Docket: 2009-3012(GST)G

BETWEEN:

THE CITY OF EDMONTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 10 and 11, 2015, at Edmonton, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	Margaret A. Irving Paige McPherson

---

JUDGMENT

The appeal, instituted under Part IX of the *Excise Tax Act*, from Notice of Reassessment No. 10BT0201888 dated February 24, 2006, with respect to the reporting periods between January 1, 2002 and January 31, 2004, is allowed, with costs, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of July 2015.

"Diane Campbell"

Campbell J.

Citation: 2015 TCC 172
Date: 20150703
Docket: 2009-3012(GST)G

BETWEEN:

THE CITY OF EDMONTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] This appeal focuses on the Appellant's role in various development processes and transactions that occur when subdivisions are established on raw land situated within the municipal boundaries. The proper tax treatment of these transactions, in respect to the completion of the so-called municipal infrastructure, is at issue.

[2] Construction of the infrastructure, such as arterial roadways, sidewalks, street lighting, sewer trunks, drainage improvements and boundary requirements, (the "Oversized Infrastructure"), is completed by the developer, (the "Frontender"), who is first to commence subdivision activities in a particular municipal geographical area. This infrastructure is oversized because it is in excess of the size that a developer requires for the land it is actually intending to develop. However, this infrastructure will be servicing the entire larger area that has been zoned for development. Subsequent developers, (the "Latecomers"), who wish to develop a block of land within the same geographical area, will receive the benefit of the completed Oversized Infrastructure. They must, therefore, share the cost of the Oversized Infrastructure on a *pro rata* basis because that cost is initially borne by the developer who is first in.

[3] The statutory authority, underlying this regime, is contained in the *Alberta Municipal Government Act* (the "*MGA*") and that authority is delegated from the Province of Alberta to the Appellant. As a precondition to the Appellant granting subdivision approval to developers who want to subdivide and sell individual lots to prospective buyers, the *MGA* requires municipalities, like the Appellant, to ensure the proper construction of the Oversized Infrastructure of public utilities and transportation systems. These systems will eventually service all commercial and non-commercial land owners who purchase lots within the various subdivisions in that geographical area.

[4] The Appellant has been reassessed for net Goods and Services Tax ("GST") of $1,576,800, together with penalties of $137,759, for the reporting periods January 1, 2002 to January 31, 2004, in respect to the transactions that occurred between the City and the developers, being both the Frontenders and the Latecomers. In reassessing, the Canada Revenue Agency (the "CRA") characterized the construction of the infrastructure by a Frontender as a taxable supply, with the consideration being the amount remitted by the Appellant to a Frontender pursuant to the terms of City Servicing Agreements ("CSAs"), which it had with both Frontenders and Latecomers. The supply from the Appellant to a Latecomer was characterized as an exempt supply of a development permit or subdivision approval. The Appellant had collected GST in this respect in error but had not remitted it. The effect of this reassessment was that the Appellant was still required to include GST received in error from the Latecomers in its net tax, but it was not entitled to claim input tax credits ("ITCs") in respect to the GST collected because the tax was paid in the course of the Appellant making exempt supplies of permits and approvals. Consequently, it was entitled to claim only the public service rebates, pursuant to section 259 of the *Excise Tax Act* (the "*ETA*"), in respect of the GST paid on the Frontender supplies. Such municipal rebates, during the period under appeal, were calculated at a rate of 57.14 percent of the GST amount.

The Issues

[5] Although the pleadings listed eight or nine issues, they can be summarized as follows:

(1) Was the Appellant acting as an agent in its dealings with the developers who constructed the municipal Oversized Infrastructure or, more specifically, was the Appellant acting on its own behalf or as agent of the Frontender when it dealt with the Latecomers?

(2) Depending upon the conclusion in the first issue, it may then be necessary to consider the characterization of the supplies and whether single or multiple supplies were made between the Appellant and the developers, the value of the consideration for those supplies, the identity of the recipient of those supplies and whether the supply made by the Appellant to the Latecomers was an exempt supply of a development permit or subdivision approval.

(3) Were penalties properly assessed pursuant to subsection 280(1) of the *ETA*?

The Evidence

[6] The parties submitted a comprehensive Statement of Agreed Facts, attached to the within reasons as Schedule "A". Following is a summary of those Agreed Facts together with the evidence adduced at the hearing.

[7] As a municipality, the Appellant is responsible for building and maintaining infrastructure and improvements for the benefit of and use by City residents. The municipal infrastructure at issue in this appeal consisted of sewer and drainage facilities, water improvements, arterial roads and boundary improvements.

[8] According to the provisions of the CSA and the *MGA*, it is industry standard that the Appellant, when agreeing to use its best efforts to recover infrastructure costs, is actually bound to assist the first developers or Frontenders in recovering the costs of the municipal Oversized Infrastructure from the Latecomers. When the Latecomers pay their proportionate cost-share amount of the infrastructure to the Appellant, GST is charged on that amount, for which, I assume, Latecomers claim ITCs. The Appellant then pays these amounts, plus the GST component, to the Frontenders. Pursuant to section 8.1 of the CSA, the Frontenders remit the GST that the Latecomers have paid. In tracking these amounts, the Appellant does not record them as revenue in its books.

[9] Ken Mamczasz, the Appellant's senior development engineer, outlined the land development process that occurs when a developer, who is the owner of property within the municipality, wants to develop and subdivide the land so that lots can be sold. If the land has not been properly zoned, the developer must first apply to the Appellant's Sustainable Development department to obtain the requisite zoning permit. To obtain subdivision approval, the developer must submit the application, including engineering designs and drawings, for review and

approval to various municipal departments. If the Appellant grants approval, and to do so all departments must sign off on the proposed plan, the developer is required to enter into a CSA, which contains various cost elements, including those costs that relate to the charges for the Oversized Infrastructure. This agreement also references applicable inspection and administrative charges as well as all of the improvements to the property that a developer must complete.

[10] Mr. Mamczasz explained the contents of a typical CSA (Exhibit A-1, Tab 2), including the types of municipal improvements that must be completed on the land. These include the typical items that immediately come to mind, such as roadways, water distribution, drainage and storm trunk sewer systems and electrical distribution, as well as telecommunication infrastructure for companies such as Telus and Shaw, and additional designs that may be required to ensure compliance with environmental standards. Subsequent developers of property, within the geographical area that will be serviced by the construction of the Oversized Infrastructure, will benefit and, therefore, be obligated to cost share. This calculation is based on a per-hectare basis, according to a formula set out in the CSA with the Appellant. Latecomers can take advantage of the endeavours of the first developer or Frontender who was obligated to construct the infrastructure and municipal improvements for the entire geographical area.

[11] Mr. Mamczasz testified that the City, in prior years, had constructed its own infrastructure but now does so only when it develops its own parcels of land. For any new developments by private developers, they will assume the responsibility for those infrastructure costs on a shared basis so that the first developer of the land is repaid for its over-expenditure costs.

[12] In some instances, a developer could be required to pay to the Appellant, in trust, its proportionate share of the cost of a particular infrastructure system, such as a roadway, even though it was not yet constructed and even though it was not that developer's responsibility to complete it. Amounts paid in trust eventually flow through to the developer that actually constructs the infrastructure at a later date.

[13] This witness also explained the "cascading methodology", as he termed it, of cost sharing by subsequent developers of the cost expenditures incurred by a prior developer. Depending on the timing of the entry of a subsequent developer in a land basin and the percentage of that area that it would be developing, the developer will be required to contribute to reduce the over-expenditure costs of any prior developers in that geographical area.

[14] When the Appellant received those cost-share payments from the Latecomers, it paid the Frontender, according to the provisions of the CSA, provided that the Frontender was not otherwise in default under the agreement. Under Article 8 of the CSA, if the Appellant was prevented by law from receiving the Schedule D payments from other Latecomers, it was not required to pay any amount to the Frontender/developer. If the Appellant did not pay a developer within sixty days of receipt of a Latecomer's payment, it was required to pay interest to the developer.

[15] When the infrastructure has been completed within a particular land basin, the Appellant inspects the site and issues a Construction Completion Certificate. A maintenance inspection is completed one year later to ensure that the municipal improvements are operating properly and a Final Acceptance Certificate will then be issued by the Appellant. At this point, the Appellant assumes full responsibility for the operation and ongoing maintenance of the municipal improvements and infrastructure for the residents of the City.

