Docket: 2018-3444(GST)G

BETWEEN:

THE BELL TELEPHONE COMPANY OF CANADA
or BELL CANADA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on June 20–22, 2022, at Toronto, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Alan Kenigsberg Al-Nawaz Nanji
Counsel for the Respondent:	Jack Warren Dominik Longchamps

JUDGMENT

In accordance with my Reasons for Judgment:

The appeal from assessments made under the *Excise Tax Act* by Notices of Assessment dated July 30, 2015 and May 30, 2016 is dismissed, with costs to the Respondent.

Signed at Vancouver, British Columbia, this 12th day of April 2023.

"S. D'Arcy"

D'Arcy J.

Citation: 2023TCC45
Date: 20230412
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THE BELL TELEPHONE COMPANY OF CANADA
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Appellant,

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HIS MAJESTY THE KING,

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REASONS FOR JUDGMENT

D'Arcy J.

Introduction

[1] The primary issue in this appeal is whether the Appellant, Bell Canada, when purchasing electricity in Ontario, received a single supply of electricity or, as argued by the Appellant, multiple supplies of electricity, delivery services and regulatory services.

[2] During the relevant years, subsection 236.01(2) of Part IX of the *Excise Tax Act* (the "**GST Act**") required a large business, such as the Appellant, to recapture a portion of the input tax credits that it claimed in respect of certain specified property and services, including electricity.

[3] The issue of whether the Appellant received a single supply of electricity as opposed to multiple supplies is key when determining the amount of input tax credits that the Appellant was required to recapture under subsection 236.01(2) for its reporting periods ending between July 1, 2010 and December 31, 2012. The amount at issue is approximately $2,550,000.

[4] The Appellant is a GST registrant that is engaged exclusively in GST commercial activities, being the selling of telecommunications services,

telecommunications equipment and services related to telecommunications services and equipment.

Preliminary Issues

[5] The parties filed a short partial agreed statement of facts (the "**PASF**"). The PASF provides a brief description of the Appellant, notes the various Ontario electricity distribution companies (the "**Local Distributors**") that made supplies to it, references the 106 invoices issued by various Local Distributors that are included in the Joint Book of Documents, and describes the audit of the Appellant and the assessments issued by the Minister. The PASF contains few relevant facts with respect to the issue before the Court.

[6] I heard from three witnesses: Mr. William Ferris, the Director of Real Estate Operations for the Appellant, Mr. John Todd, the President of Elenchus Research Associates, Inc., and Mr. Travis Lusney, the Director of Power Systems at Power Advisory LLC.

[7] Since the primary issue in this appeal is whether each supplier (i.e. a Local Distributor) made a single supply or multiple supplies, I expected to hear testimony from employees of one or more of the Local Distributors. This did not occur. As a result, the Court received only general details of how the Local Distributors operate when making supplies. For example, while the parties provided the Court with numerous invoices issued to the Appellant by various Local Distributors, the parties did not file any contracts that the Appellant entered into with Local Distributors. Nor did the parties provide the Court with any contracts or details of any contracts that Local Distributors entered into with their suppliers.

[8] Mr. Ferris's testimony related mainly to how the Appellant powered its networks and to the 106 sample invoices included in Exhibit A-1, focusing on the four categories of items set out on the invoices. I did not find his testimony with respect to the invoices particularly helpful since the invoices speak for themselves and, as I will discuss, the Local Distributors were required, pursuant to subsection 79.17(1) of the *Ontario Energy Board Act, 1998*[1] (the "**OEB Act**") and the relevant regulations, to itemize their invoices to show the four categories of items.

[1] S.O. 1998, C. 15, Sched. B.

[9] In addition, Mr. Ferris's evidence was limited since he did not work for the Appellant during the years at issue in this appeal.

[10] Mr. Todd, as the President of Elenchus Research Associates, Inc., provides advice to numerous Canadian distributors of electricity, including the majority of the Local Distributors as well as integrated electric utilities such as Hydro-Québec and New Brunswick Power. His advice relates primarily to operating in the various Canadian regulated electricity markets, including applying for rate increases.

[11] He holds a bachelor of science in electrical engineering and a master of business administration in economics and management science, both from the University of Toronto. He is not a professional engineer. He stated that he has redefined himself as an economist.

[12] Mr. Todd has never worked as an employee of a Local Distributor, a transmission company, a company that generates electricity or one of the entities that regulates the Ontario electricity market.

[13] The Appellant first put Mr. Todd to the Court as an expert witness. After holding a *voir dire*, I ruled that his expert report was not admissible. The oral reasons for my ruling are attached as Appendix A. I did not find Mr. Todd's expert report necessary.

[14] As can be seen from Appendix A, I found that Mr. Todd's answers to the questions put to him by the Appellant did not contain facts that were of such a technical nature that I required help to appreciate those facts. If a lay witness had provided the various facts set out in Mr. Todd's report, I could have formed my own conclusion without the help of an expert.

[15] In addition, as stated in my oral reasons, the primary purpose of Mr. Todd's report is to give fact evidence; it is not to give an opinion, an inference from the facts. I do not require an expert to tell me the facts. I need a lay witness whose fact evidence can be tested under cross-examination.

[16] After my ruling, the Appellant decided to present Mr. Todd to the Court as a fact witness. Mr. Todd's evidence was helpful with respect to the structure of the Ontario electricity market. However, he was not able to provide evidence with respect to the actual individual supplies made by Local Distributors to their various customers. Only an employee of a Local Distributor could provide such evidence.

Mr. Todd could only tell me how the various regulators and the relevant provincial legislation regulated the business of the Local Distributors.

[17] Mr. Lusney, as Director of Power Systems at Power Advisory, oversees most of the firm's analysis with respect to electricity sectors across Canada and throughout North America. Power Advisory is a management consulting firm in the electricity sector. Mr. Lusney noted that Power Advisory provides traditional management consulting services involving asset valuation, price forecasting, market assessments, strategic guidance and investment analysis.

[18] Mr. Lusney holds a bachelor of science in electrical engineering and a master of science in electrical engineering, both from Queen's University. He is a professional engineer.

[19] Unlike Mr. Todd, Mr. Lusney has worked for parties involved in the Ontario electricity market. Prior to joining Power Advisory, he worked for the Ontario Power Authority and, between 2006 and 2008, for a Local Distributor, Hydro Ottawa Limited. When working at Hydro Ottawa, he was responsible for supporting the planning process, in particular, the development, allocation, and justification of capital planning budgets.

[20] The Respondent first put Mr. Lusney to the Court as an expert witness. After holding a *voir dire*, I ruled that his expert report was not admissible. My reasons were the same as my reasons for excluding Mr. Todd's expert report: Mr. Lusney's report was not necessary, because there was nothing in his report of such a technical nature that an expert was required. In addition, it was an attempt to adduce fact evidence through an expert as opposed to a lay witness.

[21] The Respondent then called Mr. Lusney as a fact witness. Mr. Lusney's evidence was also helpful with respect to the structure of the Ontario electricity market. Furthermore, he was able to provide some evidence with respect to the operation of Hydro Ottawa; however, the evidence was limited since he did not work for Hydro Ottawa during the relevant period and he did not appear to have been directly involved in the making of supplies by Hydro Ottawa to its various customers.

Summary of the Facts

[22] The Ontario electricity market is heavily regulated.

[23] Only registered entities can participate in the Ontario electricity market. The businesses that such entities may carry on are limited by legislation. Electricity can only be purchased for resale in the government-operated market, fees charged for transmitting electricity are set by government regulators, the total price at which entities may sell electricity to the ultimate consumers is set by government regulators, and the government dictates what can appear and how it is to appear on invoices issued to the ultimate consumers.

[24] During the relevant period, the key players in the Ontario electricity market were the entities that generate the electricity (the "**Generators**"), the Independent Electricity System Operator (the "**IESO**"), the entities that transmit the electricity (the "**Transmitters**"), and the Local Distributors which sell the electricity to most consumers.

