Dockets: 2005-4015(GST)G
2006-511(GST)G

BETWEEN:

THE OTTAWA HOSPITAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 20, 21 and 22, 2008
at Ottawa, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Daniel Sandler L. Michele Anderson
Counsel for the Respondent:	Ernest Wheeler Michael Ezri

JUDGMENT

The appeals from the assessments made under Part IX of the *Excise Tax Act*, for the period from July 16, 2001 to September 30, 2002, dated February 13, 2004 and for the period from October 1, 2002 to October 31, 2003, dated August 8, 2005, respectively, are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of January 2010.

"Diane Campbell"

Campbell J.

Citation: 2010 TCC 53
Date: 20100129
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REASONS FOR JUDGMENT

Campbell J.

Introduction:

[1] These appeals arise as a result of the failure and/or refusal of the Appellant, a public body, to meet the requirements placed on it to balance its budget. Following an operational review commissioned by the Minister of Health and Long Term Care (the "MHLTC"), temporary control over the Appellant was placed with a supervisor appointed by the Lieutenant Governor-in-Council for Ontario (the "LGIC"). This appeal focuses on whether the Appellant is entitled to a refund of Goods and Services Tax ("GST") on the goods and services acquired by it in the course of its activities during this period, as well as a subsequent period of time.

[2] The Appellant is a public hospital governed by the *Public Hospitals Act*, R.S.O. 1990, c. P.40, as amended, (the "*PHA*") and a corporation governed by the *Corporations Act*, R.S.O. 1990, c. C.38, as amended, for the Province. By Order-in-Council No. 1704/2001 dated July 16, 2001, the LGIC, acting on the recommendation of the MHLTC, appointed Dennis Timbrell as supervisor of the

Appellant. For the period of Mr. Timbrell's appointment, July 16, 2001 to September 30, 2002 (the "Supervisor Period"), as well as a period subsequent to Mr. Timbrell's appointment, October 1, 2002 to October 31, 2003 (the "Subsequent Period"), the Appellant applied for a rebate of 17% of the GST paid during those periods pursuant to subsection 261(1) of the *Excise Tax Act* (the "*ETA*"), R.S.C. 1985, c. E-15, on the basis that the GST amounts had been paid by mistake. The Appellant and certain other public service organizations are entitled to rebates for a portion of the GST which they have paid on some inputs pursuant to section 259 of the *ETA*. Initially, the Appellant claimed public sector rebates of 83% of the GST paid pursuant to subsection 259(3) of the *ETA*. The Appellant is now appealing the denial of GST claims for the 17% rebate for the Supervisor Period and the Subsequent Period.

[3] The Appellant, in claiming the GST rebate amounts, argued that it was either a part of, or an agent of, the Province of Ontario and, consequently, by virtue of section 125 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), it was immune from paying the remaining 17% of GST because of Crown immunity.

[4] The Appellant's rebate applications were denied on the following basis:

(a) The Appellant was neither a part of, nor an agent of, the Province of Ontario;

(b) Even if the Appellant was a Crown agent, it did not have standing to file the rebate applications or to bring this appeal before the Court; and

(c) Even if the Appellant was a Crown agent, its immunity to this claim would be waived pursuant to the Reciprocal Taxation Agreement (the "RTA") between the Province of Ontario and the Government of Canada. In addition, the Respondent argued that the Appellant would not be entitled to claim the rebates paid by mistake because subsection 262(2) of the *ETA* prohibits the Appellant from filing a second claim covering the same subject matter.

Facts:

[5] The parties filed a Partial Agreed Statement of Facts and Issues, which I have attached as Schedule "A" to my Reasons for Judgment.

[6] By the Spring of 2001, it became apparent that the Appellant's continued inability to remain within its budget required that the MHLTC implement the extreme measure of appointing a supervisor to oversee the Appellant's Board of

Trustees (the "Board") and to implement a long-term recovery plan. Mr. Brian Patterson, the Chief of Staff for then MHLTC, Tony Clement, described this measure as "kind of the atomic bomb of control … It was the ultimate control of the Hospital was to eliminate the executive and the Board and take control of it yourself …" (Transcript, page 243). On June 29, 2001, correspondence was forwarded to the Board advising of the MHLTC's decision to recommend to the LGIC that a supervisor be appointed pursuant to section 9 of the *PHA*. The appointment of a supervisor was recommended after the completion of an operational review of the Appellant by the Hay Group which contained 127 recommendations.

[7] On July 16, 2001, the MHLTC wrote to the Chair of the Board advising that he had recommended the appointment of a hospital supervisor and that pursuant to an Order-in-Council, Dennis Timbrell had been appointed. According to the Order-in-Council, Mr. Timbrell had "the exclusive right to exercise all of the powers of the board, The Ottawa Hospital corporation and the members of the corporation" and the "exclusive right to exercise all the powers of the officers of The Ottawa Hospital" other than the Chief Executive Officer/President.

[8] Mr. Timbrell has a long history in politics, dating back to 1971, as well as with the Ontario health care system. He has held seven different ministerial portfolios and was Minister of Health from 1977 to 1982. During this period he oversaw legislative changes to the *PHA* in respect to the appointment of inspectors and supervisors of public hospitals.

[9] Mr. Timbrell's Terms of Reference as Supervisor were as follows:

> 1. The Supervisor will review governance issues, including the functioning, composition and membership of the board.
>
> 2. The President and Chief Executive Officer of the hospital will continue to manage the day to day operations of the hospital. Acting as the board of the hospital, the Supervisor will provide direction to the senior management team as appropriate during the term of the involvement of the Supervisor.
>
> 3. The Supervisor will oversee the implement[at]ion [of] the MOHLTC approved recovery plan taking into account the recommendations contained in the Operational Review and in consultation with key internal and external stakeholders.
>
> 4. The Supervisor will fulfill all the responsibilities of the board, the corporation, its officers (other than the Chief Executive Officer/President)

and members in governing the hospital in accordance with the Public Hospitals Act, its regulations and all other applicable legislation.

5. The Supervisor will create an appropriate advisory body and seek external resources as appropriate.

6. The Supervisor will liaise with the Assistant Deputy Minister, Health Care programs Division and the Regional Director, East Region.

7. The Supervisor will report to the Minister of Health and Long-Term Care.

(Tab 2, Joint Book of Documents)

[10] Mr. Timbrell described the financial circumstances of the Appellant at this time as "disastrous" with the hospital projecting a loss of approximately $250,000.00 per day in the face of "Having been bailed out the previous year to the tune of 30 or 40 million and the year before that as well." (Transcript, page 96).

[11] Pursuant to his terms of reference, Mr. Timbrell appointed a small advisory group to identify the problems with the Appellant, as well as, the direction to be taken. In addition, he appointed sub-committees for governance, finance, quality and planning. However, Mr. Timbrell testified that at the end of the day he made the decisions and that "… for all intents and purposes [he] was the Board" (Transcript, page 125). Further, Mr. Timbrell testified that he was in constant and regular contact with the Chief of Staff, Mr. Patterson, who was "the eyes and ears of the Minister" (Transcript, page 154), throughout his appointment, including the monitoring phase, the implementation of the recovery plan and for the 2002-2003 budget, together with the development of new hospital by-laws and the recruitment of a new hospital Board. Mr. Timbrell testified that ultimately, if the MHLTC disagreed with his suggestions, the MHLTC had the power to veto his proposals.