[16] Finally, in direct examination, Mr. Mamczasz reviewed a waiver agreement in which a prior developer or Frontender and a Latecomer waive or opt out of the provisions of the CSA relating to the Appellant's obligation to collect cost sharing amounts from the subsequent Latecomers. This may occur, for example, where both the Frontender and Latecomer are related companies or have negotiated a separate arrangement without the Appellant's involvement.

[17] There may also be instances where a developer is both a Frontender and a Latecomer with respect to the same Oversized Infrastructure. In this scenario, the Appellant considers the cost sharing payment, that a Latecomer would owe the Frontender, to be offset and does not collect on that amount under the CSA. If there is only one developer who develops the entire basin, the City continues to track all of the related costs, even though those costs would be offset in respect of that developer. Such tracking would be important where, for example, mid-way through the development, that developer decides to sell the land and the Appellant must cost assess proportionately.

[18] In cross-examination, Mr. Mamczasz testified that, in respect to subdivision approvals for Latecomers, a Frontender cannot compel the Appellant to approve those applications. In most cases, the Frontender will not know who the Latecomer will be. When the Frontender and Appellant enter into the CSA, the Frontender will not know when it will be receiving payment from a future Latecomer. Mr. Mamczasz, on cross-examination, also confirmed that, pursuant to the CSA, once

the subdivision plan is registered, the Appellant becomes the owner of that land on which the roads and other infrastructure has been constructed, as well as the completed infrastructure and improvements.

[19] Stephen Jensen, an engineer with the Appellant, described situations where Latecomers make a request to the Appellant to forego payment of their proportionate cost-sharing amount of the Oversized Infrastructure. In those cases, the Appellant presented the Frontender with this request. It was the Frontender that could decide to waive all or a portion of the Latecomer's cost-sharing amount depending on the particular circumstances. On cross-examination, Mr. Jensen provided the example of a Frontender not agreeing to waive the over-expenditure payment because a Latecomer, who may be a direct competitor with the Frontender, would be receiving the advantage of being able to proceed with its development without having to pay its cost-sharing amount.

[20] The third and final witness, Carol Engelking, an accountant employed by the Appellant, identified various correspondence documents referred to in earlier evidence. She stated that, with respect to the Appellant's understanding of the CRA's position during the period in issue, there were ongoing discussions between the Appellant and the CRA concerning the GST treatment by the Appellant of the amounts under appeal. The Appellant, however, did not report GST in accordance with the CRA's interpretation contained in documentation at Exhibit A-2, Tab 29.

The Appellant's Position

[21] The Appellant contended that the initial developer or Frontender makes two separate taxable supplies. The Appellant relied on the decision in *Calgary (City) v Canada*, 2012 SCC 20, [2012] SCJ No. 20, to make the argument that there are separate supplies because none are integral to the other, they could exist separately and one supply is not preparatory to the other. The Respondent's characterization of the nature of the supplies and the value of the consideration ignores provisions of the CSA, the statutory regime for municipal Oversized Infrastructure set out in the *MGA* and the historical practice developed between members of the Urban Development Institute and the Appellant.

[22] The Frontender makes a taxable supply of construction services and real property rights to the Appellant when completing the municipal Oversized Infrastructure. The Appellant receives the completed infrastructure for free by operation of law. In fact, this was the position taken by the CRA in its GST/HST Interpretation dated September 16, 2004 (Exhibit A-2, Tab 36, page 7). In addition,

the Reply to the Notice of Appeal made no assumptions of fact in this regard. Pursuant to subsection 16(2) and section 651 of the *MGA*, no consideration changes hands in respect to this supply of municipal infrastructure and, therefore, no GST should be payable by the Appellant under subsection 165(1) of the *ETA*. The Appellant is the recipient of this supply because title to the completed municipal infrastructure ultimately vests in the Appellant.

[23] The Frontender also makes a second taxable supply of completed Oversized Infrastructure to Latecomers for consideration which is payable by the Latecomers pursuant to the CSA and section 651 of the *MGA*. The Latecomers are required to contribute proportionately to the total cost of the Oversized Infrastructure because it benefits their property. The Latecomers receive a supply of services of completed Oversized Infrastructure from the Frontender. The recipient of this supply is the Latecomer, not the Appellant, and there should be no GST assessed in respect to the Appellant on the supply of services which were from the Frontenders to the Latecomers. Therefore, it is the Frontender that must collect and remit GST.

[24] There is no evidence, in fact or as disclosed in the CSAs, that the Appellant supplied or resupplied infrastructure to the Latecomers or, for that matter, to Frontenders. The Appellant supplies the Latecomers with only the development permits or subdivision approvals which are subject to a separate pricing system with respect to municipal permit and inspection costs. When the Appellant supplies development permits and subdivision approvals to Frontenders or Latecomers, that supply is an exempt supply pursuant to subsection 20(c), Part VI, Schedule V of the *ETA*. The Minister incorrectly assumed that the total of all amounts that the Latecomers paid to the Appellant related solely to these permits and approvals. However, the Appellant pointed out that the total amounts, that the Minister contends were collected from the Latecomers as permit and approval fees, "vastly exceed" the fees for permits and approvals established in Tab 8 of the Joint Book of Documents (Exhibit A-1). Consequently, amounts paid by the Latecomers to the Appellant in excess of the permit and inspection fees, are being collected by the Appellant as agent of the Frontenders, who are entitled to those amounts from the Latecomers as a condition to the issuance of the permits by the Appellant. Those amounts that are paid by the Latecomers, in excess of the amounts of the permit fees, are for receipt of the supply of the Oversized Infrastructure from the Frontenders.

[25] The Appellant is, therefore, acting as an agent for the Frontender in respect of the second supply because it acts as a facilitator when it receives funds from the Latecomers on behalf of the Frontender. It does not supply or re-supply services to

the Latecomer. It is acting in its capacity as the administrator of the CSAs in remitting the cost-sharing amounts from the Latecomers to the Appellant's principal, the Frontender. Those amounts include an amount in respect to GST collected, since the Frontender is required to collect and remit tax on its taxable supply, construction services of Oversized Infrastructure, that benefits the Latecomers. Because the Latecomers are liable to pay under the CSA and the *MGA*, they are the "recipient" of the supply. The Appellant must remit this payment, including GST, to the Frontender pursuant to the CSA between the Appellant and the Frontender. In oral argument, Appellant counsel suggested that the question that is relevant to ask in respect of this issue is: What did the Appellant supply? Counsel contended that the Appellant supplied nothing (Transcript of Submissions, page 4).

[26] The Appellant relied on the principles of agency as outlined in the Federal Court of Appeal decision in *Canada v Merchant Law Group*, 2010 FCA 206, [2010] FCJ No. 990, as well as the statements made in the CRA's GST Policy Statement P-182R. Since the Appellant has the ability to alter the Frontender's legal position according to section 651 of the *MGA*, and since the Frontender has control over the Appellant's obligations to collect from the Latecomers, because only the Frontender can provide a formal waiver of this obligation pursuant to section 8.1 of the CSA, these facts are indicative of an agency relationship. Ultimately, it is the Appellant's role to administer the established CSA regime respecting the cost allocation while it is the Frontenders and Latecomers who are involved with the installation, oversizing costs, together with the cost sharing and reimbursement for those costs.

[27] Finally, the Appellant contended that it exercised due diligence and reasonable care in addressing its filing position, with ongoing attempts to ascertain the CRA's position. The Appellant continued to believe that the CRA was considering the Appellant's submissions throughout this period.

The Respondent's Position

[28] Respondent counsel argued that the Frontenders made either a taxable supply of the construction and installation of the Oversized Infrastructure or a taxable supply of real property, or both, to the Appellant. The value of the consideration for the taxable supply is the money that is payable by the Appellant to the Frontenders under their CSA (as set out in Articles 1.1(b) and (d)). The consideration that the Appellant pays to the Frontenders is the same amount as the Latecomers' proportionate cost share of the Oversized Infrastructure. It is

sufficiently linked to the supply that it can be regarded as having been made for that supply *Commission scolaire des Chênes v The Queen*, 2001 FCA 264, [2001] FCJ No. 1559). The consideration is not paid in respect of the real property because the Frontender is obligated to supply that property to the Appellant for the roadways and public utilities for nil consideration pursuant to subsection 661(a) of the *MGA*.