[25] The witnesses also referred to retailers. Mr. Todd noted that there are 70 licensed retailers in Ontario but that only a few are active.

[26] Mr. Todd and Mr. Lusney provided similar descriptions of how each of the key players participates in the Ontario electricity market.

[27] The Generators are the companies that create the electricity. The primary Generators located in Ontario are Ontario Power Generation and Bruce Power (which produce power using nuclear reactors). In addition, there are a number of smaller Generators in Ontario, which generate electricity through gas-fired generation plants, solar farms and wind generators. The witnesses noted that Generators located outside of Ontario, such as Hydro-Québec, also sell into the Ontario electricity market. Further, electricity produced outside of Ontario may also be sold into the Ontario market by wholesalers (the "**Wholesalers**"), which purchase electricity from Generators for resale.

[28] The IESO is a government agency that manages the Ontario electricity system in real time to ensure that there is an adequate supply of electricity in Ontario on both a moment-by-moment basis and an annual basis. The Generators and Wholesalers sell their electricity through a market operated by the IESO. The market operates in real time, matching the Generators and Wholesalers that are willing to sell a specific quantity of electricity at a specified price into the Ontario market with Local Distributors, large industrial customers and Wholesalers that are willing to buy the specific quantity at the specified price. The price is referred to as the market clearing price, or the MCP.

[29] The Transmitters carry the electricity from the Generators to the Local Distributors and to a few large commercial customers that are connected to the transmission systems (for example, steel mills in Hamilton). Hydro One and its subsidiaries own 95% of the capacity of the transmission system. Certain Indigenous organizations and a private U.S. company own the remaining 5% of the capacity.

[30] Because of the high voltage of the transmission system, only large commercial users of electricity are able to connect to it. All other users can only access the electricity by connecting to the system of a Local Distributor. Local Distributors transform the power from high voltage to low voltage and then sell it, at a usable voltage level, to residential, commercial and small industrial users. As a result, most consumers in Ontario purchase electricity from Local Distributors. During the relevant period, the Appellant only purchased electricity from Local Distributors.

[31] There are 61 licensed Local Distributors in Ontario. Municipalities own most of them. These Local Distributors serve their local communities. In fact, each of the Local Distributors is only entitled to sell in a designated area. The designated area is usually the area of the local municipality.

[32] In addition to being a Transmitter, Hydro One is also a Local Distributor. It services the parts of the province of Ontario that are not serviced by the other Local Distributors.

[33] Consumers can also purchase electricity from so-called retailers. As mentioned previously, Mr. Todd stated that few retailers were active in Ontario during the relevant period. He noted that the use of retailers was, in effect, a failed experiment. Consumers who purchase electricity from retailers must purchase transmission services from the Local Distributor for the area in which they live or operate. The Appellant did not purchase any electricity from retailers during the relevant period.

[34] When purchasing electricity, the Appellant received supplies from various Local Distributors. The PASF states that it had no separate suppliers of, nor contracts for, electricity, transmission services and distribution services apart from the Local Distributors.[2]

[35] As mentioned previously, the electricity market in Ontario is heavily regulated. This is done mainly through the provisions of the *Electricity Act, 1998*,

[2] PASF, paragraph 6.

S.O. 1998, c. 15, Sched. A (the "**Electricity Act**") and the provisions of the OEB Act.

[36] Section 57 of the OEB Act provides that an entity must be registered before it can, among other things:

- own or operate a distribution system;
- own or operate a transmission system;
- generate electricity;
- retail electricity; and
- sell or purchase electricity through the IESO-administered markets.

[37] Subsection 71(1) of the OEB Act provides that a Transmitter or Local Distributor shall not carry on any business activities other than transmitting or distributing electricity.[3]

[38] The effect of section 57 is that a Local Distributor can only carry on a business of owning or operating a transmission system if it is registered to do so. There is no evidence before me that any Local Distributor other than Hydro One carried on the business of owning or operating a transmission system. I infer from this lack of evidence that none of the Local Distributors other than Hydro One was registered to carry on the business of owning or operating a transmission system.

[39] As a result, the Local Distributors were restricted by the OEB Act to the business of selling electricity to consumers in their defined area.

[40] Subsection 70(11) of the OEB Act provides, in effect, that a Local Distributor can only distribute electricity in the area specified in its licence. Section 28 and subsection 29(1) of the Electricity Act require a Local Distributor to sell electricity to every person who requests to be connected to its distribution network.

[41] These provisions are consistent with the testimony of Mr. Todd and Mr. Lusney who testified that Local Distributors must be registered, can only carry on business in their designated area, and cannot own a Generator.[4] They also testified that the Generators cannot own Local Distributors or Transmitters. Their testimony

[3] Exceptions are provided, including exceptions for small renewable energy generation facilities and those allowed under rules prescribed by regulation.
[4] See also sections 80 and 81 of the OEB Act.

is consistent with section 81 of the OEB Act and subsection 29.1(2) of the Electricity Act.

[42] Section 78 of the OEB Act provides that the only amount that a Transmitter can charge for the transmission of electricity and the only amount that a Local Distributor can charge for the distribution and sale of electricity is the amount set by the Ontario Energy Board. As Mr. Todd and Mr. Lusney explained, the rates that the Transmitters and Local Distributors may charge are set on a continuous basis by the Ontario Energy Board.

[43] Mr. Todd and Mr. Lusney testified that the Ontario Energy Board uses a cost-recovery model to set the rate that a Local Distributor may charge its customers. The rate allows the Local Distributors to recover the amounts that they pay the Generators and Wholesalers when acquiring electricity on the IESO market, the amounts that they pay the Transmitters to transmit the electricity from the Generators to their distribution network, the fees that are charged by regulators such as the IESO and the costs that they incur in operating their distribution and sales network (in the OEB Act, the distribution and sales network is referred to as the *retailing of electricity*).[5]

[44] The rate also includes a profit element. The profit element is calculated on the costs that a Local Distributor incurs in operating its distribution and sales network. The Local Distributors are not allowed to earn a profit on the costs that they incur to purchase the electricity, on the costs that they incur to transmit it to their distribution network or on the regulatory fees.

[45] All the witnesses were taken to invoices issued to the Appellant by various Local Distributors. The witnesses focused on the various itemized items on the invoices that together comprise the total amount charged on the invoices to the Appellant. The individual items shown on the invoices vary from Local Distributor to Local Distributor and, for one Local Distributor, from invoice to invoice.

[46] The OEB Act requires each Local Distributor to itemize its invoices. Section 79.17 provides that the invoices are to be in a form prescribed by regulation or approved by the Minister. The actual information required on a Local Distributor's invoice is set out in Regulation 275/04 to the OEB Act, *Information on Invoices to Low-volume Consumers of Electricity* (the "**Invoice Regulations**"). Pursuant to the Invoice Regulations, the invoices issued by Local Distributors to so-

[5] See subsections 78(2) and (3) of the OEB Act.

called low-volume consumers, which include most residential customers and commercial customers (including the Appellant), must include the following information:

- the heading *Your Electricity Charges*;
- the following sub-headings are to be included below the *Your Electricity Charges* heading:
    - *Electricity,*
    - *Delivery,*
    - *Regulatory charges, and*
    - *Debt retirement charge;*
- under the sub-heading *Electricity*, the amount of electricity consumed, the commodity price of the electricity and any other information required by other regulations made under the OEB Act must be shown clearly and separately;
- under the sub-heading *Delivery*, the invoice must clearly indicate the total cost of the delivery charges;
- under the sub-heading *Regulatory charges*, the invoice must clearly indicate the total cost of the regulatory charges;
- under the sub-heading *Debt retirement charge*, the invoice must clearly indicate the total amount of the debt retirement charge payable;
- the invoice must include information on the historical consumption of electricity;
- the invoice must clearly indicate the consumer's consumption of electricity as indicated on the consumer's meter;
- the Local Distributor must include, on or with the invoice, the glossary of terms set out in subsection 10(1) of the Invoice Regulations [the glossary of terms provides a description of each of the four sub-headings];
- the invoice must include the Local Distributor's website and telephone number in a note following the glossary of terms that reads as follows:

"NOTE: For a detailed explanation of electricity terms, please visit (*website of distributor, where available*) or www.oeb.gov.on.ca"; and

- the invoice must include any messages with respect to conservation, alternative energy sources or renewable sources issued by the Minister.[6]

[47] Section 9 of the Invoice Regulations provides that the only information that a Local Distributor can provide on the invoices with respect to the *Your Electricity Charges* heading and the four sub-headings is information specified in the Invoice Regulations, another regulation made under the OEB Act or in a provision or regulation made under the Electricity Act or the *Ontario Clean Energy Benefit Act, 2010*.