[12] Reporting by Mr. Timbrell to the MHLTC was conducted primarily through the MHLTC's Chief of Staff, with most of those meetings being in the form of weekly telephone conversations. Actual contact with the MHLTC was minimal with three to five hours of face-to-face meetings over the duration of the 15 month period.

[13] The Appellant's CEO, Dr. J. Kitts, testified that Mr. Timbrell never provided him with instructions regarding goods and services purchased on behalf of the Appellant. On cross-examination, Dr. Kitts stated that standing orders and other supply and utility contracts that pre-dated the Supervisor Period were unaffected by the appointment of Mr. Timbrell as supervisor.

[14] Mr. Timbrell remained in charge of the Appellant for almost 15 months. Immediately following Mr. Timbrell's termination by Order-in-Council No. 1675/2002 on September 30, 2002, a new Board of Trustees, appointed by Mr. Timbrell, operated the hospital for just over a year.

[15] On an ongoing basis, the Appellant made applications pursuant to subsection 259(3) of the *ETA* for public service body ("PSB") rebates of GST equal to 83% of the GST paid in the period in respect of its purchases of taxable goods and services. These applications were assessed and paid to the Appellant. On December 1, 2003 and January 19, 2004, the Appellant made two applications for further GST rebates pursuant to subsection 261(1) of the *ETA*, one for the Supervisor Period in the amount of $1,704,984.55 and one for the Subsequent Period in the amount of $1,582,291.00. Both of these applications requested an additional 17% rebate of GST paid during the relevant periods. The Appellant's rebate applications for both the Supervisor Period and the Subsequent Period were denied.

[16] The Appellant has conceded that its claim for the period July 16, 2001 to November 30, 2001 is statute barred under subsection 261(3) of the *ETA*.

[17] The following are the issues to be decided in this appeal:

(i) Whether the Appellant was part of, or an agent of, the Crown during the Supervisor Period;

(ii) Whether the Appellant was part of, or an agent of, the Crown during the Subsequent Period;

(iii) If the Appellant was a part of, or an agent of, the Crown during the Supervisor Period and/or the Subsequent Period, whether it had standing to file the Rebate Applications that are the subject of these appeals and whether it has standing to appeal to the Tax Court of Canada in respect of a claim for Crown immunity;

(iv) If the Appellant was a part of, or an agent of, the Crown during the Supervisor Period and/or the Subsequent Period, whether its immunity from federal tax under section 125 of the *Constitution Act, 1867* was waived pursuant to a reciprocal taxation agreement entered into between the Government of Canada, represented by the federal Minister of Finance,

and the Government of Ontario, represented by Ontario's Minister of Finance, effective July 1, 2000; and

(v) Whether the Appellant is precluded by sections 262, 297, 299 and 306 and subsection 301(1.1) of the *ETA* from claiming the rebates of GST paid by mistake.

Crown Agency:

[18] (i) Whether the Appellant was part of, or an agent of, the Crown during the Supervisor Period; and

(ii) Whether the Appellant was part of, or an agent of, the Crown during the Subsequent Period.

The Appellant's Position:

[19] The Appellant argued that although it was not an agent of the Crown by virtue of a statute, at common law it was part of, or an agent of, the Crown, the MHLTC, during both the Supervisor Period and the Subsequent Period. The Appellant relied on *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, to argue that agency is established by looking to the control test and that this test is based on the degree of control that the Crown is legally entitled to exercise (*de jure* control) and not on the degree of control that is in fact exercised (*de facto* control).

[20] The Appellant's position is that the powers given to the MHLTC under the *PHA* are extensive. These powers can be exercised over the Appellant even in periods where no supervisor is appointed. Once a supervisor is appointed, the MHLTC and/or the LGIC have the ability to exercise complete control over the Appellant through the office of the hospital supervisor. Consequently, the powers bestowed upon the MHLTC under the provisions of the *PHA*, combined with the ability to appoint and exercise complete authority over a hospital supervisor, make the Appellant an agent of the Crown both during the Supervisor Period and the Subsequent Period.

The Respondent's Position:

[21] The Appellant cannot be an integral part of, or an agent of, the Crown. It has a separate corporate existence and governance from the Ministry of Health and Long Term Care (the "Ministry"). Neither the *Ministry of Health and Long Term Care Act*,

R.S.O. 1990 c. M.26 (the "*MOHLTCA*") nor the *PHA* designate the Appellant as a part of the Ministry. The Respondent pointed to a number of provisions in the *MOHLTCA* and the *PHA* that are incompatible with a finding that the Appellant is part of the Ministry: the Ministry's business is conducted by employees appointed under Ontario's *Public Service Act*, R.S.O. 1990, c. P.47, but the Appellant's staff are not; where the government intends for a hospital to be part of the Ministry, it does so expressly; the primary functions of each are different; the Ministry's business plans describe hospitals as independent corporations run by independent boards; the Ministry has no reversionary interest in the Appellant's property; and the Order-in-Council appointing the supervisor did not change the Appellant's legal status. Therefore, there is no statutory support to conclude that the Appellant is a part of the Crown. The Respondent relied on the test set out by the Supreme Court of Canada in *Halifax (City) v. Halifax Harbour Commissioner*, [1935] S.C.R. 215, to support its position that the Appellant was not a Crown agent at common law when the control test factors were applied. The Appellant never held itself out to be an agent and was not an agent when acquiring goods and services. In operating the hospital, it carried on its own business, owned its own property and had its own employees throughout.

Analysis – Crown Agency:

[22] A public body may either be expressly designated to be an agent of the Crown by statute or treated as an agent at common law because it satisfies the common law control test when various factors are considered. The Appellant in these appeals does not claim that it was a statutory Crown agent (paragraph 18, Appellant's Memorandum of Fact and Law). The Supreme Court in the *Halifax Harbour Commissioner* case discussed the test for determining whether a public body will be treated as an agent of the Crown at common law. The Court looked at the "… nature of the powers and duties of the respondents …" (page 226).

[23] The Supreme Court revisited this test in *Westeel-Rosco Ltd. v. South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238, and stated at pages 249-250:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. …

[24] The Court goes on at page 250 to quote *R. v. Ontario Labour Relations Board, Ex p. Ontario Food Terminal Board*, (1963), 38 D.L.R. (2d) 530:

> It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

[25] This test has been summarized by Professors Hogg and Monahan in *Liability of the Crown*, 3rd Edition, Carswell, 2000, at page 334, as follows:

> … If the corporation is controlled by a Minister (or cabinet) in much the same way as a government department is controlled, then the corporation is an agent of the Crown. If, on the other hand, the corporation is largely free of ministerial control, then it is not an agent of the Crown.