[29] Since the Appellant is liable to pay consideration for the supply of construction services with respect to Oversized Infrastructure, it is the recipient of that supply pursuant to the definition of "recipient" in subsection 123(1) of the *ETA*. Even if the CSA between the Appellant and the Latecomer is considered an agreement pursuant to subsection 123(a), the recipient will still be determined by reference to the CSA between the Appellant and the Frontender. The decision in *Telus Communications (Edmonton) Inc. v The Queen*, 2008 TCC 5, [2008] TCJ No. 62, which concluded that a second agreement does not change who the recipient of the supply is pursuant to the first agreement, is applicable to the facts in this appeal.

[30] The decision in *Telus* distinguished other jurisprudence in this area based on the facts. Similarly, the facts in the present appeal can be distinguished. First, no agreement exists between the Frontender, who made the supply, and a Latecomer, whom the Appellant claims is a recipient. Second, as the Appellant retains discretion over the use of the funds received from the Latecomer, it is not acting as a conduit or agent through which consideration flows.

[31] The Appellant also made an exempt supply of a permit to Latecomers in providing subdivision and/or development approval pursuant to subsection 20(c), Part VI, Schedule V of the *ETA* and, in doing so, charged GST to the Latecomers. Athough a permit is an exempt supply, the Appellant charged GST in error. However, the Appellant did not remit the tax and it is required to do so once the tax is collected. As a result, the Appellant cannot claim ITCs.

[32] Contrary to the Appellant's argument, the Respondent contended that there is no agency relationship between the Appellant and the Frontender because the three essential qualities of agency, discussed in the *Merchant Law* decision, are absent in this appeal. Also, the Appellant does not act in the best interests of the Frontender when entering into the servicing agreements with the Latecomers. Of paramount importance to the Appellant, under the CSA, was the fact that it acquired municipal improvements from the Frontender. The Appellant, therefore,

did not act as an agent of the Frontender, but on its own behalf, in its dealings with the Latecomers.

[33] The Respondent also disagreed with the Appellant's interpretation of the Supreme Court of Canada decision in the *Calgary (City)* case and argued that those reasons instead support the Respondent's characterization of the supply of municipal infrastructure as a single supply.

[34] In an alternative argument, the Appellant seeks to claim ITCs for the amounts paid to the Frontender as consideration for the supply. The Respondent contended that this position is based on the incorrect assumption that the Appellant acquired the supply from the Frontenders in order to make a taxable supply to the Latecomers. The Respondent's position is that the Appellant acquired those supplies of construction services as an input to exempt supplies pursuant to sections 21, 21.1 and 22, Part VI, Schedule V of the *ETA* and, therefore, ITCs cannot be claimed with respect to expenses that are incurred in making that supply. Consequently, in respect to the tax paid, the Appellant is limited to recovery of the municipal rebates pursuant to section 259 of the *ETA*.

[35] Finally, with respect to the issue of penalties, the Respondent contended that the Appellant was aware of the Minister's interpretation of the proper tax treatment in respect to Oversized Infrastructure but failed to file its GST returns in accordance with that interpretation. It is also irrelevant that the Appellant calculated the tax in error.

The Legislative Framework / Jurisprudence and Application to the Facts in this Appeal

A. *Issue #1: Whether the Appellant acted as an agent of the Frontender in its dealings with the Latecomer*

---

[36] Professor Gerald Fridman in *Canadian Agency Law* (2nd ed., Markham: LexisNexis Canada Inc., 2012) at page 4, defined "agency" in the following manner:

> … the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.

[37] In *Merchant Law*, the Federal Court of Appeal, at paragraph 15, approved GST/HST Policy Statement P-182R as a "useful tool" when determining whether agency may exist between two parties. That policy statement, at page 3, sets out the following three essential qualities that are indicative of an agency relationship:

> 1. Consent of both the principal and the agent;
>
> 2. Authority of the agent to affect the principal's legal position; and
>
> 3. The principal's control of the agent's actions.

[38] In addition, the policy statement, at pages 5 to 7, sets out the following eight indicators that may be helpful in determining whether the three essential qualities of agency exist in a particular relationship:

> *Assumption of Risk*
>
> An agent usually does not assume the risk of loss from a transaction with a third party. For example, if the value of property diminishes after it is acquired from the third party, the loss normally would be borne by the principal. This is not to say that an agent does not bear any risk at all. For example, an agent could be liable for damages caused by its own negligence. …
>
> *Accounting Practices*
>
> A person's accounting practices may reveal how the person perceives its role in a relationship. For example, an agent will generally not record in its books, as expenses, amounts paid toward the cost of property or services acquired in its capacity as an agent. Similarly, the agent will not record, as revenues, amounts received for property or services supplied as agent. Moreover, an agent will generally not record an acquisition made in its capacity as an agent as an asset and will not record an obligation incurred as an agent as a liability.
>
> In addition, the fact that a person segregates from its own funds any monies received or paid in connection with another person is indicative of an agency relationship. …
>
> …
>
> *Remuneration*
>
> Remuneration of an agent generally takes the form of a set fee. This fee is sometimes referred to as a commission. However, sometimes an agent may be paid an hourly wage.

…

Best Efforts

An agent usually undertakes to use its best efforts in acting for a principal but does not guarantee a certain result. …

…

Alteration of Property Acquired

In general, agents do not alter the nature of property acquired from a third party before it is passed on to the principal, although this is also true in many cases where someone acquires property from a third party otherwise than as agent.

Use of Property or Service

Where a person acquires property or services, the consumption or use of the property or services by the person generally indicates that the person did not acquire them as agent on behalf of another person. …

Liability Under Contract/Liability for Payment

Where a person sells goods on behalf of a supplier, the supplier is liable to provide whatever it is that the purchaser has bought. That is, if the terms of the agreement are not met, the purchaser will generally have recourse against the supplier as opposed to the person selling on behalf of the supplier. Similarly, where a person purchases goods on behalf of another person, the other person is liable to pay for whatever it is that the supplier has sold. In such circumstances, the person acting on behalf of the purchaser is considered an agent of the purchaser.

…

Ownership of Property

Generally, an agent does not acquire an interest in any property it acquires as agent on behalf of a principal, as the ownership of the property passes directly to the principal. However, a principal and an agent may agree that the agent will hold title to the property.

…

Depending on the facts of a particular relationship, some of these indicators may not be applicable at all, while others may reflect the existence of one or more of the three essential qualities of agency.

[39] The Federal Court of Appeal in *Merchant Law* focused on the second essential quality of an agency relationship, that is, the authority of the agent to affect the principal's legal position. At paragraph 17 of the reasons, the Court quoted Professor Fridman, *Canadian Agency Law* (2009), as follows:

> … "the law of agency will apply only when the acts of one person on behalf of another make a difference to that other's legal position, that is to say, his or her rights against, and liabilities towards, others. The grant of the right to exercise another person's legal powers, thereby potentially affecting the grantor's legal position, is an essential feature of agency."

The Federal Court of Appeal relied on the decision in *Glengarry Bingo Assn. v Canada*, [1999] FCJ No. 316, where the Court stated that the absence of this essential element of agency will conclusively determine that there is no agency relationship in the particular circumstances of a case. In fact, the Court, in *Glengarry Bingo*, determined that it was not necessary to address any of the other indicators of an agency relationship, once it determined that the putative agent did not, in fact, have the capacity to affect the putative principal's legal position. Application of the proper test, in such a determination, requires the Court to examine who is bound by a contract, who is liable for payment under the contract and who is exposed to risk (*Merchant Law*, at paragraph 25).

[40] The Respondent, in its Written Argument, stated, at paragraph 51, that "an agent's relationship with a principal is fiduciary in nature" and, consequently, the agent will be required to act in good faith and in the best interests of its principal. However, there does not appear to be consensus on the characterization of agency relationship as fiduciary in nature. Although the impact of the existence of fiduciary duties may need to be further examined, it will not be conclusive evidence of the existence of an agency relationship (Fridman, *Canadian Agency Law*, pages 112 to 113).

