Docket: 2013-3473(GST)G

BETWEEN:

UNIVERSITY OF CALGARY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 29 and 30, 2014, at Calgary, Alberta.
Submissions received from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Justin Kutyan Carla Hanneman
Counsel for the Respondent:	Ronald MacPhee Jack Warren

JUDGMENT

The appeals from the reassessments made under the *Excise Tax Act* and dated September 30, 2011, January 24, 2012, February 2, 2012 and April 20, 2012 are allowed with costs. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that, during the relevant periods, the Appellant used the property identified as Plan 1935JK to the extent of 81.2% in its commercial activities, the property identified as Plan 859JK to the extent of 41.33% in its commercial activities and the property identified as Plan 9410341 to the extent of 25.86% in its commercial activities. The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award to the Appellant. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Ottawa, Canada, this 11th day of December 2015.

"S. D'Arcy"

D'Arcy J.

Citation: 2015 TCC 321
Date: 2015 12 11
Docket: 2013-3473(GST)G

BETWEEN:

UNIVERSITY OF CALGARY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

I. **Issue**

[1] The issue in these appeals is the extent to which the Appellant acquired and subsequently used certain of its land in its GST commercial activities.[1] This issue requires the Court to address the application of the general input tax credit rule in subsection 169(1), the "fair and reasonable" rule in subsection 141.01(5), and the input tax credit apportionment rules in subsections 141.01(2) and (3) of the GST Act.

II. **Interrelationship with the University of Alberta's Appeals**

[2] These appeals and appeals by the University of Alberta[2] were scheduled to be heard over the same three-day period. The appeals of both Appellants raise the same issue.

[3] Counsel for the Appellant suggested, at the commencement of the hearing of the appeals, that the Court hear the appeals of the University of Calgary on common evidence with the appeals of the University of Alberta. However, he asked that the Court issue two separate judgments.

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1 As that term is defined in subsection 123(1) of Part IX of the *Excise Tax Act* (the "GST Act" or the "Act".) Unless otherwise stated, all statutory references are to the provisions of the GST Act.

2 *University of Alberta v. The Queen*, 2013-3740(GST)G.

[4] Counsel for the Respondent was willing, for efficiency purposes, to proceed in such a manner but had some concerns since each Appellant would be presenting different facts to support its claim for input tax credits.

[5] I was not willing to follow counsel for the Appellant's suggestion for the simple reason that the evidence was not common to both parties. Although the Appellants carried on very similar, if not identical businesses, they engaged in different activities in the course of their respective businesses. These activities determine their entitlement to input tax credits.

[6] However, I did recognize that the two Appellants used very similar methodologies to determine their entitlement to input tax credits. In addition, counsel for the Appellant informed the Court that, while there was no evidence that was common to both appellants, there was "quite a bit of parallel in the evidence".

[7] As a result, the appeals of both Appellants proceeded as follows:

- The Court called the University of Calgary appeals and both parties presented their evidence.
- The Court adjourned these appeals.
- The Court called the University of Alberta appeals and both parties presented their evidence.
- The Court called the appeals of both Appellants, allowing the parties to present a single argument for the appeals of both Appellants.

III. **Summary of Facts**

[8] I heard from two witnesses. Mr. Bradley Klaiber testified on behalf of the Appellant and Mr. Robert Kinzner testified on behalf of the Respondent.

[9] Mr. Klaiber, a chartered accountant, is the Director of Financial Reporting for the Appellant. Mr. Kinzner, a certified management accountant, is a CRA auditor.

[10] I found both witnesses to be credible. However, as I will discuss, I do not accept Mr. Kinzner's application of subsections 141.01(2) and (3).

[11] The University of Calgary is a public research university located in Calgary, Alberta, with 31,500 students and 4,800 faculty and staff. Founded in 1966, the university has 14 faculties and more than 85 research institutes and centres.[3]

[12] The Appellant owns several parcels of real property in Calgary, which collectively constitute its land and premises.[4] Mr. Klaiber described the main campus of the university as follows: "It's sort of like a mini city . . . within Calgary where a number of people come to live, work, study, complete research."[5]

[13] Notwithstanding that the campus is predominantly used for educational purposes, the University of Calgary also provides various commercial and non-educational services to students, staff and the public.[6]

[14] The parties note the following in the PASF I at paragraph 2,

> At all relevant times, the University of Calgary was a "registrant", a "public service body" and a "public institution" as defined in subsection 123(1) of the Act. For the purposes of the Act, the University of Calgary makes both taxable and exempt supplies in the course of conducting its activities.

[15] The fact that the Appellant is a public service body means that it is also a public sector body,[7] which is relevant for the purposes of the section 206 change-in-use rules.

[16] These appeals involve three parcels of land owned by the Appellant. I will refer to the three parcels of land and the buildings located on the lands as, collectively, the "**U of C Properties**". The parties, at paragraph 4 of the PASF I, describe each of the three parcels as follows:

- "Plan 1935JK ("U of C Child Development Centre")"; I will refer to this parcel of land and the buildings located on the land as the "**CDC**".
- "Plan 859JK ("U of C Main Campus")"; I will refer to this parcel of land and the buildings located on the land as the "**Main Campus**".
- "Plan 9410341 ("U of C South Campus")"; I will refer to this parcel of land and the buildings located on the land as the "**South Campus**".

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3 Statement of Partially Agreed Facts (Background Information) ("PASF I"), paragraph 1; Transcript, page 16, testimony of Mr. Klaiber.

4 PASF I, paragraph 3.

5 Transcript, page 16, testimony of Mr. Klaiber.

6 PASF I, paragraph 3.

7 Subsection 123(1), definition of public sector body.

[17] The Appellant made an election, effective February 1, 2006, under section 211 of the Act in respect of each of the U of C Properties.[8] I will discuss the effect of the elections shortly. The main consequence of the elections, for the purposes of these appeals, is that the Appellant was deemed to have received on February 1, 2006 a taxable supply of each of the properties by way of sale and to have paid on that day tax in respect of each of the deemed supplies.[9]

[18] Subsequent to February 1, 2006, the Appellant made improvements to the U of C Properties. The tax in respect of the improvements to the U of C Properties appears to have been paid or to have become payable between February 2006 and March 2009.[10]

[19] As a result of the deemed acquisition of the U of C Properties and the subsequent improvements to the properties, the Appellant is required to determine, for input tax credit purposes, the extent to which it acquired the U of C Properties, additions to the properties or improvements to the properties for use in its GST commercial activities.

[20] The Appellant developed a methodology to determine the extent to which it used the U of C Properties in its commercial activities (the "Appellant's Original Methodology"). The parties provided the following general description of the Appellant's Original Methodology in the PASF I:

> For each of the U of C Properties, the University of Calgary took into account all of the structures on the property. It identified within a particular structure all of the space (measured by square meters) that was directly used in making taxable supplies for consideration, exempt supplies, and a mix of the two activities.[11]
>
> . . .
>
> The University of Calgary then developed a ratio (expressed as a percentage) between taxable and exempt activities within each structure and applied it to the mixed activities within the structure (*i.e.*, internal common areas). The University of Calgary then aggregated all of the activities from all the structures on the

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8 PASF I, paragraph 4.

9 Paragraphs 5 and 6 of the PASF I attempt to describe the consequences to the Appellant under the Act of making the elections. This is not the purpose of an agreed statement of facts. An agreed statement of facts should deal only with facts, not the law. It is for the Court, not the parties, to determine the law and how it applies to the fact situation before the Court.

10 See Exhibit R3, page 373; Exhibit R4, pages 443-444; Exhibit R5, pages 533-534; Transcript, pages 163-164, testimony of Mr. Kinzner.

11 PASF I, paragraph 8.

> property to determine a ratio (expressed as a percentage) to be applied to the remaining space on the property (*i.e.*, external common areas).[12]

[21] The Appellant, using this methodology, filed numerous GST returns in which it claimed input tax credits in respect of the U of C Properties on the basis that, during the relevant periods, the following percentages represented the extent to which it acquired each property for use, or used each property, in the course of its commercial activities:

- CDC – 85.77%
- Main Campus 43.2%
- South Campus 27.52%[13]

[22] The Minister reassessed on the basis that three adjustments are required to the Appellant's Original Methodology in order for the methodology to comply with the provisions of the GST Act, particularly section 141.01.

[23] First, the Minister disagrees with the Appellant's determination of the amount of space in specific buildings that the Appellant used directly in the making of taxable supplies for consideration, directly in the making of exempt supplies, and indirectly to make both taxable and exempt supplies. Second, she disagrees with the Appellant's treatment of the external common areas on the U of C Properties (the "External Common Areas"). Third, she believes that the Appellant's Original Methodology should be amended to add a weighting or index factor.

[24] The Appellant accepts the changes proposed by the Minister with respect to the allocation of space within specific buildings. The PASF I states the following:

> Subsequent to issuance of the Reassessments under appeal, the Appellant agreed to some of the adjustments proposed by the Minister (in applying the Appellant's methodology). As a result, the Appellant now claims the extent to which each U of C Property was being used in commercial activities is as follows:[14]

Properties	Extent of Use
Child Development Centre	81.20%

[12] PASF I, paragraph 10.
[13] PASF I, paragraph 11.
[14] PASF I, paragraph 19.