[48] Subsections 3(2) and 4(2) of the Invoice Regulations specify how the Local Distributor is to calculate the amounts shown under the *Delivery* and *Regulatory charges* sub-headings.

[49] Most of the invoices at Tabs 1 to 106 of Exhibit A-1 contain the required heading and sub-headings. However, some invoices provide more detail than other invoices. Further, not all the invoices contain the glossary of terms and the required wording with respect to the Local Distributor's website.

[50] For example, the invoice at page 133 of Exhibit A-1, issued by Toronto Hydro-Electric System ("**Toronto Hydro**"), contains the heading *Your Electricity Charges;* four sub-headings, namely *Electricity*, *Delivery*, *Regulatory* and *Debt Retirement Charges;* and a single amount for each sub-heading, all of which are required by regulation. The four amounts shown for each sub-heading are then added together, with the total identified as *Your Total Electricity Charges*. HST is then added to the total, resulting in an amount identified as *Total Due*.

[51] The only information provided on the invoice in respect of each sub-heading is the single amount. No other information is provided, with one exception. Under the sub-heading *Electricity*, the number of kilowatt-hours ("**KWH**") of electricity consumed and the price per KWH for the electricity are indicated. This is required by section 2 of the Invoice Regulations.

[6] The Invoice Regulations, sections 1, 2, 5, 6, 7, 8, 8.1 and 10 and subsections 3(1) and 4(1).

[52] There are no calculations shown for the single amounts included under the other three sub-headings.

[53] The invoice also contains the meter reading for the relevant month.[7]

[54] I will refer to the Local Distributor invoices that only show a single amount for each of the four required sub-headings (including how the amount that appears under the *Electricity* sub-heading is calculated) as the "**Basic Information Invoices**".

[55] Other invoices issued by Toronto Hydro contain significantly more information under each sub-heading. For example, the invoice at pages 174 and 175 of Exhibit A-1 is for a period similar to the period covered by the invoice at page 133, but it is for a different Bell Canada location. This invoice also contains the heading *Your Electricity Charges* and the four sub-headings, namely *Electricity, Delivery*, *Regulatory* and *Debt Retirement Charge*. However, instead of a single amount under each sub-heading, various amounts are shown, as follows:

- Under the sub-heading *Electricity*, three separate line items appear with an amount for each item. Each of the three line items shows the KWH and price per KWH that were used to calculate the amount on the particular line.

- Under the sub-heading *Delivery*, there are seven separate line items, with an amount for each item. The calculation of six of the amounts based on KWH is shown. The seventh item is referred to as a *Customer Charge*.

- Under the sub-heading *Regulatory Charges*, three separate line items are shown, with an amount for each item. The calculation of two amounts based on KWH is indicated. The third item is referred as a *Standard Supply Service Admin Charge*.

- A single line item and amount appear under the sub-heading *Debt Retirement Charge*. The amount is calculated based on KWH.

[56] All the amounts on the invoice under the sub-headings (the 13 amounts) are added together, with the total amount shown next to the heading *Your Total*

[7] It does not contain the glossary of terms or the required wording referring Toronto Hydro's website.

Electricity Charges. HST is then added to the total electricity charge, resulting in the *Total Due*.

[57] I will refer to the Local Distributor invoices that include more than single amounts for the four required sub-headings as the "**Detailed Invoices**".

[58] Nearly all the Basic Information Invoices and the Detailed Invoices contain a total of all the items on the invoice that is identified as *Your Electricity Charges*, *Total Electric Charges*, *Your Total Electricity Charges*, *Your Electricity Charges*, *Total Current Electric Charges*, *Total Electricity Charges*, *Total of your electricity charges*, or *Electricity Charges*.

[59] Mr. Todd and Mr. Lusney explained that the separate amounts shown on Toronto Hydro's Detailed Invoice are the amounts used to calculate the relevant amount for each sub-heading in accordance with the Invoice Regulations. For example, the seven items under the sub-heading *Delivery* are the amounts that Toronto Hydro is required by subsection 3(2) of the Invoice Regulations to include when calculating the cost of delivery charges. The disclosure of the specific seven items under the *Delivery* sub-heading was not required by subsection 3(1) of the Invoice Regulations. Subsection 3(1) only requires a Local Distributor to disclose the total cost of the delivery charges.

[60] On the basis of the sample invoices provided at Tabs 1 to 106, it appears that the majority of the Local Distributors used Basic Information Invoices, which only provided limited information similar to the Toronto Hydro Basic Information Invoice.[8] However, in addition to Toronto Hydro, a number of other Local Distributors provided more detailed information similar to the information found on Toronto Hydro's Detailed Invoice.[9] It appears that Toronto Hydro and Hydro One[10] are the only Local Distributors that issued both Basic Information Invoices and Detailed Invoices.

[61] Some of the Local Distributors issued Detailed Invoices that did not contain the sub-headings required by the Invoice Regulations. For example, Waterloo North Hydro's invoice at Tab 43 of Exhibit A-1 provides the *Electricity* sub-heading but then groups all other charges under the sub-heading *Your Other Charges*. Welland

[8] See Tabs 35, 37 to 42, 44, 46 to 49, 51 to 53, 57 to 61, 63 to 65, 67, 69 to 72, 74 to 85, 87 to 89, 91, 92, 99, 101 to 105.
[9] See Tabs 36, 43, 45, 50, 54-56, 62, 66, 73, 90, 93, 100, 106.
[10] See Tabs 40 and 55 of Exhibit A-1.

Hydro-Electric System Corp.'s invoices at Tab 45 of Exhibit A-1 do not contain any sub-headings; all items are shown under the heading *Charges & Credits*. Kitchener-Wilmot Hydro lists all items under one heading: *Your Electricity Charges*.[11]

[62] The Cornwell Electric invoice at Tab 68 of Exhibit A-1 only provides limited information. However, there are only two items on the invoice: one is a charge for the electricity consumed and the second is titled *Debt Retirement Charge.* The amount shown for the debt retirement charge is 0. No amounts are included for delivery or regulatory charges.

[63] One other inconsistency in the Detailed Invoices included in Exhibit A-1 relates to the itemization of the electricity consumed. The Invoice Regulations require the Local Distributors to show, under the sub-heading *Electricity*, the amount of electricity consumed and the commodity price for the electricity. Most invoices have two types of charges for the electricity consumed. One is based on the amount of KWH consumed in the month multiplied by the amount that the Local Distributor paid for each KWH, and the second item is what is called the Provincial Benefit (also known as the Global Adjustment).

[64] Mr. Todd explained that some of the Generators are paid two amounts for their electricity: the real-time market price determined when electricity is sold on the IESO market and the Provincial Benefit. The Provincial Benefit is the difference, if any, between the market price and a guaranteed minimum price offered by the Government of Ontario to certain Generators. The Local Distributors pay the Provincial Benefit to the Generators. It is then included in the price that the Local Distributors are allowed to charge their customers.