[41] Professor Fridman makes the point that an agency relationship needs to be differentiated from a trust relationship. In *Advanced Glazing Systems Ltd. v Frydenlund*, 2000 BCSC 804, [2000] BCJ No. 1075, at paragraph 67, the British Columbia Superior Court stated the following:

> Where both agent and trust relations exist, the greater the power of control over the agent/trustee the greater the likelihood that the principles of agency, rather than the principles of trust, are applicable: …

[42] In *Fourney v The Queen*, 2011 TCC 520, 2012 DTC 1019, Hogan J., at paragraph 27, stated the following with respect to the concept of a bare trust:

> [27] When the person who has legal ownership by holding title is different from the person having beneficial ownership of the same property and the legal owner has no discretion to do anything with the property, the property is understood to be held in a bare trust, whether by an agent or a trustee. In *De Mond v. The Queen*, the Tax Court of Canada explored the meaning of bare trust:
>
> > … Professor Waters defines a bare trust as follows:
> >
> > > The usually accepted meaning of the term "bare", "naked" or simple trust is a trust where the trustee or trustees hold property without any further duty to perform except to convey it to the beneficiary or beneficiaries upon demand.
> > >
> > > …
> > >
> > > Every fiduciary, which includes an agent holding the title to property for a principal, is a bare trustee of the property he holds for another.
> >
> > … It has also been stated that a bare trustee is a person who holds property in trust at the absolute disposal and for the absolute benefit of the beneficiaries (see *Halsbury's Laws of England*, 4th ed., volume 48, paragraph 641, and *The Queen v. Robinson et al*, 98 DTC 6232 (F.C.A.)).

[43] The Ontario Court of Appeal, in *Trident Holdings Ltd. v Danand Investments Ltd. et al*, [1988] OJ No. 355, defined a bare trust:

> 29. Before relating the particular facts in this case which bear on the question, it will be helpful first to consider a basic analysis of the relevant legal terrain. I set forth the following passages from Scott, The Law of Trusts, 4th ed. (1987):
>
> > An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust [Vol. 1, p. 88]. …
>
> 30. …

> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals – the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee. …

[44] The Appellant's position is that agency is established through the legal effect of the terms of the CSAs. Pursuant to the CSAs with the Frontenders, the Appellant contended that it acts as an agent of the Frontenders when it receives the cost-sharing payments from the Latecomers under their separate CSAs with the Latecomers.

[45] To make this argument, the Appellant relied on the principles that an individual can be the agent of another for a limited purpose and that the agency can be implied as opposed to explicit. The Appellant contended that a "general agency relationship between the Frontenders and the Appellant" does not exist but such a relationship exists for the limited and sole purpose of permitting the Appellant to collect payments from Latecomers on the Frontenders' behalf. If the Appellant is correct in its argument, the Appellant will not be the person making the supplies of municipal infrastructure pursuant to subsection 221(1) and none of the amounts that the Appellant received will be on account of GST pursuant to section 225. If the Appellant is an agent of the Frontenders for this limited purpose, then it will be the Frontenders who are responsible for the GST remittances.

[46] The CSAs embody the terms and conditions of the legal relationship between the parties. There are no other written or oral agreements. The CSAs do not explicitly reference any type of agency relationship between the Appellant and the Frontenders, nor do the facts support the existence of an implied agency relationship. Consent to create an agency relationship may be implied from a particular set of circumstances (Fridman, *Canadian Agency Law*, pages 40 to 41). However, none of the factual evidence presented before me supports such a finding from either the conduct or the circumstances of the parties. It is insufficient for the Appellant to argue that the CSAs, together with the *MGA*, "suggests an agency relationship" (Transcript of Submissions, page 40) without the facts or evidence to support the suggestion. Consequently, the first of the three essential qualities of an agency relationship, consent of both parties, is absent in the facts of this appeal.

[47] The second essential quality of an agency relationship, the authority of the agent to affect the principal's legal position, as well as the third quality, control over an agent's actions, are also absent. The Federal Court of Appeal in *Merchant*

Law, while relying on the decision in *Glengarry Bingo*, stated that if the second quality is absent in a relationship it will be conclusive that no agency relationship exists.

[48] The Appellant does not enter into CSAs with Latecomers on behalf of the Frontenders. The Appellant enters into those agreements solely on its own behalf. It does not provide representations to the Latecomers on the Frontenders' behalf. In negotiating the CSA with a Latecomer, the Appellant does not consult, notify or seek approval from a Frontender. A Frontender cannot choose a Latecomer nor does a Frontender have any input whatsoever with respect to the terms and conditions of the CSAs between the Appellant and the Latecomers. A Frontender's approval for granting subdivision and development permits to Latecomers is not required and a Frontender cannot compel the Appellant to grant those to a particular Latecomer. There is no requirement in the CSAs for the Appellant to provide a Latecomer's identity to the Frontender. It is apparent on the facts that the Frontenders have no input into the terms of the CSAs which the Appellant negotiates on its own behalf with the Latecomers.

[49] The payment process with respect to the Latecomer's *pro rata* share of the Oversized Infrastructure follows the method set out in the *MGA* and is not authorized by the Frontender. If the Appellant fails to pay an amount received from a Latecomer to the Frontender, then the Frontender's recovery rights are against the Appellant and not the Latecomers.

[50] The limited control that a Frontender has, with respect to the CSA between the Appellant and a Latecomer, relates to a waiver or partial reduction of the amounts payable by a Latecomer. A complete waiver can occur when the Frontender and Latecomer are the same developer or related corporations and a partial waiver may occur where the Frontender deems it to be to its benefit. However, I agree with Respondent counsel's position that a reduction of the amount payable simply changes the timing of the receipt of payment. Where, however, there is a waiver, for example as in the case of related companies, there will be no financial impact on the Frontender.

[51] The Appellant contended that it has statutory authority pursuant to section 651 of the *MGA* to alter the Frontender's legal relationships because it determines how much a Latecomer will pay to the Frontender. Section 651 states that, where a Frontender is required to "oversize" municipal infrastructure and a Latecomer is required to pay a *pro rata* share of those costs, the reimbursement will be determined by the Appellant. However, unless there is a waiver, the Latecomer

pays its *pro rata* share according to the terms set out in the CSA. If the Frontender had appointed the Appellant its agent for the limited purpose which the Appellant proposes, then the Appellant would be obliged to maximize the Frontender's cost recovery relating to the Oversized Infrastructure. In this regard, the Appellant has an obligation to ensure that a Latecomer is compliant with municipal regulations prior to issuing permits and approvals and collecting fees based on a pre-determined cost recovery formula. When the Appellant approaches a Frontender seeking a payment reduction on behalf of the Latecomer, it is not representing the Frontender as its agent. Nor is the Appellant concerned with ensuring that the Frontender recovers outstanding cost amounts in a timely manner. In fact, the Appellant will not remit funds to the Frontender if the Frontender is in default under the terms of its CSA with the Appellant.

[52] Consequently, it is evident that the Appellant does not have authority to affect a Frontender's legal position nor does a Frontender have any control over the Appellant's actions in this regard. This is also evident throughout a general reading of the provisions contained in a sample CSA and, in particular, Article 8.1, which reads in part:

> 8.1 The City acknowledges that the Owners are required to construct or pay for the construction of all or a portion of the storm and sanitary trunk sewers in excess of the requirement for the Said Lands. The City shall, at such time as other land benefitted by the storm and sanitary trunk sewers is developed or subdivided, as the case may be, enter into agreements with the applicants for development permits or subdivision approval for that other land, (the "Developers"), requiring the Developers to pay an amount, calculated in accordance with the method outlined in Schedule "D" (the "PAC Payment") as a condition of approval of their subdivision or issuance of a development permit. In calculating the amount to be paid to the City by Developers, the City shall include applicable Sales Taxes and interest at the rate prescribed in Article 8.2 (the "Prescribed Rate") calculated in the manner provided in Article 8.2. If and at such time as the City receives from the Developers the aforesaid payments and upon fulfilment by the Owners of the requirements described above and provided that the Owners are not otherwise in default under this Agreement, the City agrees to pay to the Owners a pro rata share of the amount the City received from the Developers, within sixty (60) days of receipt by the City. The pro rata share shall be calculated in accordance with the method outlined in Schedule "E". …
>
> (Servicing Agreement, Exhibit A-1, Tab 2, page 17)

[53] The Frontender cannot compel the Appellant to take any action other than to recover the money that the Appellant collected from the Latecomer, which the Frontender is owed pursuant to the terms of the CSA that it has with the Appellant.

Such a contractual arrangement does not fall within the parameters of an agency relationship.

