertram agreed to sell and Atlas agreed to purchase a certain Sendzimir planetary hot mill for the sum of $5,150,000 00, subject to the terms and conditions of the said contract, a copy of which is attached hereto as

Appendix "A"

2. The aforesaid contract in writing was prepared by Atlas. At the time it was made Atlas and Bertram had manufacturers' licences issued under Section 34 of the *Excise Tax Act* and were making returns to the Department of National Revenue and paying sales tax on taxable articles.

3. Attached hereto and marked *Appendix "B"* is a letter from Atlas to Bertram dated December 31st, 1964 delivered to the addressee on the same date. The payments referred to therein were made to Bertram on the due dates.

4. The terms and conditions of the said contract required that the said mill components be delivered not later than the 15th day of October, 1964, and manufacture and delivery of the said mill, pursuant to the said contract, was completed on or before the 31st day of December, 1964.

5. The said mill was "Machinery and Apparatus to be Used in Manufacture or Production" within the meaning of Schedule III of the *Excise Tax Act*, R S C. 1952, Chapter 100, as amended by Section 2 of 1960, Statutes of Canada, Chapter 30, and was exempt under that heading from sales tax under Part VI of the *Excise Tax Act*. The said heading and all that portion of the Schedule under the said heading as previously enacted by Section 2 of 1960, Statutes of Canada, Chapter 30 was repealed by Section 7, subsection (6) of the 1963 Statutes of Canada Chapter 12, which provision was deemed to have come into force on June 14th, 1963, and sales tax under Part VI of the *Excise Tax Act* therefore became payable in respect of the said mill.

6. By instalments of $340,000 00 paid on the 1st day of February, 1965, and of $64,770 65 paid on the 3rd day of August, 1965 and of $46,964 83 paid on the 25th day of April, 1966, Bertram paid the sum of $451,735 48 to the Receiver General of Canada as Sales Tax imposed under Part VI of the *Excise Tax Act* in respect of the sale of the said mill. Each of the instalments of tax as aforesaid was paid "under protest".

7. By motion brought on the 15th day of June, 1965, and argued on the 28th day of June, 1965, the Supreme Court of Ontario was moved, pursuant to Rules 611 and 612 of the Rules of Practice of that Court under the *Ontario Judicature Act*, R S O 1960, Chapter 197, as amended, by counsel for Atlas to determine and declare the rights of Bertram and of Atlas under the said contract, and in particular to determine and declare whether the liability, if any, to pay a certain Federal Sales Tax imposed by the *Excise Tax Act* rested upon Atlas or upon Bertram. Judgment upon the said application was reserved, and subsequently by order of the Supreme Court dated the 2nd day of July, 1965, it was ordered that: "...the liability, if any, to pay a certain Federal Sales Tax imposed by the *Excise Tax Act* of 1952, Revised Statutes of Canada, Chapter 100, as amended, rests upon The John Bertram and Sons Company Limited having

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regard to the provisions of an Agreement dated the 15th day of April, 1963 made between Atlas Steels Company and The John Bertram and Sons Company Limited. . ." Copies of the Notice of Motion, Affidavit of Harry Scott Wilson in support (the exhibit thereto is *Appendix "A"*), formal Order and Reasons for Judgment in the said application are attached hereto and marked *Appendix "C"*.

8. By letters addressed to the Deputy Minister of National Revenue for Customs and Excise dated the 16th day of September, 1965, the 7th day of January, 1966, and the 20th day of January, 1967, Bertram applied for a refund of the aforementioned sum paid as sales tax, pursuant to the provisions of subsection (1) of Section 10 of 1963, Statutes of Canada, Chapter 12, on the grounds set out in the letters. Copies of the said letters are attached hereto and marked *Appendix "D"*.

By letter dated the 13th day of December, 1965 the Deputy Minister of Revenue for Customs and Excise denied the request of Bertram for the said refund. A copy of the said letter is attached hereto and marked *Appendix "E"*.