[65] Certain of the Local Distributors that issued a Detailed Invoice, such as Toronto Hydro,[12] show the Provincial Benefit under the *Electricity* sub-heading, while others, such as Festival Hydro (located in Stratford, Ontario) and Waterloo North Hydro, do not include the Provincial Benefit/Global Adjustment under the *Electricity* sub-heading, but rather under a sub-heading called *Your Other Charges.*[13] This means that Local Distributors such as Festival Hydro and Waterloo North Hydro not indicate their total cost to acquire electricity under the *Electricity* sub-heading. A portion appears under another sub-heading.

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[11] See Tab 50 of Exhibit A-1. For other similar invoices, see Tabs 93, 98 and 100 of Exhibit A-1.
[12] See Tab 3 of Exhibit A-1.
[13] See Tabs 93 and 100 of Exhibit A-1.

[66] Since I did not hear testimony from any of the Local Distributors, it is not clear why the majority of Local Distributors provide only the basic information required by the Invoice Regulations while other Local Distributors provide more information with respect to how the charge for each sub-heading is calculated. It is also not clear why some Local Distributors do not provide the disclosure required by the Invoice Regulations or why, in at least one situation, there is no itemized charge for delivery or regulatory charges.

[67] Each of the witnesses described items that appeared on certain of the Detailed Invoices. I did not find this testimony particularly helpful because the Local Distributors that issued Detailed Invoices were not consistent with respect to what items they itemized on invoices and because the majority of Local Distributors issued Basic Information Invoices. In addition, there is no evidence before me with respect to how the Local Distributors that issued Basic Information Invoices calculated the amounts shown under each of the four sub-headings.

[68] The evidence that is before me is that the Ontario Energy Board, applying the Invoice Regulations, dictated the items to be disclosed on the Local Distributors' invoices, including the sub-headings to be used and the amounts that were to appear under each sub-heading. This, and the absence of evidence to the contrary, leads me to infer that the itemization is not based on what the Local Distributors believed that they supplied, but rather on what they were required to itemize under the Invoice Regulations. I would require contradictory evidence from a Local Distributor to reach a different conclusion.

Summary of the Law

[69] When calculating its net tax under subsection 225(1) of the GST Act, a person, such as the Appellant, may claim input tax credits. Subsection 169(1) of the GST 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 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
>
> . . .
>
> **(c)** . . . 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.

[70] As a result of subsection 169(1), a person's ability to claim input tax credits is dependent on the person's intended or actual use of the property or service in the person's commercial activities.

[71] It is not in dispute that any property or service that the Appellant acquired from a Local Distributor was acquired for consumption or use in its commercial activities. It was entitled to, and did in fact, claim on its GST tax return input tax credits equal to 100% of the GST that it paid to the Local Distributors.

[72] However, at the time that Ontario and British Columbia agreed to be *participating province*s for purposes of the GST Act, the GST Act was amended to add section 236.01, which may require a person to recapture a portion of the input tax credits that the person claimed under subsection 169(1). Specifically, section 236.01 requires certain persons to recapture the input tax credits that they claimed in respect of the tax that they paid under subsection 165(2), sections 212.1 and 218.1 and Division IV.1 on the acquisition, importing or bringing into a particular province of certain specified property or services. Section 236.01 applied to supplies made in Ontario between July 1, 2010 and June 30, 2018. This period includes the years at issue in this appeal.

[73] In order to understand how the recapture works, one must first understand how the GST is levied under the GST Act.

[74] The GST is levied under four separate and distinct divisions, each of which imposes the tax. The four divisions are as follows:

- Division II, which levies the tax on taxable supplies that are made in Canada. This is the tax levied on supplies that occur in Canada;

- Division III, which levies the tax on all goods imported into Canada, regardless of whether or not the goods are subject to Canadian customs duties;

- Division IV, which levies the tax on imported services and intangible personal property; and

- Division IV.1, which levies the tax on property and services brought into a participating province.

[75] Each of the divisions levies the federal GST at multiple rates.

[76] Subsection 165(1) levies Division II tax at a 5% rate on all taxable supplies made in Canada. Subsection 165(2) levies an additional tax on taxable supplies made in a so-called participating province at the relevant rate for that province. A participating province is a province that has agreed with the federal government to share the revenue realized from the GST. As of July 1, 2010, Ontario became a participating province. As a result, an additional tax at an 8% rate is levied under subsection 165(2) of the GST Act on all taxable supplies that are deemed under the GST Act to have been made in Ontario. This results in a total tax rate of 13%, which is referred to as the HST rate.

[77] Divisions III, IV and IV.1 operate in a similar manner. Tax at the 5% rate is levied under sections 212 and 218[14] of Division III and Division IV respectively. The additional tax on supplies consumed in participating provinces (e.g. the 8% rate for Ontario) is levied under sections 212.1 and 218.1 of Division III and Division IV respectively. Division IV.1 tax is only levied at the relevant participating province's tax rate (e.g. the 8% rate for Ontario).

[78] During the periods at issue in this appeal, subsection 236.01(2) required that input tax credits in respect of the tax payable at the additional 8% Ontario rate be recaptured for certain specified supplies made in Ontario regardless of whether the tax was levied under division II, III, IV or IV.1.

[79] The issue in the current appeal is the amount of input tax credits that the Appellant must recapture in respect of the 8% tax that it paid under subsection 165(2) of Division II, section 212.1 of Division III, section 218.1 of Division IV or Division IV.1 on supplies made to it by the Local Distributors. It appears from the evidence

[14] Also under section 218.01 for Division IV tax on certain financial institutions.

before me that the Local Distributors only levied the 8% tax under subsection 165(2) of Division II.

[80] Subsection 236.01(2) reads as follows:

> If a sales tax harmonization agreement with the government of a participating province relating to the new harmonized value-added tax system allows for the recapture of input tax credits, in determining the net tax for the reporting period of a large business that includes a prescribed time, the large business shall add all or part, as determined in prescribed manner, of a specified provincial input tax credit of the large business.

[81] The sales tax harmonization agreement between the federal government and Ontario allows for the recapture of input tax credits. Therefore, the recapture applied to a *large business* that operated in Ontario during a prescribed period.

[82] *Large business* is defined in subsection 236.01(1) to mean a prescribed person or a person of a prescribed class. The relevant regulations for purposes of section 236.01 are those included in Part 6 of the *New Harmonized Value-added Tax System Regulations, No. 2* (the "**Recapture Regulations**"). Both parties accept that the Appellant is a prescribed person for purposes of section 27 of the Recapture Regulations and thus is a large business for purposes of subsection 236.01(2).

[83] As mentioned previously, the recapture applied during the periods at issue in this appeal. The periods at issue occurred during a prescribed time as defined in section 30 of the Recapture Regulations.

[84] Since the Appellant was a large business and the reporting periods at issue occurred during a prescribed time, the Appellant was required, when determining its net tax for the reporting periods to add all or part of a *specified provincial input tax credit*.

[85] *Specified provincial input tax credit* is defined in subsection 236.01(1) of the GST Act to mean:

> **(a)** the portion of an input tax credit of a large business in respect of a specified property or service that is attributable to tax under subsection 165(2), section 212.1 or 218.1 or Division IV.1 in respect of the acquisition, importation or bringing into a participating province of the specified property or service; and
>
> **(b)** a prescribed amount in respect of an input tax credit of a large business that is attributable to tax under subsection 165(2), section 212.1 or 218.1 or Division IV.1

> or in respect of an amount that would be such an input tax credit if prescribed conditions were satisfied in prescribed circumstances.

[86] Paragraph (a) is the relevant portion of the definition for purposes of this appeal. As a result, the specified provincial input tax credits of the Appellant were all of the input tax credits that the Appellant claimed in respect of tax paid at the additional 8% Ontario rate on *specified property or services* in respect of the acquisition, importation, or bringing into Ontario of the *specified property or service*.