[54] In addition, an agency relationship may be fiduciary in nature, that is, the agent must act in the best interests of its principal without putting its own interests ahead of those of its principal. In performance of its obligations under the CSA with a Frontender, the Appellant is not acting and is not required to act in the best interests of the Frontender as it would be required to do if that Frontender were its principal. The Appellant, under the CSA with the Frontender, acquires the Oversized Infrastructure and, in doing so, acts in its own best interests.

[55] With respect to the eight indicators set out in CRA Policy Statement P-182R, and approved as useful tools by the Federal Court of Appeal in *Merchant Law*, some of these support my conclusion while others are either neutral, when applied to the facts of this case, or do in fact support the existence of an agency relationship. As with many such factual situations, not all of the indicators fall neatly within the four corners of the box commonly referred to as "agency relationships". The Appellant does not alter the property acquired, that is, the money received from the Latecomers. The CSA does not create any liability in respect to the Appellant related to the cost-recovery of the Oversized Infrastructure, with the exception of interest associated with late-forwarding of the funds received. The Appellant does not assume any risk under the CSA, with the exception of the interest related to late payments. The Appellant's accounting practices also fall under this category because multiple funds were co-mingled. These factors would support the existence of an agency relationship between the Appellant and the Frontender. Other factors are neutral. For example, although the Appellant did not acquire an interest in the funds it received from the Latecomers, pursuant to section 661 of the *MGA*, it did acquire ownership of land and Oversized Infrastructure from the Frontender. The fact, that the Appellant does not use its best efforts to ensure that Frontenders recover amounts from Latecomers as quickly as possible, supports a non-agency relationship.

[56] However, on balance, based on the facts presented, the actions and conduct of the Appellant and the language of the *MGA* and CSAs as a whole, I conclude that the proper view is that the Appellant was not acting as an agent of the Frontender. The Frontender exercised very little control, if any, over the Appellant. As noted in the caselaw, the greater the control exercised by a principal, the greater the likelihood that agency exists, as opposed to a mere trust relationship. Based on the facts before me, I conclude that the Appellant holds the funds received from the Latecomers, not as an agent, but likely as a bare trustee for the Frontender and only

for the limited purpose of receiving those funds in trust and conveying them to the beneficiary, the Frontender. The Appellant, as trustee, was not subject to the control of the Frontender and had no other responsibilities except for the receipt and transfer of the funds (*Trident Holdings*) and, consequently, as noted by Lamarre J. (as she was then) in *De Mond v The Queen*, 99 DTC 893, at paragraph 37:

> [37] … The existence of a bare trust will be disregarded for income tax purposes where the bare trustee holds property as a mere agent or for the beneficial owner. …

B. *Issue #2: Is the Appellant the recipient of the Oversized Infrastructure and Land?*

---

[57] Subsection 165(1) of the *ETA* requires "every recipient of a taxable supply made in Canada" to pay GST. Subsection 221(1) imposes an obligation to collect the GST on the person who makes the taxable supply. Subsection 123(1) defines the term "recipient" as follows:

> **"recipient"** of a supply of property or a service means
>
> (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> (b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
>
> (c) where no consideration is payable for the supply,
>
> (i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
>
> (ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and
>
> (iii) in the case of a supply of a service, the person to whom the service is rendered,
>
> and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

[58] The definition establishes that the recipient of a supply is generally the individual who is liable to pay the consideration for the supply under the agreement for that supply. In an article entitled "*Just who is the Recipient: The Person Bearing Economic Burden or the One Contractually Liable to Pay?*", (Canadian GST Monitor, October 2006), the following comments were made concerning the definition of recipient:

> The "recipient" of a supply is defined in subsection 123(1) of the *ETA* to generally mean the person who is liable to pay the consideration for the supply under the agreement for the supply. The person who receives the benefit of a supply or who ultimately pays the tax imposed on a supply does not determine who the recipient of the supply is.

[59] In *Immeubles Sansfaçon Inc. v The Queen*, [2000] TCJ No. 603, Tardif J. concluded that the circumstances outlined in subparagraphs (a) and (b) of the definition of recipient are mutually exclusive (paragraph 32). The Court went on, at paragraph 33, to state that

> [33] … in a case where consideration has to be paid, the recipient is the one who, ultimately, under an agreement for a supply [according to paragraph (a)] or otherwise [according to paragraph (b)], is liable to pay that consideration.

[60] I made similar observations in the decision in *Bondfield Construction Co. (1983) Ltd. v The Queen*, 2005 TCC 78, [2005] TCJ No. 239:

> [121] Under subsection 169(1), the person entitled to claim the ITC is the person to whom the supply is made; and under subsection 123(1) that person is deemed to be the "recipient". Accordingly, for the purposes of the *Excise Tax Act*, it is the recipient of the supply who is entitled to claim the ITC. Who, then, was the recipient in the present case? In both subsections 123(1) and 169(1) the focus is on: who is liable to pay for the supply (and thus the tax on that supply)? The language of these provisions and just simple logic dictate that the intent of subsections 123(1) and 169(1) is to allocate the ITC to the person who actually paid the GST on the supply.
>
> […]
>
> [123] Thus, we must determine who was "ultimately" liable to pay for the supply. In the present case, where a subcontractor's work was deficient, it was common practice for the Appellant to hire a second subcontractor to remedy the work. The Appellant would then attempt to recover its costs for the remedial work from the original subcontractor through a back-charge, that is, by seeking a price reduction on the original contract equal to the amount paid to the second subcontractor (including the GST paid). By accepting this back-charge, the

> original subcontractor acknowledged its responsibility for the work deficiencies and assumed liability for the invoice. Although the Appellant's name appeared on the face of the invoice, it was the original subcontractor, not the Appellant, that accepted ultimate liability for the invoice including the GST on that invoice.

[61] The Respondent relied on the decision in *Telus Communications (Edmonton) Inc v The Queen*, 2008 TCC 5, affirmed by 2009 FCA 49, to argue that the only relevant agreement to consider for the purposes of the definition of recipient would be the CSA between the Frontender and the Appellant and not the CSA between the Latecomer and the Appellant. In *Telus*, this Court considered whether a third party can become a recipient of a taxable supply by virtue of a second agreement where there is an assumption of the liability for payment of the consideration. Based on the facts, the Court held that subparagraph (a) of the definition of recipient refers only to the original agreement pursuant to which the supply is made. The decision in *Telus* concerned supplies paid for by the Appellant as part of an acquisition which was pursuant to an assumption of liabilities. The Appellant in *Telus* assumed the liability to pay for the taxable supplies and did, in fact, pay subsequent to the acquisition. At paragraphs 12 and 13, the Court made the following conclusions:

> [12] … The "recipient" by definition is the person liable to pay "that consideration". That person, in my view, must be the person making the payment as consideration for the particular supply to which the term "recipient" relates. The recipient of a supply is not a person required to pay the supplier an amount equal to the consideration payable on account of a liability of that person which arose as a consequence of a separate supply between that person and that recipient.
>
> [13] In any event, where there is an agreement between a supplier and the person to whom the supply is made for that person's benefit (Ed Tel in the case at bar), there is only one paragraph of the definition of "recipient" that can apply; namely paragraph (a). I see little room to argue in this case that the agreement referred to in paragraph (a) of the definition of "recipient" can be any other than *that* agreement – the agreement between the supplier and the party or parties contracting with the supplier for the supply to be made. It cannot be another agreement such as the assumption agreement in the case at bar.

[62] Identifying the recipient of a supply is the first step in determining who is responsible for paying the tax and who will be entitled to claim an ITC. The definition of recipient contained in subsection 123(1) of the *ETA* is the person who is liable to pay the consideration for the supply under the agreement. Based on this definition, the Appellant is not the recipient of the Oversized Infrastructure or land. According to the terms of the CSA, the Appellant is not liable to pay any

consideration in respect of the Oversized Infrastructure and land or any other supply created under the CSA. In particular, Articles 1.1, 1.2 and 8.1 establish no liability in respect to the Appellant unless it fails to remit within 60 days the *pro rata* share of funds that it has received from Latecomers. Article 1.1 sets out the various amounts and fees that the developer/owner shall pay to the Appellant prior to an endorsement of the subdivision plan. Article 8.1, in referencing those payments specified in Article 1.1, states that:

> 8.1 … If and at such time as the City [Appellant] receives from the Developers the aforesaid payments … the City [Appellant] agrees to pay to the Owners a pro rata share of the amount the City [Appellant] received … within sixty (60) days …

[63] Although Frontenders are required to construct the Oversized Infrastructure, the Appellant is not liable to cost-share those expenses if Latecomers fail to materialize or if Latecomers fail to pay their *pro rata* share of the costs of the municipal infrastructure. In those cases, the Frontenders bear the costs of constructing the infrastructure. Under the terms of the CSA, the Appellant is not required to pay consideration. Section 661 of the *MGA* requires Frontenders to provide land for roads and public utilities "without compensation". Once the infrastructure is completed upon the land, section 661 contemplates the inclusion of the Oversized Infrastructure together with the land upon which it has been constructed. While the Appellant is responsible for developing and maintaining infrastructure services for the benefit of its residents (Statement of Agreed Facts, paragraph 4 and *MGA*, section 34), it is not required to construct such services or pay consideration to a developer who has constructed them. It is the Latecomers, and not the Appellant, who are responsible to pay the consideration, or at least their *pro rata* share of the cost, of the municipal infrastructure.