9. By letter dated the 14th day of September, 1966 Bertram applied to the Tariff Board pursuant to Section 57 of the *Excise Tax Act* for a declaration of the board that no sales tax pursuant to Part VI of the *Excise Tax Act* was payable in respect of the sale and delivery of the said mill by Bertram to Atlas and for a further declaration that a refund of the said tax paid be made to Bertram. On or about the 6th day of March, 1967 the Tariff Board held that it did not have jurisdiction under Section 57 of the *Excise Tax Act* to make a declaration in this matter, and accordingly dismissed the application for lack of jurisdiction. A copy of the Reasons for Judgment of the Tariff Board are attached hereto and marked *Appendix "F"*.

10. The following Statement of Facts is hereby agreed to on behalf of the Suppliant, The John Bertram and Sons Company Limited, and the Respondent, for the purpose of enabling the Exchequer Court of Canada to hear and consider the Suppliant's petition for a declaration that the Suppliant is entitled to have refunded to it the sum of $451,735.48, together with interest thereon at the rate of 5% per annum from the date of payment thereof.

Appendix "A" to the agreed statement of facts is a photostatic copy of the contract dated April 15, 1963 between the suppliant and Atlas Steels Company which contract was prepared by Atlas Steels Company.

Paragraph 15 of that contract sets out the purchase price of the mill as $5,150,000 with the stipulation that "This price is not subject to escalation or change for any cause except as set forth in paragraph 18".

Paragraph 18 referred to in paragraph 15 is headed "Price Adjustment" and reads as follows:

> The price for the Mill shall be subject to the following adjustment:
>
> (a) the amount of any Federal or Provincial Sales Tax imposed by law;

(*b*) the amount of any increase or decrease resulting from changes required by Atlas under paragraph 8(*c*); and

(*c*) charges for installation services under paragraph 19;

(*d*) penalty and bonus adjustments under paragraph 6.

Paragraph 17 provides for the terms of payment and paragraph 23 provides that the agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario, but the question whether the suppliant as vendor may add the tax to the purchase price payable by the purchaser and so qualify for a refund of (or in effect exemption from) sales tax is dependent upon the interpretation of paragraph 18(*a*) set out above.

Appendix "B" is a photostatic copy of a letter dated December 31, 1964 written by Rio Algom Mines Limited (the effective purchaser of the mill) to the suppliant denying its liability in respect of federal sales tax demand for the payment of which had been made by the suppliant.

Despite its denial of liability Rio Algom Mines Limited paid to the suppliant the amount of the sales tax demanded but subject to the conditions that,

(1) the payment was made under protest,

(2) the suppliant remit the tax to the Department of National Revenue under protest and making known the purchaser's protest, and

(3) judicial proceedings be taken to resolve the rights of the contracting parties in respect of federal sales tax under the contract of April 15, 1963 between them.

It was also agreed and understood that if the judicial interpretation of the contract resulted in a refund of the sales tax to the suppliant, that the amount of such refund would be promptly refunded by the suppliant to the purchaser.

As outlined in paragraph 7 of the Agreed Statement of Facts, a motion was brought on June 15, 1965 and argued on June 28, 1965, before the Supreme Court of Ontario pursuant to Rules 611 and 612 of the Rules of Practice of that Court to determine and declare the rights of the parties to the contract of sale under their contract and in particular whether the liability, if any, to pay the federal sales tax fell upon the purchaser, Atlas Steels Company, or upon the vendor, the suppliant herein.

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Appendix "C" to the Agreed Statement of Facts is a copy of the Notice of Motion dated June 15, 1965, the formal Order dated July 2, 1965 and the Reasons for Judgment.