Main Campus	41.33%
South Campus	25.86%

[25] I will refer to the methodology used by the Appellant to determine these percentages as the "**Appellant's Final Methodology**" and the resulting percentages as the "**Appellant's Final Percentages**".

[26] The Appellant does not accept the Minister's treatment of the External Common Areas or the addition of an indexing factor.

[27] The parties provided in the PASF I, the following general description of the methodology developed by the Respondent (the "**Respondent's Methodology**"):

> The Minister takes the position that the entirety of each of the U of C Properties must be considered in calculating the extent of use in commercial activity. The Minister takes the position that the outdoor areas (other than parking areas) such as green space, roadways, walkways, and landscaped areas were not for use in making taxable supplies for consideration. Based on this view, the Minister takes the position that the U of C Method must be applied in a manner that includes these outdoor areas when calculating the extent of use in the commercial activity of the appellant.
>
> The Minister takes the position that a weighting or index system is required to take into account the different types of space on each of the U of C Properties. The Minister has identified the replacement costs of the various structures on each of the U of C Properties and uses that information to apply an indexing factor to the U of C Properties.[15]

[28] The Minister, using the Respondent's Methodology and after making adjustments to the Appellant's original calculation of the use of space within specific buildings, determined the extent to which each of the U of C Properties was used during the relevant period in commercial activities, as follows (the **"Respondent's Percentages"**):

- CDC – 69.91%
- Main Campus – 18.06%
- South Campus – 11.93%[16]

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[15] PASF I, paragraphs 13, 14.

[16] PASF I, paragraph 15.

[29] This resulted in the Minister assessing the Appellant to increase its net tax by approximately $3.9 million for the relevant periods.[17]

[30] Although they disagree on the treatment of the External Common Areas and the addition of a weighting or indexing factor to the Appellant's Final Methodology, the parties do agree on the actual use of the space within each building situated on the U of C Properties. Specifically, the Appellant's Final Methodology and the Respondent's Methodology use the same determination of the extent (measured in square meters) to which the Appellant used each building directly in the making of taxable supplies for consideration, directly in the making of exempt supplies and indirectly in the making of both taxable and exempt supplies.[18]

IV. **The Appellant's Methodology**

[31] Mr. Klaiber explained the Appellant's Original and Final Methodologies to the Court.

[32] As noted in the PASF I, the Appellant identified within a particular structure[19] situated on the U of C Properties all of the space (measured in square meters) that was used directly in the making of taxable supplies for consideration, directly in the making of exempt supplies and indirectly in the making of both taxable and exempt supplies.[20]

[33] Mr. Klaiber explained the process used by the Appellant to identify the use of particular space.[21] He emphasized that the Appellant tried to use "readily available information".

[34] His department first worked with the Appellant's Teams and Facilities Maintenance and Development group. This group has a database containing information relating to the space on campus within the Appellant's structures and buildings. This database contains detailed information for each building identifying each room in the building, the physical size of the room, the name of the room and the Appellant's use of the room.

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17 See PASF I, Exhibit F.
18 PASF I, paragraphs 8 and 9.
19 Including the parking lots.
20 PASF I, paragraph 8.
21 Transcript, pages 30-54, testimony of Mr. Klaiber.

[35] Mr. Klaiber and his staff reviewed all of the space on each floor of each building and allocated the space in each room and each common area to use directly in the making of exempt supplies, use directly in the making of taxable supplies for consideration or indirect use in making both exempt and taxable supplies (the "**Internal Common Areas**").[22]

[36] He noted that space used directly in the making of exempt supplies included classrooms and research labs that were not leased to third parties. Space used directly in the making of taxable supplies included food establishments, bookstores, parking lots and space leased to third parties.

[37] The Internal Common Areas included utility rooms, corridors and hallways, washrooms, etc. He explained that this space supported the "directly attributable activities" in the specific building.

[38] Exhibits A3, A4, and A5 summarize the Appellant's calculations for each room in each building on the three U of C Properties. These exhibits contain 270 pages of calculations for thousands of rooms in 90 structures (including parking lots) comprising approximately 898,000 square meters of space.

[39] The Appellant then aggregated the amounts calculated for the structures located on the U of C Properties. Specifically, for each of the three pieces of land comprising the U of C Properties, it calculated the square meters it used directly in making taxable supplies for consideration, the square meters it used directly in making exempt supplies and the square meters that comprised the Internal Common Areas.[23]

[40] At some point in time, the Appellant reviewed these calculations with the CRA and accepted certain adjustments proposed by the CRA with respect to the Appellant's determination of the use of the space within the structures. Exhibits B, C, and D to the PASF I contain the parties' agreed allocation of space in each of the structures on the U of C Properties.[24]

[41] Exhibit B to the PASF I contains the numbers agreed upon by the Appellant and the Respondent for the CDC land. The Appellant identifies seven structures on the CDC land. Exhibit B shows the total of the room-by-room calculation for each structure on the CDC land broken down according to the square meters used

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22 Mr. Klaiber referred to the Internal Common Areas as the mixed-use space.
23 Transcript, page 34, testimony of Mr. Klaiber.
24 PASF I, footnote 1. See also Transcript, pages 45, 96 and 102.

directly in the making of taxable supplies for consideration, the square meters used directly in the making of exempt supplies and the square meters used indirectly in the making of both taxable and exempt supplies (the Internal Common Areas).

[42] The square meters for the seven structures are then totalled, with the following result:

- The Appellant used 30,261.78 square meters directly in the making of taxable supplies for consideration.
- The Appellant used 7,004.81 square meters directly in the making of exempt supplies.
- The Appellant used 1,582.81 square meters indirectly in the making of both taxable and exempt supplies.

[43] Exhibit C contains the same calculation for the structures on the Main Campus. The Appellant identifies seventy-seven structures on the Main Campus. The totals of the calculations for the seventy-seven structures are as follows:

- The Appellant used 258,842 square meters directly in the making of taxable supplies for consideration.
- The Appellant used 367,485 square meters directly in the making of exempt supplies.
- The Appellant used 27,863 square meters indirectly in the making of both taxable and exempt supplies.

[44] Exhibit D contains the same calculation for the structures on the South Campus. The Appellant identifies six structures on the South Campus. The totals of the calculations for the six structures are the following:

- The Appellant used 53,001.30 square meters directly in the making of taxable supplies for consideration.
- The Appellant used 151,941.60 square meters directly in the making of exempt supplies.

[45] It is the Appellant's position that the extent to which a specific piece of land was used in commercial activities is determined by taking the total square meters of all of the structures on the specific piece of land that were used directly in the making of taxable supplies for consideration and dividing it by the total of the square meters of such land used directly in the making of taxable supplies for consideration and the square meters of such land used directly in the making of

exempt supplies. Using the numbers in Exhibits B, C and D results in the following (the Appellant's Final Percentages), which the Appellant argues represents the extent to which each piece of land was used in commercial activities:

- CDC - 30,261.78/(30,261.78+7,004.81) = 81.20%[25]
- Main Campus - 258,842/(258,842+367,485) = 41.33%[26]
- South Campus - 53,001.30/(53,001.30+151,941.60) = 25.86%[27]

[46] It is the Appellant's position that it is entitled to the input tax credits resulting from the application of the Appellant's Final Percentages to the GST paid or deemed to have been paid in the relevant reporting periods, as set out in Exhibit A to the PASF I.

[47] For example, Exhibit A shows that the parties have agreed that the GST in respect of which the Appellant is entitled to claim an input tax credit as of August 2007 was $543,700. It is the Appellant's position that it was entitled to claim an input tax credit equal to 81.2% of this amount.

[48] The Appellant's Final Methodology assumes that the Appellant acquired all areas of the land on the U of C Properties for the purpose of making either taxable or exempt supplies.

V. **The Respondent's Methodology**

[49] The Respondent does not accept the Appellant's methodology. She does not believe it complies with section 141.01. She proposes a methodology developed by the CRA that starts with the Appellant's calculations and makes two substantial adjustments. First, it treats the External Common Areas as space that was "not for use in making taxable supplies for consideration".[28] Second, it applies a weighting or index factor based upon the replacement cost of the various structures on the U of C Properties.

[50] Mr. Kinzner explained the CRA's methodology to the Court.

[51] The CRA started with the numbers contained in Exhibits B, C, and D of the PASF I for each structure on the U of C Properties. These are the numbers the

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25 PASF I, paragraph 19; Transcript, page 79, testimony of Mr. Klaiber.
26 PASF I, paragraph 19; Transcript, page 103, testimony of Mr. Klaiber.
27 PASF I, paragraph 19; Transcript, page 121, testimony of Mr. Klaiber.
28 PASF I, paragraph 13.

