Simpsons-Sears Limited *Appellant*;

and

The Provincial Secretary of the Province of New Brunswick and The Minister of Justice of the Province of New Brunswick *Respondents*;

and

The Attorney General for Ontario, The Attorney General for British Columbia and The Attorney General for Alberta *Intervenants.*

1977: May 30, 31; 1978: January 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Constitutional law — Taxation — Provincial sales tax — Catalogues distributed free — Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10, ss. 4, 5, 7.

The appellant is a large national retail merchandising company with head office in Toronto. It carries on business in several Provinces of Canada through its retail stores, of which there are three in New Brunswick, and by means of catalogues which the company distributes to prospective customers for use in ordering through its sales offices, of which there were nineteen in New Brunswick in 1972. Each year the company prepares, issues and distributes two major catalogues in the Atlantic region. These are prepared and printed in Toronto. Some are sent by mail to known customers in New Brunswick and others are distributed by home-delivery from the sales offices and retail stores in the Province. The question is whether or not the free distribution of the catalogues in New Brunswick is "consumption" of the catalogues within the meaning of the *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10, so as to make the appellant a consumer of goods consumed in the Province. The tax imposed by s. 4 of the statute as originally enacted was a sales tax upon "goods purchased at retail sale" within the Province and it was made payable by the purchaser. In 1957 the present s. 4 was substituted therefor with the difference that the tax imposed at that time was "computed at the rate of 3 per centum of the fair value . . ." . Barry J. of the Queen's Bench Division set aside the tax assessment imposed in

respect of the catalogues as invalid on the grounds that it was beyond the purview of the Act and beyond the powers of the Government of New Brunswick to impose constitutionally. The Appeal Division however reversed.

Held (Martland, Pigeon, Beetz and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Judson, Ritchie, Spence and Dickson JJ.: Reading the section as amended in the context of the statute as a whole the tax remains in the case of a retail sale within the Province a sales tax payable by the purchaser. Both ss. 5(1) and 7(1) relate to cases of such a retail sale within the Province and when read together can only be construed as imposing a tax payable by *the consumer when he purchases goods at such a sale*. The tax referred to in ss. 5(1) and 7(1) is obviously the tax imposed by s. 4 and the "consumption" referred to in s. 4 has to be construed as *a consumption after sale* if the goods are to be purchased at retail within the Province; "a sale" is an essential component of the taxable consumption. In this case there is no sale within or without the Province either at retail or otherwise, the question therefore is whether the language of the statute can convert a free distributor into a taxable consumer under s. 5(2). To construe consumption in s. 1(b) as meaning that every "use of goods" is taxable would be absurd and it is more reasonable to interpret the definition as being directed to "ultimate use". The catalogues are not to be regarded as finally consumed by the appellant. The distribution merely gives potential customers the use of the catalogues for making purchases within the Province but it is the purchase of the goods and not the distribution which attracts the tax. The only final use made of the catalogues is by those recipients who become purchasers for consumption.

Per Laskin C.J.: The language of the Act cannot be construed to convert a distributor into a taxable consumer of the catalogues mailed or delivered free to persons in New Brunswick.

The present form of the taxing statute derives from an effort by the provincial legislatures to find a drafting formula to meet the test of *a direct tax*. This was found in imposing the tax on the "consumer" and fortifying the charge by making retail sellers the agents for the

collection of that tax. It would be strange if under the definition of "consumer" a Province could validly tax a seller or a distributor regardless of the subsequent impact or general tendency of the tax.

Per Martland, Pigeon, Beetz and de Grandpré JJ. *dissenting*: Although the appellant obtained an order stating constitutional questions as to the validity of the tax on the catalogues, the submissions were limited to the contention that the tax was not due under the circumstances. *Atlantic Smoke Shops, Ld. v. Conlon*, [1943] A.C. 550, and *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619, effectively dispose of the constitutional objections based on the admitted fact that the cost of the catalogues was part of appellant's general expenses which have to be covered by the mark-up of the goods sold. The free distribution of catalogues should not be considered as a gift but as a business expenditure. Such free distribution should be regarded as a "use" under the Act in the same way as a "use" by a manufacturer or producer of items for advertising was under the federal legislation considered in the *Wampole* case, [1931] S.C.R. 494. As the appellant had borne the cost of the catalogues in question it should be held liable for the tax.

[*Atlantic Smoke Shops, Limited v. Conlon*, [1943] A.C. 550; *Canadian Industrial Gas and Oil Limited v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Cairns Construction Limited v. Government of Saskatchewan*, [1960] S.C.R. 619; *Attorney General for British Columbia v. Kingcome Navigation Company Limited*, [1934] A.C. 45; *R. v. Henry K. Wampole & Co. Ltd.*, [1931] S.C.R. 494; *Oriental Bank Corporation v. Wright*, (1880) 5 A.C. 842 (P.C.); *I.R.C. v. Ross and Coulter*, [1948] 1 All E.R. 616 referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], allowing an appeal from a judgment of Barry J.[2] holding that the appellant was not liable to pay New Brunswick sales tax under the *Social Services and Education Tax Act* now R.S.N.B. 1973, c. S-10, in respect of catalogues distributed free in the Province. Appeal allowed, judgment at trial restored, Martland, Pigeon, Beetz and de Grandpré JJ.

[1] (1976), 14 N.B.R. (2d) 631.
[2] (1975), 14 N.B.R. (2d) 289.

dissenting.

E. Neil McKelvey, Q.C., *R. M. Sedgewick, Q.C.*, and *Eric Nazzer*, for the appellant.

B. A. Crane and *R. Speight* for the respondent.

Blenus Wright and *V. L. Freidin* for the intervenant Attorney General for Ontario.

J. I. Bird and *Norman Tarnow* for the intervenant Attorney General for British Columbia.

Wm. Henkel, Q.C., and *E. F. Gamache* for the intervenant Attorney General for Alberta.

THE CHIEF JUSTICE—I have had the advantage of reading the reasons of my brothers Ritchie and Pigeon, and I agree with my brother Ritchie's primary conclusion that the language of the New Brunswick *Social Services and Education Tax Act* cannot be construed to convert a distributor into a taxable consumer of the catalogues which that distributor mails or delivers free to persons in New Brunswick. This is enough to dispose of the appeal which I would allow as proposed by my brother Ritchie.

I make only this additional observation relating to the present form of the taxing statute which charges the consumer and not the purchaser, as was the case before 1957. The difference in formulation owes much to the judgment of the Privy Council in *Attorney-General for British Columbia v. C.P.R.*[3], where a gasoline tax charged on a "purchaser" was struck down as indirect. This led to a provincial search for a drafting formula which would meet the test of a direct tax, and it was found in imposing the tax on the "consumer" and fortifying the charge by making retail sellers the agents of the government for the collection of the tax: see *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd.*[4]

[3] [1927] A.C. 934.
[4] [1934] A.C. 45.

However "consumer" is defined, it must be related to direct taxation, and it would be strange indeed if, under the terms of a definition of "consumer", a Province could validly tax a seller or a distributor, regardless of the subsequent impact or general tendency of the tax. Constitutional limitations cannot be evaded by such a bootstrap exercise. This issue lurks in the present case, but it is unnecessary to pursue it.

The judgment of Martand, Pigeon, Beetz and de Grandpré JJ. was delivered by

PIGEON J. (*dissenting*)—This is an appeal from the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick reversing the judgment of Barry J. of the Queen's Bench Division and restoring a tax assessment of $57,642.41 against appellant Simpsons-Sears Limited. The assessment was made under what might be called the New Brunswick sales tax act, the proper title of which is the *Social Services and Education Tax Act* now R.S.N.B. 1973 c. S-10. The facts which are not in dispute, were summarized by Hughes C.J.N.B. as follows:

> ... Simpsons-Sears Limited, (herein referred to as "the company") is a large national retail merchandising Company with head office in Toronto. It carries on business in several of the Provinces of Canada through its retail stores of which there are three in New Brunswick, and by means of catalogues which the Company distributes to prospective customers for use in ordering merchandise through the Company's sales offices of which there were nineteen in New Brunswick in 1972. Each year the Company prepares, issues and distributes large numbers of two major catalogues in the Atlantic Region, one in the spring season and the other in the fall. In these catalogues the Company advertises a wide selection of merchandise at stated prices and gives instructions how to order merchandise by mail and also by telephone. In addition the Company distributes in large numbers several smaller catalogues displaying seasonal selected merchandise.
>
> The Company's catalogues are planned, prepared and printed in Toronto under the supervision of its general catalogue order merchandising manager. ...

Some of the catalogues are sent by mail from Ontario to persons in New Brunswick who have previously purchased goods from the Company. Others are delivered by various means to customers' homes from the Company's sales offices and retail stores in the Province. The Company was assessed under the Act with respect to all catalogues delivered to persons in New Brunswick in the year 1972 without cost to the recipients. Counsel for the parties have agreed, (a) that the catalogues are "goods" within the meaning of the Act; (b) that 383,976 catalogues were mailed by the Company in Ontario in 1972 to customers in New Brunswick; (c) that the fair value of the catalogues so mailed for the purpose of the Act was $239,762 and that the tax thereon, if exigible, would be $19,180.96; (d) that during 1972 the Company also delivered to customers in New Brunswick 419,181 catalogues; (e) that the fair value of the catalogues so delivered for the purpose of the Act was $386,786 and the tax thereon, if exigible, would be $30,942.88, and (f) that interest on the assessment would be $7,518.57.

The relevant provisions of the *Social Services and Eduction Tax Act*, which were in effect at the time Simpsons-Sears is alleged to have become liable to the tax are the following:

1. In this Act, unless the context otherwise requires

. . .

(b) "consumption" includes use and also includes the incorporation into any structure, building, or fixture, of goods including those manufactured by the consumer or further processed or otherwise improved by him;

(c) "consumer" means a person who

(i) utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense; or

(ii) utilizes or intends to utilize within Province goods on behalf of or as the agent for a principal, who desired or desires to so utilize such goods for consumption by the principal or by any other person at the expense of the principal;

. . .

4. Every consumer of goods consumed in the Province shall pay to the Minister for the raising of a revenue for Provincial purposes, a tax in respect of the consumption of such goods, computed at the rate of eight per centum of the fair value of such goods.

5. (1) If the goods to be consumed are purchased at a retail sale within the Province, the consumer shall pay such tax computed on the fair value of the goods at the time of such purchase.

(2) If the goods are not purchased at a retail sale within the Province, the consumer shall pay such tax on the fair value thereof, determined in the manner following, namely:

(a) if the goods are primarily intended for consumption by use only, such tax shall be computed on the fair value of the goods at the time they are brought into the Province;

(b) if the goods are primarily intended for consumption otherwise than by use only, such tax shall be computed on the fair value of the goods at the time of consumption.

. . .

7. (1) In case of a retail sale within the Province, the tax shall be payable by the purchaser at the time of the purchase on the whole amount of the purchase price.

(2) Every person who brings or causes to be brought into the Province or who receives delivery in the Province of goods, for his own consumption or for the consumption of another person at his expense, or, on behalf of or as agent for a principal who desires to utilize such goods for consumption by such principal or by any other person at his expense, shall immediately report the matter to the Commissioner and forward or produce to him the invoice, if any, in respect of such goods and any other information required by the Commissioner with respect to the same.

(3) If the goods so brought in are primarily intended for consumption by use only, he shall pay the tax payable with respect to their consumption at the time such goods are brought into the Province.

(4) If the goods are primarily intended for consumption, otherwise than by use only, he shall pay such tax at the time of consumption.

In setting aside the tax assessment the trial judge said:

In the instant case, there was no sale of the catalogues in New Brunswick. The catalogues come from Toronto and are mailed free or given away free. The mailing takes place in Toronto to people in New Brunswick. The remainder of the free distribution takes place in this province. The sole purpose is to promote the sale of goods by Simpsons-Sears Limited in New Brunswick,

and the taxes collected from the purchaser on a very high proportion of such sales so effected and remitted to the respondent province. One can hardly say that the catalogues are consumed in this province and they are certainly not sold here. Without doubt, they are used here by at least some of the recipients. It is possible to define "use" as including the distribution by the appellant but, in my opinion, the user in fact is the recipient of the distributed catalogue. Its use by the appellant is transitory.

Bearing in mind that many authorities hold such opposite views, I express my opinion that the statute never contemplated a tax on catalogues purchased in another province and distributed without charge to people in this province. The plain ordinary common sense meaning to me, at least, of the words "sale", "purchase", "consumption", or "use" in the statute bear no relation to the present factual situation. A dictionary definition is not necessarily helpful in interpreting a taxation statute.

As against this Hughes C.J.N.B. said:

Having regard to the fact the company employs catalogues to a purpose, I do not see how it can be successfully argued that the company does not use or consume them. If the questions were asked: Does the company utilize catalogues in its business?, I think the answer must be in the affirmative; and it seems to me that it makes no difference whether the catalogues were kept only at company's retail stores or sales offices where customers could order goods from them, or whether the catalogues were delivered to prospective customers at their homes.

Counsel for the respondent made a special submission with respect to the catalogues mailed in Ontario to persons in New Brunswick. Counsel contends that even if the Court should find that the company utilized the catalogues it did not do so within New Brunswick. It seems to me the company is in no different position from any other resident of the Province who orders goods from a merchant outside the Province for delivery by mail to himself or to another person for that person's use or consumption at the expense of the person who ordered them. Although the company has its head office in Ontario it has several places of business within the New Brunswick and is therefore a person within the Province who may be taxed here, if taxed directly: See *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575.

The contention that the tax was indirect was rejected essentially on the following basis:

The case of *C.P.R. v. Attorney General for Saskatchewan*, [1952] 2 S.C.R. 231 was also cited in support of the submission that the tax on catalogues in the circumstances of the present case is *ultra vires* the province. In that case Rand, J. stated at p. 251:

> Lord Greene in the same case (British Columbia v. Esquimalt & Nanaimo Railway Company (1950) A.C. 87) speaks of the "fundamental difference" between the "economic tendency" of an owner to try to shift the incidence of a tax and the "passing on" of the tax regarded as the hallmark of an indirect tax. In relation to commodities in commerce, I take this to lie in the agreed conceptions of economists of charges which fall into the category of accumulating items: and the question is, what taxes, through intention and expectation, are to be included in those items? If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market. However much, in any case, these may be actually "intended" or "expected" to be passed on, it is now settled that they are to be so treated: Attorney-General for British Columbia v. C. P. Railway Company, [1927] A.C. 934; R. v. Caledonian Collieries, [1928] A.C. 538.

In my opinion a catalogue is not a commodity in commerce in the ordinary sense, and a tax imposed with respect to the consumption of catalogues by the company cannot be passed on as such. Applying the test formulated by Mr. Justice Rand it is my opinion the tax imposed by the Act on catalogues is not related or relateable to any unit of the commodities which the company advertises and sells and cannot be regarded as a tax which clings as a burden to a unit of the commodity or its price, or to the transaction presented to the market. The mere fact that the company may be able to shift the burden of the tax to the purchasers of its merchandise is not, in my opinion, sufficient to make the tax an indirect one, for almost everything purchased by a merchandiser of goods for the purpose of doing business, except the merchandise which he purchases for resale, attracts a tax under the Act. Naturally a merchandiser of goods seeks to recover such taxes and any

other direct taxes, such as real property and business taxes which he pays on his business premises, from the purchasers of his merchandise, but that does not make such taxes indirect taxes. Professor LaForest in his publication entitled The Allocation of Taxing Power Under the Canadian Constitution commented on the effect of passing on the burden of a tax at p. 65 as follows:

> What is required is the passing on of the tax itself in a recognizable form, not its recovery by more or less circuitous operation of economic forces. For that reason, subtle tracing of the ultimate economic incidence of a tax is irrelevant, and evidence of such economic tendencies will be rejected.

Although Simpsons-Sears obtained an order stating constitutional questions as to the validity of the tax on the two classes of catalogues, counsel appeared to concede the validity of the statute and to limit his submissions to the contention that the tax was not due under the circumstances. In any event, in view of what was decided by the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon*[5] as to the constitutional validity of the New Brunswick *Tobacco Sales Act*, I fail to see how a different conclusion could be reached with respect to another sales tax legislation so closely similar in nature. In this connection I would quote some passages from the unanimous judgment of the Court rendered by Martland J. in *Cairns Construction Ltd. v. Government of Saskatchewan*[6], holding that a builder was liable for sales tax on the price of components incorporated in houses built for a landowner or for resale (at pp. 626, 627, 629 and 630):

> The appellant seeks to distinguish the *Conlon* decision and that of the Privy Council in *Attorney-General for British Columbia v. Kingcome Navigation Company Limited* ([1934] A.C. 45), on the grounds that the taxes in question in those cases related to goods purchased for the purpose of consumption by the buyer, tobacco in the *Conlon* case, fuel oil in the *Kingcome* case. The Act in question in the present case relates not only to personal property purchased for consumption, which were referred to in argument as non-durable goods, but also to personal property purchased for use, referred to in argument as durable goods. It was contended that the

[5] [1943] A.C. 550.
[6] [1960] S.C.R. 619.

major incidence of the tax imposed by the Act would be upon durable goods. Such goods, it was argued, would, by their nature, continue, after their purchase, to be capable of being the subject-matter of subsequent trading. If they were subsequently traded, the purchaser of them, who had paid the tax, would seek to pass it on to a subsequent purchaser. Consequently it was submitted that a tax upon durable goods is an indirect tax. The trading in of second-hand automobiles was cited as an example. . . .

. . . In my opinion, the same reasoning which led the Privy Council to conclude, in the *Kingcome* and *Conlon* cases, that the respective statutes there under consideration imposed direct taxation is properly applicable to the Act now under consideration and is not rendered inapplicable because the present statute applies to durable as well as to consumable goods. It is true that the number of cases in which there might be a resale, as second-hand goods, by the taxpayer, of personal property which he has purchased for his own use and on which he has paid tax is greater in relation to durable goods than consumable goods. Our task, however, is to consider the general tendency of the impost for the purpose of classifying the tax. In my view, the sale by the taxpayer, as second-hand goods, after using it, of personal property which he has purchased for his own use, is exceptional when considering the general tendency of the tax as a whole. I cannot reach the conclusion that the Legislature, in imposing the tax, must have had the expectation and intention that it would be passed on. . . .

Is the general character of the tax altered because a house-builder, such as the appellant, would seek, as he undoubtedly would seek, in fixing the price of the house, to recoup the tax which he was required to pay in respect of the component parts? I do not think that it is. In my view, this attempt to recoup the tax in such cases is no different from the attempt which, in argument in the *Kingcome* case, it was suggested would be made by the manufacturer or the transporter to pass on the fuel oil tax there in question in the price of the article manufactured or transported. The appellant would undoubtedly seek, when selling the house which he constructed, to recoup himself for municipal land taxes which he had been required to pay on the land on which the house is situated, yet, clearly, a tax of this general character does not cease to be direct because cases may occur in which the taxpayer may be able to pass it on, as was established in *City of Halifax v. Fairbanks Estate* (1928 A.C. 117). . . .

These observations effectively dispose of the constitutional objections based on the admitted

fact that the cost of the catalogues was part of Simpsons-Sears general expenses which, of course, have to be covered by the mark-up of the goods sold, if the business is to be operated profitably.

In my view practically all the points raised by counsel for Simpsons-Sears boil down to the submission that the actual users of the catalogues, the ultimate consumers intended to be taxed, were the persons to whom those catalogues were given by Simpsons-Sears. As to this, I have to note that in *Cairns Construction*, the builder was held to be the final user, Martland J. saying (at p. 629):

> ... it also appears to me that a person who purchases personal property and incorporates it into something else, in the process of which it loses its own identity as personal property, is the final user of that personal property so incorporated....

In the instant case consideration must be given to what was decided by this Court with respect to federal sales tax, in a case mentioned by Hughes C.J.N.B.: *R. v. Henry K. Wampole & Co. Ltd.*[7], where tax was claimed on samples produced for free distribution. Anglin C.J.C. speaking for the majority said at pp. 496-497:

> ... My construction of clause (d) of section 87 is that the "use" by the manufacturer or producer of goods not sold includes any use whatsoever that such manufacturer or producer may make of such goods, and is wide enough to cover their "use" for advertising purposes by the distribution of them as free samples, as is the case here....

But, in clause 4 of the Special Case, we find the following statement:

> 4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

It is obvious to me that it cannot have been the intention of the Legislature to tax the same property twice in the hands of the manufacturer. Having regard to the admission of paragraph 4, above quoted, such double taxation

[7] [1931] S.C.R. 494.

would ensue were we to hold the samples here in question to be now subject to the consumption or sales tax, it being there admitted that the cost of producing such samples is included in the "cost of production of articles manufactured and sold, in respect of which ... the company has paid sales tax".

If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should be held liable for sales tax on their distribution as free samples.

Both parties rely on this decision: the respondents quoting it as supporting the view that the free distribution of the catalogues is the final use, the appellant as supporting the submission that double taxation is involved and the statute should be construed so as to avoid it. However, it should be borne in mind that the *Wampole* case turned upon the construction of a totally different statute where the tax is levied not on the consumer, the ultimate user, but on the manufacturer. The present case falls to be decided on the relevant statute and it turns mainly on the application of subs. 2 and 3 of s. 7 of the *Act* the relevant parts of which read:

(2) Every person who brings or causes to be brought into the Province or who receives delivery in the Province of goods, for his own consumption or for the consumption of another person at his expense, ... shall immediately report the matter to the Commissioner ...

(3) If the goods so brought in are primarily intended for consumption by use only, he shall pay the tax payable with respect to their consumption at the time such goods are brought into the Province.

Assuming that, as urged by the appellant, the recipients of the catalogues are the ultimate users, it seems clear to me that Simpsons-Sears is a person who has caused those goods to be brought into the province for the use of other persons at its expense, seeing that under s. 1(b) consumption "includes use".

As against this two objections are made: first, that the tax in question is not meant to be a gift tax and second, that the recipients are liable to the tax and double taxation should be avoided.

With respect to the first objection, I should say that the free distribution of catalogues, like the free distribution of samples or other advertising material, should not properly be considered as a gift but as a business expenditure. Item (z) of the exemptions in s. 10 of the *Act* (now item (gg) in s. 11) clearly indicates the Legislature's intention to tax catalogues, it reads:

> (z) books which are printed and bound, and which are solely for educational, technical, cultural or literary purposes, but not including directories, price lists, timetables, rate books, catalogues, periodic reports, fashion books, albums, magazines, periodicals, books for writing or drawing upon, or any books of the same general classes;

The Legislature must have been aware that catalogues, like price lists, timetables and rate books, are not usually sold to the ultimate user when distributed to the general public. I can see no reason why the free distribution of catalogues would not be a "use" under the New Brunswick Act, as well as under the Federal Act considered in the *Wampole* case.

As to the double taxation argument, it must be conceded that nothing in the Act expressly exempts the recipients of catalogues from being taxed as ultimate users. But such is the situation of every consumer of taxable goods provided at another's expense. In this respect, the situation of the recipients is not different from that of guests at a banquet, the host is liable for the tax just like the man who buys cigars for free distribution on the occurrence of a blessed event. Is the tax collector's claim going to be defeated by the objection that the guests are legally liable for the tax and nothing exempts them? Will the host be allowed to say that this is not a gift tax?

In my view, if there is any substance in the contention that the Act should be construed so as to avoid double taxation, then the conclusion should be that the recipients of the catalogues, like guests at a banquet, should be held not to be taxable. Otherwise, the words of the statute "or for

consumption of another person at his expense" are deprived of any meaning. These words have obviously been inserted for the purpose of having the giver taxed in the case where goods are provided free to an ultimate consumer. They were in s. 5 of the *Tobacco Tax Act* which was held valid by the Privy Council of the *Atlantic Smoke Shops* case. It read:

> 5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall . . . pay the same tax . . .

Viscount Simon L.C. said at pp. 566-567:

> . . . There is an obvious distinction between an indirect tax, like an ordinary customs or excise duty, which enters into the cost of an article at each stage of its subsequent handling or manufacture, and an impost laid on the final consumer, as "the particular party selected to pay "the tax," who produces the money which his agent pays over. This is mere machinery, and resembles the requirement in British income tax that in certain cases A is assessed for tax which B really bears—a circumstance which does not make income tax "indirect". The test for indirect taxation which Mill prescribed is the passing on of the burden of a duty by the person who first pays it through subsequent transactions to future recipients in the process of dealing with the commodity, or, at any rate, the tendency so to pass on the burden. Here the position is quite different. It is really the principal who in this case also both pays the tax and bears it. Their Lordships find it impossible to suppose that, in applying the economic distinction which is at the bottom of Mill's contrast, it would be correct to call this tax "direct" if a man bought a packet of cigarettes over the counter by putting his hand in his pocket and paying price and tax himself to the vendor, but "indirect" if he stood outside the shop and gave his wife the necessary amount to get the cigarettes and pay the tax for him. . . .

In my view, the same reasoning must be made in the case of goods bought for the use of another at

one's expense as in the case of goods bought for another as his agent. When the agent pays the tax he pays it for his principal and similarly when the giver pays the tax on goods bought for the use of another at his expense he pays it to the exoneration of the recipient. The man who picks up the check of his guest at the restaurant pays the tax on his meal as well as the cost of the meal and no question of double taxation arises, no tax collector was ever heard to have claimed a second tax from the guest on the basis that the host had paid his own tax, anymore than no one ever heard of a tax collector claiming a second tax from the principal when it had been paid by an agent. It should make no difference whether the check is picked up for a few guests or for a large number or whether the checks are paid cash or billed. In the present case Simpsons-Sears has picked up the check for the cost of the catalogues. I can see no reason why it should not be liable for the tax.

As to the contention that the catalogues were not really supplied at Simpsons-Sears' expense because this was done for business purposes with a view of earning a profit and was covered by the mark-up of goods sold, I would say first that this implies a construction of the statute which is not in accordance with the usual meaning of the words. In the usual meaning of language, a tradesman is always considered as supplying something at his expense when he is supplying it without charge. If a merchant says: «All merchandise delivered at our expense», every one understands this to mean that there is no charge for the delivery. It will never be understood to mean that this expenditure is not borne out of the profits made on sales and, in that sense and from the point of view of an economist, included in the price of the goods. In respect of the catalogues, the situation is even clearer than for any other business expense, because the recipients are under no obligation to purchase goods and they may well get them without buying any goods. Martland J's observations in the *Cairns Construction* case at pp. 629-30 should in my view apply *a fortiori* against any view that, in law, the cost of catalogues given free, is part of the goods sold.

It should finally be noted that double taxation is not unconstitutional. For instance, it is settled that legislatures may levy death taxes on transmissions within the province as well as on property within the province. Whenever the *situs* is in a province other than that in which the transmission occurs this may result in double taxation which will be avoided only if taxing provinces cooperate. In the present case, the Court was informed that no tax had been claimed by Ontario, para. 40 of s. 5 of *The Retail Sales Act* (R.S.O. c. 415), exempting "tangible personal property to be shipped by the vendor for delivery outside Ontario". A question was raised by counsel for the Attorney General of Ontario as to whether this exemption was properly applicable to the catalogues mailed from Toronto in view of s. 41 of the *Post Office Act* (R.S.C. c. P-14). It does not appear to me that this question, which is at variance with administrative practice and never appears to have been raised previously, needs to be considered in the present case. What the situation may be under the Ontario Act is not required to be determined in the present case. Even assuming the catalogues mailed from Toronto became the property of the addressees in Ontario, the fact remains that Simpsons-Sears did cause those addressees to receive delivery thereof in the Province of New Brunswick for their use at its expense.

Counsel for the intervenants other than Ontario were content to support respondents' submissions.

I would dismiss the appeal with costs to the respondents and, as usual, there should be no costs to or against the intervenants.

The judgment of Judson, Ritchie, Spence and Dickson JJ., in which Laskin C.J. also concurred, was delivered by

RITCHIE J.—The difficult question raised by this appeal is whether or not the free distribution of catalogues by Simpsons-Sears Limited in New Brunswick constitutes "consumption" of these catalogues within the meaning of the *Social Services and Education Tax Act*, R.S.N.B. 1973 c. S-10 (hereinafter referred to as the "statute", so as

to make that company subject to tax as a consumer of goods consumed in the Province. Section 4 of the statute provides:

> 4. Every consumer of goods consumed in the Province shall pay to the Minister for the raising of a revenue for Provincial purposes, a tax in respect of the consumption of such goods, computed at the rate of eight per centum of the fair value of such goods.

The meaning of the words "consumer" and "consumption" is explained by s. 1(b) and (c) of the statute, the relevant portions whereof read as follows:

> 1. In this Act, unless the context otherwise requires
>
> . . .
>
> (b) 'consumption' includes use and also includes the incorporation into any structure, building, or fixture, of goods including those manufactured by the consumer or further processed or otherwise improved by him;
>
> (c) 'consumer' means a person who
>
> (i) utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense.

When the statute was first enacted by c. 17 of the New Brunswick Acts of 1950, the predecessor of the present s. 4 provided that:

> 4. Every purchaser of goods purchased at a retail sale in the Province shall pay to His Majesty in the right of the Province for the raising of revenue at the time of making the purchase a tax in respect of the consumption of the goods and the tax shall be computed at the rate of 4 per centum of the purchase price of the goods purchased.

It was not until 1957 (New Brunswick Acts 1957 c. 59) that this section was repealed and the present s. 4 substituted therefor with the difference that the tax imposed at that time was "computed at the rate of 3 per centum of the fair value . . ." .

The tax imposed by s. 4 of the statute as originally enacted created a sales tax upon "goods purchased at retail sale within the Province" and it was made payable by the purchaser. But it is now contended by the respondent that the amended section provides for a tax on "consumption" or "use" payable by the "consumer" whether he be

purchaser, vendor, or producer of the goods and whether they have been purchased at retail sale within the Province or not.

It appears to me that when the amended section is read in the context of the statute as a whole, the tax imposed by s. 4 remains, in the case of a retail sale within the Province, a sales tax payable by the purchaser.

Section 5(1) of the present statute provides:

5 (1) If the goods to be consumed are purchased at a retail sale within the Province, the consumer shall pay such tax computed on the fair value of the goods at the time of such purchase.

This section must, however, be read in conjunction with s. 7(1) which reads as follows:

7. (1) In case of a retail sale within the Province, *the tax shall be payable by the purchaser* at the time of the purchase on the whole amount of the purchase price. [The italics are my own].

These two sections both relate to cases where there has been "a retail sale within the Province" and in my view when they are read together s. 5(1) can only be construed as imposing a tax payable by "the consumer" when he purchases goods at such a sale.

The "tax" referred to in both these sections is obviously "the tax" imposed by s. 4 which is the charging section and when that section is read in light of s. 5(1) the "consumption" therein referred to is to be construed as meaning *a consumption after sale* if the goods are to be purchased at retail within the Province. For these purposes "a sale" is an essential component of the taxable consumption and where there has been such a sale the tax "shall be payable by the purchaser" under s. 7(1).

This interpretation is reinforced by reference to many other sections of the Act. I refer by way of example to s. 17 which reads:

17. The tax imposed by section 4 and payable under subsection (1) of section 5, ... shall be collected or made as the case may be at the time of the purchase *on the whole amount of the purchase price.* [The italics are my own].

As I have indicated, the predecessor of the present statute was originally enacted as a Sales

Tax Act imposing a direct tax on the purchaser within the meaning of the language employed by Viscount Simon in *Atlantic Smoke Shops, Limited v. Conlon*[8], and in amending s. 4 so as to place the burden of the tax on the consumer, the Legislature of New Brunswick nevertheless retained "a sale" or "purchase" as a precondition of taxable consumption at least with respect to goods purchased at retail in New Brunswick.

In the present case there is no sale of catalogues within or without the Province either at retail or otherwise. The appellant is the producer, not the purchaser of the catalogues and potential customers receive them free of charge. I have referred to the last cited sections only to show that the original concept of a sales tax payable by the consumer purchaser is maintained in the present statute in respect of retail sales within the Province. The question here, however, is whether in the case of goods not purchased within or without the Province the language employed in the statute serves to convert a free distributor into a taxable consumer.

In this regard it becomes relevant to consider the provisions of s. 5(2) of the statute which impose a tax on the consumption of goods "not purchased at a retail sale within the Province" and which read as follows:

> 5. (2) If the goods are not purchased at a retail sale within the Province, the consumer shall pay such tax on the fair value thereof, determined in the manner following, namely:
>
> (a) if the goods are primarily intended for consumption by use only, such tax shall be computed on the fair value of the goods at the time they are brought into the Province;
>
> (b) if the goods are primarily intended for consumption otherwise than by use only, such tax shall be computed on the fair value of the goods at the time of consumption.

The word "consumption" as it occurs in the phrase "consumption by use" and "consumption otherwise than by use" in this subsection must, as it seems to me, connote something more than and different from "use" simpliciter, and in my opinion it is to be construed in this context as importing

[8] [1943] A.C. 550.

finality so that the consumer either by use or otherwise is the ultimate consumer and it is he who bears the tax. Incidental use such as that which the appellant makes of its catalogue is not, in my opinion, "consumption" within the meaning of this section or of s. 4 of the statute.

To construe the definition of "consumption" in s. 1(b) as meaning that every "use of goods" is taxable under the statute, in my view, if read literally could give rise to the absurdity that whenever a citizen uses an article his use attracts the tax. I cannot attribute this intention to the Legislature and find it more reasonable to interpret the definition as being directed to "ultimate use".

The catalogues in this case are not finally consumed by the appellant who distributes them for the benefit of such of the recipients as make retail purchases from them. The distribution merely places the catalogues in the hands of potential customers for use by them in making purchases within the Province, but it is the purchase of the goods and not the distribution or receipt of the catalogues which attracts the tax.

If I should be wrong in the above conclusions and the statute can be regarded as imposing a tax on the appellant's free distribution of catalogues, the further question arises as to whether such a tax can under the circumstances of this case be said to be "direct taxation within the Province" within the meaning of s. 92(2) of the *B.N.A. Act*. The distinction between direct and indirect taxation has been fully explored by my brothers Martland and Dickson in the course of their respective reasons for judgment in the recent case of *Canadian Industrial Gas and Oil Limited v. The Government of Saskatchewan et al.*[9] and I accept the definition adopted by them both in the following short paragraph:

> The dividing line between a direct and an indirect tax is referable to and ascertainable by the 'general tendencies of the tax and the common understanding of men as to those tendencies. The general tendency of a tax is the relevant criterion'.

[9] [1978] 2 S.C.R. 545.

In my opinion, if the appellants were taxable in respect of the distribution of their catalogues, the tax would not only be one having a general tendency to be passed on, but it would in fact be passed on by the appellant as appears from the evidence of its "General Catalogue Order Merchandising Manager who stated:

Q. Well perhaps you could answer. Is provincial sales tax, where payable, included in the cost of catalogues?

A. Yes.

Q. Which the department supervisors take into consideration when setting their prices.

A. Yes, this is one of the elements of cost, like paper and ink and setting, etc.

And again:

Q. Well is provincial sales tax, wherever you have to pay it, included as a cost of the catalogue?

A. Yes, it is.

Q. And what would happen if there was an increase in sales tax or a new sales tax? What does that do to the catalogue costs?

A. Well it would be no different than any other new cost or increased cost fact that we have charged to the individual department, and in that respect it would have to be recovered through the pricing.

The characteristics of a "direct tax" are illustrated in the well-known judgment of Viscount Simon in *Atlantic Smoke Shops, Limited v. Conlon, supra*, where he said at p. 563:

It is a tax which is to be paid by the last purchaser of the article, and, since there is no question of further resale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while for the purpose of classifying the tax, *it is the general tendency of the impost which has to be considered.* [The italics are my own].

This passage was adopted by Martland J., in the course of his reasons for judgment in this Court in

Cairns Construction Limited v. The Government of Saskatchewan[10].

If the present statute did purport to impose a tax on the appellant in respect of the free distribution of catalogues it could not in any sense be regarded as a tax payable "by the last purchaser of the article" or indeed by the last user thereof, and such a tax would not, in my opinion, be a direct tax within the Province within the meaning of s. 92(2) of the *British North America Act*.

We are dealing here exclusively with catalogues delivered to the homes of prospective customers either by mail from Toronto or by means of delivery within the Province and in my view if it could be said that these catalogues so distributed are used or consumed by Simpsons-Sears in New Brunswick, that use or consumption would be an intermediate use only, leading to the consummation of retail sales of its products in the Province, which sales are in turn subject to a tax payable by the purchaser if the goods are intended for consumption in New Brunswick. These catalogues may well be discarded by some of the recipients and consigned to the waste paper basket, in which case they have been of no use to anyone and it is clear from the evidence in this case that Simpsons-Sears Limited derives no benefit from them unless and until a retail purchase is made by a recipient within the Province. In my opinion their only final use is that made of them by those recipients who become purchasers for consumption. But it cannot be that the recipients are intended to be taxed as the consumers of the catalogues whether a purchase is made or not; if this were so their individual liability to tax would depend on whether or not the appellant had decided to send a catalogue to them. As I have said, it is the purchase which the recipient makes from the catalogue and not the catalogue itself which attracts the tax.

The cases of *Atlantic Smoke Shops Limited v. Conlon* (*supra*) and *Cairns Construction v. The Government of Saskatchewan* (*supra*), like that of the *Attorney General for British Columbia v. Kingcome Navigation Company Limited*[11], are all

[10] [1960] S.C.R. 619.
[11] [1934] A.C. 45.

sales tax cases in each of which a sale had been made and in referring to the *Atlantic Smoke Shops, Limited case*, Mr. Justice Pigeon observes:

> ... I fail to see how a different conclusion could be reached with respect to another sales tax legislation so closely similar in nature.

The distinction between those cases and the present one is, as I have endeavoured to point out, that in each of those cases there was a sale, whereas there is no sale of any kind involved in the distribution of the catalogues and the statutory language does not in my opinion convert the distributor into a final purchaser, consumer or user required to bear the burden of the tax.

It was contended on behalf of the respondent that even if the delivery of the catalogues did not constitute consumption by the appellant for its own use, the distribution was nonetheless taxable as constituting delivery of goods within the Province for the consumption of other persons at the appellant's expense. This contention is supported by reference to s. 1(c) of the statute which, as I have said, defines a consumer as a person who "utilizes or intends to utilize within the Province goods for his own consumption, *or for the consumption of any other person* at his expense;". The argument is reinforced by reference to s. 7(2), (3) and (4) which read:

> (2) Every person who brings or causes to be brought into the Province or who receives delivery in the Province of goods, for his own consumption or for the consumption of another person at his expense ... shall immediately report the matter to the Commissioner ...
>
> (3) If the goods so brought in are primarily intended for consumption by use only, he shall pay the tax payable with respect to their consumption at the time such goods are brought into the Province.
>
> (4) If the goods are primarily intended for consumption, otherwise than by use only, he shall pay such tax at the time of consumption.

It will be seen from the above that the appellant is not, in my view, a consumer within the meaning of the statute but the last quoted subsections purport to impose a tax on goods which a person has brought or caused to be brought into the Province for the consumption of another person at the

expense of the importer, and it is contended that even assuming that the recipients of the catalogues are to be regarded as the ultimate users or consumers, the appellant is nonetheless taxable as a person who has caused those goods to be brought into the Province for the use of others at its expense. In the present case, however, the uncontradicted evidence in my view establishes that Simpsons-Sears Limited has developed and perfected a system to ensure that the expense involved in producing and delivering its catalogue is reflected in the retail price charged for the goods which it displays and is therefore borne by the ultimate consumer. Mr. Justice Barry pointed this out in his reasons for judgment where he said of the catalogues:

> All costs of production, printing and distribution were pro rated to various stores, outlets and departments on an actuarial basis, and as a result, such costs would be reflected in the retail selling price of the goods sold by the appellant.

In the same context, Chief Justice Hughes stated that:

> The department supervisors are informed of the costs of the preparation and distribution of catalogues displaying their merchandise since it is their responsibility to produce a profit and they have to know the elements of cost that will be charged in computing the costs of the merchandise.

As the ultimate consumers at or after retail sale bear the expense of producing, printing and distributing the catalogues it cannot, in my opinion, be said that they were brought into the Province for the consumption of other persons *at the expense of Simpsons-Sears* within the meaning of s. 1(c) and s. 7(2). The evidence does not appear to me to support the inference that Simpsons-Sears "has picked up the check for the cost of the catalogues" as suggested by my brother Pigeon.

The recovery of the expense of production which is effected by the appellant is to be distinguished from the passing on of a sales tax although both may enter into the retail price charged. What is at issue here is the recovery of the expense of production and the evidence makes it clear that the product in question which is never sold is paid for

by the retail purchasers of the appellant's merchandise as the expense of producing it forms an element in the price paid for that merchandise and is thus subject to a sales tax payable by the ultimate consumer.

If I am correct in concluding that the word "consumption" as defined in the statute refers to ultimate use or consumption and that the ultimate users or consumers by whom the tax is payable in this instance are those recipients of the catalogues who purchase the merchandise displayed in it, then it must follow in my view that the subsections in question have no application to the present circumstances. The catalogues are not goods brought into the Province for the consumption of other persons at the appellant's expense if their "consumption" is evidenced by the ultimate purchase of the appellant's merchandise displayed in them; on the contrary, such "consumption" would normally show the appellant a profit.

In the course of the argument, reference was made to the case of *R. v. Henry K. Wampole & Co. Ltd.*[12], which involved the taxing of samples which were distributed without cost to the recipients and although the statute in that case imposed a federal sales tax on the manufacturer and is therefore of little assistance here, it is of interest, having regard to the following paragraph of the judgment rendered by Anglin C.J.C. on behalf of the majority of the Court:

> If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should be held liable for sales tax on their distribution as free samples.

In this regard I share the view expressed by Mr. Justice Barry that the present statute did not contemplate taxing the appellant and the recipient as well.

Finally, I should advert to the fact that a substantial number of the catalogues here in question were mailed from Toronto, whereas the remainder were delivered to the recipients within the Prov-

[12] [1931] S.C.R. 494.

ince. I make no distinction between the catalogues mailed to New Brunswick from Ontario and those given away in New Brunswick except that in relation to the catalogues mailed, the transaction is complete in Ontario insofar as Simpsons-Sears is concerned and this affords an additional reason why the New Brunswick Government cannot validly tax the goods involved therein.

It will be seen that in my opinion, in the particular circumstances of this case, the tax sought to be imposed by the present statute would be an indirect tax if the statutory language were such as to reach the appellant as producer and distributor of the catalogues, but that as there is no purchase of goods by the appellant either within or without the Province and as Simpsons-Sears Limited is not a "consumer" of goods "not purchased at a retail sale within the Province" within s. 5(2), there is no provision in the statute creating a tax payable by the distributor in respect of the free distribution of the catalogues here in question.

In seeking to determine the true meaning of the language used in the present statute, I have been mindful of the observation of Lord Blackburn in *Oriental Bank Corporation v. Wright*[13], when he referred to the rule "that the intention to impose a charge on the subject must be shewn by clear and unambiguous language" and I have also had very much in mind what was said by Lord Thankerton in *I.R.C. v. Ross and Coulter*[14], at p. 625 where he said:

> Counsel are apt to use the adjective 'penal' in describing the harsh consequences of a taxing provision, but if the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is capable of two alternative meanings the courts will prefer that meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect.

If the charging sections of the present statute are susceptible of alternative meanings, it will be seen that I prefer that which is more favourable to the appellant.

[13] (1880), 5 A.C. 842 (P.C.).
[14] [1948] 1 All E.R. 616.

For all these reasons, I would allow this appeal and restore the judgment rendered at trial by Barry J. The appellant is entitled to its costs both in this Court and in the Appeal Division of the Supreme Court of New Brunswick. There will be no costs for or against any of the intervenants or the Minister of Justice of the Province of New Brunswick.

Appeal allowed with costs, judgment at trial restored, MARTLAND, PIGEON, BEETZ *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: McKelvey, Macaulay, Machum & Fairweather, Saint John.

Solicitor for the respondents: The Attorney General for New Brunswick, Fredericton.

Solicitor for the Attorney General for Alberta: William Henkel, Edmonton.