The pertinent language of the Order reads as follows:

> 1. THIS COURT DOTH DECLARE that the liability, if any, to pay a certain Federal Sales Tax imposed by the *Excise Tax Act* of 1952, Revised Statutes of Canada, ch. 100, as amended, rests upon The John Bertram and Sons Company Limited having regard to the provisions of an Agreement dated the 15th day of April, 1963 made between Atlas Steels Company and The John Bertram and Sons Company Limited,...[3]

In the Reasons for Judgment also delivered on July 2, 1965, Landreville J. stated:

> ...After reading the contract as a whole and more particularly the above-numbered clauses (i.e. clauses 15, 17 and 18) I have come to the conclusion that the contract, while referring to the sales tax, does not specifically and clearly state who is to pay same Due to the fact that the statute which subsequently came into existence imposes on the manufacturer the tax, it is not that clear language necessary for me to displace the obligation to the purchaser.
>
> I accept the argument of the applicant that the words imposed "by law" make reference and contemplate the tax which might be in existence at that time. I understand that the goods manufactured could have been pleaded to have been exempted from taxation at the time of contract.
>
> Not knowing on whom to place the responsibility for the loose wording of the contract, there will be no taxable costs on this motion.

Appendix "D" to the Agreed Statement of Facts is comprised of three letters written by the suppliant to the Department of National Revenue.

The first letter is dated September 16, 1965 and was an application for a refund of the tax paid. It recapitulated the dispute between the suppliant and the Departmental officials setting out that the Department's view that the contract of April 15, 1963, was not within the exemption contemplated by section 10 of the amending statute and the suppliants disagreement with that view. The letter referred to the proceedings taken before the Supreme Court of Ontario pointing out that the Court arrived at a

[3] While this judgment merely declares what the *Excise Tax Act* clearly provides which is that the sales tax shall be paid by the manufacturer, nevertheless both counsel argued the present matter accepting that the true purport of this judgment as deciding that the manufacturer having paid the tax, the contract between the manufacturer and purchaser did not permit the adding of the tax to the purchase price and I have discussed the matter on that basis.

conclusion opposite to that of the Department and had held that the suppliant could not pass on the tax to its purchaser under the contract between them. The letter continued to the effect that since the suppliant's rights as against the purchaser had been judicially determined adversely to the suppliant, the question had been determined by the Court having jurisdiction and so the contract fell expressly within section 10 of the Act amending the *Excise Tax Act*. Copies of the pertinent Court Order and Reasons for Judgment were enclosed.

The second letter in Appendix "D" is dated January 7, 1966, acknowledging a departmental letter of December 17, 1965. It states in part:

> ...As a result of that letter, Bertram finds itself in a very difficult situation, since the Supreme Court of Ontario has explicitly stated that the contract in question does not permit the tax to be added to the purchase price, while your solicitors appear to have taken a position which is directly in conflict with the order of the Ontario Court.
>
> . . .

Parenthetically speaking, I have some reservations as to the difficulty to which the suppliant refers to as finding itself in, bearing in mind the letter dated December 31, 1964, from Rio Algom Mines Limited to the suppliant, Appendix "B", refers to the circumstance that if the judicial interpretation sought should result in a refund of any sales tax under the contract, then the purchaser expects a refund forthwith. The judicial interpretation obtained did not result in the Department of National Revenue changing its attitude and no refund was forthcoming. The attitude of Rio Algom Mines Limited expressed in its letter of December 31, 1964, appears to be to the effect that it did not expect a refund of the tax paid to the suppliant under protest unless a refund was forthcoming from the Department to the suppliant from which it seems to follow that Rio Algom Mines Limited would assume the responsibility for the payment of the tax. However, it might be that following the decision of the Supreme Court of Ontario that the purchaser was not liable to the suppliant for the sales tax imposed and which decision determined the rights between those parties, Rio Algom Mines Limited changed its attitude and expects the suppliant to refund to it the amount so paid in any event. If such is the case then the

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suppliant's difficulty is readily apparent, but there has been no evidence to this effect and I do not think that this circumstance is material to the question I have to decide.

The third letter in Appendix "D" is from the suppliant to the Department of National Revenue dated January 20, 1967, enclosing a further payment of sales tax and simultaneously requesting its refund.

Appendix "E" is a letter dated December 13, 1965, from the Department of National Revenue to the suppliant, and which was written subsequent to the Order of the Supreme Court of Ontario dated July 2, 1965, (Appendix "C"). The pertinent part of this letter reads as follows:

> . . .
>
> I now have an opinion from the Department of Justice in this matter and it is the view of our Solicitors that the contract in question permits the tax to be added to the purchase price. This, in fact, has been done and, consequently, the refund that you are seeking cannot be approved.

Obviously, so far as the Department of National Revenue is concerned, the matter is concluded and the Department has decided that the requested refund of the sales tax collected from the suppliant would not be made to it.

Thereupon the suppliant applied to the Tariff Board pursuant to section 57 of the *Excise Tax Act* for a declaration that no sales tax was payable on the sale of the mill by the suppliant and that a refund of the tax paid be ordered to be made to the suppliant. The Tariff Board dismissed the appeal for lack of jurisdiction. Appendix "F" to the Agreed Statement of Facts is a copy of the Board's Reasons for Judgment.

At the trial counsel introduced as Exhibit 2, a photostatic copy of a letter dated January 29, 1965, written by the suppliant to the Department of National Revenue. In this letter the suppliant forwarded the amount of $340,000 as part payment of the sales tax. The suppliant did so under protest maintaining that no tax was owing and that it did so to prevent penalty interest arising if it should ultimately be determined that the tax was properly exigible. The letter also referred to the opinion of the officials of the Department of National Revenue that the contract for the sale of the steel mill dated April 15, 1963, between the suppliant and its purchaser which gives rise to the disputed amount was not a contract which qualified the suppli-

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ant for relief under section 10 of the 1963 amendments to the *Excise Tax Act*. The suppliant then stated in its letter that it intended to seek judicial interpretation in the Ontario Courts as to whether, under the terms of that contract, the suppliant had the right to pass on to Atlas Steels Company (the purchaser) the burden of sales tax imposed by the amendment to the *Excise Tax Act*, effective June 13, 1963. The letter concluded with the statement that if the result of such a determination should be that the suppliant did not have the right to demand payment of the sales tax from its purchaser that the suppliant then intended to apply for a refund of the amount paid and any subsequent payments similarly made by it.

There was no other evidence adduced.

As I have intimated before, the question which I must decide is whether the suppliant is entitled to a refund of the sales tax paid by it under the *Excise Tax Act* by virtue of section 10 of the Act to amend the *Excise Tax Act*, 1963 Statute of Canada, chapter 12. All essential elements required by section 10 to entitle the suppliant to a refund are present with one possible exception, which is the subject matter of the dispute between the parties hereto, and that is whether or not the contract of April 15, 1963, between the suppliant and Atlas Steels Company for the sale of a steel mill permits the suppliant to add the tax to the purchase price payable by the purchaser. If the language of the contract so permits, then the suppliant is not entitled to the refund it seeks, but if it cannot add the tax to the purchase price under the contract of sale, then the suppliant is entitled to the refund.

To reach that decision I must consider the contract to ascertain whether or not the suppliant is entitled to pass the tax on to the purchaser. Therefore the meaning of the contract, normally to be determined from the language employed in the contract itself, is vital to the determination of the issue herein.

Counsel for the suppliant submitted that I am absolved from interpreting the meaning of the contract because that has already been done for me in an adversary proceeding between the parties to the contract before the Supreme Court of Ontario, which is the Court having jurisdiction to determine the rights between those parties. With the

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proposition that the Supreme Court of Ontario is the Court having jurisdiction to determine the rights as between the parties to the contract and that its decision is binding on those parties, I am in complete accord. At one stage in the course of his argument counsel for the suppliant suggested that it was very debatable whether I had jurisdiction to consider the contract even collatorally to the issue which I must decide and that the only Court competent to interpret the contract would be the court having jurisdiction over the parties to the contract, which in the present instance would be the Ontario Court. In the circumstances of the present action, I am not called upon to decide that matter and accordingly do not comment thereon except to say that I have difficulty in appreciating how this Court can discharge its judicial functions if that be the law.

The only principles of which I know under which the judgment of the Supreme Court of Ontario might be binding upon me are those commonly called *res judicata* and *stare decisis.*

A decision as to a right, question, or fact distinctly put in issue, as was the interpretation of the contract of April 15, 1963, between the suppliant and Atlas Steels Company, and which was directly determined by the Supreme Court of Ontario, a Court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties. Even if the subsequent suit is for a different cause of action, the right, question or fact once so determined must, as between the parties, be taken as conclusively established so long as the judgment in the first suit remains unmodified. An adjudicated matter is forever binding between the parties.

It was suggested, during argument, that the respondent had ample notice of the impending action before the Supreme Court of Ontario so that it could have applied to become a party thereto. On the other hand there was some question whether the respondent was entitled to be joined under the Rules of Practice of the Supreme Court of Ontario. However I consider such circumstances to be immaterial to the decision of the question before me. The simple fact is that the respondent was not a party to the

proceedings before the Supreme Court of Ontario and its decision did not resolve the issue between the suppliant and the respondent.

For the reason that the respondent was not a party to the action in which the judgment of Landreville J. was given the doctrine of *res judicata* cannot be here invoked, nor does counsel for the suppliant invoke it.

Neither does he seek to invoke the principle of *stare decisis*. One of the most elusive areas of the doctrine of precedent has been the respect to be accorded by a single judge to the opinion of another judge of equal jurisdiction. The view expressed in Halsbury[4] is that there is no common law rule compelling one court to abide by the decision of another court of co-ordinate jurisdiction. Therefore I am not bound by the decision of Landreville J.

The argument of counsel for the suppliant, as I understood it, was threefold.

First he submitted that the judgment of Landreville J. is the fact which determines the rights between the parties to that action and that the refund under section 10 of the Act to amend the *Excise Tax Act* depends upon the rights as between those parties as so determined. In other words he says that section 10 must be interpreted in the light of the fact that the suppliant has been found not to be entitled to pass the sales tax on to the purchaser under the contract between them by a court having the jurisdiction to so determine in a non-collusive adversary action before it. He went on to say that the judgment of Landreville J. is conclusive of the fact that the incidence of the tax falls on the vendor from which it follows that the refund must be forthcoming to the suppliant from the respondent.

Because of the view I take of the matter, it is not necessary for me to express an opinion on this submission.

Secondly counsel for the suppliant submitted that even if the decision of the Provincial court is not determinative and conclusive of a material fact this Court should abide by the decision of another court of co-ordinate jurisdiction, not because of the principle of *stare decisis*, but because of judicial comity.

Thirdly, he submitted that the interpretation of the contract by Landreville J. was right in any event.

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[4] 3rd. ed. 1958, vol. 22, pp. 801-802.

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With respect to the third submission on behalf of the suppliant, I must say that if the matter had come before me initially, untrammelled by the judgment of Landreville J., I would have come to a conclusion contrary to his. Considering the contract as a whole and what I conceive to be the fair and plain meaning of the language of paragraph 18(*a*) thereof, I would have concluded that the parties thereto contemplated that any federal sales tax imposed by law would be the subject matter of a price adjustment to be borne by the purchaser.

At the time the contract for the sale of the steel mill was signed by the parties thereto, the mill was exempt from any federal sales tax whatsoever. However in accordance with the contract, the mill would not have been delivered until approximately a year later and because of that interval in time it is inconceivable to me that the parties were oblivious of the possibility that a federal sales tax might be imposed prior to delivery of the mill. If such were not the case it would not have been necessary to include a paragraph such as 18(*a*) in the contract. The obvious purpose of paragraph 18 is to provide against contingencies and uncertainties and, in my view, the imposition of a federal sales tax was such a contingency provided against. By paragraph 15 the purchase price was a specified amount not subject to escalation or change for any cause except as outlined in paragraph 18. Since the mill was exempt from tax at that time the only possible change that could have been contemplated by the parties would be an increase in the purchase price consequent upon the imposition of a federal sales tax. It could not be a decrease but only an escalation.

Paragraph 18 is headed "Price Adjustment" and for convenience I repeat the language of 18(*a*) here.

> The price for the Mill shall be subject to the following adjustments:
>
> (*a*) the amount of any Federal or Provincial sales tax imposed by law;

I cannot agree with Landreville J. that "the words imposed 'by law' make reference and contemplate the tax which might be in existence at that time". First, because there was no federal sales tax imposed by law at that time, secondly, because the words "imposed by law" is the adjectival use of a participle modifying the word "tax" and

thirdly, because of the inclusion of the word "any". It accordingly seems clear to me that the language employed contemplates a possible future tax being borne by the purchaser by way of an increased price.

However this Court has generally taken the position that judgments of courts of equal or co-ordinate jurisdiction should be followed in the absence of strong reasons to the contrary.

In *Canada Steamship Lines Ltd. v. M.N.R.*[5] the President of this Court did not feel himself free to consider an approach to the disposition of the problem there before him different from the approach adopted in two previous decisions by other judges of this Court. He said at page 259:

> ...I think I am bound to approach the matter in the same way as the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say bound, I do not mean that I am bound by any strict rule of *stare decisis* but by my own view as to the desirability of having the decisions of this Court follow a consistent course as far as possible.

While I fully appreciate that the President was addressing his remarks to decisions of other judges of the same Court, nevertheless, I believe that his remarks apply with equal force to the decisions of another court of co-ordinate jurisdiction.

In considering what "strong reason" would justify a departure from a decision of a judge of the same Court or of a court of co-ordinate jurisdiction, McRuer, C.J. H.C. had this to say in *R. v. Northern Electric Co.*[6]:

> I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular judge.

Landreville J. reached his decision after the matter was fully argued before him and to which arguments he had given mature consideration. His decision was not *per incuriam* nor was it the result of any slip or inadvertence. So far as I can see no additional or different evidence was adduced before me, nor was any authority cited to me of

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[5] [1966] C.T.C. 255.

[6] [1955] 3 D.L.R. 449 at 466.

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which Landreville J. was not aware. Therefore there is no compelling reason for me to depart from his decision that under the terms of its contract the suppliant was liable to pay the federal sales tax imposed by the *Excise Tax Act* and could not thereunder be reimbursed by its purchaser by way of increased purchase price even though I might well have reached a different conclusion if the matter had come before me originally for the reasons I have outlined above. I accept his conclusion with the realization that I am not bound to abide by it upon the rule of *stare decisis* but rather upon what Brett M.R. described in the *Vera Cruz*[7] as "comity among judges". Such adherence is most advantageous for without it the administration of justice would become disordered, the law would become uncertain and the confidence of the public undermined. (In so stating I am adopting the language of Rinfret, C.J.C. in *Woods Mfg. Co. v. King*[8], commenting on the benefits of the principle of *stare decisis* which comments I believe to be applicable to judicial comity as well.)

It therefore follows that the suppliant is entitled to have refunded to it the sum of $451,735.48.

There remains the question whether the suppliant is entitled to interest at the rate of 5 per cent per annum on $340,000 paid by it on February 1, 1965, $64,770.65 paid by it on August 3, 1965 and $46,964.83 paid by it on April 25, 1966, from those respective dates to the date of judgment herein as prayed for in its petition of right. Section 10 of the Act to amend the *Excise Tax Act* contemplates a refund of the tax paid where an applicant complies with the requirements therein outlined. There is no reference to interest being payable on such refund. I am aware of no other statutory enactment, nor was any cited to me, which would authorize the payment of interest. Accordingly in the absence of statutory authority I do not feel justified in purporting to exercise a discretion by ordering the payment of interest.

The suppliant is therefore entitled to recover from Her Majesty the Queen the sum of $451,735.48 being part of the relief sought by its petition of right herein, and costs to be taxed.

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[7] (1884) 9 P.D. 96 at 98.

[8] [1949] Ex. C.R. 9; [1951] 2 D.L.R. 465 at 471.