Docket: 2014-1195(GST)G

BETWEEN:

HÔPITAL SANTA CABRINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 22, 23 and 25, 2015, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Claude Nadeau
Counsel for the respondent:	Huseyin Akyol

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* for the period from February 14, 2011, to April 24, 2012, notice of which is dated May 22, 2013, and bears no identifying number, is dismissed, without costs.

Signed at Ottawa, Canada, this 28th day of October 2015.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 29th day of January 2016
Daniela Guglietta, Translator

Citation: 2015 TCC 264
Date: 20151028

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REASONS FOR JUDGMENT

Archambault J.

[1] Founded by Italian sisters some 50 years ago, the Hôpital Santa Cabrini (**Hôpital**) includes two facilities: a general and specialized hospital with 369 beds (**Centre hospitalier**) and a long-term care centre with 103 beds, the Centre d'accueil Dante (**Centre Dante**).

[2] The Hôpital has a community mission for all Montréal East residents. It offers a wide range of health care and services and social services, and has approximately 1,600 professionals and employees to provide these services. For instance, the establishment receives approximately 400,000 visits to its emergency department and 70,000 to its outpatient clinics, has 10,000 admissions and performs nearly as many surgeries. The Centre Dante offers long-term and short-term accommodations at the drop-in centre to the seniors from the Italian community experiencing loss of independence.[1]

[3] During the relevant period covered by this appeal, i.e., February 14, 2011, to April 24, 2012 (**relevant period**), the Hôpital, like many other hospitals in Quebec, was facing a shortage of nurses and had to fill vacancies and absences. The Hôpital used the services of three employment agencies (**Agencies**) to address this shortage and obtain the personnel required to deliver nursing care. The Agencies, which employed hundreds of nurses, provided their staff members to render services under the direction and control of the Hôpital. The Agencies

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1 The source of this information is the Hôpital's Web site.

invoiced the Hôpital for the agreed amount for the right to retain the services of this personnel, to which they added the good and services tax (**GST**) provided for in the *Excise Tax Act* (**Act**), and the Quebec sales tax.

[4] On February 14, 2013, the Hôpital, through its representative, Consultaxe Ltée, submitted to the Agence du Revenu du Québec (**ARQ**), acting as an agent of the Canada Revenue Agency (**CRA**), a general application for GST rebate of $34,958.27 using the prescribed form, FP-189, dated February 6, 2013. This application was for the GST that the Hôpital allegedly paid in error, or overpaid, to its suppliers during the relevant period. The reason given by the Hôpital for the application was the exemption under section 6 of Part II of Schedule V of the Act, which reads as follows:

> 6. A supply of a nursing service rendered to an individual by a registered nurse, a registered nursing assistant, a licensed or registered practical nurse or a registered psychiatric nurse, if the service is rendered within a nurse-patient relationship.

> 6. La fourniture de services de soins rendus à un particulier par un infirmier ou une infirmière autorisé, un infirmier ou une infirmière auxiliaire autorisé, un infirmier ou une infirmière titulaire de permis ou autorisé exerçant à titre privé ou un infirmier ou une infirmière psychiatrique autorisé, si les services sont rendus dans le cadre de la relation infirmier-patient.

[Emphasis added.]

[5] The ARQ rejected the application for the rebate for the relevant period on the ground that the supply by the Agencies did not constitute an exempt supply. The Hôpital is appealing this decision.

Factual background

[6] The following assumptions of fact are found in the Reply to the Notice of Appeal, which sets out the facts that the Minister of National Revenue (**Minister**) relied on in making the assessment at issue and which were admitted by the Hôpital:

> [TRANSLATION]
>
> 24. . . .
>
> (c) during the period at issue, the appellant paid $205,636.90 in GST to the Employment Agencies on the consideration for the supply it purchased of loaned qualified personnel in the health sector, namely, nurses, GST that was invoiced to it by said Agencies;
>
> (d) the appellant applied for, and previously received, the partial rebate of the GST for public service bodies (hereinafter partial GST rebate) in respect of the supplies at issue, namely, $170,678.63 or 83% of the amount of $205,636.90 mentioned in the previous subparagraph, under section 259 of the ETA and the *Public Service Body Rebate (GST/HST) Regulations* (hereinafter the (Regulations);
>
> (e) the amount of the rebate of $34,958.27 applied for by the appellant, which was rejected, is the difference between the amount of GST that the appellant paid, during the relevant period, to its suppliers for the supplies at issue purchased ($205,636.90) and the portion of said GST amount refunded to the appellant by Revenu Québec, after it applied for it, as a partial GST rebate in respect of said supplies ($170,678.63).