[26] The test was similarly summarized by the Supreme Court of Canada in *Eldorado Nuclear*, at pages 573-574, in the following manner:

> … At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official: *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property*, [1954] A.C. 584 at pp. 616-17, and see Hogg, *Liability of the Crown*, 1971, p. 207. …

[27] Ultimately the essential element in the control test is *de jure* control as opposed to *de facto* control. Consequently, the relevant degree of control is that which the Minister is legally entitled to exercise over the particular body or institution and not the degree of control that is in actual fact exercised. The Court in *Eldorado Nuclear* stated at page 574:

> The position at common law is not that those under *de jure* control are entitled to Crown immunity, but rather that immunity extends to those acting on behalf of the Crown … Nevertheless, it does indicate that the *de jure* test applies only in the absence of specific language indicating the body acts on behalf of or as an agent of the Crown. …

[28] According to Professors Hogg and Monahan in *Liability of the Crown*, the question will be resolved by examining the body's empowering statute and will not

involve an assessment of the actual relationship between the particular body and the government (page 336).

[29] Like many areas of the law, this is fraught with uncertainties. The line between those bodies that will be considered Crown agents at common law and those that will not is anything but precise. There is "some uncertainty over just what degree of governmental control will be sufficient to create Crown agent status" (*Crown Agent Status*, by Robert Flannigan, Canadian Bar Review, (1988) 67 Can. Bar Rev. 229 at page 231). However, at pages 573-574 of *Eldorado Nuclear*, J. Dickson stated:

> … Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. …

The previously referred to article, *Crown Agent Status*, relies on the reasoning in *Eldorado Nuclear* and at page 249 draws the line as follows:

> … This would appear to suggest that anything less than substantial discretion will result in a Crown agent characterization. In other words, any *significant* government control, even though it could not be said to be *substantial* control, would be sufficient to establish a Crown agency. If that is so, the precise degree of control required is *significant* control …

[30] Tracing the application of the control test prior to the *Halifax Harbour Commissioner* case requires a step back in time to the case of *Fox v. Government of Newfoundland*, [1898] A.C. 667, where the Privy Council considered whether balances in the books of a bank to the credit of various local boards administering education in the Colony were debts to which Crown priority applied. The educational board was found not to be a Crown agent because the board had independent discretion as to the application and expenditure of its resources.

[31] The Privy Council reached a similar decision in *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899. Despite the fact that the Governor-in-Council appointed board members and could veto certain board actions, the Metropolitan Meat Industry Board ("MMIB") was nevertheless held not to be a Crown agent. At page 905, the Court stated:

> … They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. …

The Court focused on the fact that the act constituting the MMIB conferred wide powers on the board and these powers could be exercised at the board's own discretion, without consulting Crown representatives. The Court listed those board powers as including the ability of the MMIB to acquire land, construct abattoirs and works, sell cattle and meat and lease property. The Court also noted that the MMIB did not pay its receipts into the general revenues of the State.

[32] Similarly, in *Tamlin v. Hannaford*, [1950] 1 K.B. 18, Lord Denning held that the British Transport Commission was not a Crown agent because its servants were not civil servants, the property was not that of the Crown and the exercise of control by the Minister of Transport was insufficient to meet the requisite standard.

[33] The Exchequer Court in *University of Toronto v. Minister of National Revenue*, (1950) 50 D.T.C. 738 (Ex. Ct.), also utilized the control test in considering whether the governors of the University of Toronto were an agent of the Crown so as to exempt the monies passing to this body from succession taxes. Pursuant to the *University Act*, R.S.O. 1937, c. 372, the board, as the governing body of the University of Toronto, had the power to appoint servants and hire employees, to fix student fees, regulate and manage residences and dining halls, invest money, purchase and erect buildings with approval of the LGIC, administer its property and endowments and to receive income and make expenditures. The appeal was dismissed and the Board of Governors could not claim an exemption as an agent of the Province of Ontario. The LGIC's powers were primarily of a financial nature, but they did not operate to restrict the governors' independence when they were conducting the affairs of the university.

[34] In applying the control test in *Westeel-Rosco*, the Supreme Court first examined the relevant act constituting the appellant in that case, the *South Saskatchewan Hospital Centre Act*, R.S.S. 1965, c. 254. The Court, at pages 251-252, noted that the hospital board was "endowed with wide powers for the construction and administration of the [South Saskatchewan] Hospital". Those provisions included: the ability, with the permission of the LGIC, to purchase, lease and sell land and construct or acquire other buildings; to enter into agreements to operate hospital facilities and management; to receive funds from the Crown; to make rules relating to the operation and management of the hospital; to borrow money; to allow the Legislature to appropriate funds for hospital maintenance and board expenses; and to have the hospital audited and to have the hospital report on its finances to the Minister of Public Health. The Court at page 253 concluded:

> … the powers with which the Board is endowed are far removed from those of a Crown agency which is subject at every turn to the control of the Crown in executing its powers as was the case with the *Halifax Harbour Commissioners* …

The Supreme Court concluded that the powers of the hospital board were "more analogous to those of the Metropolitan Meat Industry Board", which was held not to be a Crown agent. It should be noted, however, that at the time of the *Westeel-Rosco* decision, the Province of Saskatchewan had no legislation providing for the appointment of a supervisor.

[35] More recently, in *Toronto District School Board v. Canada*, [2009] T.C.J. No. 25, C. Miller J. considered a situation involving the appointment of a supervisor under the *Education Act*, R.S.O. 1990, c. E.2, for Ontario to oversee the Toronto District School Board (the "TDSB"). C. Miller J. focused on whether GST was a tax on lands or property belonging to the Province of Ontario; in other words, whether the province became the owner of the TDSB's property. The Court held that, although TDSB was an agent of the Crown during the vesting order period, TDSB's authority as a Crown agent under the *Education Act* did not extend to make the property, including TDSB's funds used to acquire property and services, the property of the province. Consequently, C. Miller J. concluded that TDSB became a Crown agent in order to subject its affairs to control by the province, but not to divest itself of all its property.

[36] The Federal Court of Appeal upheld this decision ([2009] F.C.J. No. 1422) based on the fact that the TDSB was not acting as a common law or statutory Crown agent.

[37] The *Toronto District School Board* decisions of both the Tax Court and Federal Court of Appeal merit further discussion as I requested counsel for both parties to present written submissions on this appeal subsequent to the Federal Court of Appeal rendering its decision. However, I intend firstly to provide my reasons for concluding that the Appellant's principal argument that it is not part of, or an agent of, the Crown must fail.

[38] A finding that a body is a common law Crown agent is made only in exceptional cases after a rigorous application of the relevant test. As Lord Denning stated in *Tamlin v. Hannaford*, at page 25:

> … When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly …

This is particularly applicable in the Province of Ontario where provincial legislation is replete with statutes that establish bodies and then expressly designate them as Crown agencies.

[39] There are a number of factors in this appeal that militate against a finding of the control essential to concluding that an agency relationship existed at common law. The Appellant is established pursuant to the *PHA*. There is no statutory provision, in either the *MOHLTCA* or the *PHA*, which designates the Appellant as part of the Ministry. Furthermore, as the Respondent pointed out, where the Ministry wishes to include separate entities, such as District Health Councils or psychiatric hospitals, as part of the Ministry, it expressly states that intention (Reciprocal Taxation Agreement, Joint Book of Documents, Tab 21). As noted in *Tamlin v. Hannaford*, at page 25, in the:

> … absence of any such express provision [designating the body a Crown agent by statute], the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.

Therefore, if the Appellant is to be a Crown agent, the Crown must be found to exercise the requisite degree of control over the Appellant at common law.

[40] As explained by Mr. Timbrell, in testifying respecting the origin of the current hospital system, historically hospitals such as the Appellant were viewed as autonomous and somewhat independent of government. The enactment of supervisory legislation and its implementation at the Appellant's facilities did not constitute a change to this role for the Appellant. The supervisory legislation was described as an incremental change of a rarely invoked power. The roles of the Appellant and the Ministry are very different in nature. The Appellant does not carry on the business of the Ministry but rather the Ministry has delegated to the Appellant the authority to deliver health care to the Ottawa region as its own business (Cross-examination of Mr. Patterson; direct examination of J. McKinley).

[41] The Appellant argued that the Ministry is legally entitled to exercise a high degree of control over the Appellant even in periods when a hospital supervisor has not been appointed. To support this position, the Appellant argued that the MHLTC's approval was required to amalgamate; to add additional buildings and facilities; to sell, lease, mortgage or dispose of land; to continue to run as a hospital; and to dissolve. In addition, most of the financial assistance upon which the Appellant relied

came from the Ministry and the Ministry could appoint provincial hospital representatives to the Appellant's Board. However, many of these factors are the same factors considered in the *Westeel-Rosco* decision (the power to continue to operate and the ability to sell, lease and add additional buildings with Crown approval) where the Supreme Court held that the hospital board was not a Crown agent. In contrast to the facts in *Westeel-Rosco*, the Appellant is not subject to an annual audit and the Board is not regularly appointed by the LGIC. While these two factors would indicate an even greater degree of control over the body in question, the Court rejected the argument that the hospital board was a Crown agent in that case.

[42] In *Townsville Hospitals Board v. Townsville City Council*, (1982) 149 CLR 282, a decision of the High Court of Australia, the issue was whether a hospital board enjoys Crown immunity in constructing a building on Crown land. The Court held that, although the hospital board was subject to stringent controls in relation to the construction of the building, it nonetheless retained independent discretion to decide whether to engage in such work and therefore this meant that the board was independent of the Crown. At paragraph 15, the Court stated the following:

> 15. It has more than once been said in this Court that "there is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant of the Crown": *Launceston Corporation v. Hydro-Electric Commission* [1959] HCA 12; (1959) 100 CLR 654, at p 662 ; *State Electricity Commission (Vict.) v. City of South Melbourne* [1968] HCA 49; (1968) 118 CLR 504, at p 510 . All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention. The Hospitals Act does not expressly provide that a board shall have the privileges and immunities of the Crown when engaging in building operations, and in my opinion it does not impliedly so provide. The fact that a number of Ministerial approvals must be obtained if the Board needs to borrow or raise money or make financial arrangements for the purposes of a proposed work does not indicate that the Board in carrying out the work is acting for the Crown. The Board cannot be directed to do the work, and if it does borrow or raise money for the purpose, the Board and not the Crown is liable in case of default. Although in some respects a hospitals board is subject to stricter controls than those which governed the statutory bodies in *Metropolitan Meat Industry Board v. Sheedy* (1972) AC 899 ; *Grain Elevators Board (Vict.) v. Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70 and the *Gladstone*

> *Town Council v. Gladstone Harbour Board* (1964) QdR 505 , there is in my opinion no ground of distinction between the present case and those cases. (at p292)

Although this is the view of the Court with respect to Australian law, it appears consistent with the Canadian approach.

[43] The Appellant argued that it was a Crown agent during the Supervisor Period because the hospital supervisor, Mr. Timbrell, exercised all of the powers of the Board, reported to and took direction from the MHLTC and was obligated to carry out the Minister's directions. These powers are granted to the supervisor pursuant to the *PHA*. However, as the Respondent noted, there is nothing in the *PHA* that makes the supervisor's acts those of the MHLTC, and to the contrary, those remain the acts of the hospital for whose board the supervisor acts as per subsection 9(5) of the *PHA* (Respondent's Written Submissions, page 19). The proposition of not adopting the acts of the body was referenced in the *Metropolitan Meat Industry Board* case where the Court stated at page 905:

> … Even if a Minister of the Crown has power to interfere with [the acts], there is nothing in the statute which makes the acts of administration his as distinguished from theirs. …

The Federal Court of Appeal in *Toronto District School Board* also made reference to this fact.

[44] While the control test focuses on the amount of control that can be exercised and not what was exercised, for completeness I will review the actual control exercised during the Supervisor Period. Mr. Timbrell, as supervisor, had substantial discretion in respect to the Appellant's operation. Aside from the fact that he was appointed by the Ministry and continued to brief the Ministry throughout, he received few, if any, specific instructions to perform or carry out any particular act. In fact, when invited on cross-examination to explain how the MHLTC more closely controlled the hospital during this Period, Mr. Timbrell referred only to the attempts to re-start funding for capital projects (Transcript, page 192). To the extent that the hospital received instructions from the Ministry during the periods under appeal, those instructions were no different than the kinds of instruction provided to other hospitals not under supervision (Discovery Read-Ins of J. Kitts, q. 52-53). The Appellant's Board was not appointed by the LGIC. Even when the supervisor appointed the new Board, he exercised his own discretion in the selection process. In fact, Mr. Timbrell refused to commit to a Francophone quota when he selected the new Board (J. Kitts, q. 162-163). Both before and after the period in dispute, the

Board would have retained substantial discretion in determining how the hospital would operate. The hospital's financial reporting remained unchanged during the periods under appeal and was not consolidated with the financial statements of the province (Direct examination and cross-examination of J. McKinley). The Appellant's employees were not public servants and were not bound by provincial public service statutes (Direct examination of J. McKinley and cross-examination of J. Kitts). At all times, the Appellant maintained its separate corporate status. The Appellant was not required to obtain ministerial approval to pass by-laws. In fact, the requirement to have such approval was removed as part of the legislation that allowed supervisors to exercise the powers of a hospital board. The power to amend by-laws rested with the Board and not the Minister (Direct examination of D. Timbrell; by-law Tab 15, section 12.1, Joint Book of Documents).

[45] In *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, the Court held that a B.C. hospital was subject to the *Charter of Rights and Freedoms*, but only in respect to the actual delivery of health care services and not in respect to the internal management of the hospital. This case is instructive because the B.C. *Hospital Act* (R.S.B.C. 1996, c. 200) contained provisions which are as restrictive as, or perhaps more restrictive than, the provisions contained in the *PHA*. For example, the Lieutenant Governor-in-Council in *Eldridge* appointed 14 of the 16 board members and could have a representative on the board, all by-laws had to be approved before becoming effective and the Minister could compel the passage of by-laws.

[46] In summary, the Appellant is not a Crown agent. It carries on its own business, that is, the operation of the hospital. It does not carry on the business of the Ministry. It has broad discretion in carrying out its mandate, owns its own property, employs its own staff and makes its own decisions. It enjoys relatively more autonomy than other bodies which have nevertheless been held by the Courts not to be Crown agents. Since the hospital board is not a Crown agent, then it is not possible for the supervisor to be an agent where he is subject to the same degree of control. The fact that the *PHA* provisions require that the supervisor report to the MHLTC or to carry out the MHLTC's directions under subsections 9(9) and 9(11), respectively, does not change the result.

[47] Even if it could be said that the Appellant was an agent of the Crown for some purposes, it acted on its own account with respect to its internal management and procurement of goods and supplies. This approach is consistent with the decisions in *Cloutier v. Science Council of Canada*, [1995] O.J. No. 4893 (Div. Ct.) and *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2000] O.J. No. 3270 (Sup. Ct.). In *Cloutier*, at paragraphs 48-51, it was held that where a person, even a Crown agent, enters into

an arrangement (in that case an employment relationship) in its own name, it does not carry with it all the prerogative rights and immunities of the Crown. In such cases, the Courts examine the relevant statutory and factual framework to determine in what capacity the body in question is acting. The facts before me in these appeals, together with the statutory provisions, support that suppliers provided goods and services to the Appellant and not to the Crown. For example, the lands and property of the Appellant, including taxable supplies purchased during the periods in dispute, were at all times vested in the Appellant and not the Crown. The Appellant never held itself out or represented to third parties, such as suppliers, that it was a Crown agent. It never completed GST exemption forms when purchasing taxable supplies. The evidence was that the Appellant had pre-existing standing orders for the routine procurement of supplies. The procurement procedures did not change when Mr. Timbrell was appointed and supplies continued to be procured under those agreements. Those standing orders were arrangements of the Appellant to acquire goods and services on its own account. This conclusion is consistent with the decision in *Ontario Realty Corp.*, where the plaintiff was held to be an agent of the Crown for the purposes of contracting, in part, because it held itself out as being exempt from the payment of GST. Further, Mr. Timbrell never reported back to the Ministry concerning the routine procurement of goods and services during the meetings and he did not receive instructions from the Ministry in respect to the procurement of goods and services. The Appellant is not an agent for the purpose of procuring goods and services as it never held itself out as an agent, it received no instructions of any kind from the Ministry with respect to procurement and it provided no feedback to the Ministry regarding procurement.

[48] With respect to the Appellant's argument that the Appellant was also a Crown agent during the Subsequent Period, the fact that the Board was appointed during the Subsequent Period is not relevant as the *PHA* contained no special provisions that would give the MHLTC the ability to legally exercise more control over this type of board. Therefore, since I have concluded that the hospital board is not a Crown agent, a hospital board that was appointed by the supervisor, Mr. Timbrell, cannot be a Crown agent.

The Decision in *Toronto District School Board*:

[49] I have considered the parties' written submissions on the impact upon the outcome of the present appeal with respect to the Federal Court of Appeal and the Tax Court of Canada decisions in the above-noted matter. My conclusions respecting the Agency issue, however, remain unchanged.

[50] C. Miller J. did not discuss the Crown agency issue to any great extent in his reasons except to state, at paragraph 30, that the emphasis on Crown agency by counsel was misplaced and that the real focus was on "… whether in the circumstances the GST was a tax on lands or property belonging to Ontario".

[51] The Federal Court of Appeal in affirming C. Miller J.'s decision in dismissing the Appellant's appeal, clearly had an opposing view on the agency issue and stated at paragraph 4:

> We are all of the view that the Judge committed no reversible error in dismissing the Board's appeal. However we would base the decision on the ground that the Board was at no time acting as a common law or statutory agent of the Crown.

[52] The Appellant submits that there are both factual and legal distinctions between the decision in *Toronto District School Board* and the present appeal. First, the Appellant argued that the *Education Act* in *Toronto District School Board* contained a so-called anti-agency provision (section 257.43), while no such provision was contained in the *PHA*. Second, the Appellant submitted that the MHLTC can exercise more control over a hospital supervisor than the control that could be exercised by the Minister of Education when he appoints a supervisor.

[53] Section 257.43 of the *Education Act* states:

> 257.43 Where a board has become subject to an order made under subsection 257.31 (2) or (3), all things done by or for the Minister under this Division in relation to the affairs of the board shall for all purposes be deemed to have been done by and for the board and in its name.

[54] While it may be possible through clear statutory language to deem a body, that is otherwise a Crown agent at common law, not to be an agent for legislative purposes, the language in section 257.43 does not appear to be sufficient on its own, as this provision simply deems the acts of a supervisor to be acts of the school board. With respect to this provision, at paragraph 6, the Federal Court of Appeal in *Toronto District School Board* stated:

> That the Board was not the agent of the Crown during the period that the Supervisor was conducting its affairs <u>is made clear</u> by section 257.43 of the *Education Act*. …
>
> (Emphasis added)

[55] I do not infer from this quote that the Federal Court of Appeal considered section 257.43 to be an anti-agency provision. In fact, it appears that in stating that the school board in *Toronto District School Board* is not a Crown agent, although the Court gave no specific reasons for its conclusion, that its finding of non-agency is not affected even though a supervisor had control over the school board for a period of time. Further, the fact that the Federal Court of Appeal's reference to section 257.43 appears after their conclusion on agency indicates that their decision was simply strengthened by this provision.

[56] While the Appellant suggested that the Federal Court of Appeal in *Toronto District School Board* did not consider all of the provisions of the *Education Act* as these were not brought to the Court's attention, I do not believe it is for me to speculate on what the Court did or did not do when the entire *Education Act* was before it as the *PHA* is before me in the present appeals. I simply have to assume that the Court did review the statutory provisions of the *Education Act* in their entirety in applying the common law agency test and concluding that the supervisor was not a Crown agent at common law.

[57] On my review of the evidence and of the statutory provisions of the *PHA*, I see no intent by the government to alter the status of the Appellant hospital and the autonomy it enjoyed. The temporary interference with that autonomy did not convert the business of the Appellant hospital into a business operated by the Crown. This is consistent with the Federal Court of Appeal conclusions in *Toronto District School Board* that the legislation did not make the school board a Crown agent while a supervisor had conduct of the board's affairs. On a reading of the decision, I conclude that this was the primary basis for the Federal Court of Appeal's conclusion and that it was simply supported by the application of section 257.43 of the *Education Act*.

[58] Although counsel for the Appellant suggested a number of distinctions between the present appeal and the *Toronto District School Board* decision, I am not persuaded that the requisite elements for Crown agency exist in the appeal before me.

[59] The Respondent proposed three alternative arguments for consideration in the event that I concluded that the Appellant was a part of, or an agent of, the Crown during either or both of the periods under appeal. Although I have decided the Appellant was not an agent and I am therefore not obliged to consider these alternative arguments, I intend to address them briefly as both sets of counsel were well prepared and spent considerable time on these arguments.

Standing:

[60] If the Appellant was a part of, or an agent of, the Crown during the Supervisor Period and/or the Subsequent Period, whether it had standing to file the rebate applications that are the subject of these appeals and whether it has standing to appeal to the Tax Court of Canada in respect of a claim for Crown immunity.

Appellant's Position:

[61] The Appellant has standing to file the rebate applications and to bring its appeal to this Court because the rebate applications are in respect of a federal statute that this Court has jurisdiction over and the issue of Crown immunity is a question of law for the Courts to decide. Therefore, the Appellant has standing as of right to bring the appeals because it is specifically affected by the denial of the rebates. Consequently, there is a direct causal relationship between the Appellant's pecuniary loss and the Respondent's denial of the rebates (Appellant's Memorandum of Fact and Law, pages 12-14).

Respondent's Position:

[62] The Appellant has no such standing because Crown immunity belongs to the Province of Ontario and only the Attorney General has the ability to conduct litigation for and against the Provincial Crown or its agencies. A Crown agent that litigates a matter must add the Attorney General as a party. Subject to certain exceptions, the *Ontario Realty Corp.* case states that where a party contracts as an agent on behalf of the principal, the contract is that of the principal and not the agent and only the principal may sue or be sued on the contract. The Respondent relied on the Federal Court of Appeal decisions in *West Windsor Urgent Care Centre Inc. v. The Queen*, [2008] F.C.J. No. 24, and *United Parcel Service Canada Ltd. v. The Queen*, [2008] F.C.J. No. 178, to support the general prohibition on having an agent bring a claim (Respondent's Written Submissions, pages 21-22).

Analysis - Standing:

[63] Counsel for both parties focused on the concept of Crown immunity. However, the focus here should really be on a consideration of those decisions which have dealt with section 261 of the *ETA*. Hershfield J. in *West Windsor Urgent Care Centre Inc. v. The Queen*, [2005] T.C.J. No. 564, considered the general agency principle that the principal, and not the agent, should bring the action. The Court held, at paragraph 64, that a clinic did not have standing pursuant to section 261, nor

could it be considered an agent of its principal (the physicians), partly because it is "… generally accepted that a principal's cause of action cannot be advanced by its agent". The Federal Court of Appeal, in affirming the decision, stated, at paragraph 1, that there was "… no reviewable error in concluding that the appellant had no standing to seek a rebate under section 261 …".

[64] However, in the recent Supreme Court of Canada decision in *United Parcel Service Canada Ltd. v. The Queen*, [2009] S.C.J. No. 20, the Court in considering whether the Appellant was entitled to a GST refund under section 261 focused on the phrase "has paid an amount". The Court interpreted this phrase as referring to the person who had actually paid the amount, whether or not that person was the person who had the legal liability to pay the GST amount. This decision supports the proposition that it is the Appellant in this appeal that would be entitled to a refund pursuant to section 261, since the Appellant paid the GST. This would be the case whether or not the Appellant was acting as an agent for the Crown. Following the Supreme Court decision in *United Parcel Service* leads to the conclusion that in the present appeal the Appellant would have standing to bring the action whether or not it is a Crown agent.

Reciprocal Taxation Agreement:

[65] If the Appellant was a part of, or an agent of, the Crown during the Supervisor Period and/or the Subsequent Period, whether its immunity from federal tax under section 125 of the *Constitution Act, 1867* was waived pursuant to the RTA entered into between the Government of Canada and the Government of Ontario, effective July 1, 2000.

Analysis - Reciprocal Taxation Agreement:

[66] The RTA basically states that all provincial Crown corporations shall pay GST on their purchases unless they are listed in the Schedule "A" annexed to the agreement. The RTA purports to bind Canada, the Province of Ontario, and their agents. The Appellant argued that this Court does not have jurisdiction to apply the RTA since it is limited to dealing with matters arising under Part IX of the *ETA* pursuant to subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The Appellant also argued that this Court does not have jurisdiction because if it did apply the RTA, it would extend the powers of this Court to persons not within the express jurisdiction of the Court (Appellant's Memorandum of Fact and Law, page 17).

[67] Other than the comments of C. Miller J. in *Toronto District School Board* respecting the application of the RTA and this Court's jurisdiction to interpret an agreement between the Federal and Provincial governments, neither party provided me with any other caselaw respecting this issue nor could I locate any caselaw from this Court dealing directly with this issue. While C. Miller J.'s comments are *obiter*, he stated, at paragraph 50, of his Reasons:

> … I presume the parties believe that the correct procedure, had I found the TDSB could successfully claim immunity from taxation (without reference to the Reciprocal Taxation Agreement) was for the parties to then arbitrate the matter for an interpretation of the Reciprocal Taxation Agreement, to determine if it waived such immunity for the TDSB. I would have happily run the risk of short-cutting such unnecessary and prolonged litigation by grabbing the contract by the horns and giving it an interpretation that I suggest is clear on its face: the TDSB is not on Schedule A and it is, therefore, not immune from taxation and the assessment was therefore correct.

While my comments in this regard are also *obiter*, I agree with C. Miller J. Although the Appellant submitted that this Court does not have jurisdiction to apply the provisions of the RTA in a manner that would extend the application of a taxing statute beyond its express scope, I conclude that this agreement is no different in nature than any other agreement that this Court must interpret and apply in the circumstances of any appeal. The Appellant is clearly incorrect in suggesting that if this Court interpreted the RTA it would be expressly extending the application of Part IX of the *ETA* because section 122 makes Part IX applicable to and binding on both Her Majesty in Right of Canada and Her Majesty in Right of the Province. If I had concluded that the Appellant had been a Crown agent during these periods under appeal and therefore immune from taxation and entitled to its rebate claim, I would have pursued an interpretation of the RTA in order to ascertain if immunity from taxation was waived by virtue of this agreement. Like C. Miller J., logic dictates and because the agreement appears clear on its face, I would have concluded that since the Appellant is not listed in Schedule "A" to the RTA, it is required to pay GST. According to the RTA, all Provincial Crown corporations and agencies shall pay GST unless they are on Schedule "A". The inclusion of eight Ontario psychiatric hospitals on Schedule "A" clearly precludes all other Ontario hospitals, including the Appellant.

Filing of Second Rebate Claim:

[68] Whether the Appellant is precluded by sections 262, 297, 299 and 306 and subsection 301(1.1) of the *ETA* from claiming the rebates of GST paid by mistake.

Appellant's Position:

[69] Rebate applications for GST are governed by section 261 of the *ETA* and are therefore not precluded under subsection 262(2). The Appellant suggested that the case of *Fanshawe College of Applied Arts & Technology v. The Queen*, [2006] T.C.J. No. 504, which denied a claim for a rebate of GST paid by mistake, should be distinguished because the taxpayer in *Fanshawe College* was firstly, trying to recoup an aggregate of 167% of the GST originally paid (which the Appellant in this appeal was not attempting to do) and, secondly, that the word "supply" rather than "matter" should have been used in the wording of subsection 262(2) if Parliament had intended to limit the meaning of "matter" in this provision. Woods J. in *Fanshawe College* held that the word "matter" means "a transaction giving rise to the incidence of GST".

[70] The Appellant suggests two additional textual interpretations that the word "matter" could have. The Appellant suggests the word "matter" could mean "the amount of the rebate claimed" or "the statutory basis for a rebate claim". Pursuant to these interpretations, the Appellant's rebate applications under subsection 261(1) concern a matter distinct from its rebate applications under subsection 259(3) and would not be precluded by subsection 262(2). Since the *ETA* consistently uses the word "supply" to refer to a transaction that gives rise to GST, then the word "matter" must refer to something else, that is, something different from the transaction giving rise to the payment of GST. This makes the textual interpretation of "matter" ambiguous.

[71] In respect of the applicable limitation period, the Appellant submits that section 262 implies that it should be interpreted together with the provisions dealing with Division PSB rebates including applicable objection and appeal provisions, which would imply a two year limitation period (as per subsection 261(3)) and not a 90 day period (as per subsection 301(1.1)). If Parliament had intended that the 90 day limitation period for an objection in subsection 301(1.1) apply, rather than the two year limitation period set out in subsection 261(3), then it would have included a reference to section 297 in subsection 261(2) in addition to the section 296 reference. Lack of such a reference in subsection 261(2) suggests that the two year limitation

period in subsection 261(3) applies. In addition, the spirit and purpose of the *ETA* support the application of the two year limitation period for claiming rebates.

Respondent's Position:

[72] The Appellant's claim for the GST amounts paid in error is prohibited by subsection 262(2) of the *ETA* because they cover the same subject matter as the Appellant's PSB rebate claim of 83% of the GST paid during the Supervisor Period and the Subsequent Period. Therefore, the restriction in subsection 262(2), that only one application may be made for a rebate with respect to any matter, prevents the Appellant from filing a claim to recover the remaining 17%. Subsection 262(2) is best construed in a contextual and purposive manner as being a residual prohibition on multiple rebate claims in respect of the same transaction without reference to the category of the rebate claim.

Analysis - Filing of Second Rebate Claim:

[73] By way of background, for each monthly reporting period that occurred during the Supervisor Period and the Subsequent Period, the Appellant applied for a rebate of 83% of the GST pursuant to subsection 259(3) of the *ETA*. Each application for a PSB rebate was assessed pursuant to subsection 297(1) and the rebate so assessed was paid to the Appellant pursuant to subsection 297(3).

[74] The Appellant applied for a rebate of 17% of the GST paid for each of the Supervisor Period and the Subsequent Period pursuant to subsection 261(1) on the basis that they had been paid by mistake (the "Rebate Applications"). The Rebate Applications were denied pursuant to subsection 262(2).

[75] Subsection 262(2) states:

> (2) Only one application may be made under this Division for a rebate with respect to any matter.

[76] The *Fanshawe College* decision appears to be the only case to directly consider whether an additional GST rebate may be filed pursuant to subsection 262(2) of the *ETA*.

[77] Contrary to C. Miller J.'s comments in *Toronto District School Board*, at paragraph 51, where he stated that he would not have followed *Fanshawe College*, I

would follow the reasoning of Woods J. and disallow the 17% Rebate Applications. At paragraph 58, Woods J. stated:

> … The word "matter" in section 262 in my view relates to a transaction -- in this case the purchase of a book. If, for example, the College is entitled to a $10 rebate in relation to the purchase of a book but it claims only $8 in error, section 262 precludes the College from including the remaining $2 in another rebate application. The manner in which the College could correct its claim for the GST in relation to the book is to object to the assessment which determined the rebate. This must be done within the time limits for filing objections.

[78] The example by Woods J. contained in the aforementioned quote where "matter" is interpreted as referring to each book purchase, clearly captures the very situation in the present appeals. On a plain reading of this provision, I agree with *Fanshawe College* because it is technically correct, although as noted by Woods J., it produces results that may be contrary to how the rebate has been understood to have operated even by the Department of Finance in its Technical Notes.

[79] Both the first and second rebate applications fall under Division VI of the *ETA*. The Appellant argued that *Fanshawe College* should be distinguished because the taxpayer in that appeal was attempting to unfairly claim GST in excess of 100%. However, this argument must be rejected given the "book" example offered by Woods J. at paragraph 58. The approach taken by Woods J. accords with the approach to statutory interpretation in *Nowegijick v. The Queen et al.*, [1983] 1 S.C.R. 29, where the Supreme Court of Canada gave the widest possible scope to the words "in respect of" and stated:

> … The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[80] According to the Appellant's argument, from a textual interpretation, the meaning of the word "matter" is ambiguous. The "any matter" restriction in subsection 262(2) means that once a particular transaction has been the subject of a rebate claim of any kind, it cannot be the subject of a second rebate application of any kind. Subsection 262(2) interpreted in a contextual and purposive manner requires that it be read as a residual clause within Division VI of the *ETA*.

[81] In accordance with *Fanshawe College*, subsections 259(3) and (6) preclude the filing of multiple PSB claims in respect of any period or in respect of the same transaction. Section 261 refers to obtaining a rebate of tax paid in error as including tax, net tax, penalty, interest or other obligation under that part of the *ETA*. The

conclusion from this is that there must be wording broad enough to capture items beyond a "supply". Subsection 262(2) should be viewed as a residual prohibition on multiple rebate claims in respect of the same transaction.

[82] The French version of subsection 262(2) states:

> (2) **Demande unique.** – L'objet d'un remboursement ne peut être visé par plus d'une demande selon la présente section.

This literally translates to "the object of reimbursement cannot be made on more than one application" and again lends support to Woods J.'s interpretation.

[83] As per the recent Supreme Court decisions in *Caisse populaire Desjardins de l'Est de Drummond v. R.*, [2009] 2 S.C.R. 94, and *R. v. S.A.C.*, [2008] 2 S.C.R. 675, when considering an ambiguity in a federal statute one must take both the English and French versions of the statute into consideration. If one version of the statute is ambiguous, as the English version is here, and the other version of the statute is plain and unequivocal, as appears to be the case with the French version, then the correct approach is to adopt the plain and unambiguous version as the shared meaning. This approach also offers support for Woods J.'s conclusion in *Fanshawe College*.

[84] Although the Appellant's argument respecting the use of the word "matter" and not the word "supply" within subsection 262(2) has merit, I conclude, in reviewing the textual, contextual and purposive interpretations to be accorded subsection 262(2), that the Appellant would have been precluded from making an additional GST claim. This conclusion, while it has the potential to produce some unfairness, is nevertheless the technically correct one.

[85] In summary, since the Appellant was not part of, or an agent of, the Crown during either the Supervisor Period or the Subsequent Period, its claim for a GST refund paid by mistake is dismissed with costs.

Signed at Ottawa, Canada, this 29th day of January 2010.

"Diane Campbell"

Campbell J.

Schedule "A"

Partial Agreed Statement of Facts and Issues

Court File Nos.: 2005-4015(GST)G
2006-511(GST)G

TAX COURT OF CANADA

IN THE MATTER OF THE *EXCISE TAX ACT*

BETWEEN:

THE OTTAWA HOSPITAL CORPORATION

Appellant

- and –

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS AND ISSUES

Couzin Taylor LLP
Barristers & Solicitors
Ernst & Young Tower
222 Bay Street, P.O. Box 143
Toronto, Ontario
M5K 1H1

Daniel Sandler
Michele Anderson

Counsel for the Appellant

John H. Sims
Deputy Attorney General of Canada
Department of Justice
Bank of Canada Bldg., East Tower
234 Wellington Street
Ottawa, Ontario
K1A 0H8

Ernest Wheeler
Michael Ezri

Counsel for the Respondent

OVERVIEW

1. These appeals concern whether The Ottawa Hospital Corporation (the "Appellant") is entitled to a GST refund in respect of GST paid under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "ETA") for the period beginning on July 16, 2001 and ending on September 30, 2002

(the "Supervisor Period") and the period beginning on October 1, 2002 and ending on October 31, 2003 (the "Subsequent Period").

STATEMENT OF FACTS

For the purposes of this proceeding only, the following facts are agreed to by the Appellant and the Respondent:

2. The Appellant is, and was, at all material times, a public hospital governed by the *Public Health Act*, R.S.O. 1990, c. P.40, as amended (the "PHA"), and a corporation governed by the *Corporations Act*, R.S.O. 1990, c. C.38, as amended.

3. On July 16, 2001, Dennis R. Timbrell was appointed by Order in Council No. 1704/2001 as the hospital supervisor for the Appellant pursuant to subsection 9(1) of the PHA.

4. Under the terms of the Order in Council, the hospital supervisor had "the exclusive right to exercise all of the powers of the board, The Ottawa Hospital corporation and the members of the corporation" as well as "the exclusive right to exercise all of the powers of the officers of The Ottawa Hospital" other than the Chief Executive Officer/President of The Ottawa Hospital.

5. During the Supervisor Period, there were no board meetings and there was no executive committee. Instead, the hospital supervisor held periodic "Meetings with the Supervisor" for which a formal agenda was prepared and minutes were kept. Such meetings were held on August 30, 2001, October 16, 2001, November 8, 2001, December 17, 2001, February 26, 2002, April 4, 2002, April 23, 2002, May 30, 2002, August 22, 2002, and September 27, 2002.

6. Pursuant to Order in Council No. 1675/2002, the appointment of Dennis R. Timbrell as hospital supervisor was terminated at midnight on September 30, 2002.

7. During the Supervisor Period and the Subsequent Period, the Appellant paid GST in respect of property and services that were acquired.

8. For each monthly reporting period of the Appellant that occurred during the Supervisor Period and the Subsequent Period, the Appellant applied for a rebate of 83 percent of the GST paid on goods and services acquired during the Supervisor Period and the Subsequent Period under subsection 259(3) of the ETA (the "PSB Rebate").

9. Each application for a PSB Rebate was assessed by the Minister of National Revenue (the "Minister") under subsection 297(1) of the ETA and the rebate so assessed was paid to the Appellant under subsection 297(3), together with interest under subsection 297(4) where the rebate was paid more than 21 days after the rebate application was filed.

10. On December 1, 2003 and January 19, 2004, respectively, the Appellant applied for a rebate of 17 percent of the GST paid during each of the Supervisor Period and the Subsequent Period pursuant to subsection 261(1) of the ETA (i.e., the GST paid during each such period that was not included in the PSB Rebate applications referred to in paragraph 8 above) on the basis that such GST was paid by mistake (the "Rebate Applications"). The Rebate Applications were for the amounts of $1,704,984.55 and $1,582,291.00, respectively.

11. The Minister issued Notices of (Re)Assessment dated February 13, 2004 (regarding the Supervisor Period) and August 8, 2005 (regarding the Subsequent Period) (collectively, the "Assessments") denying the Appellant's Rebate Applications. The Minister confirmed the Assessments by Notices of Decision dated August 24, 2005 and December 19, 2005, respectively.

12. The Appellant filed Notices of Appeal from the Assessments to this Honourable Court.

13. The parties agree that they shall be entitled to lead additional evidence and shall be entitled to ask the Tax Court of Canada to draw inferences from the evidence presented, provided that such additional evidence or inferences are not inconsistent with this partial agreed statement of facts.

14. Pursuant to subsection 261(3) of the ETA, the parties agree that the Appellant's claim for the period from July 16, 2001 to November 30, 2001 is not payable by the Minister.

15. In the event that these appeals are allowed, the parties agree that the matters will be referred back to the Minister of National Revenue for reassessment to determine the amount of the rebate payable to the Appellant.

STATEMENT OF ISSUES

16. The parties agree that the issues before this Honourable Court are as follows:

    i. Whether the Appellant was part of, or an agent of, the Crown during the Supervisor Period;

ii. Whether the Appellant was part of, or an agent of, the Crown during the Subsequent Period;

iii. If the Appellant was a part of, or an agent of, the Crown during the Supervisor Period and/or the Subsequent Period, whether it had standing to file the Rebate Applications that are the subject of these appeals and whether it has standing to appeal to the Tax Court of Canada in respect of a claim for Crown immunity;

iv. If the Appellant was a part of or an agent of the Crown during the Supervisor Period and/or the Subsequent Period, whether its immunity from federal tax under section 125 of the *Constitution Act, 1867* was waived pursuant to a reciprocal taxation agreement entered into between the Government of Canada, represented by the federal Minister of Finance, and the Government of Ontario, represented by Ontario's Minister of Finance, effective July 1, 2000 (the "RTA");

v. Whether the Appellant is precluded by sections 262, 297, 299 and 306 and subsection 301(1.1) of the ETA from claiming the rebates of GST paid by mistake.

AGREEMENT REGARDING EVIDENCE

17. The Appellant and Respondent agree to file copies of the following documents with the Court as exhibits for the purposes of this proceeding:

[This list has not been reproduced as part of the Agreed Statement of Facts and Issues as it is not essential to my reasons.]

ALL OF WHICH IS RESPECTIVELY SUBMITTED.

Per: *"Daniel Sandler"* Oct. 17, 2008

Daniel Sandler
Michele Anderson

Couzin Taylor LLP
Barristers & Solicitors
Ernst & Young Tower
222 Bay Street, P.O. Box 143
Toronto, Ontario
M5K 1H1

Counsel for the Appellant

Per: *"Michael Ezri"* Oct. 17, 2008

Ernest Wheeler
Michael Ezri

Department of Justice
Tax Law Services Section
Bank of Canada Building
East Tower, 9th Floor
234 Wellington Street
Ottawa, Ontario
K1A 0H8

Counsel for the Respondent

Tel.: (416) 943-4434 / 943-5445
Fax: (416) 943-2700

Tel.: (613) 957-4805 / 957-4807
Fax: (613) 941-2293

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APPEARANCES:

Counsel for the Appellant:	Daniel Sandler L. Michele Anderson
Counsel for the Respondent:	Ernest Wheeler Michael Ezri

COUNSEL OF RECORD:

For the Appellant:

Name:	Daniel Sandler and L. Michele Anderson
Firm:	Couzin, Taylor LLP Toronto, Ontario

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada