SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax Herald Ltd. v. Nova Scotia (Finance)*, 2017 NSSC 284

Date: 2017-11-03
Docket: Hfx No. 462483
Registry: Halifax

Between:

The Halifax Herald Limited

Applicant

v.

Minister of Finance and Treasury Board (Nova Scotia)

Respondent

Judge:	The Honourable Justice James L. Chipman
Heard:	September 26, 2017, in Halifax, Nova Scotia
Counsel:	Robert G. Grant, Q.C. and Laura Rhodes, for the Applicant Agnes E. MacNeil, for the Respondent

By the Court:

Overview

[1] The Applicant seeks judicial review of the Respondent's decision to deny its application for a tax credit. The tax credit, known as the *Digital Media Tax Credit*, is a provincial refundable tax credit for costs related to the development of interactive digital media products in Nova Scotia.

[2] The Herald submits that the App they developed four years ago falls within the ambit of the relevant legislation such that the Minister's decision is unreasonable. The Herald says that in coming to its decision the Minister was informed by *Guidelines* which they submit are inconsistent with the *Regulations* applicable to the legislation.

Evidence Received

[3] The 224 page Record was filed on July 14, 2017. In addition, and rather unusually in the context of a judicial review, the parties agreed to the filing of these affidavits:

1. August 9, 2017, affidavit of The Herald's Senior Director, Digital Content, Sheryl Grant;
2. August 29, 2017, affidavit of the Respondent's Director of the Taxation and Federal Fiscal Relations Division, Paul B. Davies; and
3. September 8, 2017, supplementary affidavit of Ms. Grant.

[4] Additionally, the parties agreed Ms. Grant would be permitted to give (limited) direct evidence primarily with respect to introducing exhibits B and C of her first affidavit. These exhibits are discs which were played in Court when Ms. Grant was on the witness stand. Exhibit B is a video prepared by The Herald and shown to representatives of the Respondent in early September, 2014. The video demonstrates the functionality of the App or in the words of the narrator, "makes it come to life".

[5] Exhibit C is a video prepared by Ms. Grant. During cross-examination Ms. Grant stated the video was made, "to recreate the key features" of the App shown to the Respondent's representatives in early August, 2016. The video was prepared recently as the original video was not retained by either of the parties.

Background

[6] Just over ten years ago the provincial government instituted the *Digital Media Tax Credit* ("*DMTC"*) in s. 47A of the *Income Tax Act*, RSNS 1989, c. 217 ("*Income Tax Act*"). At the same time, the government created the *DMTC Regulations*, RS 1989, c. 217 ("*Regulations"*).

[7] The *DMTC* and *Regulations* were brought into force in May, 2010. In September, 2010, the government released the *DMTC Guidelines* ("*Guidelines"*) on the *DMTC* website.

[8] On May 27, 2016, The Halifax Herald Limited ("The Herald") made an application to the Nova Scotia Department of Finance and Treasury Board ("Department") for a *DMTC* with respect to its News Application ("App"). The Herald had made an earlier demonstration of the App to Department staff on September 5, 2014.

[9] On August 5, 2016, The Herald demonstrated the App to Department staff for a second time. As well, Department staff were provided with access codes and their devices were added as authorized users so, at their convenience, they could test and use the App.

[10] On December 21, 2016, Mr. Davies, on behalf of The Minister of Finance and Treasury Board (Nova Scotia) ("Minister") wrote to The Herald advising that the App was not eligible for the *DTMC*. On February 15, 2017, The Herald's legal counsel responded with a letter asking for a reconsideration of the decision. The Minister reconsidered the application and on March 9, 2017, Mr. Davies wrote to The Herald's legal counsel advising the App was ineligible for the *DMTC* for the reasons set out in the December 21, 2016, letter and for additional reasons.

[11] On April 13, 2017, The Herald filed the within Notice for Judicial Review setting out ten grounds for review, including this key ground:

> The Minister's Decision that the user is not interacting with the App is unreasonable, and is not consistent with the *Act* and the *Regulations.*

[12] Among other things, The Herald sought an Order, "quashing the Decision and directing the Minister to issue a certificate that the App is an eligible product, or alternatively, directing the Minister to reconsider the application in accordance

with directions of the Court that the App is an interactive digital media product within the meaning of the *Regulations*."

[13] On May 5, 2017, the Minister filed a Notice of Participation. On June 28, 2017, a Motion for Directions occurred and the within hearing date was set along with filing deadlines.

Issue

[14] The issue for consideration on this judicial review may be distilled to:

> Was the Minister's decision to deny The Herald's application reasonable?

Standard of Review

[15] The parties agree and I find that the standard of review is reasonableness. In *Stitch Media Incorporated v. Nova Scotia Minister of Finance* (Hfx. No. 395764, unreported NSSC decision dated September 14, 2012) Justice Coady found reasonableness to be the applicable standard of review for a judicial review of a decision to deny a *DTMC*.

[16] In *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70, Justice Fichaud explained the concept of reasonableness at paras. 33-40:

> 33 In *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R. 895 (S.C.C.), Justice Moldaver for the majority succinctly explained reasonableness:
>
> > [20] ... However, the analysis that follows is based on this Court's existing jurisprudence — and it is designed to bring a measure of predictability and clarity to that framework.
> >
> > . . . . .
> >
> > [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations. ... The question that arises, then, is who gets to decide among these competing reasonable interpretations?

> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision-maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker — not the courts — to make. ...
>
> [38] ... Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance. [citations omitted]
>
> [Justice Moldaver's emphasis]

34 We are dealing principally with the Review Officer's findings of fact. The reasonableness standard applies to findings of fact. The test is whether the tribunal's reasons allow the reviewing court to understand why the tribunal made its key findings and whether they are within the range of inferences that are permissible from the evidence before the tribunal. If the answer is yes, then the tribunal's findings stand, and it is immaterial that the reviewing judge might have drawn different inferences had he or she been the trier of fact.

35 The reviewing judge's perspective is wide-angled, not microscopic. The judge appraises the reasonableness of the "outcome", with reference to the tribunal's overall reasoning path in the context of the entire record. The judge does not isolate and parse each phrase of the tribunal's reasons, and then overturn because the judge would articulate one extract differently.

36 As authority for those principles, I refer to the following.

37 In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 (S.C.C.), Justice Abella for the Court said:

> [14] ... It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." (para. 47)
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the

> decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means the courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

38 In *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 (S.C.C.), Justice Abella for the majority reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. ...

39 In *Egg Films*, the majority said:

> [30] ... Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society of Upper Canada v. Ryan*, [2003] 1 S.C.R. 247, at paras. 50-51.

40 To similar effect: *Abridean International Inc. v. Bidgood*, 2017 NSCA 65 (N.S. C.A.), paras. 35 and 44.

[Emphasis added]

[17] Picking up on the guidance of Fichaud, J.A., I will endeavour to take a wide-angled perspective. In doing so, I will appraise the reasonableness of the outcome of denying The Herald's application, with reference to the Minister's overall

reasoning path in the context of the July 14, 2017, Record and affidavit evidence. My focus will be on the entirety of the grounds for review with particular emphasis on what I have characterized as the key ground; i.e., The Herald's assertion that the decision is not consistent with the *Income Tax Act* and *Regulations*. In particular, The Herald in both its written arguments (brief and reply brief) and oral submission vigorously argue that the decision relies on the *Guidelines* which are inconsistent with the *Regulations*. As for the Respondent, she argues that there is nothing in the *Guidelines* that contradicts the *Regulations*.

Statutory Framework

[18] The *DTMC* is a refundable tax credit for costs related to the development of interactive digital media products. Section 47(1)(c) of the *Income Tax Act* defines an "eligible product" as one that "satisfies the conditions prescribed by the regulations". The *Regulations* list the conditions the product must meet to be eligible for a *DMTC* as follows:

> **Eligible product**
> 5 A product must meet all of the following conditions to meet the definition of eligible product in clause 47A(1)(c) of the Act:
>
> (a) the product must be an interactive digital media product;
>
> (b) the product must not be used primarily
>
> (i) to present, promote or sell the products or services of a corporation or an organization, or
>
> (ii) for interpersonal communication;
>
> (c) the product must not be a combination of application files and data files that is developed primarily for use as
>
> (i) operating system software, or
>
> (ii) application software;
>
> (d) the product must not be capable of inciting hatred against an identifiable group, including a section of the public distinguished by colour, race, religion, sex, sexual orientation or ethnic origin;
>
> (e) the product must not be a product whose dominant characteristic is the undue exploitation of sex;

(f) the product must not be pornographic in nature.

[19] From the above it is clear that the product – in this case The Herald App – must be an "interactive digital media product". The *Regulations* provide this definition for "interactive digital media product":

Definitions
2 (1) In these regulations,

(a) "Act" means the *Income Tax Act*;

(b) "eligible employee" means an employee of an eligible corporation who

(i) was resident in the Province on the last day of the calendar year immediately before the year in which their eligible salary was earned, and

(ii) normally reports to a permanent establishment of the eligible corporation in the Province;

(c) "eligible remuneration" means remuneration that satisfies all the requirements in subsection 10(1);

(d) "government assistance" means assistance from a government or other public authority whether as a grant, subsidy, forgivable loan, deduction from tax, investment allowance or any other form of assistance, but does not include a tax credit under Section 47A of the Act;

(e) "interactive digital media product" means a combination of 1 or more application files and 1 or more data files, all in a digital format, that are integrated and are intended to be operated together with all of the following characteristics when they are being operated:

(i) their primary purpose is to educate, inform or entertain the user,

(ii) they achieve their primary purpose by presenting information in at least 2 of the following forms:

(A) text,

(B) sound,

(C) images,

> (iii) by interacting with them, the user can choose what information is to be presented and the form and sequence in which it is to be presented;
>
> (f) "marketing and distribution expenditure" means an expenditure that meets the requirements of subsection 8(1).
>
> (2) In Section 47A of the Act and these regulations, "eligible salaries" means salaries or wages that satisfy all the requirements in subsection 9(1).

[20] The *Guidelines* were published by the Minister subsequent to the passage of s. 47A of the *Income Tax Act* and *Regulations.* The cover page of the 23 page *Guidelines* indicates, "released September 2010 *DTMC* Website".

[21] The parties agree and I find that the *Guidelines* are not law. In the Minister's brief, they are described in this way:

> The Minister published Nova Scotia Digital Media Tax Credit Guidelines (the "Guidelines") for the administration of the DMTC. The Guidelines outline the nature of the tax credit, provide information regarding its calculation, what expenditures were eligible and what types of products were eligible for the DMTC. Such guidelines assist the administrators in consistent application of the *Act* and *Regulations*, and provide transparency to the public, outlining the factors considered in assessing the eligibility of applications for a DTMC.

[22] At p. 5 of the *Guidelines*, eligible and ineligible products are dealt with as follows:

> **What types of products are eligible?**
>
> To be eligible for the DMTC a product must be an "interactive digital media product" whose primary purpose is to educate, inform or entertain the user. The product must be a combination of application and data files, all in a digital format, and achieve its primary purpose by presenting information, in appreciable quantities, in at least two of: (a) text, (b) sound or (c) images.
>
> The eligible product must be interactive, that is, the user must be able to interact with the digital files and not simply be a reader or spectator. Appendix C describes the types of characteristics that an eligible product must contain for it to be considered sufficiently interactive.
>
> Types of interactive digital media products that may be eligible for the tax credit include, but are not restricted to, video games, educational, and informational

products. There is no restriction on how the eligible product is distributed, for example, on a Read Only Medium (ROM) or through a website.

What types of products are not eligible?

A combination of application files and data files developed primarily for use as an operating system or application software (e.g., word processing, spreadsheets, database, etc.) is not eligible for the tax credit. Products used primarily for interpersonal communications – such as cellular phone and email software – are also not eligible for the tax credit. For the purposes of interpreting the word "primarily", the Department of Finance uses "greater than 50 percent" to mean "primarily". The Department of Finance will determine what products exceed the 50 percent threshold.

A product used primarily to present, promote, or sell the goods or services of a corporation or an organization is not eligible for the tax credit. Generally, this will include products that display, advertise or inform a user about the goods and services of a corporation or organization, or where they can be purchased, provide the user with the ability to purchase goods and services of a corporation or organization by using the product, or contain links to websites where the user can purchase goods and services of a corporation or organization.

A tax credit will not be provided for products for which public financial support would, in the opinion of the Minister of Finance of Nova Scotia, be contrary to public policy. For greater clarification, this includes products that are pornographic in nature, have the undue exploitation of sex as their dominant characteristic, or are capable of inciting hatred against an identifiable group, including a section of the public distinguished by colour, race, religion, sex, sexual orientation or ethnic origin.

Each applicant will be required to submit a completed copy of their product to the department where it will be reviewed, to ensure compliance with the Act and Regulations.

[23] Appendix C of the *Guidelines* is titled "The Concept of Interactivity" and reads:

Appendix C

The Concept of Interactivity

The term "interactivity" is used to describe communication between a human being and a computer. This being said, interactivity can range from "technical"

interaction on a primary level (menus, cursors, etc.) to verbal exchanges with a computer.

An interactive digital media product must enable the user to become a participant, not simply a reader or spectator.

Three characteristics enable Finance staff to determine whether a multimedia title is interactive: feedback, control, and adaptation.

1. Feedback

Feedback is, in a way, a response given to a program user. For example, interactive educational software could comment on results obtained by a user to a test in the program. Depending on the case, it could give the right answer, point out weaknesses, or suggest that the user review one chapter or another.

2. Control

The user has a degree of control over a multimedia product when he can influence and affect the way in which the program unfolds. For example, the user can make choices, implement a strategy, move objects, use logical reasoning, reconstitute a whole, modify or create an image.

3. Adaptation

A program is said to adapt to various users' needs if the choice of actions depends on a number of situations that have been provided for. The program can therefore offer several scenarios that take into account the user's level of ability. It could also incorporate decision trees or databases leading to a search for information and subsequent processing of it.

It should be noted that these characteristics are not strict conditions with regard to interactivity. They nevertheless serve as an important guide in the evaluation of this criterion.

Examples of multimedia productions that usually present one or more characteristics:

- Video games;
- Educational software;
- "Edutainment" products;
- Simulators (for example, for driving a car).

To further clarify, a multimedia product that allows users only to choose content using buttons, panel displays, menus, or cursors, but does not allow users to interact with this content (e.g., a slide, video, karaoke or PowerPoint presentation), does not qualify for assistance under this tax measure. By the same

> token, the presence of hyperlinks allowing access to Web sites that may or may not be interactive is not sufficient for a product to be considered interactive.

[24] The *Guidelines*, at p. 3, contain the following bolded statement of the scope of their applicability:

> **Where there is a conflict between the information contained in these Guidelines and the Legislation and Regulations, the Legislation and Regulations governing the DMTC will take precedence over the guidelines, application forms, advance ruling or any other published information.**

The Minister's Decision

[25] In the Minister's initial letter, Mr. Davies starts out by referring to clause 2(1)(e)(iii) of the *Regulations*. The letter then concludes with these paras.:

> "The Chronicle Herald ISO App" is essentially an online newspaper that primarily provides news to its users. The App has other functions such as commenting forums that allow users to submit in-app comment and review other user generated comments on individual articles and content. It allows users to share links to articles via email, SMS, Facebook and Twitter. Users are also able to submit news tips by text or photo directly to the newsroom. Some of the news items have online videos and interactive maps showing the location where the specific news item is happening. The App also has a feature called "augmented reality" where the user can hover their iPhone/iPad over selected content of the Chronicle Herald newspaper to view videos related to the news.
>
> Pursuant to sub-clause 2(1)(e)(iii) of the DMTC Regulations, there must be interaction between the user and the product. The criteria used by the Department of Finance to assess a product's fulfillment of the interactivity requirement are outlined in the DMTC Guidelines; these criteria are feedback, control and adaptation.
>
> We do not consider the use to be "interacting" with the product as required in the Regulations. The user is essentially a spectator who chooses which news is to be viewed. Although the user may interact with other users by commenting and sharing links, this is not interacting with the product itself. The product itself is not providing any interaction with the user, though it does provide a platform for users to interact with each other. The interactive maps allows user to use the in-app embedded maps and the "augmented reality" feature can trigger a news or advertising video. However, there is no feedback (tailored response) from these features to the user. Overall, the product does not adapt to choices made by the user, which results in all users having essentially the same experience with the

> product. As a result, the Department of Finance finds that this product does not comply with sub-clause 2(1)(e)(iii) of the DMTC Regulations.

[26] In the reconsideration letter Mr. Davies states the App is not eligible for the *DMTC* for the reasons set out in the first letter, "as well as for the reasons set out herein". He again refers to clause 2(1)(e)(iii) of the *Regulations* and then writes:

> Whether the user of the product can choose the information to be presented and the form and sequence in which it is to be presented is only one part of the requirement set out in the clause. The Department disagrees that the user is "interacting" with the product, which is a critical requirement.
>
> The *Canadian Oxford Dictionary*, 2nd ed, defines "interact" as "1. act reciprocally; act on each other". If defines "interactive" as "1. reciprocally active; acting upon or influencing each other. 2. (of a computer, television or other electronic device) allowing a two-way flow of information between it and a user; responding to the user's input."
>
> In this case, the user's interaction with the product consists mainly of tapping menus or icons. The product responds by displaying information to the user. There is no further interaction between user and product, beyond tapping/selecting what is to be viewed and then viewing the selected article. The Department sees this as essentially a spectator who chooses which news in to be viewed. The user is not encouraged or influenced to do anything further in his or her use of the product (other than read the article); there is no reciprocity to the exchange between the user and the product.
>
> It was also noted in the decision letter that although the user may interact with other users by commenting and sharing links, this is not interacting with the product itself. The product itself is not providing any interaction with the user, though it does provide a platform for users to interact with each other.
>
> In summary, it is the Department's determination that the user is not interacting with the product in this case, and the product is therefore not eligible for the DMTC.
>
> In the decision letter, Appendix C of the DMTC Guidelines and the criteria listed therein were referenced (feedback, control and adaptation). As noted in the DMTC Guidelines, these characteristics are not strict conditions with regard to interactivity, and the Department does not treat them as such when it makes a decision regarding DMTC eligibility. The DMTC Guidelines are provided with the application forms and are published on the Department's website. They are designed to assist potential DMTC applicants; as notes by the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at paragraph 5:

> *There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be.*

With respect to business decisions being made in reliance on the receipt of a Digital Media Tax Credit, I would note that the Department has a Part "A" application process in place that enables entities to receive guidance in advance of the eligibility of their product before any investment or production costs are incurred.

If you have any further questions please feel free to contact me.

Positions of the Parties

The Herald

[27] The Applicant argues that clause 2(1)(e)(iii) of the *Regulations* should have been determinative in favor of their application. They submit that the *Regulations* do not require that the product be "interactive", but rather that the product be an "interactive digital media product". Further, The Herald argues that the concept of "sufficiently interactive" is present in the *Guidelines* only and not the *Regulations*. In their brief at paras. 29-32, The Herald makes this pitch:

> The purported interpretation given in the Guidelines provides criteria that modify in a significant manner the criteria in sub-condition 2(e)(iii) of the *Regulations.* The Guidelines introduce additional and different criteria from those in the *Regulations*. The *Regulations* should have governed the Minister's Decision.
>
> Under the criteria in the *Guidelines*, not only must the user, by interacting with the product, choose what information is to be presented and the form and sequence in which it is to be presented (as required under sub-conditions 2(e)(iii) of the *Regulations*), but the product must *also* provide feedback to the user based on their usage; adapt to the user's needs; and/or offer the user control over the way in which the multimedia product "unfolds".
>
> In the face of such a conflict, the Minister must give priority to the eligibility criteria given in the *Regulations* over the different and inconsistent (that is, "sufficiently interactive") set of criteria given under the Guidelines.

> The Minister does not enjoy "untrammeled discretion" and cannot apply higher standards where there is no basis in law to do so.

[28] The Applicant goes on to submit that in the first letter the Minister incorrectly used the "sufficiently interactive" criteria as determinative of the issue of eligibility.

[29] As for the second letter, The Herald says that the Minister wrongly read a dictionary definition of "interactive" into the statutorily defined term, "interactive digital media product". They add that the Minister's definition of "augmented reality" is flawed and that the App's augmented reality functionality is consistent with a proper definition of the term.

[30] In the result, The Herald submits that the Minister's decision is not reasonable and must be quashed.

Minister

[31] The Minister counters that the decision is reasonable. The Respondent says that The Herald's argument centres on their interpretation of "interactive digital media product", which skips over the portion of the provision which requires the user to be able to interact with the product. They submit that the Minister's reasons appropriately focus on the interpretation of "interacting".

[32] The Respondent says that the use of dictionary definition to assist with the textual meaning of words is appropriate. They add that the *Guidelines* transparently set out the policy and factors considered by the Minister. As for the concept of augmented reality (and virtual reality), the Respondent notes that these terms are not defined in the legislation and are not relevant to the Court's determination.

[33] The Minister, at p. 14 says this regarding the adequacy of reasons:

> The reasons outline the Minister's assessment that a user of the Herald app could select information to view, but that selecting by itself was a one-way flow of information, and interacting requires a two-way flow of information. The Guidelines' descriptions of feedback, control and adaptation are one way of describing a two-way flow of information. In the absence of the ability to have a two-way flow of information, the Minister found the product lacked interactivity, a critical requirement to qualify for the tax credit, and the application was denied.

> Whether the reasons are adequate depends upon the Court's assessment of whether they are justifiable, transparent and intelligible. The Minister submits that they are, and in accordance with the decision in *Stitch Media*, the Minister submits that the reasons provided are therefore adequate.

Legal Framework and Analysis

[34] In *Stitch*, Justice Coady found that the decision of the Minister had been conveyed by "an economy of words", as the Minister's decision in that case simply stated that the product "did not meet the requirement of being interactive". Accordingly, the statement of reasons was found to be inadequate and the Minister's decision was quashed. Given the circumstances, Justice Coady did not address the interpretation of "interactive digital media product".

[35] Of course this judicial review requires me to consider the Minister's interpretation of an interactive digital media product pursuant to the *Income Tax Act* and *Regulations*. Before doing so, however, I wish to make the observation that I am of the view that the Minister's decision is thorough, transparent and intelligible. In this regard the December 21, 2016, letter offers a host of reasons for why the Minister found the App to be ineligible, including:

> a) The App was primarily an online newspaper that mainly provides news to its users;
>
> b) There must be interaction between the user and the product.
>
> c) The Department uses feedback, control and adaptation as criteria to assess whether the interactivity criteria are met.
>
> d) The Minister did not consider the user to be "interacting" with the product as required in the *Regulations*.
>
> e) The user is essentially a spectator who chooses which news to view.
>
> f) Although the user could interact with other users by commenting and sharing links, it was not interacting with the product itself.
>
> g) The product does not provide any interaction with the user, though it provides a platform for users to interact with each other.
>
> h) The maps feature allows users to use in-App embedded maps and the "augmented m reality" feature can trigger a new or advertising video, but there is no tailored response from these features to the user.

> i) The product does not adapt to choices made by the user, resulting in all users having essentially the same experience with the product.

[36] The reconsideration letter of March 9, 2017, offers further reasons as to why the App did not meet all of the eligibility requirements; namely:

> a) Choosing the information to be presented and the form and sequence of it is only one part of the requirement in clause 2(1)(e)(iii) of the *Regulations*.
>
> b) The Department does not agree that the user is "interacting" with the product, which the Department states is a critical requirement.
>
> c) The Oxford Dictionary definitions of "interact" and "interactive" are cited:
>
> a. Interact: act reciprocally; act on each other",
>
> b. interactive: 1. Reciprocally active; acting upon or influencing each other. 2. (of a computer, television or other electronic device) allowing a two-way flow of information and a user; responding to the user's input.
>
> d) The user's interaction with the product consists of tapping menus or icons with the product responding by displaying information.
>
> e) There is no further interaction between the user and the product beyond tapping/selecting what is to be viewed and then viewing the selected article.
>
> f) The Department sees this as essentially a one-way flow of information, with the product supplying information to the user.
>
> g) The user is essentially a spectator who chooses which news to view. There is no reciprocity to the exchange between the user and the product.
>
> h) It reiterates that although the product provided a platform for the user could interact with other users by commenting and sharing inks, the user was not interacting with the product itself.
>
> i) The criteria listed in the *Guidelines* are not strict conditions with regard to interactivity, and the Department does not treat them as such when deciding eligibility.

[37] My determination that the decision is thorough, transparent and intelligible does not dispense with the key issue on this judicial review. The critical remaining questions are whether the Minister's decision relied too heavily on the *Guidelines*

and if so, whether the *Guidelines* are inconsistent with the *Income Tax Act* and *Regulations*.

[38] In *Stitch*, Justice Coady stated that it is a question of fact whether a product meets the definition, noting at para. 11:

> It is a question of fact whether a product meets the definition. That is the exercise of discretion, and that discretion related to a provincial government policy meant to attract more of this type of industry to Nova Scotia to employ Nova Scotians trained in that area.

[39] In *Elmsdale Landscaping Ltd. v. Nova Scotia (Environmental)*, 2009 NSSC 358, the Appellants argued that the Minister of Environment gave an erroneous interpretation of the word "structure" found in s. IV(2)(C) of the *Pit and Quarry Guidelines*. Justice Duncan analyzed the argument at paras. 45-50 and his observations are of assistance here:

> Having regard to the submissions of the appellants, which include definitions of "structure" as set out in Black's Law Dictionary and in the Canadian Oxford Dictionary, the building in question would seem to be a structure. So how is it then that the Minister might reasonably have concluded otherwise, even with the benefit of the additional information of amenities? Put another way, one may ask the question, when is a "structure" not a structure?
>
> I accept the respondent's argument that the guidelines are not statutory, nor regulatory, and do not have the force of law. They are prepared at the direction of the Minister as a tool to guide decision-makers.
>
> Guidelines may be presented to the public as mandatory but they cannot be used to fetter the discretion of the Minister. While they may serve to provide consistency and predictability to the affected parties, they are, nevertheless, guidelines only.
>
> Neither can they be relied upon as a means to subvert a statutorily authorized decision that a proper balancing of all relevant factors would otherwise support. see, *Allstate Insurance Company of Canada v. Nova Scotia (Insurance Review Board)* 2009 NSCA 78 at paragraph 40.
>
> The ultimate question for the Minister was whether, having regard to all of the information before him, the approval of the establishment of the quarry should be permitted to stand.

> With respect, the presence of the building, was but one factor to consider in the overall assessment of the appropriateness of the granting of the approval. To suggest that it, by virtue of the guideline definition, should be a determinative bar to the granting of the approval flies in the face of the more complex assessment that the department is called upon to make in determining whether approval or refusal of the application fulfills the purposes of the *Act*.
>
> [Emphasis added]

[40] I reiterate what Justice Duncan said about guidelines and also draw reference to the Nova Scotia Court of Appeal decisions in *Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 1 and *Paradise Active Healthy Living Society v. Nova Scotia (Attorney General)*, 2013 NSCA 9. In *Guy*, Justice Cromwell reviewed the legal principles with respect to a policy (which I liken to a guideline) at paras. 10 and 11:

> The first is that subordinate legislation must be authorized by a statute and not conflict with it. This is simply one aspect of the fundamental principle of legality: delegated power must be exercised within the limits granted by the legislature. If those limits are exceeded, the exercise of power is said to be *ultra vires* - beyond the authority of - the delegate: see, e.g., David J. Mullan, *Administrative Law*, (Toronto: Irwin Law, 2001) at 141.
>
> The second principle is related to the first. Unless it has clear legislative authority, a decision-maker generally must exercise its statutory discretion having regard to the particular circumstances of the case before it; it must not exercise its discretion solely on the basis of general rules or policies without regard to those particular circumstances. This is often referred to as the principle that a decision-maker may not "fetter" its discretion: see, e.g. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 1998 updated to July, 2007), vol. 3, s. 12.4410 ff. As Brown and Evans point out, "[s]ome statutes confer express authority on agencies to formulate rules or guidelines that are legally binding. However, as with all grants of statutory authority, whether such powers confer authority to create rules that have the force of law, or merely guide the judgment of decision-makers in much the same way as those made without explicit statutory authority, will depend upon their construction.": para. 12.4422.
>
> [Emphasis added]

[41] In *Paradise Active Healthy Living Society*, Justice Oland provided helpful background with respect to policies at paras. 33 and 34:

> Here, however, the Rails to Trails policy is merely a policy. Policies do not have a legally binding character. In *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., for a unanimous Court, stated that the Minister's policy guidelines could not fetter the exercise of his statutory discretion: "The discretion is given by Statute and the formulation and adoption of general policy guidelines cannot confine it" (pp. 6 & 7). He continued:
>
> > ... To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:
> >
> > > The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).
>
> The non-binding nature of policies is also discussed in D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf, Vol. 3, (Toronto: Canvasback, 2012) at pp. 12-39 - 12-43, p. 15-45. See also *R. v. Beaudry*, 2007 SCC 5, at para. 45, *Harnum v. Canada (Attorney General)*, 2009 FC 1184 at para. 38, 39, and *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2 at para. 30-31.
>
> [Emphasis added]

[42] *Maple Lodge Farms Ltd.* is referred to in the Minister's March 9, 2017, letter and relied upon in their submissions. The Minister's reconsideration letter quoted this passage (para. 5) from the Supreme Court of Canada's decision:

> > There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be.

[43] I do not find that anything turns on the fact that the *Guidelines* were published some three to four months after s. 47A of the *Income Tax Act* and *Regulations* were brought into force. The *Guidelines* were published over five years before The Herald made its application. They were on the Department's website so that members of the public could read about the nature of the tax credit and what types of products would be eligible for the *DMTC*. In this regard, the *Guidelines* were transparent and, provided they were consistent with the *Income Tax Act* and *Regulations*, of assistance to all concerned.

[44] Both parties agree that the *Guidelines* cannot be used to fetter then Minister's discretion. The Minister must base her statutory discretion on the particular circumstances of the case.

[45] The Applicant makes the point that the *Regulations*, "do not require that the product be 'interactive', but rather that the product be 'an interactive digital media product'". With respect, and for the reasons I will explain, I find this to be a distinction without a difference. The Herald goes on to argue that the concept of "sufficiently interactive" is present only in the *Guidelines*. While this is true, I am of the view that the *Guidelines* merely employ this terminology in an effort to explain what classifies pursuant to the *Regulations* as an interactive digital media product.

[46] I agree with The Herald that the *Regulations* tell the reader what is meant by an interactive digital medial product. Resort to statutory interpretation is not required because the *Regulations* specifically sets out what is meant by the term. Clause 2(1)(e)(iii) addresses the quality of the interactivity stipulating that the user, "can choose what information is to be presented and the form and sequence in which it is to be presented".

[47] In the Minister's first letter, the above clause is recited and then the author states, "there must be interaction between the user and the product". The letter goes on to state that the criteria used by the Minister to assess the App's "fulfillment of the interactivity requirement" are outlined in the *Guidelines*, i.e., feedback, control and adaptation.

[48] While it is correct that these three characteristics of interactivity are not specifically found in the *Regulations*, I do not regard this omission as fatal to the position of the Minister.

[49] "Interactive" or "interacting" are not defined in the *Income Tax Act* or *Regulations*. There is a definition of "interactive digital media product" which describes the minimum characteristics that the product must have to qualify for the *DMTC*. Part of these characteristics is that the user can interact with the software. The *Guidelines* provide an elaboration - which I find to be consistent with the legislation – with respect to the concept of interactivity involving feedback, control and adaptation. Indeed, the Supreme Court of *Canada in Maple Lodge Farms Ltd*. (see in particular para. 5 as quoted in the Minister's March 9, 2017, letter) stated that it will be helpful to applicants to know in general terms what the policy and practice of the Minister will be.

[50] On fair reading I am of the view that the *Guidelines* do not overreach or run afoul of the legislation. To my mind, they provide consistency and predictability to the process and do not offer policy inconsistent with the *Regulations*.

[51] An interactive digital media product is defined within the *Regulations*. Critical to the definition is that the user can choose what information is to be presented and the form and sequence in which it is to be presented, by interacting with them. In the initial letter it is made clear why the Minister does not consider the use to be "interacting" with the Herald's App as required in the *Regulations*. The Minister then refers to the *Guidelines* and the "interactivity requirement"; however, I do not believe that this reference and explanation as to why the App is ineligible to be inconsistent with the *Regulations*. Indeed, I am of the view that the *Guidelines* do nothing more than amplify and explain the intent of the legislation. To my mind the reconsideration or second letter provides further rationale for the decision. The dictionary references are perhaps unnecessary but do not cause the decision to be unreasonable.

[52] In this regard, I am mindful of Justice Fichaud's direction in *Canadian Union of Public Employees, Local 3912*. Rather than taking a microscopic approach, when I adopt a wide-angled perspective I find the outcome to be reasonable.

[53] The Minister delivered an overall reasoning path that in the context of the overall record, I find to be thorough, transparent and intelligible. The two letters referenced the *Regulations* as well as the *Guidelines*, which I find to be appropriate policy, consistent with the legislation.

[54] The use of the *Guidelines* was appropriate. They provide transparency and offer a logical and sensible guide to applicants. The Minister's decision (contained

within the two letters) provides a path of reasoning based on the facts which leads to a finding that The Herald's App is not interactive within the meaning of the legislation. The reasons taken as a whole support the decision, which is in line with the legislation and *Guidelines*. When I review the Minister's decision it is clear and supportable that The Herald's App is not eligible for the *DMTC* because the user is not interacting with the App sufficiently, in a way that is required by the legislation. On fair reading I find that the *Guidelines* are consistent with s. 47A of the *Income Tax Act* and *Regulations* and assist in conveying what is a reasonable decision. In the result, I hereby dismiss the within application for judicial review with costs to the Minister. If parties cannot agree on the amount of costs, I will accept written submissions within 30 days.

Chipman, J.