[87] *Specified property or service* is defined in subsection 236.01 to mean a prescribed property or service, or property or service of a prescribed class.

[88] Division 3 of the Recapture Regulations contains the prescribed property and services for purposes of the definition of *specified property or service*. Paragraph 28(1)(e) of the Recapture Regulations prescribes *specified energy* that is acquired in, or brought into, Ontario.

[89] *Specified energy* is defined is section 26 of the Recapture Regulations to mean:

> **(a)** electricity, gas and steam; and
>
> **(b)** anything (other than fuel for use in a propulsion engine) that can be used to generate energy
>
> > **(i)** by way of combustion or oxidization, or
> >
> > **(ii)** by undergoing a nuclear reaction in a reactor for the generation of energy.

[90] As a result of section 236.01 and the Recapture Regulations, the Appellant was required to recapture the portion of the input tax credits that it claimed in respect of the tax that it paid under subsection 165(2) on the consideration for the supply by the Local Distributors of electricity.

[91] Further, pursuant to subsection 31(3) and section 26 of the Recapture Regulations, it was required to recapture 100% of such tax during the periods at issue.

[92] The Appellant has raised the issue of whether the tax it paid under subsection 165(2) to Local Distributors was in respect of a single supply of

electricity or multiple supplies of electricity, delivery services and regulatory services.

[93] A *taxable supply* is defined in subsection 123(1) as a supply made in the course of a commercial activity. A *supply* is defined as the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.

[94] *Property* and *a service* are also defined in subsection 123(1). *Property* is defined to mean any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind whatever, but not including money. *Service* is defined even more broadly to mean anything other than property, money and certain services supplied to an employer by an employee, an officer and certain other persons. The definition of *service* is extremely broad. If something is not property, money or an employee service, it will be deemed to be a service for purposes of the GST legislation.

[95] Because of the broad definitions of *supply*, *property* and *service*, the provision of anything in the course of a commercial transaction will potentially be subject to tax.

[96] In view of these broad definitions, the issue frequently arises as to whether a supplier has made a single supply comprised of a number of constituent elements or multiple supplies of separate goods and/or services.

[97] The determination of this issue involves two steps. First, it must be determined whether the supplier made a single supply or multiple supplies; that is a question of fact. If it is determined that the supplier made multiple supplies, the deeming provisions in sections 138 and 139 of the GST Act must be considered.

[98] When determining the factual question of whether a supplier has made a single supply or multiple supplies, the Court must follow the decision of the Supreme Court of Canada in *Calgary (City) v. Canada*, 2012 SCC 20 (*City of Calgary*). In *City of Calgary*, the Supreme Court adopted the principles summarized by Justice Rip (as he then was) in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (T.C.C) (*O.A. Brown*). In other words, the Tax Court of Canada must follow the principles set out in *O.A. Brown*.

[99] O.A. Brown Ltd. carried on the business of purchasing and reselling livestock. In the course of its business, it purchased cattle at an auction and then resold the

cattle to customers. After purchasing the cattle, O.A. Brown Ltd. incurred costs such as feeding, inoculating and branding the cattle before they were sold to its customers. It also incurred costs in transporting the cattle to its customers and in insuring the transportation.

[100] When invoicing its clients, O.A. Brown Ltd. itemized each of its costs in the invoice, including the cost to purchase the cattle, the feeding and branding costs, the cost of transporting the cattle to the customer, and the cost of insurance. The invoice also included a commission charge equal to approximately 1% of the value of the cattle purchased.

[101] In *O.A. Brown*, the respondent argued that O.A. Brown Ltd. supplied two things: cattle and a service. She focused on the fact that O.A. Brown Ltd. itemized each of its costs. The respondent argued that this was evidence that O.A. Brown Ltd. dealt separately with each good or service that it sold to its customers.

[102] O.A. Brown Ltd. argued that the commission, inoculation, branding and transportation costs were not distinct services. They were inputs for the supply of the cattle.

[103] In deciding that O.A. Brown Ltd. made a single supply, Justice Rip provided the following framework for making the factual determination of whether a supplier has made a single supply or multiple supplies:

> In deciding this issue, it is first necessary to decide what has been supplied as consideration for the payment made. It is then necessary to consider whether the overall supply comprises one or more than one supply. The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. . . .[15]

[104] When reaching his decision, Justice Rip made the following observations:

> One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive but is a factor that assists in determining the substance of the transaction. . .

[15] O.A. Brown, at 40-6.

> The fact that a separate charge is made for one constituent part of a compound supply does not alter the tax consequences of that element. Whether the tax is charged or not charged is governed by the nature of the supply.
>
> In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful article or service.
>
> For if it is not possible then it is a necessary conclusion that the supply is a compound supply, which cannot be split up for tax purposes. [16]

[105] Justice Rip noted the importance of using common sense when the determination is made. As my former colleague Justice McArthur noted in *Gin Max Enterprises Inc. v. The Queen* at paragraph 18:

> From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense. . . . [17]

[106] The issue in *City of Calgary* was whether the city made a single supply of the acquisition and construction of certain transit facilities or whether it made two supplies: a supply to the public of operating its transit facilities and a separate supply to the Province of Alberta of acquiring, constructing and making available the transit facilities to the citizens of Calgary.

[107] The Supreme Court of Canada adopted Justice Rip's framework previously set out at paragraph 103 of my reasons in this appeal. The Court also noted the following, at paragraph 36 of its reasons:

> When reaching his decision, Justice Rip made the following observation:
>
> . . . one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. [p. 40-6]
>
> (Citing *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported).)

[108] The Supreme Court of Canada noted that the Federal Court of Appeal's decision in *Maritime Life Assurance Co. v. R.*, [2000] G.S.T.C. 89 (F.C.A.) supports

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[16] O.A. Brown at 40-6 and 40-7.
[17] 2007 TCC 223.

the proposition that work preparatory to, or in order to make a supply does not become a separate service subject to GST.

[109] The Supreme Court emphasized that common sense must be used when making the determination of whether a supplier made a single supply or multiple supplies (see paragraphs 37 and 43 of *City of Calgary*).

Application of the Law to the Facts

[110] The determination of whether a person has made a single supply or multiple supplies is done on a supply-by-supply basis. One must look at what was provided by the person to the person's customer. Normally, one cannot make a single determination in respect of supplies made by multiple persons. However, the evidence before me is that the 61 Local Distributors operated in a heavily regulated marketplace and, notwithstanding the inconsistency in their invoicing policies, all made very similar, if not identical, supplies.

[111] Each of the Local Distributors supplied electricity that it delivered to the premises of the Appellant using the electricity system regulated by the IESO and other Government of Ontario agencies.

[112] At paragraph 38 of its decision in the *City of Calgary*, the Supreme Court of Canada notes that in *O.A. Brown*, former Chief Justice Rip, when applying the single supply versus multiple supplies test, found that the disbursements and commission were not charged for services that were "distinct supplies, independent of the whole activity". Only if taken together did the activities of buying, branding, and inoculation form a useful service.

[113] The Supreme Court quoted part of the following conclusion made by former Chief Justice Rip in *O.A. Brown*:

> The appellant buys livestock according to the instructions of its customers. It subsequently supplies the livestock to each customer as ordered. In the course of providing this service the appellant incurs the cost of feed, inoculation, transportation and insurance. The appellant seeks reimbursement of these costs and charges a fee for this service. It is difficult to isolate these buying activities as being distinct supplies, independent of the whole activity. Only if taken together do they form a useful service. In substance and reality, the alleged separate supply, that of a buying service, is an integral part of the overall supply, being the supply of livestock. ***The alleged separate supplies cannot be realistically omitted from the overall supply and in fact are the essence of the overall supply. The alleged***

> ***separate supplies are interconnected with the supply of livestock to such a degree that the extent of their interdependence is an integral part of the composite whole. The services are rendered under a single contract, for a single consideration, albeit the invoice is itemized***. The appellant is making a single supply of livestock and the commission and disbursements charged are part and parcel of the consideration for that supply. They do not amount to separate supplies. This is simply a matter of common sense. No GST is collectible on the commission charged and the disbursements.
>
> [Emphasis added.]