[64] The Respondent argued that the facts in the present appeal are consistent with those relied upon by this Court in the case of *Telus*. However, the *Telus* appeal concerned supplies paid for by an appellant as part of an acquisition and paid for pursuant to an assumption of liabilities. The appellant in *Telus* did, in fact, pay for the supply subsequent to the acquisition. The *Telus* decision can be distinguished from the present appeal because the CSAs between the Appellant and the Latecomers are not assumption agreements and the Latecomers are not assuming liabilities of the Appellant in respect to the Frontender. In fact, the CSAs between the Appellant and the Frontender do not create any liabilities for the Appellant to pay consideration.

[65] While paragraph 123(1)(a) addresses the definition of recipient where an agreement for the supply exists and consideration is payable pursuant to that agreement, paragraph 123(1)(b) determines the identity of the recipient by addressing the test of "who bears the liability to pay the consideration". Although there is no contractual agreement between the Frontenders and the Latecomers, in considering paragraph 123(1)(b), it is the Latecomers who are liable to pay the consideration to the Frontender for its share of the cost of constructing and installing the Oversized Infrastructure. Some of the Respondent's key assumptions, therefore, have been demolished. The Minister assumed that it was the Appellant who was liable to pay the Frontender (Reply to the Notice of Appeal, paragraph 7(h)) and further assumed that the value of the consideration for the supply of infrastructure and land is established in Articles 1.1(b) and (d) of the CSA between the Appellant and Frontender (Respondent's Written Argument, paragraph 32).

[66] Both parties recognized that the Appellant made supplies of development permits and subdivision approvals to Latecomers. It follows that the value of the exempt supply must be the amounts set out in the fee schedule for the various approvals. Such supplies are exempt supplies pursuant to subsection 20(c) of Part VI of Schedule V of the *ETA* and, as such, no tax is payable. Since I have concluded that the Appellant is not the recipient of a taxable supply, then no ITCs can be claimed in respect to the Oversized Infrastructure.

[67] Finally, the Respondent contended that the Appellant collected amounts from Latecomers on account of tax but failed to remit those amounts to the CRA. Although this tax was collected in error, the Respondent argued that the Appellant is still obligated to remit it even though it has been collected in error (*800537 Ontario Inc. v Canada*, 2005 FCA 333, [2005] FCJ No. 1732). However, applying the reasoning in the *De Mond* decision, a bare trust will be disregarded for tax purposes. The Appellant is not the recipient of a taxable supply. It held the funds as a bare trustee on behalf of the Frontender. Consequently, it is the Frontender that has the obligation to collect the GST on the supply of infrastructure and to remit it. If the Appellant had not remitted the tax to the Frontender in these circumstances, a problem would have existed. However, there is no evidence to support this allegation and the Reply to the Notice of Appeal states only that amounts were not remitted by the Appellant in respect to the GST it collected from the Latecomers (paragraphs 7(bb) and (cc)).

C. *Issue #3: What is the nature of the supplies made between the Appellant and the developers and, in particular, whether there are multiple or single supplies,*

what is the value of the consideration and whether the supply between the Appellant and Latecomer is an exempt supply?

---

[68] The test for determining whether a single supply comprised of a number of constituent elements or a multiple supply comprised of separate goods and/or services has been made is set out in the Supreme Court of Canada decision in *Calgary (City)*. That decision endorsed the test established by Rip J. in *O.A. Brown Ltd. v The Queen*, [1995] TCJ No. 678. At paragraphs 35 to 37 of the Supreme Court reasons, the Court stated the following:

> [35] *O.A. Brown* established the following test to determine whether a particular set of facts revealed single or multiple supplies for the purposes of the *ETA*:
>
> > 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. [p. 40-6]
>
> [36] 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).)
>
> [37] Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56, at para. 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.

[69] Because of the conclusions that I have reached, it is not necessary for me to address either the issue of whether a single supply or multiple supplies were made or the issue of penalties. However, my view is that the construction and operation

of municipal infrastructure, including the Oversized Infrastructure, is a single supply. Applying the test established in the reasons in *Calgary (City)* which endorsed this Court's conclusions in *O.A. Brown*, the "interdependence and interconnectedness" of the supply of roadways and public utilities for the residents of the City to the municipal infrastructure is evident. The Appellant could not provide roads and utilities without the essential component of infrastructure. It was integral to the services that the Appellant was obligated to provide pursuant to statute. This interpretation accords with the "true nature of the transaction".

[70] The Appellant received municipal infrastructure and land for no consideration. The Latecomers received the benefit and services of already constructed infrastructure for payment of consideration. Where the Frontenders had not completed the infrastructure, the Latecomers would be required to do so. Because this is a single supply with consideration payable, either paragraph 123(1)(a) or (b) of the definition of recipient would be applicable. The fact that the Appellant received the benefit of this supply does not affect who was liable to pay the consideration for it.

[71] Accordingly, the appeal is allowed, with costs.

Signed at Ottawa, Canada, this 3rd day of July 2015.

"Diane Campbell"

Campbell J.

SCHEDULE "A"

2009-3012(GST)G

TAX COURT OF CANADA
IN RE: THE *EXCISE TAX ACT* (CANADA)

BETWEEN:

THE CITY OF EDMONTON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties, through their respective solicitors, agree for the purpose of this appeal only and any appeal therefrom, that the following facts are true and that the documents attached hereto are accurate copies of authentic documents.

The parties are free to make submissions with respect to, and are not to be taken as agreeing to, the degree of relevance or weight to be attributed to these facts and documents. The parties are also free to seek to introduce additional facts in evidence at trial, however, such facts may not be inconsistent with the facts herein, unless the parties agree.

This agreement shall not bind the parties in any other action; may not be used against either party on any other occasion; and may not be used by any other party.

A. BACKGROUND

1. The Appellant is a "specified person" under ss. 301(1) of the *Excise Tax Act* (the "Act").

2. The Appellant is a GST registrant and it files its returns on a monthly basis.

3. The Appellant is a "municipality" as defined in:

   (a) par. 1(1)(s) of the *Alberta Municipal Government Act* (the "MGA"); and

   (b) ss. 123(1) of the Act.

4. As a municipality, the Appellant is responsible for establishing and implementing processes for the orderly maintenance and development of land within its municipal boundaries. This includes managing the building of, and later the maintenance for infrastructure for use by public utilities including water, sewer and drainage improvements, and street lighting, roads and sidewalks for the benefit of the residents of the City of Edmonton (the "municipal improvements").

5. For the purposes of this Appeal, it is agreed that the municipal improvement infrastructure at issue can be divided into the following descriptions:

   (a) Sewer and drainage improvements. These improvements are developed in a "basin", which is a geographical, watershed-type boundary area that drains into a particular sewer. For the purpose of this Appeal, a basin will be comprised of one or more "parcels" of land which may be owned by more than one owner or developer. The sewer and drainage improvements may consist of smaller 'lateral' sewers and infrastructure for which the developer will construct and pay the full cost, and larger 'trunk sewers' and shareable infrastructure for which the developer may construct and initially pay the full cost. The developer will then receive from the Appellant, payment of amounts equal to payments made by subsequent developers to the Appellant.

   (b) Water improvements. These improvements interconnect in a network that will provide adequate pressure and flows within and between parcels.

   (c) Roads, transportation infrastructure and arterial roadway improvements. These improvements are roadways and transportation improvements including sidewalks that provide access into and out of the subdivision, and

also the arterial roadways that would run between parcels or along the borders.