Appellant used, in its Final Methodology, to determine the extent to which it used the U of C Properties in commercial activities. The numbers represent the square meters in each structure used directly in the making of taxable supplies for consideration, the square meters used directly in the making of exempt supplies, and the square meters used indirectly in making both taxable and exempt supplies.[29]

[52] The CRA then adjusted the calculations in each of Exhibits B, C and D of the PASF I on the assumption that the Appellant did not use the External Common Areas indirectly to make taxable and exempt supplies.[30] As noted in Exhibits B, C, and D respectively of the PASF I, the square meters of the External Common Areas for each parcel of land are as follows:

- 168,420 square meters for the External Common Areas on the CDC land.
- 567,183 square meters for the External Common Areas on the Main Campus.
- 31,614 square meters for the External Common Areas on the South Campus.

[53] Mr. Kinzner testified that the Appellant used the External Common Areas on the CDC Lands and the Main Campus in "exempt" activities.[31] He also testified that the Appellant used 22,795 of the square meters making up the External Common Areas located on the South Campus in "exempt" activities. The CRA determined that the Appellant did not use the remaining 8,819 square meters of the External Common Areas on the South Campus in "exempt" activities, but rather leased the land as part of the parking garage.[32]

[54] Mr. Kinzner took me to Exhibits R3, R4 and R5, which show the adjustments the CRA made to the Appellant's Final Methodology.

[55] With respect to the CDC, Exhibit R3 shows that the CRA did not change the square meters of space the Appellant used directly in the making of taxable supplies for consideration or the square meters of space within the structures that the Appellant used indirectly in the making of both taxable and exempt supplies. However, the CRA did increase the number of square meters the Appellant used directly in the making of exempt supplies by the 168,420 square meters of External

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29 Exhibit R3, page 375; Transcript, pages 154-155, testimony of Mr. Kinzner.
30 Exhibit R3, page 375; Exhibit R4, page 447; Exhibit R5, page 535.
31 Transcript, pages 143 and 170, testimony of Mr. Kinzner.
32 Transcript, page 185, testimony of Mr. Kinzner.

Common Areas, resulting in an increase from 7,004.81 square meters to 175,424.81 meters.[33]

[56] Exhibit R4 sets out the similar adjustments the CRA made to the Appellant's numbers in Exhibit C of the PASF I with respect to the Main Campus. The square meters used directly in the making of taxable supplies and those used within structures indirectly for making both taxable and exempt supplies do not change. The number of square meters used directly in the making of exempt supplies increases by the 567,183 square meters of External Common Areas, resulting in an increase from 367,485 to 934,669 square meters.[34]

[57] The CRA made similar adjustments to the Appellant's numbers in Exhibit D of the PASF I with respect to the South Campus. It increased the square meters used directly in the making of taxable supplies by the 8,819 of the External Common Area that was leased as part of the parking garage, resulting in an increase from 53,001 to 61,820 square meters. It increased the number of square meters used directly in the making of exempt supplies by the remaining 22,795 square meters of the External Common Areas, resulting in an increase from 151,941 to 174,736 square meters.[35]

[58] After adjusting the Appellant's calculations for the External Common Areas, the CRA then applied what it refers to as a "weighting index" to its square meter calculations.

[59] A CRA valuator, David Jang, estimated the replacement costs for the buildings, parking lots, and landscaped areas located on the U of C Properties (referred to in the PASF II as the improvements).[36] Mr. Jang calculated the total replacement cost of each of the improvements as of September 30, 2011.[37]

[60] The appendices to Exhibit R3 set out the application of the CRA's indexing factor to the CDC lands.

[61] The CRA auditor, using the replacement cost determined by the CRA valuator, determined a cost per square foot for each of the seven structures and the External Common Areas on the CDC lands as follows:

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33 Exhibit R3, Appendix B, page 375.
34 Exhibit R4, Appendix C, page 447.
35 Exhibit R5, Appendix B, page 555.
36 Statement of Partially Agreed Facts (Valuator's Evidence) ("PASF II"), paragraph 1; Transcript, page 148, testimony of Mr.Kinzner.
37 PASF II, paragraph 2.

- CDC - $230.57 per square foot
- Physical plant - $204.53 per square foot
- General services building - $32.13 per square foot
- Materials handling - $32.13 per square foot
- The three parking lots - $5.05 per square foot
- Green space (roads/sidewalks/landscaping/forest) (the External Common Areas) - $4.25 per square foot[38]

[62] The CRA used the cost per square foot as a weighting index and applied it to the square meter breakdown agreed to by the parties for the seven structures on the CDC land.[39]

[63] For example, for the physical plant located on the CDC land the parties agree that the Appellant used 1,867 square meters of the plant directly in the making of taxable supplies for consideration and 3,592 square meters directly in the making of exempt supplies.[40] The CRA applied its weighting index as follows:

- It first calculated a weighted commercial area for the physical plant equal to the space used directly in the making of taxable supplies for consideration times the weighted index (the cost per square foot for the physical plant), i.e., 1,867 square meters x 204.53 = 381,857.51.

- It then calculated a weighted exempt area for the physical plant equal to the space used directly in the making of exempt supplies times the weighted index (the cost per square foot for the physical plant), i.e., 3,592.00 x 204.53 = 734,671.76.

- The CRA then totalled these amounts to arrive at a weighted total area for the physical plant of 1,116,529 (381,857 + 734,671).

[64] The CRA completed the same calculation for each of the other six structures on the CDC land.[41]

[65] A calculation was also done for the External Common Areas. Specifically, the CRA auditor began with the 168,420 square meters that the parties agreed was

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38 Exhibit R3, Appendix C, page 377; Transcript, pages 149-151, testimony of Mr. Kinzner.

39 Exhibit R3, Appendix D, page 378; transcript, pages 157-162, testimony of Mr. Kinzner.

40 PASF I, Exhibit B.

41 For the CDC building itself, it apportioned the mixed-use space (1,583 square meters) between commercial and exempt area. This calculation was not done for any other buildings on the U of C Properties.

the size of the CDC External Common Areas.[42] Since Mr. Kinzner assumed all of this area was "exempt", he calculated a weighted exempt area for the entire External Common Areas equal to the size of the External Common Areas times the weighting index (cost per square foot for improvements on the External Common Areas) i.e., 168,420 x 4.25 = 715,785.[43]

[66] The CRA then totalled the calculated weighted commercial area, the weighted exempt area, and the weighted total area for the CDC lands with the following result:

- Weighted square meters used in commercial activities – 3,888,152.35
- Weighted square meters used in exempt activities - 1,673,408.46 [44]
- Weighted total area – 5,561,560.81

[67] The CRA used the same method to apply the indexing factor to the Main Campus. It used the cost per square foot as a weighting index and applied it to the agreed calculation of the square meters used directly in the making of taxable supplies for consideration, the square meters used directly in making exempt supplies and the square meters used indirectly in the making of supplies for the structures on the Main Campus.[45]

[68] With respect to the External Common Areas, the auditor began with the 567,183 square meters that the parties agreed was the size of the External Common Areas on the Main Campus.[46] Since the CRA auditor assumed all of this area was "exempt", he calculated a weighted exempt area for the entire External Common Areas equal to the size of the External Common Areas times the weighted index (cost per square foot for improvements on the External Common Areas) i.e., 567,183 x 4.25 = 2,410,528.[47]

[69] The CRA then totalled the calculated weighted commercial area, the weighted exempt area and the weighted total area for the Main Campus, including the External Common Areas, with the following result:

- Weighted square meters used in commercial activities – 18,824,279
- Weighted square meters used in exempt activities – 85,426,040

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42 PASF I, Exhibit B.
43 Exhibit R3, Appendix D, page 378.
44 This includes 715,785 weighted square meters for the External Common Areas.
45 Exhibit R4, Appendix D and Appendix E, pages 448-455; Transcript, pages 172-175, testimony of Mr. Kinzner.
46 PASF I, Exhibit C.
47 Exhibit R4, Appendix E, page 454.

- Weighted total area – 104,250,320.[48]

[70] The CRA used the same indexing method for each structure on the South Campus and for the South Campus External Common Areas, with the following result:

- Weighted square meters used in commercial activities – 5,152,150
- Weighted square meters used in exempt activities – 38,016,992
- Weighted total area 43,169,142 [49]

[71] The CRA then determined the extent to which the Appellant used each piece of land in commercial activities by taking, for each of the three pieces of land, the amount it calculated as the total weighted square meters used in making taxable supplies for consideration and dividing it by the weighted total area for the piece of land. This resulted in the following percentages (i.e., the Respondent's Percentages),

- CDC – 69.91% (3,888,152/5,561,561)
- Main Campus 18.06% (18,824,279/104,250,320)
- South Campus 11.93% (5,152,150/43,169,142)[50]

[72] It is the Respondent's position that the Appellant is entitled to input tax credits calculated by applying the Respondent's Percentages to the agreed amount of GST that the Appellant paid or was deemed to have paid on each property.[51] For example, Exhibit A of the PASF I shows that the eligible amount of GST for the Appellant's August 2007 reporting period for the CDC was $543,700.11. It is the Minister's position that the Appellant was entitled to claim an input tax credit equal to 69.91% of this amount.[52]

VI. **The Law**

[73] Subsection 169(1) of the Act contains the general rules for the claiming of input tax credits. The applicable portions of subsection 169(1) read as follows:

> Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person

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48 Exhibit R4, Appendix E, page 454.
49 Exhibit R5, Appendix D, page 539; Transcript, pages 183-184, testimony of Mr. Kinzner.
50 PASF I, paragraph 15.
51 The agreed amounts are set out in Exhibit A of the PASF I.
52 Exhibit R3, Appendix E, page 379; see also Exhibit R4, Appendix F, page 457 and Exhibit R5, Appendix E, page 540.

> during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period
>
> A x B
>
> where
>
> A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B is
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> . . .
>
> *(b)* where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and
>
> *(c)* in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[74] These appeals relate to the Appellant's ability to claim input tax credits with respect to the acquisition of capital real property and subsequent improvements to the real property. Under paragraph *(c)* of the definition of B in subsection 169(1), a GST registrant is entitled to claim an input tax credit for GST paid on the acquisition of capital real property according to the extent to which it acquired the property for consumption, use or supply in the course of its commercial activities. With respect to improvements to the capital real property, paragraph *(b)* of the definition of B in subsection 169(1) allows a person who is a registrant to claim an input tax credit based upon the extent to which the person was using the capital real property in the course of the person's commercial activities immediately after the capital real property was last acquired by the person.

[75] Subsection 209(1) provides that subsections 199(2) to (4) and 200(2) and (3) apply, with any modifications the circumstances require, to certain real property

acquired by a registrant that is a public service body as if the real property were personal property. Those subsections apply to real property acquired by the public service body for use as capital property or, in the case of subsection 199(4), to improvements to capital real property of the public service body.

[76] The Appellant is a public service body. Therefore, in the first instance, subsection 209(1) would apply to any acquisition of the U of C Properties and to improvements to those properties.

[77] Subsections 199(2) to (4) contain rules that are generally referred to as the primary use test. The combined effect of those provisions and subsection 209(1) is that tax payable by a registered public service body in respect of the acquisition of capital real property is not included in determining the input tax credit of the public service body unless the real property was acquired for use primarily in commercial activities of that body.[53] A similar rule applies for improvements to such real property. Any tax payable in respect of improvements is not included in determining the input tax credit of the public service body unless, at the time that such tax is paid or becomes payable, the capital real property is used primarily in commercial activities of the public service body.[54]

[78] It is my understanding that the Appellant prior to making the section 211 elections on February 1, 2006, was not entitled to claim input tax credits in respect of the U of C Properties since it was not using the properties primarily in commercial activities.

[79] Section 211 provides a mechanism whereby certain public service bodies may claim input tax credits in respect of real property that they do not use primarily in commercial activities. In addition, the election results in certain exempt supplies of the real property becoming taxable supplies.

[80] Subsection 211(1) provides in part that, where a public service body files an election with respect to real property that is capital property of the body, section 209 does not apply to the property. As a result, the public service body is entitled to claim input tax credits in respect of such real property even if the real property is used primarily in non-commercial activities.

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53 Subsections 209(1) and 199(2).

54 Subsections 209(1) and 199(4).

[81] In addition, supplies of the real property that would otherwise be exempt because of the application of section 1 of Part V.1 of Schedule V[55] or the application of section 25 of Part VI of Schedule V[56] are excluded from exemption under these sections.

[82] The evidence before me is that, prior to February 1, 2006, the Appellant made significant exempt supplies of real property by way of lease. As a result of the elections under section 211, these supplies became taxable supplies.

[83] Once a public service body makes an election under subsection 211(1), it is deemed under paragraph 211(2)*(a)* to have made, immediately before the effective date of the election, a supply of the real property by way of sale and to have collected, on the particular day, tax in respect of the supply equal the basic tax content of the property on the particular day.[57]

[84] Paragraph 211(2)*(b)* deems the public service body to have received on the effective date of the election a taxable supply of the real property by way of sale and to have paid, on the particular day, tax in respect of the supply equal to the basic tax content of the property on the particular day.

[85] Effective February 1, 2006, the Appellant made elections under section 211 in respect of the CDC, the Main Campus, and the South Campus. As a result, it was deemed to have made a supply of each property immediately before February 1, 2006 and to have acquired each of the properties on February 1, 2006.

[86] There is no dispute before the Court with respect to either the deemed supply under paragraph 211(1)*(a)* of each of the three properties or the Appellant's ability to claim an offsetting input tax credit for the tax it was deemed to have collected.[58]

[87] The issue before the Court is the Appellant's ability to claim input tax credits for the tax it was deemed to have paid on the exercise of the elections and for the GST it subsequently paid in respect of improvements to the U of C Properties.

[88] The majority of the input tax credits at issue relate to the GST the Appellant was deemed under paragraph 211(2)*(b)* to have paid on the deemed acquisition of

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55 Section 1 of Part V.1 of Schedule V exempts certain supplies made by charities.
56 Section 25 of Part VI of Schedule V exempts certain supplies of real property made by a public service body.
57 Basic tax content is defined in subsection 123(1).
58 I assume the offsetting input tax credit was claimed under section 193.

the U of C Properties. Under subsection 169(1), the Appellant is entitled to claim a credit for such tax based on the extent (expressed as a percentage) to which it acquired the real property for use in the course of its commercial activities.

[89] The parties also disagree on the amount of input tax credits the Appellant is entitled to claim in respect of tax paid or payable, after the deemed acquisition, on improvements to the properties. Since the U of C Properties are capital real property of the Appellant and the Appellant has made elections under subsection 211(1), paragraph 169(1)*(b)* and the change-in-use rules in section 206 apply when determining the Appellant's entitlement to input tax credits for tax paid in respect of improvements to the properties. These provisions look at the Appellant's actual use of the properties.

[90] Regardless of which provisions apply, the Appellant's ability to claim input tax credits is dependent on its intended or actual use of the properties in its commercial activities. Commercial activity is defined in subsection 123(1). The relevant portions of the definition for the purposes of these appeals are as follows:

> *(a)* a business carried on by the person . . . except to the extent to which the business involves the making of exempt supplies by the person,
>
> . . . and
>
> *(c)* the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.

[91] Business is defined in subsection 123(1) as follows:

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment.

[92] Under the GST Act, a person's business is broader than the person's commercial activity. A business includes all of the activities of a person regardless of whether the activities involve the making of taxable supplies or of exempt supplies. This is an important distinction for the purposes of various provisions of the Act, including the input tax credit apportionment rules contained in section 141.01.

[93] On the evidence before me, I have concluded that the Appellant carried on a single business, namely, the operation of a university, and that it carried on all of its activities in the course of this business. All of the business constituted a commercial activity of the Appellant, except to the extent to which the business involved the making of exempt supplies.

[94] The application of subsection 169(1) to tax paid on property or services acquired by a registrant in the course of its business for consumption or use directly in the making of a specific supply is relatively straightforward. For example, if the registrant acquires the property or service only for consumption or use directly in the making of a taxable supply, then the property is consumed or used in the course of the registrant's commercial activity and the registrant is entitled to claim a full input tax credit for the tax paid on the acquisition of the property or service. Alternatively, no input tax credit is available if the registrant acquires the property or service solely for consumption or use directly in the making of exempt supplies.

[95] The application of subsection 169(1) to "indirect costs", that is, property and services that are not used directly in the making of a taxable or an exempt supply, is not as straightforward. When making a determination in this regard, one must consider the section 141.01 input tax credit apportionment rules.

[96] Indirect costs include such things as administrative costs, overhead costs, and costs incurred in respect of common areas in or around a building. For example, in most instances, the payroll department of a corporation that makes both taxable and exempt supplies will not be involved directly in the making of any supplies by the corporation.

[97] The expenses of the payroll department are incurred in the course of the registrant's business. All of the registrant's business constitutes its commercial activity, except to the extent to which the business involves the making of exempt supplies. It can be argued that, since the payroll department is not involved directly in the making of exempt supplies, it is not involved in the portion of the registrant's business that makes the exempt supplies. If this argument were accepted, then all of the payroll department's activities would be considered to have occurred in the course of the registrant's commercial activity. Such an interpretation would allow a registrant who makes both taxable and exempt supplies to claim full input tax credits for indirect costs such as costs incurred by its payroll department.

[98] Parliament addressed this issue when it added section 141.01 in 1994, retroactive to the introduction of the GST. Subsections 141.01(2) and 141.01(3) clarify that, when determining input tax credits for a registrant involved in both taxable and exempt activities, one must attribute all costs of the registrant to the making of supplies.

[99] Subsection 141.01(2) sets out a deeming rule that applies on the acquisition of property or a service.[59] The subsection reads as follows:

> Where a person acquires or imports property or a service or brings it into a participating province for consumption or use in the course of an endeavour of the person, the person shall, for the purposes of this Part, be deemed to have acquired or imported the property or service or brought it into the province, as the case may be,
>
> *(a)* for consumption or use in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person for the purpose of making taxable supplies for consideration in the course of that endeavour; and
>
> *(b)* for consumption or use otherwise than in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person
>
> (i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or
>
> (ii) for a purpose other than the making of supplies in the course of that endeavour.

[100] Endeavour of a person is defined in subsection 141.01(1) as meaning a business of the person, an adventure or concern in the nature of trade of the person, or the making of a supply of real property of the person.

[101] For example, the endeavour of a person carrying on a single business is all of the activities of the business, including the making of taxable supplies and the making of exempt supplies.

[102] Subsection 141.01(2) applies to property or a service acquired[60] by the person for consumption or use in the course of the business. Pursuant to paragraph

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59 It also applies on the importation of property or a service.

60 The subsection also applies to property or services imported into Canada and property or services brought into a participating province.

141.01(2)*(a)*, the person is deemed, for the purposes of the Act, to have acquired the property or service for consumption or use in the course of commercial activities of the person to the extent that the property or service is acquired by the person for the purpose of making taxable supplies for consideration in the course of the business.

[103] Alternatively, under subparagraph 141.01(2)*(b)*(i), the person is deemed to have acquired the property or service for consumption or use otherwise than in the course of commercial activities of the person to the extent that the property or service is acquired by the person for the purpose of making supplies in the course of the business that are not taxable supplies made for consideration. Normally, this would be exempt supplies and taxable supplies made for no consideration or nominal consideration.[61]

[104] In addition, under subparagraph 141.01(2)*(b)*(ii), the person is deemed to have acquired the property or service for consumption or use otherwise than in the course of commercial activities of the person to the extent that the property or service is acquired by the person for a purpose other than the making of supplies in the course of the business. This provision applies where a person incurs expenses that do not relate to the person's business. Normally, such expenses are personal expenses of the owner of the business or a person related to the owner.

[105] Subsection 141.01(2) looks at the person's purpose when acquiring the property or service, in other words, the person's intended consumption or use of the property or service. In particular, it looks to see if the intention was to use the property or service in the making of taxable supplies for consideration, the making of exempt supplies or the making of a combination of such supplies.[62] The person is only entitled to claim an input tax credit for tax paid on the property or service to the extent that the person's intention was to use the property or service in the making of taxable supplies for consideration.

[106] In my view, if a corporation incurs an expense in the course of its business (endeavour), then the expense will always be incurred for the purpose of making one or more supplies. The purpose of the business is to earn revenue, i.e., to make supplies. Therefore, the result of subsection 141.01 (2) is that all costs incurred by

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61 Under subsection 141.01(4) property or services acquired for the purpose of making a taxable supply for no consideration or nominal consideration may be deemed to have been acquired for the purpose of making a taxable supply for consideration.

62 In addition to taxable supplies for consideration and exempt supplies, the person may make taxable supplies for no consideration or nominal consideration. Generally speaking, under subsection 141.04(4), such supplies are re-characterized as either taxable supplies for consideration or exempt supplies.

a person in the course of the person's business must be traced to a specific supply or multiple supplies in respect of which the costs were incurred.

[107] This is a relatively easy exercise for property or services that can be traced directly to the making of a taxable or an exempt supply. The challenge is to trace indirect costs to the various related supplies.

[108] My view is consistent with the Department of Finance's February 1994 technical notes, which explain the purpose of section 141.01 with respect to indirect costs as follows:

> Many types of properties and services used in the operation of a business are not directly used in the making of supplies. These may be referred to as "indirect inputs". Examples include items of overhead and inputs used in the operation of "support" functions of a business such as a personnel department or an internal audit department. The personnel, management, administrative and other support functions of a business **are part of what is involved in the making of supplies since these functions are undertaken in order for the business to achieve the ultimate end or purpose of making supplies.** . . .
>
> New section 141.01 is added only to reinforce this concept that the ultimate purpose of making supplies of some kind involves all aspects of the business. **The section, in effect, requires an attribution of all costs to the making of supplies.** . . .
>
> [Emphasis added]

[109] Subsection 141.01(3) contains identical rules, except that it applies to the actual consumption or use of the property or service rather than the intended consumption or use of the property or service on its acquisition. This subsection is relevant when applying provisions of the GST Act that look at the actual use or consumption of property or a service in a specific period, such as the section 206 change-in-use rules.

[110] The second input tax credit rule that is relevant for the purposes of these appeals is subsection 141.01(5). Paragraph 141.01(5)*(a)* provides, in part, that the method used by a person in a fiscal year to determine the extent to which property or services are acquired by the person for the purpose of making taxable supplies for consideration or for other purposes must be fair and reasonable and is to be used consistently by the person throughout the year.

[111] Paragraph 141.01(5)*(b)* provides an identical rule for actual consumption or use of the property or service. It provides, in part, that the method used by a person to determine the extent to which the consumption or use of property or services is for the purpose of making taxable supplies for consideration or for other purposes must be fair and reasonable and is to be used consistently by the person throughout the year.

[112] The issue of what is fair and reasonable was recently addressed by my colleague Justice Owen in *Sun Life Assurance Company of Canada v. The Queen*.[63] He stated the following with respect to the method proposed by the Appellant, the Sun Life Assurance Company:

> [37] The definition of the word "reasonable" in the *Oxford English Dictionary* (Second Edition) that is in my view most appropriate is A.2.a: "Having sound judgement; sensible, sane. . . . Also, not asking for too much." The use of the word "raisonnables" in the French version of the provision supports this interpretation.
>
> [38] The use of a reasonableness requirement in tax legislation has been considered in other contexts. In *Bailey v. M.N.R.*, [1989] T.C.J. No. 602 (QL), 89 DTC 416, the Court stated (at page 420):
>
> > What is "reasonable" is not the subjective view of either the respondent or appellant but the view of an objective observer with a knowledge of all the pertinent facts: *Canadian Propane Gas & Oil Limited v. M.N.R.*, 73 DTC 5019 per Cattanach J. at 5028.
>
> [39] In *Maege v. The Queen*, 2006 TCC 117, the Court adopted the general approach to determining reasonableness set out in *Tsiantoulas v. Canada*, [1994] T.C.J. No. 984 (QL), where the Court stated at paragraph 11:
>
> > Reasonableness is a question of fact and requires the application of a measure of judgement and common sense.
>
> [40] I can see no reason why the general approach to determining reasonableness in these cases would not also apply to determining whether a particular method is "fair and reasonable". That is to say, what is "fair and reasonable" is a question of fact and requires the application of a measure of judgment and common sense. The determination is not based on the subjective view of either the Appellant or the Respondent but is based on the view of an objective observer with knowledge

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[63] 2015 TCC 37. Justice Owen issued his decision after the conclusion of the hearing in these appeals. The Court offered the parties the opportunity to make written submissions with respect to Justice Owen's decision and the decision of my colleague Madam Justice Campbell in *British Columbia Ferry Services Inc. v. The Queen*, 2014 TCC 305. The Court received submissions from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.

> of all the pertinent facts. It is also important to recognize that the tax authorities cannot simply substitute their approach for that of Sun Life and that there may be more than one method that is fair and reasonable in the circumstances (see *Ville de Magog v. The Queen, supra*).

[113] In my view, this is an accurate statement of the law with respect to the application of the subsection 141.01(5) fair and reasonable test.

VII. **Application of the Law to the Facts**

A. Tax Paid or Payable

[114] Under subsection 169(1), the amount of the Appellant's input tax credits in the relevant reporting periods is dependent, in the first instance, on the amount of tax that became payable by the Appellant during the relevant reporting periods or that was paid during the periods without having become payable.

[115] The parties agree on the amount of tax the Appellant was deemed to have paid on February 1, 2006 in respect of its deemed acquisition of each of the U of C Properties and on the amount of tax paid in subsequent reporting periods in respect of improvements to the properties.

[116] The tax paid on the deemed acquisition is equal to the basic tax content of the property on that date. Basic tax content is defined, as stated earlier, in subsection 123(1). The definition is extremely long.

[117] Generally, the basic tax content of the U of C Properties on February 1, 2006, was the tax the Appellant had paid in the past on the acquisition of the properties and on any improvements to the properties, provided such tax was not recoverable by way of rebate, refund or remission (the "non-rebated GST"). It includes any tax paid by the Appellant in respect of which it was entitled to claim or did claim an input tax credit.

[118] Paragraph 6 of the PASF I states the following: "A detailed description of the BTC [basic tax content] for each property during the relevant reporting periods is provided in Exhibit "A" [to the PASF I]."

[119] Mr. Kinzner clarified during his testimony that Exhibit A to the PASF I is actually referring to **incremental** non-rebated GST for the relevant reporting

periods noted in Exhibit A.[64] For example, the first line in Exhibit A to the PASF I shows basic tax content of $543,700.01 for the CDC during the Appellant's August 2007 reporting period. Mr. Kinzner explained that this was the basic tax content (as defined in subsection 123(1)) for the property as of June 2007.[65] In other words, it includes the non-rebated GST paid prior to the February 1, 2006 deemed disposition and the non-rebated tax paid on improvements subsequent to the deemed disposition.[66] The fourth line in Exhibit A shows what is referred to as basic tax content of $127,673.54 for the CDC during the Appellant's February 2009 reporting period. Mr. Kinzner explained that this represents the non-rebated GST the Appellant paid between July 2007 and March 2008 in respect of improvements to the property.[67]

[120] The sixth line in Exhibit A shows what is referred to as basic tax content of $23,459.98 for the CDC property during the Appellant's December 2010 reporting period. Mr. Kinzner explained that this represents the portion of the non-rebated GST the Appellant paid between April 2008 and March 2009 in respect of improvements to the property.[68]

[121] I am disappointed that counsel submitted a partial agreed statement of facts that required "clarification" by a witness. Regardless, the parties have agreed on the amount of tax the Appellant was deemed to have paid on the deemed disposition and that it did pay on subsequent improvements.

B. The extent to which the U of C Properties were acquired for use or used in commercial activities

[122] Having determined the amount of tax paid or payable in the relevant periods, the Appellant must then determine the extent to which it used the U of C Properties in its commercial activities. I will first consider the deemed acquisition, on February 1, 2006, of the U of C Properties.

[123] The Appellant carries on a single business that makes both taxable and exempt supplies. It acquired the U of C Properties in the course of carrying on this business. In such a situation, the Appellant must determine the extent to which it

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64 Transcript, pages 163-164, testimony of Mr. Kinzner.

65 Exhibit R3, page 373, shows the tax that was incurred between August 2005 and June 2007.

66 The Appellant is entitled, under section 225, to claim an input tax credit for the reporting period in which the tax became payable or in a subsequent reporting period, subject to a two-year or four-year limitation period. It is not clear, on the facts before me, whether the Appellant was subject to the two-year or four-year limitation period.

67 See Exhibit R3, page 373.

68 See Exhibit R3, page 373.

acquired the properties for use in the course of the portion of the business that constitutes commercial activities and the extent to which it acquired such properties for use in the course of the portion of the business that involved the making of exempt supplies.[69]

[124] For an entity such as the Appellant that carries on a large and complex business, the determination of the extent to which it acquires real property for use in the course of its commercial activities will never be exact. It will always be an estimate. The question is not whether the Appellant's Final Methodology determines the exact extent to which the Appellant acquired the U of C Properties for use in the course of its commercial activities or whether the Respondent's Methodology is better than the Appellant's Final Methodology.

[125] The question is whether the Appellant's Final Methodology provides a fair and reasonable estimate of the extent to which the Appellant acquired the U of C Properties for use in the course of its commercial activities. In most instances, there will be more than one method that is fair and reasonable.

[126] The Appellant's Final Methodology assumes that the Appellant acquired all areas of the land that comprises the U of C Properties in the course of its business for the purpose of making either taxable or exempt supplies. Specifically, the Appellant assumes that it acquired all of the lands that make up the U of C Properties for use directly in the making of taxable supplies for consideration, for use directly in making exempt supplies or for use indirectly in making both taxable and exempt supplies.

[127] This assumption is consistent with the evidence before me. The Appellant's evidence clearly shows that the Appellant acquired each of the U of C Properties for use in the course of its business of operating a university. The Respondent does not challenge this evidence. In fact, the methodology used by the Respondent, the Respondent's Methodology, is based on the same assumption.

[128] The result of the application of the Appellant's Final Methodology is that the extent to which the Appellant used the U of C Properties in its commercial activities is based upon the amount of space on those properties that was used directly in the making of taxable supplies for consideration and the amount of such space that was used directly in the making of exempt supplies.

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[69] Subsection 169(1).

[129] In using this methodology to arrive at its percentages, the Appellant looked at the physical space on each campus and determined whether it used the space directly in the making of taxable supplies, directly in the making of exempt supplies or indirectly in the making of supplies. With respect to the space used directly in the making of supplies, the Appellant examined thousands of rooms contained in the seven structures on the CDC land, the seventy-seven structures on the Main Campus and the six structures on the South Campus.

[130] The Appellant has assumed that the percentage that results from comparing the space used **directly** in the making of taxable supplies for consideration with the total space used **directly** in making taxable supplies for consideration and exempt supplies reasonably reflects the extent to which all of the land was acquired for use in the course of the Appellant's commercial activities.

[131] As a result, the Appellant determined the extent to which the External Common Areas and the Internal Common Areas were used in commercial activities by basing its determination upon the extent to which the space within all of the structures on the U of C properties[70] was used directly to make taxable supplies for consideration. This is a reasonable assumption, since the evidence before me shows that the Appellant used the common areas inside and outside the buildings to facilitate and support the various taxable and exempt supplies it made on the three pieces of land.

[132] In my view, a methodology based on the actual use of space that involves a detailed review of the use of thousands of rooms comprising approximately 898,000 square meters of space, is a fair and reasonable method to determine the extent to which the Appellant acquired the U of C Properties for use in its commercial activities.

[133] While the Respondent accepts that the methodology should be based upon the use of space directly in the making of taxable supplies and directly in the making of exempt supplies, she argues that the Appellant's Final Methodology results in an unfair and unreasonable allocation unless two adjustments are made to the calculation.

[134] The first adjustment is to treat the External Common Areas as being used only in exempt activities. Specifically, the Respondent's Methodology assumes that subsection 141.01(3) applies to the External Common Areas so as to deem the

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[70] Including the parking lots.

use of such space to be otherwise than in the course of commercial activities of the Appellant.[71] As a result, the Respondent's Methodology assumes that all of the External Common Areas were used directly in "exempt" activities.[72]

[135] The second proposed adjustment is an attempt to recognize the amount of GST paid on specific pieces of the U of C Properties. The Respondent's Methodology attempts to accomplish this by applying the indexing factor to the calculation of the Appellant's Final Percentages.

[136] I will first consider the parties' treatment of the External Common Areas.

C. External Common Areas

[137] Although the parties do not agree on the Appellant's use of the External Common Areas for the purpose of making supplies, they do agree on the size of the External Common Areas and on the fact that they are comprised of green space, roadways, walkways, and landscaped areas.[73]

[138] The Appellant's Final Methodology assumes that the Appellant used both the Internal Common Areas and the External Common Areas indirectly to make both taxable and exempt supplies.[74]

[139] During his testimony, Mr. Klaiber, using maps, explained to the Court the various uses of the External Common Areas. He explained that the primary purpose of the External Common Areas is to support the activities that occur within the structures located on the U of C Properties.[75]

[140] He explained that the walkways and roadways are used for access to the campus and to move throughout the campus. The walkways are used for access to all of the buildings on campus and various outdoor spaces, such as playing fields and parking lots. For example, he noted that the walkways are used to move people from the City of Calgary's LRT station, which is located adjacent to the campus, to the various buildings on campus, to move people from various bus stops located on campus to the various buildings located on campus and to simply move people between buildings.

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71 See paragraph 47 of the Respondent's Written Representations under the heading "Property used for calculation".
72 Transcript, page 138, testimony of Mr. Kinzner; Discovery read-ins, page 21, examination of Mr. Kinzner.
73 PASF I, Exhibits B, C and D.
74 PASF I, Exhibits B, C and D.
75 Transcript, pages 19-32, testimony of Mr. Klaiber.

[141] Buses, commercial vehicles, and cars use the roadways.

[142] He described the system of roadways, walkways and pathways as transportation corridors to not only give people access to the various buildings and playing fields but also to allow the transportation of goods that are brought in from outside campus and distributed throughout the campus.[76]

[143] He explained how the External Common Areas have underground tunnels that are used to connect all the buildings for heating and cooling purposes, and he further explained that some telecommunications equipment runs through those tunnels.[77]

[144] He explained how people used the landscaped area on the campus as a place to relax and as a meeting place. It also enhanced the look and feel of the campus.

[145] Although this is not noted in the PASF I, the External Common Areas also included some playing fields. Mr. Klaiber testified that various playing fields were used by sports teams and students and were rented to third parties.

[146] The Appellant argues that this evidence clearly shows that the External Common Areas supported all of the activities that occurred on the U of C Properties. I agree with the Appellant.

[147] The Respondent did not present any evidence to contradict Mr. Klaiber's testimony. In fact, there is no evidence before me that the Appellant acquired the portion of the U of C Properties that comprises the External Common Areas for use outside of its business. The evidence before me is that the External Common Areas were an essential part of the three campuses in that they facilitated the making of supplies on the campuses.

[148] In summary, I have found, on the evidence before me, that the ultimate purpose of the various activities that occurred on the External Common Areas was to generate revenue from the Appellant's business. In other words, the Appellant's purpose when acquiring the External Common Areas on February 1, 2006 was no different than its purpose when acquiring, at the same time, the remaining portions of the U of C Properties: to use them for the purpose of making both taxable and exempt supplies.

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[76] Transcript, pages 20 and 26, testimony of Mr. Klaiber.
[77] Transcript, page 22, testimony of Mr. Klaiber.

[149] It is not possible or practical to determine the extent to which the Appellant used a specific portion of the Internal Common Areas or the External Common Areas directly in the making of taxable or exempt supplies.

[150] The Internal Common Areas are comprised of stairwells, corridors, washrooms, heating conduits, foyers and any other area in a specific building that is not used directly to make a supply.

[151] The only way the Appellant could determine whether a person who entered a building for the purpose of receiving a taxable supply used a specific portion of the Internal Common Areas would be to physically monitor the activities of the person. For example, someone would have to stand at the door of each washroom and identify each person who entered the washroom. It was clearly not practical for the Appellant to take such action.

[152] The Appellant faced the same issue with the External Common Areas. Mr. Klaiber testified that, as with the common space within the buildings, it was not possible to trace activity on the External Common Areas to specific supplies. The Appellant simply did not have readily available information.

[153] Mr. Klaiber, in response to a question from the Respondent's counsel asking why the Appellant could identify space in the buildings that was used directly in the making of supplies but could not identify such space within the External Common Areas, stated the following:

> I think the key difference is the readily available information. I mean, with the buildings, we have information on room by room what we use it for.
>
> When we take a look at a walkway, what percentage of that walkway is used from somebody going from an office to get a coffee versus somebody going from a classroom to a classroom? We don't have that information as to what proportion of foot traffic is for taxable supply and exempt supply.
>
> So I mean, the information that we have around that foot traffic, the best information that we have is around the space and how we use our space and our buildings and structures. And that's why we applied it.[78]

[154] As a result, the Appellant was required to develop a methodology to apportion the use of the various components of the Internal Common Areas and the

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[78] Transcript, pages 115-116, testimony of Mr. Klaiber.

External Common Areas between their use in the making of taxable supplies for consideration and their use in the making of exempt supplies.

[155] Mr. Klaiber's testimony shows that, at the time of the deemed acquisition of the U of C Properties, the Appellant intended to use the Internal Common Areas and the External Common Areas in the same manner. I agree with the Appellant that any methodology chosen must consider this fact.

[156] Since the Appellant acquired the U of C Properties for use in the course of its business, it was deemed under paragraph 141.01(2)*(a)* to have acquired the properties for use in the course of its commercial activities to the extent that the properties were acquired for the purpose of making taxable supplies for consideration in the course of its business.

[157] On the other hand, the Appellant was deemed under subparagraph 141.01(2)*(b)*(i) to have acquired the U of C Properties for use otherwise than in the course of its commercial activities to the extent that it acquired the properties for the purpose of making supplies in the course of its business that were not taxable supplies made for consideration. There is no evidence before me that the Appellant made supplies for no consideration or nominal consideration. As a result, any supplies that it made that were not taxable supplies made for consideration were exempt supplies made for consideration.

[158] Subparagraph 141.01(2)*(b)*(ii) does not apply to the fact situation before me. Specifically, there was no evidence before me that the Appellant acquired the U of C Properties for use outside of its business.

[159] In summary, subsection 141.01(2) required the Appellant to determine the extent to which it acquired the U of C Properties, including the External Common Areas, for the purpose of making taxable supplies for consideration and the extent to which it acquired the U of C Properties for the purpose of making exempt supplies.

[160] This is exactly what the Appellant's Final Methodology attempts to accomplish.

[161] The Appellant was able to determine the certain portions of the U of C Properties that it acquired for direct use in making taxable supplies and the certain portions that it acquired for direct use in making exempt supplies.

[162] However, it did not use certain portions of the U of C Properties, i.e., the Internal Common Areas and the External Common Areas, directly in making either taxable or exempt supplies. The Appellant used these portions of the properties in the course of making both taxable and exempt supplies. In other words, the Appellant acquired these portions of the U of C Properties for the purpose of making both taxable and exempt supplies. As a result, it was required to develop a methodology that apportioned the use thereof between the making of taxable supplies for consideration and the making of exempt supplies.

[163] As discussed previously, the Appellant's Final Methodology assumes that the Appellant used the Internal Common Areas and the External Common Areas for both taxable and exempt activities in the same relative proportion as it used the space within the structures directly in the making of taxable supplies for consideration and directly in the making of exempt supplies. Using this assumption, the Appellant developed a methodology that resulted in the Appellant's Final Percentages, which are derived from the amount of space used directly in the making of taxable supplies for consideration and the amount of space used directly in the making of exempt supplies. The Appellant applied the relevant final percentage to all GST paid during the relevant period in respect of the relevant piece of land. This includes the GST paid in respect of the Internal Common Areas and the External Common Areas.

[164] This ratio, derived using the Appellant's Final Methodology, satisfies the requirements of the provisions of subsection 141.01(2). It is based upon the use of the space in making both taxable and exempt supplies. Further, the Appellant consistently applied the Appellant's Final Methodology to the portions of the U of C Properties that it used in the same manner, such as the Internal Common Areas and the External Common Areas. In my view, a methodology that treats differently two areas that a registrant uses in the same manner (i.e., the External Common Areas and the Internal Common Areas) does not satisfy the subsection 141.01(5) fair and reasonable test.

[165] While the Respondent's Methodology assumes that the Appellant acquired the Internal Common Areas for use in making both taxable and exempt supplies, it also assumes that the Appellant did not acquire the External Common Areas for use in making taxable supplies for consideration.[79] I have a difficult time understanding the factual and/or statutory basis for this position.

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79 PASF I, paragraph 13.

[166] The evidence before me is that the Appellant acquired all of the U of C Properties for use in its business, the purpose of which is to make supplies. Further, these supplies include both taxable and exempt supplies. There is no evidence before me that the Appellant only used the External Common Areas to make exempt supplies. Since the External Common Areas supported all activities on the U of C Properties, those areas must, as a question of fact, have been used by persons who were receiving both taxable and exempt supplies.

[167] Mr. Kinzner, the CRA auditor, during his in chief testimony, provided the following explanation for why the Respondent's Methodology treated the External Common Areas (which are referred to as "green space") as being used in what he called exempt activities,

> Q With the green space, I didn't ask you, but we heard evidence on it this morning, what was your determination as to we've agreed to 567,183 square metres, how is that dealt with?
>
> A Yes, we -- we determined that the green space, the roadways, walkways, landscape, the sports fields, et cetera, comprised a total of 567,183 square metres of space on the -- on the main campus. And that area had not been -- been accounted for in the calculations, so we -- we added it in under the -- the heading "External Areas". And we classified it as -- as exempt.
>
> Q Factually why did you do that? What facts do you rely upon to classify it as exempt?
>
> A We relied on pretty much the same facts that we did for the -- the CDC title. That we could find no evidence of -- of taxable supplies for consideration being made on any of this space.[80]

In cross-examination, Mr. Kinzner explained how the CRA differentiated the mixed-use space within the buildings (the Internal Common Areas) from the mixed-use space outside the buildings (the External Common Areas).

> Q . . . let's talk about the MacEwan Students' Centre.
>
> A Okay?
>
> Q And at appendix B, MacEwan Student Centre has 23,291 square metres total area?

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[80] Transcript, page 170, testimony of Mr. Kinzner.

A Yes.

. . .

Q And the exempt activity area was 2,453 square metres?

A Yes.

Q And the commercial activity was 19,408 square metres?

A Correct.

Q And then there is a mixed activity of 1,429 square metres?

A Yes.

Q What was that mixed activity?

A The mixed activity, I believe was the stairwells, the bathrooms and hallways.

Q And why don't you treat that as exempt?

A Because when we're inside of a building, we try to -- to use the building -- we try to -- I think that there is a link to the -- to the use of that hallway and that bathroom within a building to -- to link it to the -- to the exempt and commercial use within that building.

Q Okay. So there is a link to either the commercial or exempt activity?

A Yes, it was claimed that way and we -- we accepted that -- that methodology.

Q And the logic being that there is a -- a link between the commercial exempts?

A Yes.

Q There was not a direct activity of commercial or exempt, it was a combination of both?

A Correct.

Q Now, sir, can I ask you this, if the mixed activity is accepted within a structure, why not between buildings?

A The reason we did not do it between the buildings was because there was no link that we could find that -- that would allow for the -- the exempt and the -- like, for a mixed use for that area.

We had -- we had a roadmap, which gave us a -- gave us direction to use the -- to allow in -- in buildings the -- the mixed use of the area.

Q What's this roadmap?

A It is -- it is one of the documents that -- it's a -- it's a roadmap that was prepared by -- by Headquarters?

. . .

Q CRA Headquarters developed this roadmap?

A Correct.

Q And was this a public document?

A No, it was not. It was an internal document.

Q Okay. And what did this roadmap tell you about the external space?

A It told us that, the external space was to be treated as -- unless you can find a commercial activity, there was no -- it was treated as exempt.

Q Unless you can find a direct commercial activity?

A Yes.[81]

[168] The Respondent's Methodology with respect to the External Common Areas is based on the assumption that, if a specific area of land is not used directly to make taxable supplies for consideration, under subsection 141.01(2)[82] the area is deemed to be used in "exempt" activities.

[169] The provisions of subsection 141.01(2) do not support such an administrative position.

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[81] Transcript, pages 188-191, testimony of Mr. Kinzner.

[82] The Respondent notes in her written submissions that she relied on subsection 141.01(3). However, since I am dealing with the acquisition of the U of C Properties, the relevant subsection is 141.01(2). The two subsections contain identical rules: subsection 141.01(2) applies on the acquisition of property, while subsection 141.01(3) applies to consumption or use subsequent to the acquisition.

[170] The test is not whether the Appellant made taxable supplies for consideration on a specific piece of the U of C Properties. The test is the extent to which the specific piece of land was acquired or used for the purpose of making taxable supplies for consideration. Subsection 141.01(2) recognizes that property or services may be used indirectly, rather than directly, in the making of supplies. For property used indirectly in the making of supplies the subsection requires one to determine how the use of the property relates to the aim or objective of making taxable supplies.[83]

[171] A test based only on direct use of property or services would lead to absurd results. For example, under such a test, the Appellant would not be entitled to claim input tax credits for GST paid in respect of the External Common Areas even if it only made taxable supplies. Clearly, this is not consistent with the object and spirit of the GST Act. Under the GST Act, a registrant who only makes taxable supplies is entitled to claim full input tax credits for GST paid on property or services acquired for consumption or use in its business.

[172] As I have stated previously, the evidence before me is that the Appellant acquired the U of C Properties for the purpose of making supplies in the course of its business. Subsections 169(1) and 141.01(2) allow the Appellant to claim an input tax credit to the extent that the properties were acquired for use directly or **indirectly** in the making of taxable supplies for consideration.

[173] It is difficult for the Court to understand how the Minister could conclude that the Appellant acquired the common areas located within the buildings (the Internal Common Areas) for the purpose of making both taxable supplies for consideration and exempt supplies and the common areas located outside of the buildings (the External Common Areas) only for the purpose of making exempt supplies. This appears to be an arbitrary administrative decision rather than a decision based on applying the provisions of the GST Act to the actual use of the External Common Areas.

[174] In summary, the treatment of the External Common Areas under the Appellant's Final Methodology is fair and reasonable and is consistent with the provisions of the GST Act. However, the treatment of the External Common Areas under the Respondent's Methodology does not comply with the provisions of the

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[83] See for example, Department of Finance Technical Notes, February 1994, Subsection 141.01(2) – *Acquisition for Purpose of Making Supplies*.

GST Act. As a result, the Respondent's Methodology cannot be used to determine the Appellant's entitlement to input tax credits.

D. The Indexing Factor

[175] The second adjustment that the Respondent argues is required in order for the Appellant's Methodology to be fair and reasonable is the application of the indexing factor.

[176] As I explained previously, the CRA calculated an indexing factor based upon the replacement value of the U of C Campus on September 30, 2011. The Respondent's Methodology applies this indexing factor to the Appellant's Final Methodology (after first making the adjustment for the External Common Areas) to determine the Appellant's intended use of the U of C Properties in commercial activities on February 1, 2006.

[177] The Respondent's argument for the use of the indexing factor is set out in her written submissions as follows (at paragraph 55):

> The respondent's submission is that it is not fair and reasonable to compare a unit of space with a lower value of improvements to a unit of space with a higher value of improvements. Lower cost space contributes comparatively less GST input cost and BTC [basic tax content] to a title than does higher cost space. A correcting factor must be utilized to match spaces of the title upon which GST was paid or payable, to areas from which ITCs [input tax credits] are sought to be recovered.

[178] I do not agree with the Respondent that the use or non-use of the indexing factor is a question of what is fair and reasonable as that term is used in subsection 141.01(5). With respect to the acquisition of property, paragraph 141.01(5)*(a)* applies the fair and reasonable test to the determination of the extent to which property was acquired for the purpose of making taxable supplies for consideration or for other purposes.

[179] The addition of an indexing factor does not in any way help in the determination of the purpose of the acquisition of the U of C Properties.

[180] Once the Appellant determines, using a fair and reasonable method, the extent (expressed as a percentage) to which it acquired the U of C Properties for the purpose of making taxable supplies for consideration, then, under subsection 169(1), it is required to apply the percentage to the tax that was deemed to have

been paid (the basic tax content) on the deemed acquisition of the U of C Properties.

[181] This is exactly what the Appellant did using the Appellant's Final Methodology and the basic tax content of each of the U of C Properties on the date of the deemed acquisition.

[182] In my view, the Respondent is simply arguing that her method is better than the Appellant's method on the basis that it results in a more accurate correlation between the use of the property by the Appellant, and the tax paid by the Appellant.

[183] As my colleague Justice Owen noted in *Sun Life*, the CRA cannot simply substitute its method for that of the GST registrant. A GST registrant is entitled to use any method that is fair and reasonable provided it complies with the provisions of the Act.

[184] Regardless, the Respondent's use of the indexing factor has serious shortcomings.

[185] First, the Respondent used the 2011 replacement cost to determine the Appellant's entitlement to input tax credits in 2006, five years earlier. I would expect that costs would have changed over the five years, both in absolute and in relative terms.

[186] Second, the use of the indexing factor ignores the fact that the Appellant constructed several of the buildings prior to the introduction of the GST. The Appellant did not pay GST on property or services acquired to construct these buildings or to make pre-GST improvements to the buildings.

[187] The GST at issue is equal to the basic tax content on the date of the deemed acquisition of the U of C Properties. It is the tax paid since the introduction of the GST. The application of the indexing factor to buildings constructed prior to the introduction of the GST seriously decreases the reliability of the resulting ratios.

[188] For example the CRA calculated that the basic tax content of the Main Campus on December 31, 2007 was $4,787,125 on the basis of expenditures of approximately $224,500,000.[84] The $224,500,000 represents the expenditures the

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[84] Exhibit R4, page 443; Transcript, pages 167-168, testimony of Mr. Kinzner.

Appellant made with respect to the Main Campus between the introduction of the GST and December 31, 2007.

[189] The CRA determined that the replacement cost for the Main Campus was $1.282 billion.[85] The expenditures incurred between the introduction of the GST and the date of the deemed acquisition represent only 17.5% of the total replacement costs. This evidences the fact that the Appellant constructed a substantial portion of the buildings prior to the introduction of the GST. This is consistent with the fact that the university was founded in 1966.

[190] Another concern I have with respect to the use of the indexing factor is that it requires the Appellant to hire a valuator in order to determine its entitlement to input tax credits. This would place an unreasonable financial burden on the Appellant and other GST registrants who would be required to perform similar calculations. Further, if the Court accepted this method, the Appellant would be required to retain a valuator each time the section 206 change-in-use rules apply to its capital real property.

[191] In my view, a GST registrant should be entitled to determine its input tax credits on the basis of information in its possession, without having to resort to hiring expensive third parties, such as valuators.

[192] In summary, I do not accept the Respondent's argument that the Appellant's Final Methodology requires an indexing factor in order to satisfy the subsection 141.01(5) fair and reasonable test.

E. Improvements to the U of C Properties

[193] I will now address the input tax credits the Appellant is entitled to claim with respect to GST paid on the improvements to the U of C Properties that occurred after the deemed disposition.

[194] As discussed previously, the Appellant is entitled to claim input tax credits for GST paid on improvements to the U of C Properties according to the extent to which it was using the U of C Properties in the course of commercial activities immediately after it last acquired the properties.

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[85] PASF II, page 4.

[195] Since the Appellant made the subsection 211(1) elections, the section 206 change-in-use rules must be considered when determining the Appellant's entitlement to claim input tax credits for improvements to the U of C Properties.

[196] The parties argue that either the single percentage determined under the Appellant's Final Methodology or the single percentage determined under the Respondent's Methodology should be used to determine the Appellant's entitlement to input tax credits at the time of the deemed acquisition and at the time of subsequent improvements to the U of C Properties.

[197] This means the parties have accepted that there was no significant change in the use of the U of C Properties during the relevant periods. Because of the application of section 197, the Appellant would only have to change the Appellant's Final Percentage if it had changed its use of one of the three U of C Properties by 10% or more of the total use of the property.

[198] Therefore, in view of the finding that the Appellant's Final Methodology satisfies the provisions of the GST Act with respect to the determination of the Appellant's entitlement to input tax credits for the GST it was deemed to have paid on the deemed acquisition, the methodology also satisfies the provisions of the GST Act with respect to GST paid on subsequent improvements to the U of C Properties.

VIII. **Disposition of Appeals**

[199] For the foregoing reasons, the appeals from the reassessments made under the *Excise Tax Act* and dated September 30, 2011, January 24, 2012, February 2, 2012 and April 20, 2012 are allowed with costs. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that, during the relevant periods, the Appellant used the property identified as Plan 1935JK to the extent of 81.2% in its commercial activities, the property identified as Plan 859JK to the extent of 41.33% in its commercial activities and the property identified as Plan 9410341 to the extent of 25.86% in its commercial activities.

[200] The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award to the Appellant. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Ottawa, Canada, this 11th day of December 2015.

"S. D'Arcy"

D'Arcy J.

CITATION:	2015 TCC 321
COURT FILE NO.:	2013-3473(GST)G
STYLE OF CAUSE:	UNIVERSITY OF CALGARY V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 29 and 30, 2014. Submissions received from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.
REASONS FOR JUDGMENT BY:	The Honourable Justice Steven K. D'Arcy
DATE OF JUDGMENT:	December 11th, 2015
APPEARANCES:	
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