[114] The Supreme Court of Canada then, at paragraph 42, framed the question in the appeal before it as follows:

> Applying the *O.A. Brown* test, the question in this appeal is whether, in substance and reality, the alleged separate "transit facilities services" supply is an integral part, integrant or component of the overall supply of "public transit services". According to the jurisprudence, if one supply is work of a preparatory nature to another supply (an "input" to that supply), then the input is a part or component of the single overall supply.

[115] The overall supply made in the appeal before me is the supply of electricity. The customers of the Local Distributors, such as the Appellant, contracted with the Local Distributors to purchase electricity. Electricity is one of the necessities of life in Ontario, especially for business operators such as the Appellant. The Appellant cannot carry on its business without access to electricity.

[116] Following the Supreme Court of Canada's application of the *O.A. Brown* test, I must determine in the appeal before me whether, in substance and reality, the alleged separate supplies of the delivery services and regulatory services are integral parts, integrants or components of the overall supply of electricity. If one supply is work of a preparatory nature to another supply (an "input" to that supply), then the input is a part or component of the single overall supply.

[117] The Local Distributors are prevented by legislation from producing the electricity. They must purchase the electricity on the Ontario market. They then resupply the electricity to the individual consumers, including the Appellant. In the course of providing the electricity, they incur the cost of transmitting the electricity through the Transmitters' networks. In addition, the Local Distributors must incur costs in building, operating and maintaining their distribution networks. Further, by participating in the Ontario electricity market, the Local Distributors incur various regulatory fees.

[118] The Ontario Energy Board dictates the price that the Local Distributors can charge their customers and how such price is to be calculated. As noted previously, the Ontario Energy Board uses a cost-recovery model to determine the price that each Local Distributor may charge for the supply that it makes to its customers.

[119] The Local Distributor is entitled to be reimbursed for the costs that it incurs in purchasing the electricity and having the electricity transmitted from the Generators to its distribution lines. It is also entitled to be reimbursed for the various regulatory fees that it incurs. Further, it is entitled to recover the various costs that it incurs in running its business, which would include the costs of building and maintaining its distribution lines and of operating a sales and service department.

[120] The evidence before me is that the Local Distributors are entitled to earn a profit. This profit is calculated based upon direct costs that the Local Distributor incurs in operating its business. It is not entitled to earn a profit on the other costs that it incurs such as the price that it pays for electricity, the fees that it pays to the Transmitters or the fees that it pays to regulatory authorities.

[121] The fact situation before me is very similar to the fact situation in *O.A. Brown*. O.A. Brown Ltd. also used a cost-recovery model to determine its sales price. It calculated its sales price based upon the cost of the cattle, the feeding and branding costs, the cost of transporting the cattle to the customer and the cost of insurance. Its sales price included a profit element equal to 1% of the value of the cattle. It did not earn a profit on the other costs that it incurred.

[122] Similar to the situation in *O.A. Brown*, it is difficult, if not impossible, to isolate the costs that the Local Distributors incur when purchasing electricity, having it transmitted to their local distribution network and then distributing it through their local network as being distinct supplies independent of the whole activity. Only if taken together do these activities form a useful service, the supply of electricity.

[123] In substance and reality, the alleged separate supplies of the delivery services and regulatory services are integral parts, integrants or components of the overall supply of electricity. The supply to the Local Distributors of the transmission services and the regulatory services is work of a preparatory nature to the supply of the electricity. Similarly, the costs that the Local Distributors incur in distributing the electricity relates to work of a preparatory nature to the supply of electricity. As the Supreme Court of Canada noted in *City of Calgary*, such supplies are parts or components of the single overall supply of electricity.

[124] The Local Distributors cannot supply electricity unless they purchase and transport the electricity to their customers. They are not permitted to generate electricity or own transmission lines. In order to purchase electricity for their customers and transport it to their distribution lines, they must participate in the Ontario electricity market and pay the required regulatory fees. To paraphrase former Chief Justice Rip, the alleged separate supplies cannot be realistically omitted by the Local Distributors from the overall supply and in fact are the essence of the overall supply.

[125] In the current appeal, the fact that the Local Distributors itemize certain items on their invoices has no bearing on whether a Local Distributor made a single supply or multiple supplies. As the Court noted in *O.A. Brown*, "[t]he fact that a separate charge is made for one constituent part of a compound supply does not alter the tax consequences of that element." One looks to the nature of the supply.

[126] This is particularly true in the current appeal since the Invoice Regulations require the Local Distributors to itemize their invoices. As I noted previously, the fact that the Local Distributors are required to itemize their invoices leads to the conclusion that the itemization is not based on what the Local Distributors believed that they supplied, but rather on what they were required to itemize under the Invoice Regulations. In other words, the itemization is not something that the Local Distributors do to indicate that they are making separate supplies.

[127] Further, it is difficult to give any weight to the itemization of the invoices since the disclosure on the invoices varies significantly from one Local Distributor to the next. As noted previously, the majority of Local Distributors issue Basic Information Invoices, which contain the minimum amount of disclosure required under the Invoice Regulations, the heading *Your Electricity Charges* and the four sub-headings. With the exception of the calculations that appear under the *Electricity* sub-heading, the Basic Information Invoices do not show how the amounts next to each sub-heading are calculated or what cost recoveries are included under what sub-heading.

[128] For example, for a number of Local Distributors that issue Basic Information Invoices, it is not clear whether they are including the Provincial Benefit/Global Adjustment charge (a charge for electricity consumed) under the *Electricity* sub-heading or under another sub-heading. The evidence before me is that some Local Distributors that issue Detailed Invoices do not include the Provincial Benefit/Global Adjustment charge under the *Electricity* sub-heading.

[129] As discussed previously, the Local Distributors that issue Detailed Invoices are not consistent with respect to the items on their invoices and the sub-headings shown on the invoices.

[130] In order for me to give any weight to the itemization on the Local Distributors' invoices, I would have had to hear evidence from Local Distributors explaining why they chose the Basic Information Invoice or the Detailed Invoice and how they calculated the amounts that appear under the four sub-headings.

[131] Another issue raised by the Appellant is the fact that the Appellant could have purchased the electricity from a retailer and the transmission and distribution services from a Local Distributor. This may be true, but it has no bearing on the supplies before the Court.

[132] The Court must make its decision based upon the supplies actually made, namely the supplies made by the Local Distributors to the Appellant. The decision cannot be based upon a supply that a third party, such as a retailer, made to another third party.

[133] A third issued raised by the Appellant relates to fixed charges that appear on some of the invoices. At paragraph 74 of its written argument, the Appellant states its position as follows: "[c]ertain of the invoices do not have charges for electricity (energy) but only have delivery charges and regulatory charges. When an invoice does not actually include any supply of electricity (energy), it is clear that the payments cannot be for a single supply of electricity."

[134] The Appellant is referring to the Basic Information Invoices issued by four Local Distributors that are included at Tabs 94 to 97 of Exhibit A-1. Each of these invoices has the heading *Your Electricity Charges*, but only two of the sub-headings, *Delivery* and *Regulatory* (or *Regulatory Charges*). A single amount appears opposite each of the two sub-headings. The amount opposite the *Delivery* sub-heading varies between $16 and $44 dollars. The amount opposite the *Regulatory* sub-heading is less than 50 cents.

[135] During the hearing, I heard conflicting evidence with respect to the nature of the amounts itemized on these invoices under the *Delivery* sub-heading.

[136] The Appellant's witness, Mr. Ferris, testified that the Toronto Hydro invoice at Tab 94 reflected a situation in which the Appellant was not consuming electricity at the particular location. However, it had decided to keep the location connected to

the electricity grid. He stated that the charge on the invoice under the *Delivery* sub-heading was a fixed charge "for the right to be able to consume electricity at some point in the future".[18]

[137] The Respondent's witness, Mr. Lusney, was taken to Tab 3 of Exhibit A-1, which contains Detailed Invoices issued by Toronto Hydro during the same period as the period during which it issued the Basic Information Invoices at Tab 94. The two sets of invoices are for different locations of the Appellant. The Detailed Invoices list six items under the *Delivery* sub-heading, including an amount titled *Customer Charge* that appears to be a fixed amount since it is not based upon KWH. Mr. Lusney described this charge "as a fixed charge for the administration of delivery. . . . the need to administer invoicing."[19]

[138] The Appellant's second witness, Mr. Todd noted that during the relevant period every Local Distributor had a service charge, a fixed charge. He stated that "a service charge is a very nebulous term. . . for example, some utilities have a separate line item as a service charge for sending out the bill."[20]

[139] As discussed previously, the Local Distributors' pricing is based upon a cost-recovery model. Therefore, the amounts charged opposite the *Delivery* sub-heading on the invoices included at Tabs 94 to 97 of Exhibit A-1 must be for the recovery of costs incurred by the Local Distributors. The evidence from Mr. Ferris, Mr. Lusney and Mr. Todd with respect to the invoices is speculation. They clearly did not know, with certainty, the specific costs that the Local Distributors incurred in respect of the charges.

[140] Without evidence from the Local Distributors that issued the invoices, it is impossible to determine what specific costs the Local Distributors incurred in respect of the charges. However, the costs were clearly not related to the delivery of electricity since no electricity was delivered by the Local Distributors to the Appellant.

[141] If, as Mr. Ferris testified, the charge is for the right to be able to consume electricity in the future, it could be interpreted as an amount paid pursuant to an agreement by the Local Distributor to provide electricity in the future. In such a situation, the Local Distributor would be deemed, under section 133 of the GST Act,

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[18] Transcript of proceedings page 71.
[19] Transcript of proceedings, page 331.
[20] Transcript of proceedings, page 257.

to have made a supply of electricity. However, the Court would have to examine the contracts between the Appellant and the Local Distributors before making such a determination.

[142] On the basis of the evidence before me, and the lack of evidence from the Local Distributors, I cannot accept the Appellant's argument with respect to the fixed charge on the invoices. It is simply not possible to determine the nature of the charge.

[143] As I stated earlier, my former colleague Justice McArthur noted that the determination of whether there was a single supply or multiple supplies is made with a generous application of common sense. This is a factor that the Supreme Court of Canada emphasized in its reasons in the *City of Calgary* appeal.

[144] In my view, any application of common sense leads to the conclusion that the Local Distributors made a single supply of electricity. The Local Distributors exist to supply electricity to the premises of local homes and businesses. The electricity is something that the local homeowners need in order to live in their homes and that the local businesses need in order to operate their businesses. They contract for the purchase of electricity, and that is what the Local Distributors supply to them.

[145] My finding is similar to the Court's factual finding in *O.A. Brown*; the separate supplies alleged to have been made by the Local Distributors are interconnected with the supply of electricity to such a degree that the extent of their interdependence is an integral part of the composite whole. The provision and delivery of the electricity is rendered under a single contract, and for a single consideration, albeit the invoice is itemized. The Local Distributors are making a single supply of electricity, and the amounts itemized on the invoices for delivery, transmission, and regulatory charges are part of the consideration for that supply.

[146] Having found that the Local Distributors made a single supply of electricity, I must consider the Appellant's alternative argument. The Appellant argued that if the Local Distributors made a single supply of electricity, the recapture rule in subsection 236.01(2) only applied to the subsection 165(2) tax paid on a portion of the single supply. It argued that the term *electricity* as used in section 26 of the Recapture Regulations only applies to the electricity component of the single supply of electricity and does not apply to the delivery services and regulatory services components of the supply.

[147] I see no merit in this argument. It is an attempt to reargue the single supply versus multiple supplies issue.

[148] The provisions under the GST Act that determine when tax is exigible, the timing of when such tax is payable, and the eligibility for input tax credits look to what is being supplied. Different rules apply to the supply of property and the supply of services. Certain supplies of specific property or services are zero-rated or exempt. The rules that exist in the GST Act to make these determinations do not look at the constituent elements of the supply; they look at the supply as a whole. It is the primary reason why one must determine whether a supplier has made a single supply or multiple supplies.

[149] This can be seen by examining the various provisions that result in a recapture of a portion of the input tax credits claimed in respect of the supply of electricity.

[150] Now that I have found that the Local Distributors made a single supply of electricity to the Appellant, the next step in determining whether the recapture rule in section 236.01 applies is to determine whether Division II tax was payable under subsection 165(2). Subsection 165(2) applies to a taxable supply made in a participating province.

[151] The determination of whether tax is exigible under subsection 165(2) is dependent on whether a taxable supply was made and on whether, if a taxable supply was made, it was made in a participating province (in the current appeal, Ontario).

[152] The supply of electricity by the Local Distributors is a taxable supply. It is a supply of property made in the course of a commercial activity. To determine whether the supply was made in a participating province one must look at the provincial place of supply rules in Schedule IX to the GST Act and in the *New Harmonized Value-added Tax System Regulations*. Schedule IX and the regulations contain different rules depending on the nature of the supply. For example, different rules apply to the supply of property and the supply of services. When applying these rules, one does not look at the constituent parts of the supply. The determination is made based upon what is supplied – is it property or a service?

[153] The supply of electricity by the Local Distributors to their customers is deemed to have been made in Ontario under the rules applicable to the supply of property. It is not determined under the rules that apply to services such as transmission and delivery services.

[154] Since the supply of the electricity is deemed to have been made in Ontario, it is subject to tax under subsection 165(2) at the 8% Ontario rate. The supply of the electricity is also subject to tax under subsection 165(1) at the 5% rate since the supply was made in Canada.[21] This is because it is a supply of property that was delivered in Canada. In summary, the supply of the electricity is taxed at the 13% Ontario HST rate.

[155] When determining its net tax, the Appellant was required, under subsection 236.01(2), to add all of its specified provincial input tax credits.

[156] As discussed previously, the definition of *specified provincial input tax credit* in subsection 236.01(1) refers to an input tax credit in respect of a specified property or service. Section 236.01 of the GST Act and section 26 and paragraph 28(1)(e) of the Recapture Regulations define *specified property* to include electricity.

[157] Under subsection 225(1), an input tax credit does not arise until it is claimed by the person in that person's GST tax return. This means that the reference in the definition of specified provincial input tax credit to an input tax credit is a reference to an input tax credit that the Appellant claimed in its GST return.

[158] As a result of these provisions, a specified provincial input tax credit of the Appellant, as that term is defined in subsection 236.01(1), is the portion of the input tax credit that the Appellant claimed in respect of the tax it paid at the 13% HST rate on the consideration for the single supply of electricity that is attributable to the 8% tax under subsection 165(2).

[159] The Local Distributors made a single supply of electricity to the Appellant that was taxed at the 13% Ontario HST rate based upon the fact that the supply of **electricity** was deemed to have been made in Ontario. The Appellant did, in fact, claim an input tax credit for the tax that it paid at the 13% Ontario HST rate. It claimed such input tax credit on the basis that it acquired the **electricity** for consumption or use in its commercial activities.

[160] The Appellant is required to recapture the portion of the input tax credit that it claimed relating to the 8% tax that it paid under subsection 165(2) in respect of the single supply of the electricity. There is no ambiguity in the legislation. In fact, the

[21] A supply can only be taxed under subsection 165(2) if it is also taxed under 165(1) since a taxable supply cannot be made in a participating province unless the taxable supply is made in Canada.

legislation is very straightforward. It looks to the input tax credit claimed in respect of the single supply. In the current appeal, the single supply was a supply of electricity. The fact that there were constituent parts of the supply is irrelevant.

[161] For the foregoing reasons, the appeal is dismissed with costs to the Respondent.

Signed at Vancouver, British Columbia, this 12th day of April 2023.

"S. D'Arcy"

D'Arcy J.

CITATION:	2023 TCC 45
COURT FILE NO.:	2018-3444(GST)G
STYLE OF CAUSE:	The Bell Telephone Company of Canada or Bell Canada v. His Majesty The King
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 20–22, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Steven K. D'Arcy
DATE OF JUDGMENT:	April 12, 2023

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APPENDIX A

Oral Reasons on *Voir Dire*

[1] I will now rule on the admission of the Appellant's expert report.

[2] Like all opinion evidence, expert opinion evidence is presumptively inadmissible. Opinion evidence refers to any inference from observed facts.

[3] A properly qualified expert may provide opinion evidence to assist the trier of fact where his or her technical expertise is required to assist in drawing inferences.

[4] The admissibility of expert opinion evidence is determined by the application of a two-stage test as confirmed in 2015 by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*[22], which I will refer to as *Inman*.

[5] The first step, the threshold stage, requires the parties putting the proposed expert forward to establish that the evidence satisfies the threshold requirements of admissibility. These requirements are the so-called four *Mohan* factors, and an additional requirement related to novel science, which is not an issue in this appeal.

[6] At this first step, the evidence is assessed on a yes/no basis, and if it falls short of any of the threshold preconditions, it should not be admitted. The *Mohan* factors are relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.

[7] The second stage involves a discretionary weighing of the benefits or probative value of admitting evidence that meets the preconditions to admissibility as against the "costs" of its admission, including considerations such as consumption of time, prejudice, and the risk of causing confusion.

[8] The trial judge's gatekeeper function in relation to expert opinion evidence is important, bearing in mind that the parties have the right to put forward the most complete evidentiary record consistent with the rules of evidence.

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[22] 2015 SCC 23.

[9] As the Supreme Court of Canada noted in *R. v. J.-L. J.*, 2000 SCC 51 at paragraphs 28 to 29:

> In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility. The Court's gatekeeper function must afford the parties the opportunity to put forward the most complete evidentiary record consistent with the rules of evidence. . .

[10] With respect to the expert report put forward by the Appellant, the relevant *Mohan* factor is the necessity factor. In *R. v. D (D.)*, 2000 SC 43, the Supreme Court of Canada noted:

> . . . When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.

[11] In short, helpfulness is not enough to allow for the admission of an expert report; it must be necessary.

[12] Specifically, as noted in *Mohan*, the evidence must be reasonably necessary in the sense that it is likely outside of the ordinary experience and knowledge of the trier of fact. That can be found in *R. v. Mohan*, [1994], 2 SCR 9.

[13] Further, the expert opinion evidence must be necessary to allow the trier of fact to:

- appreciate the facts, due to their technical nature; or
- form a correct judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

[14] As the Supreme Court of Canada noted in *Mohan* when adopting a statement made by Justice Dickson in *R. v. Abbey*, "[i]f on the proven facts a judge and jury

can form their own conclusion without help, then the opinion of the expert is unnecessary". [23]

[15] Now, the primary issue before the Court is the nature or components of the supplies made by the local electricity distribution companies to the Appellant.

[16] The Appellant argues that the supply made to the Appellant included electricity within its meaning in the definition of *specified energy* in section 26 *of* Division 1, Part 6 of the *New Harmonized Value-added Tax System Regulations, No. 2*, plus other services or charges relating to the transmission or distribution of electricity or use of the electricity grid that do not constitute specified energy.

[17] The Respondent argues that the Appellant received a single supply of specified energy.

[18] The Appellant notes, in its pleading, that if the Court is required to consider whether there was a single or multiple supplies, then there were multiple supplies of electricity, distribution services, and the use of the electrical grid.

[19] To address these issues, I need to determine, from a factual perspective, what, for the purposes of the GST Act, the distributors of electricity provided to the Appellant. This will require me to understand the involvement of the various players in the Ontario electricity market in the supply made by the local distributors to the Appellant, particularly, Ontario Power Generation, Hydro One, and the various local distributors.

[20] I would expect such evidence to be provided to me by lay witnesses. This has not occurred. The only lay witness called by the Appellant was an employee of Bell Canada, whose testimony focused on how Bell powered its network and on the various invoices issued by the local distributors of electricity.

[21] The Appellant now offers the expert report of Mr. John Todd. Mr. Todd is an expert with respect to electricity and the transmission and distribution of electricity in Canada, including in Ontario. His expertise is not an issue.

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[23] *R. v. Abbey*, [1982] 2 S.C.R. 24.

[22] Mr. Todd states at page 8 of his report that he is providing his opinion on three sets of questions that were put to him by counsel for the Appellant. There are 10 questions in total.

[23] The majority of the questions involve describing the electricity and distribution market in Ontario, including:

- identifying who are the players in the market and how each of them participates in the market;
- indicating whether electricity can be obtained separately from distribution and other regulated services;
- can a company obtain electricity without distribution services;
- can any distribution services be obtained without electricity;
- what are the items listed on a local distribution company's invoice and how are the amounts determined;
- are there situations where there are electricity charges, but no distribution, or regulation services, or vice versa.
- does each of the amounts charged for distribution or other regulated services depend on the quantity of electricity purchased in a particular period. For instance, is it possible that more electricity can be purchased in one period than the next, but the fee for delivery and other regulated services remains the same, or decreases, or vice versa.

[24] After reviewing Mr. Todd's report, I have concluded that it is not necessary. The majority of the report describes the Ontario energy market. Mr. Todd's answers to the questions do not contain facts that are of such a technical nature that I need help to appreciate the nature of such facts.

[25] If I had a lay witness provide the various facts set out in Mr. Todd's report, I could have formed my own conclusion without the help of an expert. Specifically, witnesses from the various players in the Ontario market, particularly the Local Distributors that made the relevant supplies to the Appellant, could have easily provided this evidence. They each operate in a heavily regulated industry and certainly know what they can and cannot do and how the market operates.

[26] If I had such evidence from the market participants, I could have formed a correct judgment without the help of an expert. The fact that the Appellant chose not to provide such lay evidence does not make the expert evidence necessary from the Court's perspective; it just makes it helpful to the Appellant.

[27] Further, the majority of the report is composed of factual answers to the questions posed by the Appellant's counsel. It is difficult to see any opinion in Mr. Todd's answers to these questions. The only opinion I see is Mr. Todd's conclusion that, from the perspective of the industry in Ontario (counsel focused on the fact that this was from the perspective of the industry in Ontario), the term *electricity* refers to the energy that is created by the generators and is distinct from the delivery of electricity through the wires of the transmitters to distributors. This opinion would be of little help to the Court since I am concerned with what was, as a question of fact, supplied by the various local distributors to the Appellant.

[28] Further, Mr. Todd's conclusion with respect to the term *electricity* represents a small portion of the report.

[29] In my view, the primary purpose of Mr. Todd's report is to give fact evidence; it is not to give an opinion, an inference from the facts. I do not require an expert to tell me the facts.

[30] As the Supreme Court of Canada noted in *R. v. Parrott*, 2001 SCC 3, at paragraph 55:

> The special role of the expert witness is not to testify to the facts, but to provide an opinion based on the facts, to assist the trier of fact to draw the appropriate inferences from the facts as found "which the judge and jury, due to the technical nature of the facts, are unable to formulate" (*Abbey*. . . at p. 42).

[31] As I stated previously, what the Court needs is a lay witness to address the relevant factual issues, a witness whose fact evidence can be tested under cross-examination.

[32] For these reasons, I have concluded that the expert report is inadmissible.