(d) Boundary improvements. These are improvements along the boundary of a parcel which may include roads, boulevard trees, lighting, electrical or other improvements, the benefit (and cost) of which would be shared between parcels.

6. The amounts assessed by the Canada Revenue Agency are set out in Schedule "A" attached hereto. Please note that the descriptions are those of the Canada Revenue Agency and are put in issue by the Appellant.

B. DEVELOPMENT PROCESS GENERALLY

7. A developer owns a parcel of land that it wants to develop and sell.

8. If the land has not been zoned for development, the developer pays a fee and applies to the Appellant for the necessary zoning.

9. The Appellant reviews the zoning application and ensures that the technical requirements of the proposed zoning are satisfied in terms of compliance with Area Structure Plans for the area and the ability to service the lands in terms of sewers, water roads and environmental impacts.

10. Once the zoning application is approved, a developer can either subdivide the land or apply directly for a development permit for the entire parcel.

11. If the developer applies for subdivision or a development permit, the developer indicates the number of lots, the location of the roadways and the placement of utilities. A fee is paid to the Appellant upon submission of a subdivision application.

12. The Appellant conducts a review of the application for the development permit or subdivision and circulates the proposal though its various departments, which review transportation and drainage among other things.

13. Once the review is completed, the Appellant may grant the developer approval for the development to proceed, subject to a number of conditions including the requirement to construct certain municipal improvements and to enter into a Servicing Agreement (a "City Servicing Agreement" or "CSA") for the construction and/or payment of the cost of the required improvements.

14. The Appellant and the developer then enter into a CSA. For the purposes of this Appeal, the parties have agreed that the CSA at Document 48 of the Appellant's List of Documents (Document 2 in the Joint Book of Documents) is representative of other CSAs entered into by the Appellant and various developers. Wherever reference is made to a CSA, Document 48 will be used unless otherwise stated.

15. After the CSA has been executed and all of its conditions have been met or agreed to (e.g. roads or sewers are not built but agreed to, performance securities are provided and the amounts set out in the CSA are paid to the Appellant), the developer may apply to the Appellant for endorsement of the Plan of Subdivision. A fee is paid by the developer for this endorsement.

16. Once endorsed, the developer may register the plan at Land Titles to have titles to the lots created.

C. THE CITY SERVICING AGREEMENT - FRONTENDERS AND LATECOMERS

17. In order to manage the development of a particular parcel, the Appellant must ensure that all of the municipal improvements required for that parcel, as well as all other parcels in the area which may be connected to those same improvements, are developed and constructed in an orderly fashion.

18. As a result, the Appellant will enter into a CSA with that particular developer to:

    (a) construct or pay for the municipal improvements (including water, sewer and drainage systems, roads and sidewalks) required for that particular parcel and, where required,

(b) construct or pay for municipal improvements in excess of the needs for that parcel, which will benefit the parcel as well as other parcels in the area (the "Oversized Infrastructure").

19. The developer which constructs this Oversized Infrastructure will be called a "Constructing Frontender". A developer which paid more than its "permanent area contribution" or "PAC" (as defined below), even though it didn't actually construct any Oversized Infrastructure, will be called the "Overcontributing Frontender". Overexpenditures with respect to Overcontributing Frontenders occurred with respect to sewer and drainage improvements, but did not occur with respect to arterial roadway improvements or boundary improvements.

20. With respect to Schedule "A", the "Drainage Trust" arose when a developer paid an amount to the Appellant with respect to municipal improvements before those municipal improvements were constructed. The Appellant held those monies in trust, and paid the Constructing Frontender when construction occurred.

21. Other developers who own parcels in the same basin or who benefited from the municipal improvements constructed by or paid for by a Frontender may then seek to develop their particular parcel. If the parcel owned by that other developer benefits from the Oversized Infrastructure provided by the Frontender, the other developer will be required to enter into a CSA with the Appellant in which the other developer agrees to pay a proportionate share of the cost of the Oversized Infrastructure.

22. The developer of this other parcel, which benefits from the Oversized Infrastructure, will be called the "Latecomer".

D. THE CITY SERVICING AGREEMENT - RIGHTS AND OBLIGATIONS

23. With respect to the developer under the CSA in Document 48, who was both a Frontender and a Latecomer:

(a) The developer paid for, constructed and installed municipal improvements being storm sewers [Article 2]. This developer (as a Constructing Frontender) contributed more than its proportionate share (its PAC) for the storm sewers it constructed [Article 1.3].

(b) The developer (as a Latecomer) also paid an amount to the Appellant with respect to Oversized Infrastructure (storm sewers and sanitary sewers) constructed by other Frontenders [Article 1.1(b)]. Since this developer paid more than its PAC for the Oversized Infrastructure in respect of both storm sewers and sanitary sewers constructed by other Frontenders, this developer became an Overcontributing Frontender with respect to this overexpenditure [Article 1.3];

(c) Under Article 8 of the CSA:

i) The Appellant agreed to enter into CSAs with other Latecomers which required the Latecomers to pay an amount to the Appellant calculated in accordance with Schedule "D" of that CSA;

ii) When the Appellant received a payment from the other Latecomers, and so long as the developer was not otherwise in default under the CSA, the Appellant paid the developer a portion of the amount received from the Latecomers as calculated in Schedule "E" of the CSA, to a maximum of the "Sewer Overexpenditure Recovery Amounts", set out in Article 1.3;

iii) If the Appellant was prevented by law from receiving the Schedule "D" payment from the other Latecomers, the Appellant was not required to pay any amount to the developer;

iv) If the Appellant did not pay the developer within 60 days after receiving payment from a Latecomer, it must pay interest to the developer.

(d) under Schedule "D" of the CSA and among other things, two amounts are calculated:

i) the PAC which is a developer's proportionate share of the cost of Oversized Infrastructure within a basin (benefitting area); and

ii) the "over expenditure", which is the amount paid by a developer for:

a) its costs of constructing oversized municipal improvements in excess of that developer's PAC, or

b) a portion of a previous developer's "overexpenditure" in excess of that previous developer's PAC.

24. Upon completion of the construction and installation of all of the municipal improvements by the Constructing Frontender, and after a maintenance period, the Appellant assumed responsibility for the operation and ongoing maintenance of all of the municipal improvements including the Oversized Infrastructure.

E. THE CITY SERVICING AGREEMENT - PAYMENTS

25. Under the CSA in Document 48, the developer paid amounts to the Appellant as follows:

(a) Under Article 1.1(a), the developer paid $21,250, plus $1,487.50 GST with respect to the inspection and review and approval of engineering drawings.

i) The amount paid is a unit rate that is negotiated between the Appellant and the Urban Development Institute.

ii) The amount paid is intended to provide the Appellant with a partial recovery of its inspections and engineering drawing review. The amount was based on the area of the project.

iii) The rate in 2002 was $2,862 per hectare of land.

iv) For this project (Document 48) the amount paid was $2,862 X 7.425 ha = $21,250.35, which was rounded to the nearest dollar - $21,250.

v) The amounts paid were distributed to the departments proportionately. Of the amount collected,

a) $1,319.31 was disbursed to the Parks department,

b) $9,112.12 was disbursed to Drainage,

c) $4,433.01 was sent to Epcor Water and

d) $7,873.06 was sent to Transportation Department.

(b) Under Article 1.1(b), the developer (as a Latecomer) paid $1,110,989 with respect to the sewer and drainage Oversized Infrastructure that had been, or was being constructed and installed by other Frontenders and which benefited the developer's parcel.

i) A breakdown of the amounts paid by the developer and the identity of the applicable Frontender, with the Frontender's GST number, is at Schedule "C". The amount of $614,775 was paid with respect to storm trunk sewers, and the amount of $496,214 was paid with respect to sanitary trunk sewers.

ii) The amount of $534,376.84 is stated to be "as payment of the Goods and Services Tax on such amount as assessed, charged and levied by the Government of Canada". The proper tax treatment of amounts paid under Article 1.1(b) is at issue in this appeal. Please note that the GST amount of $534,376.84 contained a typographical error that was not noticed at the time the agreement was executed. The correct number should have read $54,376.84. This is the amount that was shown in Schedule "C" and was the amount actually collected.

(c) Under Article 1.1(c), the developer provided the Appellant with a Letter of Credit. The purpose of this Letter of Credit was to ensure that a developer had an incentive to construct the municipal improvements within the required timelines set out in the CSA and to complete final deficiencies. In the event that a developer stopped working and defaulted on their obligations, the Appellant required enough money on hand to secure the site by doing such things as filling in any open trenches or constructing fences and barricades for safety until the project could be completed by whoever assumed ownership of the lands. The amount was calculated by taking the assessable area of the subdivision which was 7.425 hectares (see Schedule 'B' of the Agreement) and multiplying that by the rate of $12,500/ha, rounded to $92,900.00.

(d) With respect to Article 1.1(d), no payment occurred in Document 48 because the developer was constructing a portion of the Arterial Roadway network that was in excess of its proportionate share as calculated in accordance with the method set out in Schedule "G" of the agreement. In this case the developer will receive recovery of the amount calculated in accordance with Schedule "H" from Latecomers to a maximum of $52,236.00 as identified in Article 1.4 shown on Schedule "F". However, under Document 49 of the Appellant's Book of Documents (Document 7 in the Joint Book of Documents) the developer (as a Latecomer) paid $165,091.00 with respect to the arterial roadway Oversized Infrastructure that had been, or was being constructed and installed by a Frontender and which benefited the developer's parcel.

i) A breakdown of the amounts paid by the developer and the identity of the applicable Frontenders, with the Frontenders' GST number (where available), is at Schedule "C".

ii) The amount of $11,556.37 is stated to be "as payment of the Goods and Services Tax on such amount as assessed, charged and levied

by the Government of Canada". The proper tax treatment of amounts paid under Article 1.1(d) is at issue in this appeal.

(e) Under Article 1.1(e), the developer paid $750 plus $52.50 GST to the Appellant with respect to administrative services for documentation, record keeping, letter of credit administration, and administrative services for the Arterial Roadway Assessment ("ARA") program. The entire ARA administration amount ($802.50) was sent to the Transportation Department to help cover the costs of administering the ARA program.

26. The Appellant did not charge any amount for calculating the amounts set out in Schedules "D" and "E", nor did it charge any amounts for administering its obligations set out in Article 8 of the CSA.

F. THE CITY SERVICING AGREEMENT - WAIVERS

27. In some cases, a Frontender and a Latecomer may opt out of the CSA payment requirements. While both the Frontender and the Latecomer still enter into CSAs with the Appellant, the Frontender will waive the requirement that the Appellant collect the amounts from the Latecomer under section 651 of the MGA, and the Frontender will collect these payments directly from, or make alternative arrangements with, the Latecomer.

28. In this case the Appellant requires formal acknowledgement from the Frontender that the obligation to collect is being waived.

G. THE CITY SERVICING AGREEMENT - OFFSETS

29. In some circumstances, a developer (directly or through various subsidiaries) may be a Frontender and a Latecomer vis-a-vis itself. If a developer would be paying itself, the Appellant considers the payment 'offset' and no additional documentation (i.e. a formal "waiver") is required.

H. THE CITY SERVICING AGREEMENT - RECORDING OF FUNDS

Payments received from Latecomers

30. When the Appellant receives a cheque from the developers (Latecomers) that represents payment of amounts under the CSA, the cheque is processed as follows:

    (a) A receipt is prepared for internal purposes only. The receipt indicates the name and address of the developer that paid the funds, the amount of the payment and the general ledger account number to which the payment is credited.

    (b) If the cheque is under $100,000, the cheque and receipt are taken to the cashier in the Appellant's Sustainable Development department who processes the receipt of funds. The daily deposit is picked up by armoured car and delivered to the Toronto-Dominion Bank and deposited into the Appellant's Bank account.

    (c) If the cheque is over $100,000, the deposit is taken directly to the Toronto-Dominion Bank and deposited into the Appellant's Bank account.

31. The accounting entry for the payment is:

    Debit- TD Bank
    Credit- Suspense Account 290200

32. Suspense Account 290200 is used solely for the purpose of accounting for payments received under the CSA. No other funds are credited to this general ledger account.

33. If the amount was received under Articles 1.1(a) and (e), the amounts would then be disbursed from Account 290200 to their appropriate department and included in revenue. If the amount was received under Articles 1.1(b), (c) or (d), the amount would be held in Account 290200 until they are disbursed to the appropriate

Frontender or until the Appellant's fiscal year end (December 31st), whichever comes first.

34. The payments received that have not been disbursed at December 31st, are reflected in the Appellant's financial statements in the liability account "Accrued Accounts Payable". As at January 1st, the funds are transferred back into the General Ledger Suspense Account 290200.

Payments to the Frontender

35. Disbursements to the Frontender that are made from the payments received from the Latecomers are made either by cheque or electronic funds transfer.

36. Copies of the cheque requisitions are retained and cross referenced to the line items on the Financial Schedule relative to a particular Servicing Agreement.

DATED at the City of Edmonton, this 10 day of February, 2015.

Per: James C. Yaskowich
Counsel for the Respondent

DATED at the City of Edmonton, this 10 day of February, 2015.

William F. Pentney Q.C.
Deputy Attorney General of Canada
Solicitor for the Respondent

Per: Margaret Irving
Counsel for the Respondent

Schedule A to the Statement of Agreed Facts
Amounts Assessed and In Issue

Amounts to be Remitted (Total $13,411,793.05)

	GST Collected	GST Payable	ITCs Denied
Roads	$1,035,514.98	-	-
Drainage – PAC	$2,258,188.95	-	$215,027.68
Drainage – Overexpenditures	$9,575,504.52	-	$157,089.24
Drainage Trust	-	$131,820.29	-
Boundary Improvements	$38,647.39	-	-
Subtotal	$12,907,855.84	$131,820.29	$372,116.92

Rebates Credited (Total 11,834,993.38)

	Municipal Rebate	100% Rebate
Roads	$591,722.84	-
Drainage – PAC	$1,413,266.68	-
Drainage – Overexpenditures		$9,732,593.76
Drainage Trust	$75,325.88	-
Boundary Improvements	$22,084.22	-
Subtotal	$2,102,399.62	$9,732,593.76

Net Tax/Amount in Issue: $13,411,793.05 - $11,834,993.38 = $1,576,799.67

SUMMARY BY CATEGORY

ROADS	
GST Collected from Latecomer, Not Remitted	$1,035,514.98
Municipal Rebate Credited	$591,722.84
Amount in issue	**$443,792.14**
DRAINAGE – PAC Amounts	
GST Collected from Latecomer, Not Remitted	$2,258,188.95
ITCs Denied on GST Paid to Frontenders (City as Latecomer)	$215,027.68
Subtotal	*$2,473,216.63*
Municipal Rebate Credited on GST Paid to Frontenders	$1,290,393.72
Municipal Rebate Credited on GST Paid to Frontenders (City as Latecomer)	$122,872.96
Subtotal	*$1,413,266.68*
Amount in issue	**$1,059,949.95**
DRAINAGE – Overexpenditures	
GST Collected from Latecomer, Not Remitted	$9,575,504.52
ITCs Denied (City as Latecomer)	$157,089.24
Subtotal	*$9,732,593.76*
100% Rebate Credited on GST Paid to Frontenders	$9,575,504.52
100% Rebate Credited on GST Paid to Frontenders (City as Latecomer)	$157,089.24
Subtotal	*$9,732,593.76*
Amount in issue	**$0**
DRAINAGE TRUST	$131,820.29
GST Payable to Frontender, City Assessed as Recipient	$75,325.88
Municipal Rebate Credited on GST Paid to Frontenders	**$56,494.41**
Amount in issue	
BOUNDARY IMPROVEMENTS	$38,647.39
GST Collected from Latecomer, Not Remitted	$22,084.22
Municipal Rebate Credited on GST Paid to Frontenders	**$16,563.17**
Amount in issue	
TOTAL AMOUNT IN ISSUE	$443,792.14
Roads	$1,059,949.95
Drainage – PAC Amounts	$0
Drainage – Overexpenditure	$56,494.41
Drainage Trust	$16,563.17
Boundary Improvements	**$1,576,799.67**
Total Amount in issue	

CITATION:	2015 TCC 172
COURT FILE NO.:	2009-3012(GST)G
STYLE OF CAUSE:	THE CITY OF EDMONTON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	February 10 and 11, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	July 3, 2015

APPEARANCES:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	Margaret A. Irving Paige McPherson

COUNSEL OF RECORD:

For the Appellant:

Name:	James C. Yaskowich
Firm:	Felesky Flynn LLP

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada