

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 14-17, 21-24 and October 5-8, 13-15, 2020, at Toronto,
Ontario and virtually on July 13-15, 2021

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant: David Douglas Robertson
Jonathan Ip and
Brittany Rossler

Counsel for the Respondent: Craig Maw and
Tony C. Cheung

JUDGMENT

The appeals from the Reassessments dated June 23, 2005, made under the *Excise Tax Act* (Canada) for the Appellant's January 1, 1999 to February 29, 2000 GST monthly reporting periods are allowed in accordance with the attached Reasons for Judgment, and the Reassessments are vacated.

Costs are awarded to the Appellant. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Appellant shall have a further 30 days to file written submissions on costs and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

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Signed at Ottawa, Canada this 29th day of August 2023.

“Henry A. Visser”

Visser J

Citation: 2023 TCC 130
Date: 20230912
Docket: 2012-4371(GST)G

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Visser J.

OVERVIEW

[1] LBL Holdings Limited (“LBL”) at all relevant times was a subsidiary of Sobeys Group Inc. (“Sobeys”) and carried on business as a wholesaler, including of tobacco products. LBL was formerly know as Lumsden Brothers Limited (“Lumsden”) and changed its name in January 2000 to LBL Holdings Limited.¹ During the period between January 1, 1999 and February 29, 2000, LBL sold \$97,715,258 of tobacco products (the “Tobacco Products”) which were delivered on the Six Nations of the Grand River Territory (the “Six Nations Reserve” or the “Reserve”), which is a reserve within the meaning of section 87 of the *Indian Act*.

[2] LBL’s positon is that it sold the Tobacco Products to Roberta MacNaughton, and other members of her family (collectively, the “MacNaughtons”), who carried on various retail and wholesale businesses on the Six Nations Reserve. As the MacNaughtons are status Indians registered under the *Indian Act* and the Tobacco Products were delivered on the Six Nations Reserve, LBL and the MacNaughtons’ position is that the sale of the Tobacco Products by LBL to the MacNaughtons was exempt from GST pursuant to section 87 of the *Indian Act*.

¹ “LBL” and “Lumsden” will be used interchangeably to refer to the Appellant herein.

[3] Although the Minister of National Revenue (the “Minister”) agrees that delivery of the Tobacco Products occurred on the Six Nations Reserve, the Minister’s position is that LBL did not sell the Tobacco Products to the MacNaughtons, but rather sold the Tobacco Products to unidentified third parties who were not status Indians (the “Customers”) in exchange for payments made by the Customers to LBL (the “Transactions”). The Minister also alleges that the MacNaughtons were compensated for their involvement in this scheme through volume rebates given to the MacNaughtons on their purchases from LBL. As a result, the Minister’s position is that the sale of the Tobacco Products by LBL to the Customers was subject to GST, which LBL failed to collect and remit.

[4] As a result, the Minister reassessed LBL and issued Notices of Reassessment (the “Reassessments”) dated June 23, 2005 under the *Excise Tax Act* (the “ETA”)² whereby the Minister reassessed LBL in respect of its 14 monthly GST reporting periods (the “Periods”) between January 1, 1999 to February 29, 2000. In reassessing LBL’s net tax for those Periods, the Minister made upward adjustments to net tax in respect of uncollected GST totalling \$6,840,068.03. The Minister also assessed a penalty of \$3,220,980.03 and interest of \$1,819,147.94 pursuant to subsection 280(1) of the *ETA* (as it read at the applicable time), and penalties totalling \$1,710,017.01 pursuant to section 285 of the *ETA*. The total amount reassessed equals \$13,590,213.01. All of the Reassessments were made more than four years after the applicable GST returns were filed.

[5] For the reasons that follow, I agree with LBL’s position and as a result it is my view that LBL’s appeal should be allowed.

ISSUES

[6] The issues in this appeal as raised by the parties are as follows:

- (a) Were the Reassessments statute barred pursuant to section 298 of the *ETA* or was the Minister permitted to reassess pursuant to paragraph 298(4)(a) of the *ETA* on the basis that LBL had made a misrepresentation that is attributable to LBL’s neglect, carelessness or wilful default in making and filing its GST returns for the Periods?
- (b) Was LBL required to charge and collect GST on its sale of the Tobacco Products? In this respect, the issue is whether the MacNaughtons were the

² R.S.C., 1985, c. E-15, as amended. All statutory references herein are to the *ETA*, unless specified otherwise. References herein to GST include any HST exigible pursuant to the *ETA*.

recipients, as defined in subsection 123(1) of the *ETA*, of the Tobacco Products supplied by LBL during the Periods.

- (c) Does a penalty under paragraph 280(1)(a) of the *ETA* apply, and if so, was it properly calculated and did LBL act with due diligence in not remitting GST in respect of the transactions so that LBL is not liable for a penalty under paragraph 280(1)(a) of the *ETA*?
- (d) Whether this Court has jurisdiction over the application of CRA's GST/HST Memoranda Series 16-3-1 which provides the Minister with administrative guidelines for cancelling or waiving a portion of a section 280 penalty?
- (e) Does a penalty under section 285 of the *ETA* apply? In this respect, the issue is whether LBL knowingly, or under circumstances amounting to gross negligence, made, participated in, assented to or acquiesced in not reporting the GST/HST in respect of the transactions in its GST returns filed for the Periods.

[7] I note that the second issue listed above is the primary issue in this appeal. In this respect, I note that if I find that the MacNaughtons were the recipients of the supplies of the Tobacco Products at issue in this appeal, LBL would not have been required to collect GST on the supplies of the Tobacco Products because the sale of the Tobacco Products would have been exempt from GST pursuant to section 87 of the *Indian Act*.

[8] Having considered all of the evidence, it is my view that the evidence establishes, on a balance of probabilities, that the MacNaughtons were the recipients of the supplies of the Tobacco Products sold by LBL during the Periods, and that as a result the sale of the Tobacco Products was exempt from applicable GST pursuant to section 87 of the *Indian Act*. It is my view that this is determinative of all of the issues raised in this appeal, and in particular that the other issues raised are moot as a result.

PRELIMINARY MATTERS

[9] There were a number of interlocutory motions in this matter. I will describe two of them that are relevant to this appeal. On September 25, 2014, Justice Graham of this Court issued an Order striking the Respondent's Reply in its entirety, with leave to amend, on the basis that it disclosed no reasonable grounds

for opposing the appeal. The Respondent had not plead any facts in the Reply but rather had relied solely on assumptions of fact. As noted by Justice Graham in a subsequent Order in this appeal dealing with a further motion to strike portions of the Respondent's Fresh Reply, "[the] Minister may not rely upon assumptions of fact when reassessing a statute barred period."³ As a result, there were no assumptions of fact in the Amended Amended Fresh Reply to Amended Notice of Appeal in this matter.

[10] On September 14, 2020, I issued an Order under Rule 135(2) of the *Tax Court of Canada Rules (General Procedure)* directing that the order of proceedings at the hearing of this appeal would be changed to the effect that the Respondent would present his case first. This Order was issued in response to a motion brought by the Appellant, on the basis, *inter alia*, that the Respondent bears the burden and must establish the facts that he was entitled to assess beyond the four-year limitation period set out under paragraph 298(4)(a) of the *ETA* because all of the Periods that were reassessed by the Minister in this appeal were otherwise statute barred. I note that the Minister also has the onus with respect to the gross negligence penalties which were assessed in this case. As an aside, I further note that the circumstances in this appeal which lead to the issuance of this Order are somewhat unique.

EVIDENCE

[11] The parties collectively called the following 15 witnesses during the hearing of this appeal:

Witnesses for the Respondent:

- (a) Kim Horoky (Madellana), a former LBL employee;
- (b) Kim Krick, a former LBL employee;
- (c) David McDowell, a former LBL employee;
- (d) Gino Vecia, a former LBL employee;
- (e) John Gardner, a former President of LBL;
- (f) Otis Henry, a former LBL employee;

³ LBL Holdings Limited v. R, 2015 TCC 115, at paragraph 4.

- (g) Roberta MacNaughton, a business woman;
- (h) Max Seymour, a former LBL employee;
- (i) Brian Blenkarn, a former LBL employee;
- (j) Peter Sgarbossa, a former LBL employee;
- (k) Kim McCulloch (Sadler), a former LBL employee;
- (l) John Sura, a former Brinks Canada employee;

Witnesses for the Appellant:

- (m) Peter Kerr, a Sobeys employee;
- (n) William Brown, a CRA employee; and
- (o) James Gilbert, a former CRA employee.

[12] The parties did not submit a partial agreed statement of facts. They also did not submit any joint books of documents. The parties did, however, each submit extensive documentary evidence which is summarized in a Joint Exhibit List submitted by the parties.⁴

[13] The parties also submitted extensive discovery read-ins.⁵

[14] Following is a summary of the evidence submitted by the parties in this appeal.

(i) Facts Relied upon by the Minister as set out in the Amended Amended Fresh Reply to Amended Notice of Appeal

[15] In reassessing LBL, the Minister relied on the following facts as set out in paragraph 12 of to the Amended Amended Fresh Reply to Amended Notice of Appeal (the “Reply”):

⁴ See Joint Exhibit List dated October 30, 2020.

⁵ See Exhibits A-11 and R-9.

- a) the appellant is a wholly owned subsidiary of Sobeys Group Inc. (“Sobeys”);
- b) the appellant is a food and tobacco products wholesaler;
- c) the appellant is registered for GST since January 1, 1991 and is a monthly GST filer;
- d) during the Periods, the appellant sold tobacco products (the “Tobacco Products”) to persons who were not status Indians (the “Customers”) in exchange for payments made by the Customers to the appellant (the “transactions”);
- e) the appellant recorded proceeds of \$97,715,258.00 for the sales of the Tobacco Products;
- f) the appellant did not collect or report any GST collectible in respect of the transactions;
- g) the appellant represented that status Indians, namely Roberta MacNaughton and members of her immediate family (the “MacNaughtons”), purchased the Tobacco Products from the appellant and that the Customers purchased the Tobacco Products from the MacNaughtons (the “scheme”);
- h) Roberta MacNaughton is a status Indian registered under the *Indian Act*;
- i) Roberta MacNaughton is a resident of, and operates the Grandview Variety store (a retail business) on, the Six Nations of Grand River Territory (the “Reserve”) which is a reserve within the meaning of s. 87 of the *Indian Act*;
- ...
- m) the MacNaughtons were compensated for their involvement in this scheme through volume rebates given to Roberta MacNaughton on her own purchases of goods from the appellant;
- n) an alphanumeric code was used to identify each Customer;
- o) Customers faxed to Roberta MacNaughton their orders for the Tobacco Products using the appellant’s standard order form which she re-faxed to the appellant without alteration;
- p) on limited occasions, the Customers placed their orders directly with the appellant;

- q) for each delivery, the appellant packaged the Tobacco Products in as many packages as there were orders received with each package identifying the Customer who ordered the products;
- r) there were as many invoices issued by the appellant as there were Customers involved in a delivery;
- s) the Tobacco Products were transferred from the appellants delivery vehicle directly into the Customers vehicles;
- t) the transfers took place on the reserve;
- u) the transfers did not occur until the appellant was satisfied that it received cash payment from the Customers;
- v) Customers dealt with the appellant directly with any shortages;
- w) The appellant received returned goods directly from Customers and provided credit notes directly to these Customers;
- x) The scheme allowed the appellant to increase sales volume of tobacco products and receive enhanced volume rebates from its suppliers of tobacco products (i.e. the manufacturers). It also allowed the appellant to have significant cash on hand to finance its operations;
- y) The appellant knowingly participated in the scheme, the purpose of which was to give the false appearance that a status Indian was involved in the transactions as a tobacco products wholesaler with a view to avoiding the collection and remittance of GST; and
- z) The GST collectible by the appellant in respect of the transactions, if a status Indian was not the recipient of the Tobacco Products, amounts to \$6,840,068.03 (i.e. \$97,715,258 x 7%).

[16] As previously noted, these pleaded facts were relied upon by the Minister in reassessing LBL but are not assumptions of fact and could not be relied upon by the Minister at the hearing of this appeal in the same way as assumptions of fact. They are, however, useful to more fully understand the basis upon which the Minister reassessed LBL.

(ii) Kim Horoky's Testimony

[17] The Respondent called Kim Horoky as a witness. She was formerly known as Kim Madellana. She was a Lumsden employee working in various positions including accounts receivable and worked on Lumsden's Grandview account. She

is currently a part time bookkeeper. She has a grade 12 education and has no post secondary education.

[18] Ms. Horoky testified in a straightforward and forthright manner, and I found her to be a credible witness.

[19] Ms. Horoky started working at Lumsden in approximately 1995 in accounting. She initially worked part time in accounts payable and later became a full time employee in accounts receivable at Lumsden in approximately 1996. She later worked in the Lumsden warehouse dealing with inventory. Ms. Horoky left Lumsden on April 15, 2011 when it closed its operations. She worked at the 79 Easton Road, Brampton location of Lumsden.

[20] Ms. Horoky counted cash for Lumsden first at its offices and later at Grandview on the Reserve in 1999. She was asked to count cash on the reserve and was advised by Gino Vecia that Lumsden would lose the Grandview account if she did not and that 28 people would lose their job. Gino Vecia was manager of sales at the time she believed.

[21] When working for Lumsden at Grandview, she would get up at 3:45 a.m. and travel to her Lumsden office to get paperwork and then travel to Grandview on the Reserve, often stopping at Tim Hortons on each of those legs to get coffee. She would get to the Reserve by 5:00 a.m. She would be let into the Grandview building by Roberta MacNaughton or Terry Squire. There were two large rooms which were open concept which she worked in. She brought in her own supplies and the paperwork from Lumsden which included a breakdown of Grandview's customers that were coming. Money was dropped into the room through something like a night depository box at a bank. The money was vacuum packed into bags. She would pick up and count the cash using a money counting machine, and make out a deposit slip and put the money into Brinks bags and put it into the safe at Grandview and reconcile to the Lumsden paperwork. She was alone when she put the money into the Brinks bags. There was a CCTV monitor in the room. Mostly she would know a customer arrived when there was a thump in the room from the cash dropped into the room, but the CCTV monitor could also alert her.

[22] She was mostly gone from Grandview by 9:00 a.m., when she would return to Lumsden's office where she would work until about noon or 1:00 p.m. She had no discussion with the customers who dropped off the cash at Grandview. She would match the bag of cash with a corresponding order based on the customer ID letters on the bag of cash and on the paperwork.

[23] Once she received the cash and reconciled it with the corresponding Lumsden paperwork, she would advise the truck driver by phone to release the tobacco products to the corresponding Grandview customer.

[24] Ms. Horoky also testified during her direct testimony that:

- (a) She started counting cash at Grandview on the Reserve in July or August 1999 and did so until February or March 2000;
- (b) There was a security person provided by Lumsden at Grandview;
- (c) Lumsden's invoices made out to Nickel and Dime #3 with Customer number 2662 or 12662 was for Grandview and was for cigar products;
- (d) Lumsden's account number 12528 was also for Grandview and was for cigarette products;
- (e) Lumsden switched accounting systems in approximately July 1999;
- (f) The alphanumeric number on the Lumsden invoices referred to Grandview's customers of the tobacco products and were issued based on instructions received from Grandview;
- (g) Gino Vecia was the salesperson responsible for the Grandview account;
- (h) She would not release tobacco products to Grandview's customers without receiving cash on hand and reconciling the cash received to a purchase order/invoice;
- (i) The reason she started counting cash at Grandview was because they did not do it at Lumsden's building any longer and because Roberta MacNaughton's mother was sick, and Roberta MacNaughton therefore needed help to serve Grandview's customers;
- (j) If Roberta MacNaughton had a problem, she would call Ms. Horoky or Gino Vecia;
- (k) Zelda MacNaughton was Roberta MacNaughton's sister and was also a customer of Lumsden;
- (l) Anne MacNaughton was Roberta MacNaughton's mother;
- (m) Grandview was Lumsden's largest tobacco account at that time;

(n) She did not recall why Lumsden stopped selling to Grandview and that she did not recall any security incidents; and

(o) Credit requests may be to cancel an invoice or to correct errors, such as when tobacco was short shipped (a shortage). They would be made at the request of Grandview, and may be called in by Roberta MacNaughton or written up by Kim Horoky when she was at Grandview. She would often take the forms back with her to Lumsden's office for processing.

[25] On cross-examination, Kim Horoky testified that:

(a) She did not do order processing for Grandview while she worked at Lumsden;

(b) Grandview was Lumsden's customer and had three accounts with Lumsden. Account number 12528 was for yellow band cigarettes, 12662 was for cigars and loose tobacco and 12539 was for Grandview's convenience store;

(c) She worked in banking for 25 years before she began working at Lumsden. She started as a teller in 1976 and also worked in daily verification of deposits. She stopped working full time for the bank when her position was moved to Toronto. She subsequently continued working part time for about an additional five years at the bank servicing bank machines, which included filling them with cash or paper, as required;

(d) Lumsden was a medium sized company which sold products to many customers, including Petro Canada, Pioneer gas bars, Foodland, Sobeys, Cash and Carry Stores, Quickway, Cottage Country and many convenience stores;

(e) Lumsden was paid in cash or by cheque, but not by credit card. The location she worked at was 79 Easton Road, Brantford. Customers would generally not walk into that location to pay their bills. They would normally mail their cheques or send them with the truck drivers;

(f) Lumsden was a 24/7 operation. Orders would generally be placed in the morning, because customers would want their deliveries early the next day before their stores opened. Delivery trucks would be loaded at night, and delivery would be done early the next morning before stores opened. Once the trucks left the warehouse early in the morning for deliveries, the warehouse would receive shipments of product into the warehouse;

- (g) Lumsden's bond room was a secure facility inside the Lumsden warehouse that held high value items, such as tobacco, drugs, and confectionaries. Kim Horoky later worked in the warehouse. When an order was received for goods stored in the bond room, she would take a pick list and a cart and put the requested items into the cart. Often, a second person would verify the order before it was sent for packing and shrink wrapping. Lumsden would have Roberta MacNaughton's orders picked and packed the same as all of their other customers;
- (h) She met Roberta (Bobbi) McNaughton and Terri Squire after they had opened their business called Grandview Variety on the Reserve. They would come into Lumsden each day to make payments in cash. At that time they had to pay within 24 hours of delivery. The amount of cash paid was often in excess of \$100,000 per day. She counted the cash using a cash counting machine. Bobbi and Terri would wait in the room while it was counted. She was not sure, but likely they received some sort of receipt or their invoices were marked paid to show the payment. The payments would be posted to the Grandview accounts the same day;
- (i) The employees at Lumsden were concerned about so much cash coming into the Lumsden office on a daily basis, as it posed a security risk. Eventually, Bobbi and Terri stopped bringing the cash to the Lumsden office and alternative arrangements were made. Initially, Roberta MacNaughton would tender cash payment to Brinks. Grandview would get the cash from its customers, and put the money into Brinks bags, deposit slips would be filled out and put into the Brinks bags and the bags of cash and slips were put into a drop safe which was at Grandview. When Brinks showed up, Bobbi would sign a form and the Brinks driver would sign the form and Bobbi would fax the form to Lumsden to show the amount of the payments tendered via Brinks. Payments tendered to Lumsden by Roberta MacNaughton were net of any rebates Lumsden owed her as well as net of any credit notes that were owed to her by Lumsden. She did not know if Roberta MacNaughton gave credits to her customers;
- (j) Later she was asked to work at Grandview for Lumsden to assist Roberta MacNaughton. Before going to Grandview each morning, she would go to the Lumsden office to pick up some paperwork in an envelope, which was like a spreadsheet with the totals of the amounts she had to collect from Grandview. When she arrived at Grandview, she would ring the bell, and she would be let in by Roberta MacNaughton, Terri Squire or Eleanor Johnson. The Grandview door would be locked and she would go

into an office in the back of the store. It was a locked office. It had a night deposit box built into the side of the store, where Grandview customers would drop off their cash into the slot. There was also a drop safe in the room, which was like a mail box. There was a top chamber into which cash bags were deposited, and the bottom was inaccessible;

- (k) When cash was deposited into the night deposit box, she would open the cash bags and count the money and take the amount owing for Lumsden and put it in a Brinks bag. If there was extra, it would not be counted and it would be left in a drawer for Roberta MacNaughton. If there was a shortage, she would advise Roberta MacNaughton or Terri Squire and Grandview would deal with the shortage;
- (l) Roberta MacNaughton and Terri Squire were nice people who ran the Grandview business in a well organized manner. Roberta MacNaughton was also demanding and demanded top notch service from Lumsden. If there were problems with the tobacco orders she would advise Kim Horoky immediately;
- (m) At Grandview she prepared deposit slips and put money into the Brinks bags and put 2 copies of the deposit slips into the Brinks bag. She would also record the bag serial number in a Brinks log book which stayed at the Grandview office. She was not there when Brinks picked up the cash. Sometimes Roberta MacNaughton might make other cash deposits into the drop safe. If any extra cash funds were received they were credited to Grandview;
- (n) She had no access to the cash deposited into the drop safe at Grandview; and
- (o) Her job was to collect payment from Grandview. She did not have any interaction with Grandview's customers, except for the bags of cash they dropped into the Grandview back office. Once payment was received, she would advise the truck delivery driver to release the tobacco products to Grandview.

[26] Overall, it is my view that Kim Horoky consistently described Grandview as being Lumsden's client and the Customers as being Grandview's clients. She also testified that Lumsden issued its invoices to Roberta MacNaughton (carrying on business as Grandview or Nickel and Dime) and that she was responsible for paying Lumsden's invoices for the Tobacco Products.

(iii) Kim Krick's Testimony

[27] The Respondent called Kim Krick to testify at the hearing of this appeal. She is currently a finance officer. She worked for Lumsden in accounts receivable at their 79 Easton Road location, including during the years 1999 and 2000. She had previously worked at TD bank for approximately 11 years and at BJ Game, which was a casino company. Kim Krick testified in a straightforward and forthright manner, and I found her to be a credible witness.

[28] Kim Krick's duties in accounts receivable at Lumsden included working on the ledger of accounts as well as collections. She worked on approximately 400 accounts. There were also other accounts receivable clerks who worked on other accounts. Ms. Krick later became the assistant credit manager and the acting credit manager from time to time in 1999 and 2000. Her responsibilities would include setting up new accounts and negotiating issues with Lumsden customers. Her position ended when Lumsden closed the location she worked out of and transferred her position to Toronto. She stayed an extra five months in a merchandising position. She left Lumsden after working there approximately 11 years.

[29] Kim Krick has a grade 12 education and took some post secondary courses through a university, but does not have any post secondary degrees.

[30] Kim Krick testified that Grandview had three main accounts with Lumsden which were 12528, 12662 and 12364. 12528 was for cigarettes, 12662 was for cigars and other specialty tobacco products, and 12364 was the Grandview grocery account. She did not know what the accounts were for any of the other MacNaughtons.

[31] Kim Krick testified that she would get to the Lumsden office at approximately 7:00 or 8:00 a.m. each day. She would open the mail and allocate cheques or other payments received to accounts and then send them to a clerk to key them into the appropriate accounts. She would also run a report from the system of what accounts were outstanding and how many days. She did work for hundreds of accounts. She would do collection calls and reconcile accounts with payments received. She would also negotiate with clients regarding discrepancies or payment terms. Generally accounts had set payments terms, with 7 days, 14 days or 21 days being common. Those were set by the credit manager.

[32] Kim further testified that Lumsden sold groceries and cigarettes to customers. Customers would phone or fax in orders to customer service. There were approximately 8 to 10 people in customer service. The orders would be keyed

into the system, which would generate a pick list and an invoice, which also served as the pack list. Orders would then be picked by a person in the warehouse and shrink wrapped on a skid/pallet together with the invoice/pack list. Customers would see the invoice upon delivery.

[33] Kim Krick further testified that:

- (a) Some Lumsden customers had COD accounts, or some would pay by cheque upon delivery. This would be based upon a credit check. New customers would fill out a credit application and after it was processed, the customer would be told what their terms would be;
- (b) The Grandview accounts covered groceries, cigarettes and speciality tobacco products. During 1999 to 2000, the Grandview accounts were generally COD – cash before drop. She is not sure why those terms applied to those accounts, as those terms were in place before she started to work on the Grandview accounts at Lumsden;
- (c) There were different procedures to collect at Grandview at different times. At one time, someone from Lumsden went to Grandview in order to help count and process the cash payments. She was however not sure of the process;
- (d) She was involved when there was a drop box at the Lumsden building, and she was involved in the cash counting at that time. Bobbi or Terri would drop off a bag of cash into a drop box or safe at Lumsden, and she would verify the amount of cash received and contact Brinks to pick it up. That process was unique to the Grandview account. She would also fill out deposit slips and a Brinks form for each cash deposit slip. After the funds were deposited, she would verify the deposit and instruct an accounts receive clerk to update the Grandview account. For a period of time the clerk was Kim Madellana;
- (e) Other small customers would also sometimes pay in cash which the drivers would often collect and bring back to the Lumsden office;
- (f) Because of safety concerns with having large amounts of cash being deposited at Lumsden by Grandview, the process did not last long. Grandview would deposit very large amounts of cash with Lumsden frequently, but she was not sure if it was daily. Cash amounts could be as

high as \$400,000 or \$500,000. Kim Madellana also helped count cash at Lumsden;

- (g) If Grandview did not submit enough cash payment she would contact Grandview to make up the shortfall. Sometimes the difference was reconciled with rebates;
- (h) Lumsden sold tobacco to other accounts on the Reserve, but she did not deal with them;
- (i) Later cash was picked up at Grandview because it was not safe to have such large volumes of cash at Lumsden. As a result the process was changed so that Brinks would pick up the cash at Grandview. Grandview would bundle the cash and Brinks would pick it up and verify the amount and sign for it. She believed that a Lumsden employee (Kim) may have been involved in the process at Grandview for a period of time, but she was not sure what Kim did at Grandview;
- (j) Lumsden keyed the Grandview orders into their system and packaged them based on instructions it received from Grandview. They did that for other customers as well;
- (k) She recalled that a Lumsden delivery truck had been hijacked and the drivers had been tied up in the back of the truck, but she did not know of any other details;
- (l) It was also not unusual for Lumsden to get cheques or bank drafts from Grandview;
- (m) Lumsden's large accounts for Grandview (2528 and 2662) were COD. The smaller grocery account may have been net 7 days, but she was not sure. She was not sure where Grandview sold its tobacco products;
- (n) Grandview operated under the names "Grandview Variety" and also "Nickel and Dime";
- (o) Before accepting a business or person as a customer, Lumsden gathered information about the person or business and did a bank and credit check on them. Lumsden also only took orders and dealt with the person(s) authorized by the client to deal with each particular account;
- (p) She primarily dealt with Bobbi (Roberta MacNaughton) if there were any problems with the Grandview account, but sometimes she also dealt with

Terri Squire. In the Grandview customer profile in Lumsden's accounting system, Bobbi (Roberta MacNaughton) was the contact person on all of the Grandview accounts. Because of the delay in processing credit requests and rebates, which were sometimes taken in advance by Roberta MacNaughton, the Grandview account did not always zero out, so there may be a balance owing from time to time;

(q) Grandview's smaller accounts were also paid in cash often; and

(r) Only Bobbi (Roberta MacNaughton) or Terri Squire at Grandview could place an order on the Grandview accounts with Lumsden.

[34] Overall, it is my view that Kim Krick consistently described Grandview as being Lumsden's client and that she only dealt with Roberta MacNaughton and Terri Squire regarding matters relating to the Grandview accounts.

(iv) David McDowell's Testimony

[35] The Respondent called David McDowell to testify at the hearing of this appeal. Mr. McDowell testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time and the vagaries of age, his recollection of some facts and events during the periods under appeal was understandably vague or lost.

[36] Mr. McDowell testified that he is a retired truck driver. He worked at Lumsden at 79 Easton Road as a truck driver for approximately 20 years starting in September 1986 and finishing in about 2005. He then continued working for Lumsden in their warehouse until about 2011. He made deliveries for Lumsden to Grandview Variety as a truck driver in 1999 to 2000.

[37] Mr. McDowell testified that if he was delivering to the Reserve, he would start at about 2:30 or 3:00 a.m. He also delivered for Lumsden to other customers all over Ontario. Once he arrived at the warehouse, he would check in, check the truck, check the load to ensure it was accurate, and then load it onto the truck. For Grandview, loads were packed by Grandview customer and put on separate skids (for each customer of Roberta MacNaughton). He did not remember very many details regarding the paperwork involved in the sales.

[38] Mr. McDowell further testified that:

- (a) He was not sure what Kim Madellana did at Grandview;
- (b) At Grandview, he would drive down a path or lane next to Roberta MacNaughton's house near the store. He would open up the truck and deliver cases to the drivers of the vans who came to pick up the product once they were advised to release the tobacco products. He did not know who the pickup drivers were. They drove commercial vans, like a Ford van. His helper would receive a call from someone telling them to release the product to the pick-up drivers. He did not know if the person calling was Roberta MacNaughton or Kim Madellana and he does not know what the helper was told;
- (c) It was usually the same 5 or 6 pick-up drivers. Sometimes Roberta MacNaughton or Terri Squire were there or were always close by. The drivers would sometimes use the washroom at the Grandview store in the back;
- (d) One of the van pickup drivers was a Korean man, one was a Chinese man, one was a woman, and one was an Arab man. Both he and the helper and the pickup drivers would count the product as it was loaded into the vans. Sometimes the pickup driver would note if there was a shortage. Any problems were dealt with by Roberta MacNaughton and the warehouse. Mr. McDowell testified that he would just sign off on any shortage;
- (e) After the deliveries were made to Grandview, he and the helper would go into Grandview and Roberta MacNaughton would sign off;
- (f) Subsequently a barn was built where the Grandview tobacco deliveries were made;
- (g) There was a hijacking of a truck at Lumsden. He was away at the time. He was told the details by Jim, another driver, who is now deceased;
- (h) When he made deliveries to other customers, he did not deal with the owners of those businesses. He dealt with the person at the receiving door, and did not know who they were. At Grandview, Roberta MacNaughton or Terri Squire would sign in each case. He could not recall if the van drivers ever signed;
- (i) He would also deliver to Middleport Plaza and Sour Spring Plaza when making deliveries to Grandview Variety on the Reserve;

- (j) He was not involved in negotiating the contract of purchase and sale with respect to the tobacco delivered to Grandview; and
- (k) He would leave tobacco products in the Grandview barn if a van driver did not arrive to pick it up.

(v) Gino Vecia's Testimony

[39] The Respondent called Gino Vecia to testify at the hearing of this appeal. Mr. Vecia testified in a straight forward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some facts and events during the periods under appeal was understandably vague or lost.

[40] Mr. Vecia testified that he is currently Vice President of sales at Hasty Market Corp. Mr. Vecia testified that he started working for Lumsden in approximately April 1980 and he left in a corporate restructuring in December 2017. Mr. Vecia testified that he started working for Lumsden as a sales representative in the Hamilton area for about 80 customers. In 1986, he was promoted to the position of key accounts manager, and dealt with about 300 accounts. In 1990, he was promoted to the position of sales manager at Lumsden. In that position, 8 sales representatives reported to him. He was responsible for all independent sales, which excluded Foodland sales.

[41] In 1996 Mr. Vecia was promoted to the position of director of sales at Lumsden. He was responsible for the financial side of all independent sales, which included about 700 customers. He was director of sales until 2017, when he became director of new business development. However, in December 2017 he was offered a package to leave Lumsden as part of a corporate restructuring.

[42] Mr. Vecia testified that Lumsden would offer financial assistance to a customer if they agreed to purchase products from Lumsden for an extended period of time.

[43] Mr. Vecia testified that the Grandview account with Roberta MacNaughton was set up in approximately 1995. He did not review any of the documents at that time. He testified that Max Seymour looked after all of the details regarding sales on a reserve tax free. He testified that Grandview was not under a long term contract, and could leave Lumsden at any time. The Grandview account was COD because of the size of the account. Mr. Vecia testified that Roberta MacNaughton had previously dealt with some other wholesalers, including Murphy's, a competing wholesaler. However she agreed to try Lumsden because they promised

better service. They started small and the volume grew over time. Early on, Mr. Vecia picked up the cash for sales at Grandview before delivery was made. Mr. Vecia testified that there was a robbery at the Grandview store, which resulted in a debt issue for Grandview to Lumsden, which she agreed to pay off over time through product purchases. Mr. Vecia testified that the cash collection changed when Roberta MacNaughton's mother was sick, but changed again when she died. Mr. Vecia testified that there was also a period of time when Roberta MacNaughton brought the cash payments to the Lumsden office.

[44] Mr. Vecia testified that he asked and was advised that they were following all of the proper rules for sales which were delivered to the Reserve. He further testified that Grandview was eventually turned into a Quickway account and was given 7-day payment terms.

[45] Mr. Vecia testified that Lumsden also used numeric codes for other customers, such as Avondale, which had over 100 split accounts. Lumsden would split orders for Avondale by store, but all of the orders were shipped to one site, and Avondale distributed the products to its individual sites. Mr. Vecia testified that Lumsden had other customers with multiple accounts, especially as Lumsden had purchased two other wholesalers.

[46] Mr. Vecia testified that Roberta MacNaughton submitted POs with alphanumeric codes on them, and that Lumsden picked and packed the product and issued invoices accordingly. They did so because that is what Roberta MacNaughton required. Mr. Vecia testified that he did not review the Grandview order forms, as customer service dealt with them. Mr. Vecia testified that Roberta MacNaughton determined the price at which she sold the Tobacco Products to her customers. He also testified that he did not know any of her customers. He testified that he dealt with Roberta MacNaughton just like any other customer, and that Roberta MacNaughton was responsible for paying all of her accounts.

[47] Mr. Vecia also testified that:

- (a) Lumsden purchased Allind in about February 1999. Allind carried on business as Harpers wholesale. They also purchased some other wholesalers, who were all closed down and consolidated into Lumsden;
- (b) Pioneer gas bars would purchase products that would be delivered to each store, but that all of the volume rebates went to the head office;

- (c) Lumsden would often provide assistance, often in the form of financing, to good customers to help improve their business;
- (d) Roberta MacNaughton switched to Lumsden from some of the other wholesalers because of Lumsden's superior quality service;
- (e) Lumsden refused to take on certain other native accounts on the Reserve because of their agreement with Roberta MacNaughton;
- (f) He understood there would be no GST/HST applicable to Lumsden's sales to Roberta MacNaughton (Grandview) and her other family members because they were making sales to a native person on a reserve. He relied on more senior personal and Lumsden's lawyers to confirm that;
- (g) He had no access to the drop safe at Grandview – only Roberta MacNaughton had access to it;
- (h) If Lumsden had a problem with Roberta MacNaughton's family members paying their Lumsden accounts, he would speak with Roberta MacNaughton who would pay on their behalf;
- (i) Sobeys took over the Oshawa group (IGA) in 1998. At that time, Oshawa Group was the 3rd or 4th largest grocer in Canada, and Sobeys was the 8th or 9th largest. It was a very large transaction;
- (j) There was an armed robbery at the Grandview store in 1996. As a result, Roberta MacNaughton owed Lumsden about \$320,000. After some negotiations with Roberta MacNaughton and her lawyers, who threatened to sue Lumsden if they did not agree to continue to sell to her, Roberta MacNaughton agreed to pay Lumsden back over a period of time through purchases. That was negotiated by Max Seymour and others more senior to Mr. Vecia;
- (k) If he ever had any issues with any of the MacNaughtons, he would contact Roberta MacNaughton and she would deal with the problem. Mr. Vecia testified that Lumsden had no control over who Grandview sold tobacco to or at what price nor what they did with the volume rebates they earned; and
- (l) The MacNaughtons never indicated they were buying tobacco products on behalf of any other persons and they had no authority to negotiate contracts for the sale of tobacco products on behalf of Lumsden.

[48] Overall, it is my view that Gino Vecia consistently described Grandview as being Lumsden's client and that he only dealt with Roberta MacNaughton and Terri Squire regarding matters relating to the Grandview accounts.

(vi) John Gardner's Testimony

[49] The Respondent called John Gardner to testify at the hearing of this appeal. Mr. Gardner testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some facts during the periods under appeal was understandably vague or lost.

[50] Mr. Gardner testified that he is currently a company executive. Mr. Gardner testified that he started with Sobeys in 1986 as a Vice President for TRA Newfoundland. He was then president of TRA Newfoundland from 1989 to 1999, when he became president of Sobeys owned Lumsden. Mr. Gardner testified that he was involved with the purchase of the Oshawa group by Sobeys, and was involved with the integration of the Allind operations in Ontario with Lumsden even before he was transferred to Lumsden. As part of Sobeys' wholesale operations, he was also regularly involved in meetings dealing with Sobeys various wholesale subsidiaries, including TRA Newfoundland, TRA Maritimes and Lumsden.

[51] Mr. Gardner also testified that:

- (a) He was an employee of Lumsden from February 1999 to February 2001, and was president of Lumsden during that time. He testified that as president of Lumsden, he was not involved in the day to day operations of the Grandview account;
- (b) Often customers would ask for orders to be segregated, and often for example may be broken down by department. Even small stores might want orders broken down and invoiced separately to keep tight inventory controls over higher value products such as tobacco;
- (c) He met Roberta MacNaughton three or four times. The first and second meetings were social business development visits. The third visit on January 20, 2000 was to advise her that Lumsden had decided to discontinue large volume tobacco sales to Grandview because of security concerns. Lumsden stopped selling large tobacco volumes to Grandview on February 4, 2000;

- (d) Brinks was on contract with Lumsden and Sobeys to pick up cash deposits, including at Grandview. Brinks also picked up cash at other locations for Lumsden;
- (e) Lumsden did not collect GST on sales to Grandview, as they were sales to a native on a reserve. He testified that Lumsden would make written inquiries of the CRA and its own corporate lawyers each year to confirm that no GST needed to be collected;
- (f) All three Sobeys wholesale companies reported to Darrel Rushton, and would meet regularly, and often weekly. He would attend the board meetings of all three companies as a guest, which were held in one location;
- (g) Lumsden refused to continue doing business with some of Allind's "native" accounts who wanted to avoid collecting GST but were not delivering tobacco products on the Reserve;
- (h) In January 2000 a second truck at Lumsden was hijacked; and
- (i) The RCMP visited Paul Godsoe, the CEO of the Bank of Nova Scotia, who was on the Sobeys board, regarding Lumsden's Grandview sales. Scotiabank was also Sobeys primary bank at that time, and Peter Godsoe had arranged the sale of Oshawa Group from the Wolfe family to the Sobey family. Paul Godsoe called David Sobey, who contacted John Gardner and advised Lumsden to stop selling tobacco products to Grandview on Reserve effective immediately.

(vii) Otis Henry's Testimony

[52] The Respondent called Otis Henry to testify at the hearing of this appeal. Mr. Henry testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of most of the relevant facts during the periods under appeal was understandably quite vague or lost.

[53] Mr. Henry testified that he is currently not employed. Mr. Henry testified that he worked for Lumsden from approximately July 1999 to January 27, 2000 when he was terminated as a result of Lumsden closing the Grandview account. Mr. Henry testified that he worked in the bond room at Lumsden as a packer, packing candy bars and tobacco products. Some time after he was working at Lumsden, he was asked to work on the Grandview account as a helper to one of the Lumsden truck drivers. The driver he worked with was called Dave. He did not

know his last name. His duties included ensuring that deliveries were properly accounted for and loaded onto the Lumsden truck and delivered to the Grandview barn. He testified that he would unload the Lumsden truck and put the tobacco into the Grandview barn, and that the van drivers would load it into their vans once he received instructions to release the product. He further testified that he received instructions on a pager to release the tobacco products. He did not know who he received the instructions from. He also testified that the van drivers were from all nationalities or ethnicity, but that he did not know any of them. They were mostly men.

[54] Mr. Henry testified that two RCMP officers came to his house and took his statement on February 25, 2000. Because he only has a grade five education, Mr. Henry testified that the RCMP wrote the statement and he signed it. He further testified that when he received the statement from the Respondent about 2 to 3 weeks prior to trial, he had his roommate read it to him, as he was not able to read it. He further testified that he had no independent recollection of the facts set out in the statement aside from when his memory was refreshed upon his roommate reading it to him and when it was read to him in Court. He could not even recall working at Lumsden 20 years ago. Because he cannot read, he trusted the RCMP to write the statement down properly.

[55] In his RCMP statement, Mr. Henry stated that he felt it was an illegal operation. He does not recall if that is something the RCMP suggested or not. He further testified that he did not know who was paying for the tobacco products delivered to Grandview. Mr. Henry testified that the RCMP did not tell him why they were investigating the sales by Lumsden to Grandview, or what the nature of the alleged crime was. They did not inform him of any alleged crime.

[56] Mr. Henry testified that he did not negotiate any of the sales of products, and that he does not know who was paying for or receiving any of the tobacco products delivered to Grandview.

[57] Overall, I have placed very little weight on Mr. Henry's testimony. He could not read the statement he gave the police when he signed it and he could not read it when it was presented to him before trial. Various documents were put to him during the hearing, but he was not asked if he could read or comprehend those documents without assistance. He also had little or no independent recollection of the events he testified about. Rather, his memories were prompted either from the witness statement or Counsel's questions. As a result, it is unclear how accurate his

statement or his testimony were and I find that his testimony is unreliable as a result.

(viii) Roberta MacNaughton's Testimony

[58] The Respondent called Roberta MacNaughton to testify at the hearing of this appeal. Ms. MacNaughton testified in a straightforward and forthright manner, and I found her to be a credible witness. Due to the passage of time, her recollection of some of the relevant facts during the periods under appeal was understandably somewhat vague or lost.

[59] Ms. MacNaughton testified that she is a retailer. Ms. MacNaughton testified that she believed she started sales with Lumsden in about 1995. She met Vince Gallant who introduced her to Gino Vecia and she told him she was opening a new store (Grandview Variety), and was looking to buy groceries from Lumsden. She initially purchased groceries and had terms of net 7 days. Terri Squire was her employee. She testified that there was no written contract with Lumsden.

[60] Ms. MacNaughton testified that there was a robbery in her store in 1996. It was an armed robbery and they stole significant cash from her. She and Terri Squire and two tobacco customers were in the store at the time. The robbery occurred on November 20, 1996. She called the police and Gino Vecia at around the same time. Gina Vecia and Max Seymour both came out to Grandview. Lumsden products that had not yet been delivered was returned to Lumsden and she was given a credit for it. She testified that the cash that was stolen was in the process of being counted and being deposited into the drop safe in her office.

[61] Ms. MacNaughton testified that the payment process for Lumsden changed after that. It became payment before pickup. Product was not released until the money was received, counted and deposited into the drop safe.

[62] The drop safe in her office was a Brinks 2 key safe. The safe was not installed by Brinks. She had the combination to the outside door and a Brinks employee had a key to unlock the inside door. She had the same safe from 1996 to 2000. The safe was only used for payments to Lumsden. Lumsden helped her buy the safe with a loan which was paid via a rebate on each carton she believed, but it is possible Lumsden paid for it. She does not recall paying Brinks for the pickup of the money, and does not remember who Brinks had its contract with.

[63] Customers would send her a list of what they wanted to order by fax or phone it in. They could send it on the Lumsden form or on regular paper. She would complete the Lumsden order forms and send them to Lumsden by fax. Each customer would be represented by a character, such as “W” for William. Her customers might have had multiple orders because they might have different end customers themselves.

[64] Ms. MacNaughton testified that she initially dealt with Max Seymour to set up her accounts and establish her payment terms. He was then VP of Lumsden.

[65] Ms. MacNaughton testified that prior to opening her own store (Grandview), she worked for her mother in all of her businesses, including her stores at Middleport Plaza and Sour Springs Plaza. Her mother passed away on April 7, 2000. Her mother Anne MacNaughton, as well as her brother Alan and sister Zelda all had accounts with Lumsden and ran their own businesses. Teri Squire only worked for Roberta MacNaughton.

[66] Ms. MacNaughton testified that Lumsden had a drop safe. For a brief period in 1999 (starting around June 7, 1999), her customers would drive to Lumsden on her instructions and drop off their payments and then drive to Grandview to pick up their orders. She believed this was chosen because it was faster. The process then switched to Kim Madellana coming out to Grandview to count the cash. Terri Squire would let her into the store and they would go into her office and Terri and Kim Madellana would count the cash, fill out deposit slips, put the cash and deposit slips into the Brinks bags, and put the bags into the drop safe. There were two money counters there. One was hers and one was Lumsden’s. She was not sure who contacted the Lumsden driver to release the product to her customers. She believed it was a Lumsden employee. Her customers picked up their products in the barn behind the store.

[67] Ms. MacNaughton testified that the barn behind her store was built in around 1996, but was not 100% sure. The size is about 20 feet by 40 feet. Tobacco would generally be picked up at that building. It was already there when she did her business with Lumsden, and Lumsden did not pay or otherwise finance it.

[68] Ms. MacNaughton testified that she believed Kim Madellana came to Grandview because her mother was sick and because she wanted to help her mother and stay close to her. A second reason was because of safety concerns at Lumsden.

[69] Ms. MacNaughton testified that her orders were packed according to her alpha numeric customer. For example, all of the “W” orders would be together. The invoice for this would come to her, and she would advise her customer how much to pay her. Kim Madellana would collect the amount of the Lumsden invoice. Roberta MacNaughton had a markup as well on cigar and loose tobacco products. For example, she might charge a \$500 mark-up on the cigarette orders which her customers would pay her in a separate envelope. This amount was determined by her based on the competitive marketplace at the time.

[70] Ms. MacNaughton also testified that:

- (a) Terri Squire would always be in the room with Kim Madellana to count the cash and process the delivery of the orders. Teri had the keys to the store and had to let Kim Madellana into the building and into Roberta MacNaughton’s office and Roberta MacNaughton was way too controlling not to have Terri in the room to assist in counting the cash and processing the orders and delivery. Her customers would drop off the cash into the deposit box and then go to the barn to pick up their orders. The Lumsden person would instruct the driver to release the products.
- (b) It was mutual decision of her and Lumsden to stop the tobacco sales in early 2000, because her mother was very sick and on her death bed and Lumsden had security concerns. She testified that she met John Gardner and someone else to discuss the closure. He came to her mother’s house;
- (c) There was a hijacking of a truck at Lumsden which created a safety concern;
- (d) The barn was there the whole time that Lumsden was selling to her;
- (e) Her store (Grandview Variety) was open at around 8:00 a.m.;
- (f) She carried on business as Grandview Variety and as Nickle & Dime. She got into the business through her mother, Anne MacNaughton, who was a single mother of six children. She started her first store in 1960 and was a self-made business woman. She had two stores and built two plazas and built homes for each of her six children. She had a gas bar at one time, but Gulf Oil seized the pumps when she refused to go along with a federal tax collection agreement for gas sales on the Reserve;
- (g) Anne MacNaughton subsequently opened a store called Sour Springs;

- (h) An Asian person visited Anne MacNaughton and asked if she would sell him tobacco and told her that a competitor (Wags) was selling tobacco free of tax. Anne MacNaughton decided to ask the manager of the Cash and Carry she was purchasing from if they would sell her cigarettes. They agreed, and she started selling cigarettes in approximately 1975. That first customer brought many other customers. Roberta MacNaughton worked for her mother from as young as age 7, and worked for her mother (when she was not in school) until she opened her own store in approximately 1995;
- (i) Anne MacNaughton also purchased cigarettes from various wholesalers, including Murphy's Wholesale which delivered to the Reserve. Product was delivered to a warehouse at her homestead which was where her first store was located until Sour Spring Plaza was built;
- (j) She started Grandview Variety in about 1995, and built her house and store on highway 54 on the other side of the Reserve. She lived in Brantford while her house was under construction. That is when she met Gino Vecia through Vince Gallant of Sobeys group. Gino Vecia introduced her to Max Seymour of Lumsden. She testified that she wanted to move some of the business away from Murphy's because they had too much business on the Reserve and were having service issues;
- (k) She had no written contract with Lumsden. It was an oral agreement. She told Lumsden how Murphy's was doing it, and asked them to do it in the same way. She requested that Lumsden not sell to other natives unless they first spoke to her. This was to ensure they did not run into service issues such as with Murphy's;
- (l) She asked for a 5 cent volume rebate from Lumsden, but that they not put it on the invoice, but rather provide as a rebate. That way she could resell at invoice price;
- (m) She initially split her business about 50/50 between Lumsden and Murphy's. She paid both Murphy's and Lumsden in cash. For Murphy's she did not necessarily pay 100% each day, and used the net 7 day terms to pay off the balance within the seven days. Lumsden initially had the same terms. Initially, she dropped cash off at Lumsden each day. Eventually, this process was changed due to safety concerns at Lumsden;
- (n) She still owns the drop safe at Grandview variety. She has the combination for the safe, and no one at Lumsden had the combination;

- (o) There was a break and enter of her store in about 1995 when about \$30,000 of cigarettes were stolen. Then there was the armed robbery in late 1996 (November 20, 1996). Because the government had announced a substantial tobacco tax increase that day, there were a large number of additional sales as customers tried to beat the tax increases;
- (p) She purchased product from three wholesalers - Lumsden, Murphy's and Links;
- (q) She thought she would be ruined by the robbery as they stole so much money. She ended up owing about \$320,000 to Lumsden, as well as amounts to the other two wholesalers and the two customers who were robbed. The total may have been as high as \$450,000. The RCMP blamed her for the robbery. Her lawyer and Lumsden's lawyers exchanged correspondence and made claims against each other about liability. She eventually met with Max Seymour and Ihor and Lumsden's lawyer and they negotiated a way for her to repay her debt to Lumsden. They offered her two alternatives. The one they agreed on had her continue to buy product from them and her rebate would go up to 10 cents per carton, and her rebate would be applied to her debt. The debt of approximately \$320,000 was paid off in about 14 months through this method. She agreed to similar deals with the other two wholesalers. She also made a deal with her two customers, and paid them off by forgoing her usual profit margin until her debts to them were paid;
- (r) She would apply her rebate to the deposits going into the Brinks bags and write it on the deposit slips. She would also apply credit notes and subtract those amounts from the amounts being paid to Lumsden. If there were accuracy issues with Lumsden, she would call customer service and advise them of the errors and they would issue a credit note. She would also advise them of miss-picks when her customers brought them back to her. She would give the product to the Lumsden driver and get a credit note from Lumsden;
- (s) She ordered product from Lumsden, Murphy's and Loeb. Larger orders would usually go to Lumsden. She would get orders from her customers and fax them to Lumsden. She never provided her customers' contact information to Lumsden. Only Roberta MacNaughton or Terri Squire could send in orders to Lumsden for her Grandview business. She never gave the \$500 profit markup to Lumsden and she never gave any of the volume rebates to her customers;

- (t) Her business name Nickel & Dime was a reference to the various rebates she received on the cigarettes;
- (u) Her mother was very sick in the summer of 1999. She stayed home to help her. She also helped run her mother's business. She asked Lumsden to help her with the payments process while her mother was sick. For about 7-8 weeks, payment were made at Lumsden. Then payments were made at Grandview again and Kim Madellana came to help there. Kim Madellana did not have access to the drop safe in the Grandview Variety store;
- (v) She did not pay GST on her purchases from Lumsden because of her native status under the *Indian Act*;
- (w) Harper's Wholesale was selling to non-natives off reserve and falsely using status Indian cards. She shared this with William Brown of the CRA. He threatened that he was going to get either her or Lumsden for the uncollected GST. She told him to go after National Grocers, owned by the Weston Family, who were selling cigarettes tax-free but not delivering them to the reserve. A member of the Weston family was Lieutenant Governor of Ontario at that time. She considered it illegal competition at the time because they were cutting the native person on the Reserve out of the supplies;
- (x) When she met with the CRA auditors, they told her of the consequences if she was an agent or if she was purchasing on her own account. The suggestion is that she would not be liable for GST if she agreed that she was buying from Lumsden either as their agent or as the agent for her customers; and
- (y) She had no subsequent contact with the CRA, Department of Justice or RCMP since that January 9, 2004 meeting at Tim Horton's with the CRA auditors.

[71] Overall, it is my view that Roberta MacNaughton consistently described Grandview as being Lumsden's client and that she (and Terri Squire) only dealt with Lumsden regarding matters relating to her Grandview accounts.

(ix) Max Seymour's Testimony

[72] The Respondent called Max Seymour to testify at the hearing of this appeal. Mr. Seymour testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some of the

relevant facts during the periods under appeal was understandably somewhat vague or lost.

[73] Mr. Seymour testified that he is a CGA and is currently retired. He was the director of finance for Lumsden starting in 1988. His responsibilities included responsibility for financial reporting, accounts receivable, accounts payable, Payroll and auditing. Prior to 1988 he worked for Consumers Distributing for 17 years. He was vice-president of Finance for that company when he left. Mr. Seymour testified that he was director of finance for about two years at Lumsden, and was appointed vice-president Finance around 1990. His duties were similar to his previous position. He reported to Allen Rowe, the Chief Financial Officer at Sobeys and to the President of Lumsden.

[74] Mr. Seymour testified that he met Roberta MacNaughton in approximately mid-1995 at Lumsden's office at 79 Easton Road. Also present at the meeting were Gina Vecia, vice-president sales Liz Mana, and maybe the president of Lumsden Bill Gilmore. The purpose of the meeting was to discuss a business opportunity to supply cigarettes to her, including what her requirements were, which included pricing, payment terms and service (including delivery). In terms of pricing, she wanted the price to be about 15-20 cents per carton above Lumsden's price from the manufacturer. Regarding delivery terms, she wanted the deliveries to be assembled on pallets and delivered to her store on the Reserve. The orders were to be segregated by alphanumeric code. The invoices were also to be separated by alphanumeric code. Payment was to be all in cash. Lumsden agreed to these terms as it was not uncommon in its business with other clients. The Brinks drop safe was not discussed at the first meeting. It was discussed about 6 months after they opened the Grandview account.

[75] Initially, Lumsden received payments from Roberta MacNaughton at the Lumsden office. Roberta MacNaughton delivered the cash payments to Lumsden's office. Security concerns arose at Lumsden, so cash collection was changed to pickup at her store. Lumsden supplied a drop safe for that purpose. This change was made at the request of Lumsden because of security concerns.

[76] Mr. Seymour testified that he wrote to the CRA regarding the sale of tobacco on a reserve to confirm it was GST exempt. He also undertook market intelligence to confirm other wholesalers were undertaking the same type of sales. He also contacted his head office which obtained legal advice from its Halifax based law firm. The president of the wholesale group contacted the Halifax law firm regarding the legal advice. He could not remember which division of the CRA

he sent his letter to, but notes that he did get a response. He acknowledged that he may have written to the Ontario Ministry of Finance.

[77] Mr. Seymour also testified that:

- (a) On August 16, 1996 he prepared a memo which set out the Grandview credit policy. Cash payment had to be made soon after delivery;
- (b) He prepared a memo regarding the November 20, 1996 armed robbery at the Grandview store.
- (c) Product was delivered to the back of Grandview store in 1996. Later a small barn was built where product was delivered. Lumsden helped finance the building of the barn after Roberta MacNaughton asked them to help finance it. The barn was maybe 2500 to 3000 square feet. It may have cost \$40,000, and Lumsden helped pay for 50% of the cost. He did not recall when the barn was built. It was likely built after the robbery and before 1999, so was likely built in 1997 or 1998;
- (d) Grandview did not have a written contract with Lumsden. It was an oral arrangement. Lumsden could stop delivery at any time;
- (e) He left Lumsden in about November 1998. However, he took a short term contract position with Lumsden in May 1999 for about two months. He was at that time between jobs and John Gardner asked if he wanted to meet with Roberta MacNaughton and him and help her with the payment logistics. Roberta MacNaughton had a problem because her mother was sick and so she did not have enough time to do her work and so Lumsden agreed to help her by bringing in Max Seymour to come up with a solution to relieve her of some of her workload. They decided to bring the cash payment back to the Lumsden office. As a result, they set up a cash payment system at the Lumsden office, including the installation of a cash drop on the side of the Lumsden building. Mr. Seymour testified that he finished his contract with Lumsden in about the end of June 1999. During the time he was there in 1999, he supervised the cash payments on a daily basis at the Lumsden office. Product would be released once full payment had been released. Cash would be dropped off at Lumsden at between 3:00 a.m. and 5:00 a.m. There would be an alphanumeric code on each cash payment. He had 2 clerks and 2 cash counting machines there to help process the cash. He does not recall the clerk names. Once the money was counted and the totals were verified, the money would be put into a 2 key drop safe. He does not know who

supplied the safe. Brinks would pick up the cash and would have the second key;

- (f) He did not know who was depositing cash in the side of the Lumsden building. He also did not know of any Lumsden employee going to Grandview to count cash while he worked at Lumsden;
- (g) Various legal letters were written and exchanged between Roberta MacNaughton and Lumsden regarding the amount she owed following the robbery. He prepared a memo with two alternatives for her to pay Lumsden the approximate \$320,000 she owed Lumsden. Ultimately alternative 2 was chosen. She was required to pay cash on delivery, and the price of the tobacco was increased and her volume rebate was increased to 10c per carton. The rebate was withheld and applied to her loan balance, which was paid off over about 14 months. A loan amortization schedule was set out in exhibit A-2 tab 45;
- (h) He did not know what Roberta MacNaughton charged her customers;
- (i) Mr. Seymour testified that it was not uncommon for Lumsden's customers to use alphanumeric or other types of codes for their purchase orders to have them segregated for various purposes. Some of its other clients (especially larger clients) had similar systems for grocery or other orders placed with Lumsden;
- (j) Lumsden sold cigarettes to Roberta MacNaughton at a price that was close to the price it paid to the manufacturers (invoice cost) (perhaps a 15 - 20 cents per carton markup). Lumsden received volume rebates from the manufacturers of up to 2%. It could also earn a 2% rebate if it paid early. This is where Lumsden would earn its profit on cigarette sales;
- (k) Roberta MacNaughton demanded a high level of accurate service from Lumsden on her Grandview accounts;
- (l) Even after the robbery, Roberta MacNaughton did not always pay in advance. Sometimes payment would be later if necessary, and Lumsden could have up to about 24 hour exposure for payment in some circumstances. Mr. Seymour testified that Lumsden did not rely on Roberta MacNaughton's customers for payment. Lumsden's customer was Roberta MacNaughton only. Roberta MacNaughton would make her profit from the volume rebates Lumsden passed on to Roberta MacNaughton. Her profit

was about 10 cents per carton. She was fully responsible for making payment to Lumsden;

- (m) The Ontario Ministry of Finance would sell any seized tobacco back to wholesalers such as Lumsden;
- (n) As a result of the armed robbery at Grandview, Roberta MacNaughton owed Lumsden approximately \$320,000;
- (o) He thought the drop safe was installed at Grandview after the armed robbery;
- (p) Lumsden undertook due diligence regarding its sales of tobacco products to Grandview on the reserve;
- (q) Roberta MacNaughton and her family members had no obligation to purchase from Lumsden and Lumsden had no control over their businesses or who they sold to or at what price. Roberta MacNaughton set the price at which she sold to her customers. Roberta MacNaughton did not have to pass on any of the volume rebates she received;
- (r) Lumsden paid volume rebates to other customers, such as the Foodland stores; and
- (s) Lumsden helped pay for CCTV cameras at Grandview, as well as part of the cost of the barn and the safe. Lumsden also paid for the Brinks cash pickup.

[78] Overall, it is my view that Max Seymour consistently described Grandview as being Lumsden's client and that he only dealt with Roberta MacNaughton and Terri Squire regarding matters relating to the Grandview accounts.

(x) Brian Blenkarn's Testimony

[79] The Respondent called Brian Blenkarn to testify at the hearing of this appeal. Mr. Blenkarn testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some of the relevant facts during the periods under appeal was understandably somewhat vague or lost.

[80] Mr. Blenkarn testified that he is a chartered accountant and director of finance. He started working at Lumsden in about 1995 and was there for about 5 years. He left in about March or April 2001. He was the controller at Lumsden, and his responsibilities included the day-to-day management of the accounting function. He had a staff of about 21 in total. He reported to Max Seymour, who had hired him. After Max Seymour left, he reported to Pat DeGrace. He never had any direct contact with the Grandview account, and he never met Roberta MacNaughton and he never went to Grandview.

[81] Mr. Blenkarn testified that the Grandview account was not a lot of work for him. While Grandview was a large tobacco account, it was much smaller than some of the large store accounts Lumsden had.

[82] Mr. Blenkarn testified that he did not deal with the operations side of the business. He believed that Grandview's terms were cash, but he was not involved in those matters. He did not recall if Grandview used alphanumeric identifiers on its purchase orders. Grandview was already an account of Lumsden when he arrived at Lumsden.

[83] Mr. Blenkarn testified that he had reservations about the tax status of the sales to Grandview, but that he was satisfied by Lumsden's due diligence that it was okay.

[84] Mr. Blenkarn testified that Grandview was very similar to other customers, including Avondale and Fiera Foods. He also testified that Lumsden never had any problems with its tobacco tax audits and that it obtains HST exemption certificates which were on file. No one raised any issues during the five years he was at Lumsden.

[85] Mr. Blenkarn testified that he did not recall speaking to the RCMP regarding this matter. He had no discussions with anyone regarding this matter between 2004 and August 2020 when both counsel contacted him.

(xi) Peter Sgarbossa's Testimony

[86] The Respondent called Peter Sgarbossa to testify at the hearing of this appeal. Mr. Sgarbossa testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some of the relevant facts during the periods under appeal was understandably somewhat vague or lost.

[87] Mr. Sgarbossa testified that he is currently the Vice President of Rena Group. Mr. Sgarbossa testified that he started working at Lumsden in approximately 1993 or 1994. In approximately 2001 to 2003, Mr. Sgarbossa moved to a position at one of the locations purchased by Sobeys as part of its acquisition of the Oshawa Group.

[88] Mr. Sgarbossa testified that his first position at Lumsden was as director of Foodland operations, which is a franchise banner. He later became vice president of sales and Foodland operations. Once the Foodland account moved to the Viscount Road location in Toronto, he became vice president of sales at Lumsden where he worked with John Gardner for about 1 to 1.5 years.

[89] Mr. Sgarbossa testified that the cash and carry division sold products to small retailers as well as to consumers, but it was mostly business to business.

[90] Mr. Sgarbossa testified that Grandview Variety was owned by Roberta MacNaughton, and that she was a customer on the Six Nations Reserve. Mr. Sgarbossa testified that Roberta MacNaughton was the customer of Lumsden. Tobacco products were delivered to the reserve. Gino Vecia and Max Seymour looked after that account. Mr. Sgarbossa estimated that sales of tobacco products to Grandview may have been \$1 million per week. Mr. Sgarbossa testified that Roberta MacNaughton paid with cash, and that she would drop off the cash at the Lumsden warehouse office daily and would meet with Max Seymour and Gino Vecia to do so. Later, because of security concerns with having so much cash coming into its office, Lumsden made an arrangement with Grandview where a safe would be installed at Grandview and cash payment would be made at Grandview and either Brinks or Wells Fargo would pick up the cash at Grandview. Mr. Sgarbossa testified that no one else would drop off cash on behalf of Roberta MacNaughton at Lumsden.

[91] Mr. Sgarbossa testified that he did not recall any interviews with police immediately following the July 1999 hijacking of a truck at Lumsden.

[92] Mr. Sgarbossa testified that he did not know of any orders being placed by Roberta MacNaughton on behalf of Koreans or East Indians and he did not know of any people from Toronto paying for tobacco products so purchased.

[93] Mr. Sgarbossa testified that when cash payment was made on the Reserve, a person would call the Lumsden warehouse and then the truck would be released from the Lumsden warehouse to deliver tobacco products to Grandview on the

Reserve. Mr. Sgarbossa testified that he remembers Kim Madellana being at Grandview on the Reserve to verify payment and then the warehouse would be contacted to release the truck.

[94] Mr. Sgarbossa testified that he was not responsible for the Roberta MacNaughton/Grandview account. Mr. Sgarbossa testified that he recalled a number of discussions with Stewart McKelvey, who were Sobey's lawyers, to make sure sales to Grandview were done legally. Stewart McKelvey advised to conduct the sales in cash, that deliveries had to be made on the Reserve, and that someone from the Reserve had to unload the truck (not a Lumsden employee).

[95] Mr. Sgarbossa testified that he never met with any CRA auditors during or after the CRA's audit of Lumsden, and that he was first contacted about this appeal in the summer of 2020 when he was contacted by counsel for each of the parties.

(xii) Kim McCulloch's Testimony

[96] The Respondent called Kim McCulloch to testify at the hearing of this appeal. Ms. McCulloch testified in a straightforward and forthright manner, and I found her to be a credible witness. Due to the passage of time, her recollection of some of the relevant facts during the periods under appeal was understandably somewhat vague or lost.

[97] Ms. McCulloch testified that she is currently a homemaker. She worked for Lumsden from approximately March 1999 to October 2003. Her first position at Lumsden was as a customer service representative, which she did for approximately one year and several months. She later worked for Lumsden in their merchandising department.

[98] Ms. McCulloch testified that as a customer service representative she would receive orders by phone or facsimile and key them into Lumsden's computer system. She would also handle enquiries from customers regarding issues such as shortages. Ms. McCulloch testified that orders for cigarettes would be received by phone or facsimile and she would key them into the Lumsden computer system.

[99] Ms. McCulloch testified that the Grandview account was stressful and it took her a lot of time to key in all of the orders, as she tried to ensure they were all keyed in accurately. Ms. McCulloch testified that she did not talk to Roberta MacNaughton or Terri Squire very often except when she was working on Sunday by herself.

[100] Ms. McCulloch testified that Roberta MacNaughton or Terri Squire would generally fax in their orders. If Ms. McCulloch could not make out any of the order numbers or if there was any issue that arose, she would call Roberta MacNaughton or Terri for clarification if it was a Sunday. Any other day of the week, one of her supervisors would call Roberta MacNaughton or Terri Squire to clarify.

[101] Ms. McCulloch testified that she did not deal with the customer name/alphanumeric codes that Roberta MacNaughton put on her order forms. She would verify the customer account number and input it and also enter the PO alphanumeric code. She did not need to look into any customer name written on the order form. Shipping instructions if any written on the order form were also not relevant. She testified that only Roberta MacNaughton was considered to be the Lumsden customer, and not any of Roberta MacNaughton's customers (or their customers). The alphanumeric codes were input into the Lumsden system solely for picking and packing purposes.

[102] Ms. McCulloch testified that Lumsden had a separate fax machine for the orders received from Grandview/Roberta MacNaughton. Ms. McCulloch testified that she did not generate the Lumsden invoices, as that was not part of her responsibility. She just entered in the orders into the Lumsden computer system.

[103] Ms. McCulloch testified that she graduated from high school in 1994 and from Guelph University in 1998. She also studied some college courses while she worked at Lumsden. Her job at Lumsden was her first real job, and it was in essence a data entry job. She would enter orders for all of the products that Lumsden sold, including groceries and confectionaries. Orders would come in by fax or phone. Some faxed orders would come in on Lumsden order forms, and some would just be handwritten pieces of paper faxed to Lumsden.

[104] Ms. McCulloch testified that she never talked to or dealt with any of Roberta MacNaughton's customers. She was not involved with the negotiation of the agreement between Roberta MacNaughton and Lumsden. Her first contact regarding this trial was in approximately July 2020.

(xiii) John Sura's Testimony

[105] The Respondent called John Sura to testify at the hearing of this appeal. Mr. Sura testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some of the

relevant facts during the periods under appeal was understandably somewhat vague or lost.

[106] Mr. Sura testified that he is currently retired but was previously employed for 39 years by Brinks Canada Limited. From 1996 to 2000, he was an account executive with Brinks Canada and sold Brinks services to it many customers. Those services include securely moving jewelry, special metals, cash or other high value goods. Lumsden was one of his accounts. Mr. Sura testified that Lumsden had been a long-term customer of Brinks long before 1996.

[107] Mr. Sura testified that he was contacted by Jane Weir and asked if Brinks would pick up cash at Grandview five days per week and then consolidate it and deliver it to Scotiabank in Toronto. He testified that Grandview was a customer of Lumsden. The arrangement was for a maximum of \$500,000 in cash per pick-up. Lumsden paid for these cash pick-ups at Grandview. After the robbery at Grandview, Lumsden stopped the pick-up at Grandview and after a period of time restarted cash pick-up at Lumsden offices at 79 Easton Road. Mr. Sura testified that Brinks had picked up cash at the Lumsden office for many years on one day per week. It was briefly changed in 1999 to five days per week to include the cash previously picked up at Grandview. It was stopped at Grandview on June 4, 1999 and started at Lumsden office on June 7, 1999. After a brief period of time, pick-up was switched back to Grandview. Cash pick-up at Grandview was stopped at the end of January 2000. In about March 2000, cash pick up at Grandview was started again for one day per week and the maximum dollar amount was fixed at \$40,000.

[108] Mr. Sura testified that there was a drop safe at Grandview, but it was not a Brinks safe. Grandview gave the control key to Brinks and Grandview had the combination or key for the outer door. Grandview may have also had a key for the inside door, to deal with the prevention of internal theft. Brinks does not insure the contents of the safe, only the cash once it is picked up and in their control. Mr. Sura testified that Lumsden did not have a key for the drop safe at Grandview.

[109] The drop safe at Lumsden's offices at 79 Easton Road was a Brinks drop safe, and that safe was removed by Brinks once the pick-up service at that office stopped. That safe was installed in about June 1999 and removed several weeks after pick-up stopped at the end of January 2000.

[110] Mr. Sura testified that that the amount charged by Brinks to Lumsden varied depending on the pick-up location and route. It was extra for pick-up at Grandview

because it was off the route, whereas the Lumsden office was on the normal route so was less expensive.

[111] After Brinks picked up the cash from Grandview or Lumsden, the cash would be counted, consolidated and deposited into Scotiabank (or used for ATMs), as instructed by the bank.

(xiv) Peter Kerr's Testimony

[112] The Appellant called Peter Kerr to testify at the hearing of this appeal. Mr. Kerr testified in a straightforward and forthright manner, and I found him to be a credible witness. Due to the passage of time, his recollection of some of the relevant facts during the periods under appeal was understandably somewhat vague or lost.

[113] Mr. Kerr testified that he is currently the vice-president of Key Accounts at Sobeys Wholesale. Mr. Kerr testified that he started working at Murphy's Tobacco (later Murphy's Distribution) while in his teens, and that he started working there full time in about 1976. He worked in a variety of positions, including in the warehouse and doing deliveries. He eventually became a branch manager in Windsor, with responsibility for sales, and then transferred to London Ontario where he became the vice-president of sales for Murphy's. Murphy's had numerous customers including gas stations, variety stores, grocery stores and restaurants. They sold tobacco, groceries, confectionaries and frozen food. Tobacco was their most important product. They mostly sold to retail locations and through Cash and Carry outlets to consumers. Over time, business evolved and their customers got larger and had multiple locations.

[114] Mr. Kerr testified that Murphy's sold to Status Indians on reserve. Tobacco was their key product for those sales, but they also sold groceries and confectionary. The tobacco allocation was set by each Indian band and the Ontario Ministry of Finance. Customers would either call Murphy's or give their orders to their sale rep. Six Nations Reserve was their largest native trading area.

[115] Mr. Kerr testified that Murphy's customer's included Anne MacNaughton, who was a former band chief, as well as her children (Roberta MacNaughton, Allen and Zelda). Mr. Kerr testified that he first met Anne MacNaughton in the early 1980's when he took over sales. She had multiple locations, including the Plaza at Sour Springs and Middleport. Later Roberta MacNaughton had Grandview. Each of her children operated one of the stores. His first meeting was

to collect some slightly overdue money. Tobacco was sold on terms in those days, whereas later it was all COD.

[116] Mr. Kerr testified that Murphy's had a strong relationship with Anne MacNaughton, and that she knew her rights as a status Indian. He had a good rapport with her, and would visit with her at her locations or at the Murphy's office. Mr. Kerr testified that Roberta MacNaughton was closest to her mother, and was a very good business person. Roberta MacNaughton did most of the business for her family, including making sure payments were made. She also looked after her mother.

[117] Mr. Kerr testified that the terms for tobacco in the early days from the manufacturer was 7-30 days, depending on the manufacturer. Retail terms were often 7-14 days. Later the standard term became zero days (COD). It has been like that for some time. The terms from Murphy's to Anne MacNaughton was 14-30 days in the early days. Sometimes she would be delayed in making a payment, but she always made payments.

[118] Mr. Kerr testified that tobacco orders could be received by Murphy's thorough a sales representative, or by phone or by fax or sometimes the drivers brought them back from a delivery. Now they are all electronic. Murphy's had order forms for each type of product, including tobacco, cigar and fine cut, confectionary. Once received, orders would be input into Murphy's system. Mr. Kerr testified that other customer's of Murphy's also used alphanumeric codes for picking and packing of products. Basically most customers who had multiple locations used an alphanumeric code for picking and packing and delivery purposes.

[119] Anne MacNaughton and Roberta MacNaughton would bring payments to Murphy's office in Brantford. Mostly payment was by cash, but it was occasionally by cheque. Deliveries to them by Murphy's was one or two times per day.

[120] Mr. Kerr testified that Lumsden was a competitor of Murphy's. Lumsden did not initially sell to status Indians in the early days. Later they did. All Six Nations customers of Murphy's almost always paid in cash. Roberta MacNaughton was Murphy's largest customer on the Six Nations Reserve. The dollar volume of sales started small, and grew significantly over time.

[121] Mr. Kerr testified that Roberta MacNaughton started Grandview Variety in the mid 90s. At that time he was in the process of moving to another wholesaler, Carries Wholesale.

[122] Mr. Kerr testified that Murphy's was selling to Grandview when Roberta MacNaughton opened her store. It was a very state of the art store, and Murphy's helped her set it up. Mr. Kerr testified that Murphy's would often help customers, including Roberta MacNaughton, set up their store, including with planning.

[123] Mr. Kerr testified that Murphy's would enter the orders as given to it by its customers, including whatever PO codes they asked.

[124] Mr. Kerr testified that he is now with Sobeys.

[125] Lumsden was a larger grocery player than Murphy's, and had a broader product category. They moved one of their locations to Brantford, about three blocks from the Murphy's location.

[126] Mr. Kerr testified that Lumsden also helped Roberta MacNaughton set up the Grandview store. Roberta MacNaughton eventually put Murphy's on notice that she was moving some of her business to Lumsden because it was better. However, she continued to purchase product from Murphy's. Murphy's only kept a small portion of her business. Murphy's provided her with a BBQ on one occasion as customer goodwill. Giving a customer a BBQ or a TV was a usual practice for Murphy's.

[127] Mr. Kerr testified that when Murphy's lost most of Roberta MacNaughton's business, he left Murphy's shortly thereafter as Murphy's sales were declining and it had started closing some of its branches. He then joined Carries Wholesale. Murphy's closed in about 1997 or 1998, and he left about one year before that.

[128] Mr. Kerr testified that there was a robbery at Grandview, but that he was not involved with it. Roberta MacNaughton may have owed money to Murphy's at that time because sales were on terms at that time, but Murphy's got paid in full. The repayment may have been made through the application of volume rebates.

[129] Mr. Kerr testified that he did not sell much to the MacNaughtons while he was with Carries. He was with Carries for about 13-14 years.

[130] Mr. Kerr testified that Murphy's had the MacNaughtons business first for many years. They were already a customer when he started with Murphy's. Later, Murphy's continued to sell some products to Roberta MacNaughton, including some tobacco products. Mr. Kerr testified that Roberta MacNaughton would purchase products from a number of wholesalers, including Lumsden and Murphy's, as well as some manufactures directly, such as Coca Cola or a bread company. Mr. Kerr testified that it was usual in the industry for stores to source their products from multiple sources, and never to give all of their business to any one supplier.

(xv) William Brown's Testimony

[131] The Appellant called William Brown to testify at the hearing of this appeal. Mr. Brown testified in a straightforward and forthright manner, and I found him to be a credible witness.

[132] Mr. Brown testified that he is currently a CRA senior programs officer. He was previously a GST auditor and undertook the GST audit of Lumsden that is in dispute in these appeals. He was also the Minister's discovery nominee. Mr. Brown testified that he started working for the CRA in 1990 as an Excise Auditor in the Hamilton Tax Services Office of the CRA and moved over to being a GST auditor once the GST was introduced. In 2001, he was promoted to being a large file auditor with the Hamilton Tax Services Office of the CRA. In 2011 he became a team leader of large audits in the Hamilton Tax Services Office of the CRA. In 2014 he was promoted to the position of AU4 Senior Program Officer within the CRA headquarters office, although he continued to work in Hamilton (from his house). At the time of the Lumsden audit, Mr. Brown was an AU3 large file auditor. Mr. Robert Ferrier was his case leader/supervisor. Phil Wilson of the Halifax Tax Services Office of the CRA was doing a similar audit of Sobeys. Bob McGillivray was his team leader.

[133] Mr. Brown testified that TIB B-039R applies regarding sales to Status Indians, and that there are only two criteria that apply – sales must be to a Status Indian and the property must be delivered to a reserve. Delivery does not have to be made to a Status Indian on the reserve.

[134] Mr. Brown testified that the audit of Lumsden followed an audit of Allind, the assets of which were purchased by Lumsden. The audit of Allind started after Lumsden acquired Allind, and some of the audit was done at Lumsden's offices because Lumsden had some of the Allind books and records and some of the

Allind staff were hired by Lumsden. The Allind audit was a targeted audit, and focused on tobacco sales to status Indians on the Six Nations Reserve. It was an audit referral from CCRA SI based on information obtained from an RCMP and Ontario Ministry of Finance investigation. The only focus of both the Allind and the Lumsden audit was tax exempt sales to Native Indians on a reserve.

[135] Mr. Brown testified that in Lumsden's audit he concluded that all deliveries of tobacco products in question were made on the Six Nations Reserve. That is an admitted fact.

[136] Mr. Brown testified that he met with Roberta MacNaughton, but that she did not say much. Their meeting was at a Tim Hortons. She wanted to record the meeting, but he declined as that went against CRA policy. Mr. Brown testified that he explained to her the consequences of various scenarios to her, including if she was buying tobacco products from Lumsden and reselling them as opposed to her acting as agent. He explain that she would be liable for the GST/HST if she was buying and reselling, but that Lumsden would be liable if she was acting as agent. She responded that she was not an employee of Lumsden and was not a tax collector. However, Mr. Brown testified that no threat was made to Roberta MacNaughton.

[137] Mr. Brown testified that Allind did not always deliver to the Reserve and also created false documents to disguise sales being made to non-status Indians to appear as if they were being made through Herman Styres (a Status Indian) who they alleged was a mere nominee. Mr. Brown testified that there were no documents falsified by Lumsden intentionally and none of Lumsden employees lied or tried to deceive the CRA (they were all truthful).

(xvi) James Gilbert's Testimony

[138] The Appellant called James Gilbert to testify at the hearing of this appeal. Mr. Gilbert testified in a straightforward and forthright manner, and I found him to be a credible witness.

[139] Mr. Gilbert is retired. He formerly worked for the CRA in various capacities.

LAW AND ANALYSIS

[140] As noted above, the primary issue in this appeal is whether the MacNaughtons (including Roberta MacNaughton) were the recipients, as defined

in subsection 123(1) of the *ETA*, of the Tobacco Products supplied by LBL during the Periods. If the MacNaughtons were the recipients of the Tobacco Products supplied by LBL during the Periods, then the supplies were exempt from GST pursuant to section 87 of the *Indian Act* because they were supplied on the Six Nations Reserve to status Indians who were registered under the *Indian Act*.

[141] Subsection 123(1) of the *ETA* defines “recipient” as follows:

“recipient” of a supply of property or a service means

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

(c) where no consideration is payable for the supply,

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

[142] In this case, after considering all of the extensive oral and documentary evidence submitted by the parties, it is my view that the evidence establishes, on a balance of probabilities, that the MacNaughtons were the recipients of the supplies of the Tobacco Products during the Periods. In this respect, it is my view that the MacNaughtons, and Roberta MacNaughton in particular, entered into an oral agreement with Lumsden to purchase the Tobacco Products from Lumsden, and it was Roberta MacNaughton who was liable under that agreement to pay Lumsden for the Tobacco Products. As a result, it is my view that Roberta MacNaughton was a recipient pursuant to paragraph (a) of the definition of “recipient”. If paragraph (a) did not apply, it is my view that paragraph (b) of the definition of “recipient” would apply in the alternative because it is my view that the evidence

establishes that the MacNaughtons were liable to pay the consideration for the purchase of the Tobacco Products.

[143] With respect to the foregoing, it is my view that the evidence clearly establishes that:

- (a) The MacNaughtons, starting with Anne MacNaughton, carried on a retail and trading business on the Reserve for many years starting in the 1960s;
- (b) Roberta MacNaughton, carrying on business as Nickel and Dime and as Grandview Variety, carried on a retail and trading business since approximately 1995 on the Reserve;
- (c) The MacNaughtons, including Roberta MacNaughton, retail and trading business included the purchase and sale of tobacco products, including cigarettes, loose tobacco and cigars;
- (d) The CRA was aware that there was, at the relevant times, a widely held view amongst Indians in Canada that their trading activities were exempt from GST;
- (e) The MacNaughtons, including Roberta MacNaughton, intended and orally agreed to purchase the Tobacco Products from Lumsden for resale on the Reserve;
- (f) Lumsden intended and orally agreed to sell the Tobacco Products to the MacNaughtons on the Reserve;
- (g) Lumsden and the MacNaughtons entered into legally binding oral agreements for the purchase and sale of the Tobacco Products on the Reserve;
- (h) The Tobacco Products were sold and delivered by Lumsden to the MacNaughtons on the Reserve;
- (i) Lumsden looked to the MacNaughtons to pay the consideration for the Tobacco Products; and
- (j) Lumsden had no legal relationship with the MacNaughton's customers, including Roberta MacNaughton's customers, and those customers had no legal obligation to pay Lumsden for the Tobacco Products.

[144] I note that virtually all of the Respondent's witnesses, including Roberta MacNaughton and the former Lumsden employees, considered Roberta MacNaughton, and not her customers, to be Lumsden's client and the person liable to pay for the Tobacco Products. In my view, the documentary evidence submitted at trial also largely supports that view.

[145] While the Respondent tried to argue otherwise based on its perception of Lumsden's normal operations, I note that Lumsden was a large organization, within the even larger Sobeys Group, and had a very large client base covering many different types of business operations.

[146] In this case, the evidence establishes that Lumsden's sales to the MacNaughtons, including Roberta MacNaughton in particular, were somewhat integrated. That, however, was not unusual for Lumsden, or the wholesale and retail industries. For example, an example provided during testimony involved the sale by Lumsden to a Quickway convenience store, where products are delivered onto store shelves by Lumsden's suppliers of products such as milk and soft drinks. As a result, a supplier might deliver the product directly to a convenience store, who would then sell it to a consumer. However, the legal supply chain would be from the supplier to Lumsden, who would then sell it to the convenience store, who would then sell it to the consumer.

[147] I also note that the sale of the Tobacco Products from Lumsden to Roberta MacNaughton often resulted in a resale to her customers almost simultaneously. They were in essence flash sales, which are common types of sales. I also note that the *ETA* contains GST rules for other types of multi-party transactions, such as the drop-shipment rules. In my view, the fact that the business relationship between Lumsden and the MacNaughtons was more complex than some of Lumsden's other business relationships is neither an issue nor even that exceptional.

[148] Even if the sale of the Tobacco Products by Lumsden to Roberta MacNaughton was not "normal" or prudent or was considered illegal (which is not alleged herein), that would be largely irrelevant. The issue in this appeal is who was the recipient of the supply of the Tobacco Products. It generally would not matter if the supplies were "abnormal" or even illegal.

[149] I also note that some of the unique aspects of the legal relationship between Lumsden and the MacNaughtons possibly stemmed from restrictions under the *Indian Act*. For example, the difficulty in obtaining security over the

MacNaughtons on Reserve property or in taking collection actions against the MacNaughtons in respect of their on Reserve property would favour cash transactions for high volume sales on the Reserve. This issue was considered by Lumsden in the context of the steps it was considering for the collection of the approximate \$320,000 Roberta MacNaughton owed Lumsden after the armed robbery at her store.

[150] In this case, the Minister alleges that there was GST leakage within the supply chain for the sale of the Tobacco Products. That, however, is not the issue in this case. The sole issue is whether Lumsden was obligated to charge and collect GST on the sale of the Tobacco Products. As I have determined that Lumsden supplied the Tobacco Products to the MacNaughtons on the Reserve, it is my view that Lumsden did not have to charge and collect GST on the sale of the Tobacco Products because the sales were exempted pursuant to section 87 of the *Indian Act*. Any GST leakage at subsequent points in the supply chain is not at issue in this appeal.

[151] Because I have concluded that GST did not apply to the sale of the Tobacco Products by Lumsden to the MacNaughtons, it is my view that all of the other issues raised in this appeal, including with respect to the reassessment of statute barred reporting periods and penalties are moot.

CONCLUSION

[152] Based on all of the foregoing, LBL's appeals from the Reassessments dated June 23, 2005, made under the *Excise Tax Act* (Canada) for the Appellant's January 1, 1999 to February 29, 2000 GST monthly reporting periods are allowed, and the Reassessments are vacated.

COSTS

[153] Costs are awarded to the Appellant. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Appellant shall have a further 30 days to file written submissions on costs and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated August 29th 2023.

Signed at Ottawa, Canada this 12th day of September 2023.

“Henry A. Visser”

Visser J.

CITATION: 2023 TCC 130

COURT FILE NO.: 2012-4371(GST)G

STYLE OF CAUSE: LBL HOLDINGS LIMITED AND HIS MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: September 14-17, 21-24, October 5-8, 13-15, 2020 and July 13-15, 2021

AMENDED REASONS FOR JUDGMENT BY: The Honourable Justice Henry A. Visser

DATE OF AMENDED REASONS FOR JUDGMENT: September 12, 2023

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