[7] The Hôpital used the following agencies during the relevant period: Agence M.D. Santé (**Agence M.D**) and Agence soins intermédiaire inc. (**Agence S.I.**) for the Centre hospitalier and Placements Formadic inc. (**Agence P.F.**) for the Centre Dante. The Hôpital was bound by written agreements with the first two agencies and had a verbal agreement with the third. Because the written agreements are similar, I will only reproduce excerpts from the one with the Agence S.I., filed as Exhibit A-9:

> [TRANSLATION]

SERVICE OFFER

1. Mandate

The Agence Soins Intermédiaires Inc. undertakes to fill short- and long-term nurse staffing needs, by offering qualified resources, as required by the Hôpital Santa Cabrini.

2. Description of personnel

The Agence Soins Intermédiaires Inc. will be able to provide the Hôpital Santa Cabrini with health professionals in the following employment category:

- Nurse
- Assistant head
- Coordinator
- Practical nurse

3. Undertaking of Soins Intermédiaires Inc.

- Provide prompt response to requests by the Hôpital Santa Cabrini with competent, punctual and professional personnel.
- Carefully select qualified personnel to effectively respond to the needs of the Hôpital Santa Cabrini while ensuring that the resources provided adhere to the rules and regulations governing the establishment. In addition, the resources undertake to comply with the policies and procedures of the Hôpital Santa Cabrini.
- Ensure that the personnel have a valid nursing licence with the OIIQ.
- Only invoice for the time worked.
- Remain compliant with *An Act Respecting Industrial Accidents and Occupational Diseases* at all times.
- Continually monitor the quality of the services provided by the Agence Soins Intermédiaires Inc.
- Throughout the duration of this contract, the Agence Soins Intermédiaires Inc. undertakes not to hire, for any position or role, a person that it knows, after research and due diligence is complete, is employed with the Hôpital Santa Cabrini, or was employed with the Hôpital Santa Cabrini, within the previous 12 months, except for

resources already employed with the Agence Soins Intermédiaires Inc. A $15,000 penalty shall be imposed on the offending party.

- The Agence Soins Intermédiaires Inc. undertakes not to assign a resource not liked by the Hôpital Santa Cabrini.

- Owing to a large labour shortage and in solidarity with the established practices at the Hôpital Santa Cabrini, the Agence Soins Intermédiaires Inc. shall require its personnel to be available for an additional shift if necessary. When the Hôpital Santa Cabrini requires one of its employees to work an additional shift, the Hôpital Santa Cabrini may also require Soins Intermédiaires Inc. to add an additional shift for employees on site.

4 Undertaking of the Hôpital Santa Cabrini

Throughout the duration of this contract, the Hôpital Santa Cabrini undertakes not to hire, for any position or role, a person that it knows, after research and due diligence is complete, is employed with the Agence Soins Intermédiaires Inc., or was employed with the Agence Soins Intermédiaires Inc., within the previous 12 months. A $15,000 penalty shall be imposed on the offending party.

5. Cancellation of shifts

It is agreed that if a shift is cancelled, the representative of the Hôpital Santa Cabrini shall notify the placement agency Agence Soins Intermédiaires Inc. four hours prior to the start of the shift to save our employees from an unnecessary trip. If the resource of the Agence Soins Intermédiaires Inc. arrives at your centre and his or her shift is cancelled, an invoice for four hours of work shall apply.

6. Orientation

It is agreed that orientation costs (two days) shall be incurred by the Agence Soins Intermédiaires Inc.

7. Expenses

No meal, parking or travel expenses shall be invoiced.

8. Resource requirements

In order to maximize efficiency for placement, the Hôpital Santa Cabrini undertakes to state its requirements by fax . . . or by email . . . when more than five resources are required. The Agence Soins Intermédiaires Inc. undertakes, in turn, to confirm by fax and/or email.

9. Statutory and special holidays

> Statutory and special holidays shall be invoiced at double time.
>
> Statutory holidays . . .

. . .

12. Conditions

> This service offer is for the sole purpose of informing the Hôpital Santa Cabrini of the conditions it accepts if it requires [the] services of the Agence Soins Intermédiaires Inc., and vice-versa. If either party should violate one or more clauses contained in this service offer, the wronged party may cease all business relationships with the other party, for a determinate or indeterminate period of time, with or without notice, at a time decided by the party, once all amounts owing having been paid, where applicable.
>
> The conditions of this agreement are agreed to by the parties.

[8] The agreement of course contains the price list for the provision of personnel by the Agency. In principle, it is a per diem rate, but in reality it represents an hourly rate.

[9] The evidence presented at the hearing and that contained in the transcripts of the examinations for discovery filed as Exhibit I-2, at Tabs 7, 8 and 9, describe the procedure when the Hôpital requires the Agencies' services.

[10] The assignment office prepared a work schedule for a period of 28 days for each of its units and posted it one week prior to the start of that period. To put it together, it first assigned its own employees to the various services or units of the Hôpital. If there were positions that could not be filled, it called on its own employees who had indicated a willingness to work overtime. In doing so, it was meeting its obligations under the collective agreements binding the Hôpital and its employees. When positions could not be filled through this exercise, the assignment office contacted the Agencies to meet its needs.[2]

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[2] For an example of a work schedule put together by a unit head, specifically the head nurse of the intensive care unit, for a period of 28 days and identifying the personnel requirements communicated to Agence M.D. for the period from March 27 to April 23, 2011, see Exhibit A-14. For a similar example for the emergency department, see Exhibit A-15.

[11] During the relevant period, when a nurse from an Agency showed up for the first time at the Hôpital, she received orientation from a representative of the Agency or by the personnel of the Hôpital. The purpose was to allow the nurse to become familiar with the Hôpital's facilities, equipment and internal practices. As indicated in the agreements with the Agencies, this orientation, which could last one or two days, was covered by the Agencies, that is, the Hôpital did not have to pay anything for that period. Once the nurse was familiar with the Hôpital, she reported for duty, either at the assignment office or the unit to which she was assigned. She was typically required to sign in noting the name of the Agency, date, time of arrival and departure, and the shift, day, evening or night. The Hôpital also kept a computerized daily attendance record that allowed it to be informed at all times of not only the nurses from the Agencies, but also the nurses from its own personnel. The record indicated for each day and for each service department of the Hôpital, such as emergency, data related to each type of employment, clinical nurse, assistant head nurse, nurse, practical nurse or an orderly, which bore a number corresponding to the job title, the position number, the time in and time out and a shift code. (See Exhibits A-23 and A-26.)

[12] Generally, the Agencies submitted an invoice to the Hôpital each week and the invoices indicated in a table the following data: the date work was provided, the name of the nurse employed by the Agency, the service to which the nurse was assigned, the shift, the number of hours worked, the hourly rate and the total amounts owing by the Hôpital. The table included two additional columns for adjustments and comments.

[13] The Hôpital personnel verified the accuracy of the amounts invoiced by the Agencies by consulting either the signed record or, if the signature was missing, the computerized daily attendance record. If the invoice corresponded to the data gathered by the Hôpital, it paid the amount indicated. If there was no evidence of work performed by the nurse from the Agency, it did not pay. For an example of an error on the part of an Agency, see Exhibit A-24. For an example of the invoices verified by the Hôpital from the Agence P.F. see Exhibit A-7.

[14] A representative of Agence S.I. testified at the hearing. On the Web site that the witness himself created, which is primarily intended for professionals that Agence S.I. wishes to recruit as employees (see Exhibit A-29), is the following description of the company's mission [TRANSLATION]: "agency specialized in nursing staffing . . . made up of a number of qualified health professionals, it offers highly competitive salaries with flexible hours." (Emphasis added.) Further on, the following information is added:

[TRANSLATION]

> In addition to providing <u>quality training</u> to its members, Soins intermédiaire guarantees improved integration into the labour market.
>
> Always attentive to new requests from its <u>employees</u> and works actively to meet their individual needs . . . .

[Emphasis added.]

[15] As requirements and in terms of the types of employees sought, the following is indicated:

[TRANSLATION]

> [W]e hire: Nurses [for]: •Operating Room •Recovery Room •Intensive Care •Emergency •Medical-Surgical •Psychiatry •Geriatrics •Pediatrics •Obstetrics •Other specializations. . . . Must be a member in good standing of a professional governing body. Competency, reliability and professionalism.

[16] Agence S.I. services the entire province of Quebec.

[17] The Agence S.I. representative described the [TRANSLATION] "Employment Application" form as the contract of employment. (See Exhibit A-30.) The future employee indicated, *inter alia*, his or her education, professional experience, references and availability as well as the type of employment sought. At the end of the document is the notation [TRANSLATION] "agreement made by," and the agreed upon salary and a declaration signed by the employee that the information provided in the document is accurate. Another indication which supports the conclusion that this Agence considers its workers to be employees is the fact that it deducted taxes from their pay under tax legislation as well as Quebec Pension Plan contributions and Employment Insurance premiums. It also pays the 4% provided for in *Act Respecting Labour Standards* for annual leave.

[18] The contract of employment binding the nurses and Agence M.D. is much more comprehensive. (See Exhibit A-36.) It is a contract entitled [TRANSLATION] "Contract of Employment for an Indeterminate Term," which contains the following provisions:

[TRANSLATION]

1. Duties and responsibilities of the employee

- The employee undertakes to adhere at all times to the policies, directives and instructions of Agence M.D. Santé inc. (hereinafter MD SANTÉ) and his or her ethical and professional obligations;
- It is the responsibility of the employee to maintain in good standing at all times his or her authorizations, mandatory training required by his or her governing body and work licences with competent authorities and provide MD SANTÉ with a copy;
- The employee of MD SANTÉ undertakes to provide upon request all information and documents that may be required by MD SANTÉ;
- The employee of MD SANTÉ undertakes to complete all training that may be required by MD SANTÉ;
- The employee of MD SANTÉ undertakes to accept assignments with at least two private or public establishments if they are compatible with the availability he or she provided;
- It is the responsibility of the employee to report his or her employment with MD SANTÉ to his or her professional governing body, where necessary;
- It is the responsibility of the employee to notify MD SANTÉ of any changes in his or her information in the course of employment;
- The employee shall not engage in verbal or physical behaviour that could cause injury to MD SANTÉ;
- The employee shall carry out his or her assignments with due diligence and professionalism;
- The employee has an obligation to carry with him or her at all times his or her ID card and governing body licence and wear appropriate and required clothing, if applicable;

- The employee shall maintain punctuality and good attendance to shifts and start the shift on time;

- In the event of a work-related accident or dangerous situation, the employee shall notify MD SANTÉ immediately and collaborate with it to comply with CSST requirements subject to the legislation;

2. Compensation and salaries

Unless otherwise directed by MD SANTÉ:

2.1 The employee shall receive an hourly rate established upon his or her hiring in the performance of his or her duties.

2.2 [The] employee shall receive an hourly training rate when completing training, including orientation (if applicable);

2.3 [The] employee shall not receive compensation for meal periods;

3. Reimbursement of expenses

- Unless otherwise specified, MD SANTÉ shall not reimburse an employee for any travel expenses or other expenses incurred in the performance of duties;

4. Pay schedule

- The employee shall be paid every two weeks, for all hours worked provided that the employee has filled out his or her time sheets in accordance with the directions of MD SANTÉ;

- Statutory leave is determined and paid in accordance with labour standards;

5. Group insurance

MD SANTÉ offers group insurance for which the terms and conditions of enrolment are determined by the insurer. However, employees who meet said enrolment terms and conditions shall maintain minimum medical coverage unless exempted by legislation;

6. RRSP and pension fund

Employees who work 250 hours during their employment with MD SANTÉ may, if they wish, contribute to a private pension fund. MD SANTÉ shall contribute to said pension fund in the same proportion as employees up to a maximum of 2% of the employees' gross salary;

7. Workplace

- MD Santé alone decides where an employee will be assigned;
- The employee shall not accept any assignment directly from a client of MD SANTÉ;

8. Hours and schedule

- MD Santé does not require any minimum availability from its employees. In this regard, employees are responsible for providing their availability no later than the 15th of each month for the following month through the Intranet access granted to them;
- It is in the employee's interest to regularly consult his or her profile on the Intranet owing to the fluctuating requirements of MD SANTÉ;
- In the event that an employee does not provide his or her availability on the Intranet for a period of three consecutive months, MD Santé shall issue a termination of employment unless there are extenuating circumstances;
- The policies of MD Santé on regular hours, overtime and compensatory leave and other related issues apply to this contract;

. . .

11. Confidentiality

- The employee undertakes to keep confidential all information not otherwise open to the public and pertaining directly and/or indirectly to MD Santé and/or its clients and/or users of the public or private health system;

. . .

13. Varia

- In the event that the employee is assigned to a shift with a client of MD Santé and cannot show up for the assignment, the employee shall provide MD Santé with a minimum of eight hours' advance notice unless there is a justifiable reason;

- In the event that the employee must exceptionally leave during the performance of work activities for serious reasons, he or she shall notify MD SANTÉ immediately to allow it to find a replacement if required. Remuneration in this case shall cease as soon as the call is received unless otherwise agreed with MD SANTÉ.

- In the event of any conflict with another employee of MD Santé and/or a third party, the employee shall notify MD Santé of the situation in writing so that it may take the measures required, and verify and take appropriate action in such circumstances;

- MD SANTÉ reserves the right to issue from time to time directives and instructions on the Intranet site which the employee shall be required to observe;

- If the employee fails to observe the provisions herein, the directives and instructions of MD SANTÉ, MD SANTÉ shall take any disciplinary actions it deems appropriate in such circumstances;

- Subject to legislation, MD SANTÉ may terminate this contract at any time on simple written notice.

[19] The co-owner and founder of Agence M.D. also confirmed that his Agency made contributions not only to the Quebec Pension Plan and Employment Insurance, but also to a pension plan for employees who wished to be members and that the employer contribution was 50% of the total contribution up to 2% of the remuneration paid by Agence M.D. to its employees. According to the information on its Web site (See Exhibit A-34), Agence M.D. has comprehensive liability insurance coverage and CSST coverage.

[20] It is likely that the Agencies were complying with a directive issued on November 29, 2011, by the ARQ with respect to the obligations of the employment agencies. The directive provided as follows:

> As employers, employment agencies must withhold Québec income tax as well as Québec Pension Plan (QPP) contributions and Québec parental insurance plan (QPIP) premiums from the remuneration paid to their employees.

[See Tab 45 of Volume 2 of the appellant's book of authorities; Emphasis added.]

[21] It should also be added that, like the employees of the Hôpital, the employees of the Agencies carry an ID card identifying the name of their Agency. (See Exhibits A-35 and A-25.) On the ID card worn by Agence S.I. employees, is not only the photo of the Agence S.I. employee, but also the logo of Agence S.I., its telephone and fax numbers and its Internet address. On the card for Agence M.D., there is only a photo of the employee with, of course, the employee's name and title—for example nurse—and the Agence M.D. logo.

[22] It is clear from the testimony of the various employees of the Hôpital, including a former director of finance, the person responsible for the assignment office and various unit heads, that the Agencies' employees, albeit under the direction and control of the Hôpital in the performance of their duties, are not considered employees of the Hôpital. There is no evidence of an agreement (contract) binding the Hôpital and the nurses placed by the Agencies. On the contrary, the Hôpital undertakes not to recruit for any position or role a person that it knows [TRANSLATION] "was employed with the Agence M.D. Santé within the previous 12 months." A $15,000 penalty is imposed if the Hôpital defaults on its undertaking. The Hôpital neither pays any direct compensation to the Agencies' employees nor provides them with any benefits. The various witnesses of the Hôpital confirmed that when there were complaints against one of the Agencies' employees, they contacted the Agency to advise of such matters. Ultimately, the Hôpital could request that the employee concerned in the complaint no longer be assigned to the Hôpital.

[23] It is also clear from all the evidence and testimony provided not only by the Hôpital's employees, but also by the representatives of the three Agencies, that the sole purpose of the agreement between the Agencies and the Hôpital is the provision of personnel, that the delivery of nursing or medical services is the Hôpital's responsibility of the, that it is the Hôpital that exercises direction and

control over the work activities of the Agencies' employees and that no representative of the Agencies is on site to direct or control the provision of nursing services. The only direction the Agencies provided in some cases was one or two orientation days when a nurse reported to work for the first time at the Hôpital. Once the employee of the Agency has received orientation, whether it be an employee of the Agence or, as was usually the case, personnel of the Hôpital, the Agency is no longer involved in the provision of nursing services by its employees. The representatives of the Agencies confirmed, *inter alia*, that they have no access to the records of the patients of the Hôpital.

[24] According to the policy of the Ministère de la Santé et des Services sociaux described on page 51 of its 2010-2015 strategic plan which deals with attracting, retaining and ensuring optimal contribution from human resources, the objective is to reduce the use of third party labour in clinical activity sectors with the result being a [TRANSLATION] "25% reduction in the hours worked by nursing personnel employed with private agencies by 2015." (See Exhibit A-12.)

<u>Analysis of the parties' legal and economic relationships</u>

[25] Before considering whether the Hôpital meets all the necessary conditions to claim the exempt supply provided for in Schedule V of the Act, I believe that it is useful to define the legal and economic relationships between the various parties.

[26] First, some context would prove useful. A patient arrives at the Hôpital and requires medical care. This person may arrive at the emergency department, the outpatient clinic or simply be hospitalized. The patient must first register before receiving care, and it is a matter of judicial notice that the patient receives, if he or she does not already have one, a card from the Hôpital confirming his or her patient status. If the patient is a resident of the province, he or she holds a Quebec health card and all costs related to care are covered by the Régie de l'assurance maladie or funded by the budget allocated to the Hôpital by the government. If the patient does not have a health care plan, particularly if the patient is a foreign tourist, he or she will have to pay for the care received in the Hôpital.

[27] To provide its hospital services, the Hôpital hires personnel, whether it be administrative staff, nursing personnel, patient attendants, housekeeping and maintenance staff or security staff. In the jargon of the Act, that is a portion of its inputs.

[28] Because its needs cannot be all met by its employees, either those on call or those who are willing to work overtime, the Hôpital requires the services of employment agencies that provide it with the personnel it needs. It has contracts with three agencies. These contracts stipulate that the agencies must provide competent and experienced personnel for the positions that the Hôpital must fill and perform the required tasks.

[29] In order to provide the personnel in question, the Agencies hire nurses. Indeed, the evidence revealed that contracts of employment are entered into between the Agencies and the nurses who will be placed in the hospitals, including the Hôpital. In the case of Agence M.D., it is a proper contract of employment containing the standard terms and conditions of a contract of employment.[3] In the case of Agence S.I., it is an employment application form that is signed by the employee and which the representative of Agence S.I. considers to be its contract of employment. Besides the fact that the expressions [TRANSLATION] "employment application," "agreement made by" and "salary" are used, the conduct of Agence S.I. is consistent with its argument that its nurses are its employees because not only does Agence S.I. deduct income tax at source, but it also deducts Employment Insurance premiums and Quebec Pension Plan contributions.

[30] In the authorities and case law, the relationship between the client—the Hôpital in this case—the employment agency and the agency's personnel is often described as being a "tripartite" relationship resulting from a contract of employment. In the *Civil Code of Québec* (**C.C.Q.**), among the 18 nominate contracts[4] there is not one that describes either this tripartite relationship or, particularly, the relationship between the employment agency and its client. There

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3 Article 2085 of the *Civil Code of Québec* (**C.C.Q.**) defines a contract of employment as follows:

> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> [Emphasis added.]

For an in-depth analysis of the contract of employment in Quebec and the conditions that must be met to constitute such a contract, see my article entitled "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It", in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law (2005)*, (Montreal: Association de planification fiscale et financière - Department of Justice Canada, 2005).

4 Title Two of Book Five on obligations (articles 1708-2643 C.C.Q.).

is some legal and jurisprudential uncertainty with respect to the characterization of this type of relationship.[5] In my view, it is possible to consider four distinct scenarios to describe the relationship between the various parties.

[31] The first scenario would be a contract under which the Agency would undertake to provide health care services. This would be a contract of enterprise or for services under article 2098 C.C.Q.[6] The object of the prestation would be to provide a service, i.e., health care to patients. The popular expression "subcontract" could be used; under this contract, the Hôpital would task the Agency with providing certain health services in much the same way as a general construction contractor may hire a plumber, an electrician or a plasterer to perform specific plumbing, electrical or plastering work.[7] In the construction industry, it is common and easy to subcontract these activities as they are specific, well-defined tasks. It is not necessary for the payer, the general contractor, to exercise a right of direction or control over the performance of the work. The only thing that matters is the end result. In this case, I do not believe that such a conclusion can be adopted, as the object of the prestation in the contract with the Agencies is not to provide health care, but rather to provide personnel who will be able to provide health care services whose scope cannot be defined beforehand because the services are too varied. In the words of the representative of Agence S.I., the agreement between the Agency and the Hôpital concerns the provision of personnel who provide health care services to the patients of the Hôpital.

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5 For an analysis of this issue and a different approach from the one I take here, see, in particular, a decision of the Court of Québec: *Agence Océanica inc. c. Agence du revenu du Québec,* 2012 QCCQ 5370.

6 Articles 2098 and 2099 C.C.Q. state as follows:

> 2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[Emphasis added.]

7 For an example in the medical world, see *Riverfront Medical Evaluations Limited v. The Queen*, 2001 CarswellNat 4932, [2001] T.C.J. No. 381(QL), [2001] G.S.T.C. 80, 2001 G.T.C. 497. In this decision, a clinic hired physicians as self-employed workers to examine patients and file medical reports at the request of insurance companies.

[32] Furthermore, it would not be appropriate in the context of a hospital to allow it to subcontract part of the health care offered in its establishment, as its mission under section 100 of *An Act Respecting Health Services and Social Services*[8] is "to ensure the provision of safe . . . quality health . . . services. . . . Section 101, second paragraph, provides that "every institution must, in particular, dispense the required health . . . services directly, or have them provided by an institution, body or person with which or with whom it has entered into a service agreement under section 108." There is an expectation in these circumstances that the Hôpital itself exercises the direction and the control over the services to be provided.[9] The services to be provided cannot be specified as is the case for a plumber, an electrician or a plasterer. In addition, there was no representative of the Agencies to supervise their employees' work. It is essential that the worker placed by the Agencies integrate into the team of various services or care units within which the worker works and this provision of services necessarily requires the Hôpital to exercise a right of direction and control over his or her work. To conclude, one cannot find in the circumstances of this appeal that there is a subcontracted contract for services under which the Agencies would have provided health care services to patients of the Hôpital.

[33] In the second scenario, the object of the prestation would be the recruitment of personnel with the Agency undertaking to search for competent personnel and offer it to the Hôpital so that the Hôpital can hire the workers itself. In such a scenario, the person recruited by the Agency becomes an employee of the Hôpital. This would also be a contract for service, as the prestation consists in searching for, identifying, interviewing and suggesting a potential employee to the Hôpital.

[34] Here, the evidence does not at all show that the Hôpital entrusted the three Agencies with the mandate of recruiting persons who would become employees of

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[8] R.S.Q., c. S-4.2.

[9] That is what counsel for the Hôpital believes. He stated the following during his submissions:

> [TRANSLATION]
> Thus, in a hospital, it is understood that the hospital will not give an employment agency or whomever the control of its emergency room, intensive care unit. It's impossible. That never happens.
> The hospital is legally required to be responsible. It is required to retain control. It could not hand over such control even if it wanted to. It is legislatively barred. (pp. 166 and 167 of the transcript.)

the Hôpital. The Hôpital needs to fill positions temporarily and does not seek to hire a worker for the long-term, even though some may believe that is what the Hôpital ought to do. Indeed, the agreements specifically prohibit hiring workers placed by the Agencies and a penalty is also provided for in cases where the Hôpital itself hires a nurse. The advantage for the Hôpital in not recruiting employees full-time is the flexibility to terminate the services of the worker placed by the Agency as soon as the need is gone. It is a matter of judicial notice that in matters of dismissal of its employees the Hôpital is subject to much more onerous obligations under its collective agreements.

[35] It should also be added that the workers placed by the Agencies do not have any desire either to become employees of the Hôpital as they do not wish to be subject to the control that could be exercised by the Hôpital over their schedules. By working for the Agency, they reserve the right to accept or refuse to work for any hospital, as the agreement between the worker and the Agency provides that it is the worker who decides when and where to work.

[36] Also, the reality is that workers placed by the Agencies are not on the payroll of the Hôpital. The Hôpital does not provide any remuneration or benefits. The only remuneration these workers are entitled to is that paid by the Agencies, and the hospitals have nothing to do with the terms and conditions of the contract of employment between the workers and the Agencies. Indeed, there is no contractual relationship between the Hôpital and the nurses placed by the Agencies.

[37] The third scenario is a variant of the previous one. The Agencies would act as agents of the Hôpital and would hire personnel on behalf of the Hôpital covertly, without the Hôpital having to openly acknowledge that it is the real employer of the workers.

[38] In my view, the facts in evidence in this appeal do not show the existence of such a covert mandate conferred upon the Agencies by the Hôpital for the purpose of hiring nurses. First, there is no written contract of mandate. The only written contract in existence is a contract under which the Agencies undertake to provide workers in order to integrate them into the teams of the Hôpital. Nor is there, in my view, any verbal agreement between the Hôpital and the Agencies or the workers of these Agencies that would establish that the Agencies would be acting as agents of the Hôpital.

[39] Moreover, for the reasons set out in the analysis of the second scenario, each of the parties would have an interest in preventing the Agencies' workers from becoming employees, legally speaking, by way of a contract of mandate. Indeed, the Hôpital and the workers do not intend that the workers hired by the Agencies become employees of the Hôpital. I think one cannot conclude here, based on the evidence, that there was a covert contract when there is no indication of any intent or conduct contrary to what was established in the version presented by the parties.[10]

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[10] I read some of the decisions provided by counsel for the Hôpital from the Commission des relations du travail, at least one of which was the subject of judicial review by the Superior Court of Québec. Among these decisions is *Revera Health Services Homecare, l.p. c. Commission des relations du travail*, 2013 QCCS 5691 (CanLII), *Agence MD santé inc. c. Professionnel(le)s en soins de santé unis (FIQ)*, 2012 QCCRT 82 (CanLII), and the leading decision on the matter referred to specifically in *Agence MD santé*, namely, *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, 1997 CanLII 390 (SCC).

These decisions relate to the application of certain sections of the Quebec *Labour Code*, particularly section 39, which confers on the labour commissioner exclusive jurisdiction to determine whether a person is an employee included in a bargaining unit. In section 1 of the Code an employee is defined as "a person who works for an employer and for remuneration . . ." and an employer as "anyone, including the State, who has work done by an employee."

Cited in paragraph 31 of *Agence MD santé* are paragraphs 97 *et seq.* of *Professionnel(le)s en soins de santé unis (FIQ) c. Hôpital Maisonneuve-Rosemont*, 2011 QCCRT 447 (CanLII) (decision under appeal in *Agence MD santé*, which addresses *Pointe-Clair.* In particular, it relates the relevant facts and notes that the Supreme Court of Canada reviewed the case law of the Labour Court which analyses the criteria to be used in the context of certification to determine the "real employer" in a tripartite relationship. Also noteworthy is the comment by Chief Justice Lamer, who was writing on behalf of the majority in *Pointe-Claire*:

> . . . Despite the importance of this issue, in this appeal I do not have to determine how to identify the real employer in all tripartite relationships involving a personnel agency. In the present case, the only issue is whether the Labour Court made a patently unreasonable error by holding, in the context of a request under s. 39 of the Labour Code, that the City was Ginette Lebeau's employer during her two work assignments. (para. 26)

[Emphasis added.]

As can be seen from the description of the issues in these decisions, this is not an analysis of the contractual relationships under the provisions of the *Civil Code of Québec*, particularly article 2085 C.C.Q.—which was not in force during the relevant period for the facts of the decision of the Supreme Court of Canada—, but rather the application of

[40] Rather, it should be found that the agreements entered into in this case must be afforded their legal effects consistent with the intent of the parties and as they appear from a reading of their contract provisions. The first contract is a contract of employment between the Agencies and the workers. For at least one of the Agencies, there is a duly written contract, entitled [Translation] “Contract of employment for an indeterminate term,” in which it is clear that the workers become employees of the Agency and that the workers agree to provide services under the direction and control of the payer, the Agency. Though not as exhaustive, the other written contract is also a contract of employment. As the directive issued by the Agencies to their workers is to provide their services at the Hôpital, the Agencies delegate to the Hôpital their right to the prestation of work and their right of direction and control over the workers’ work, rights they acquired under the contract of employment. I reiterate, the only contractual relationship between the Agencies’ workers is the contract binding them to the Agencies. The other contract is the agreement to supply personnel between the Hôpital and the Agencies, under which the Agency undertakes to meet the nurse staffing needs of the Hôpital. There is a written contract between the Hôpital and Agence M.D. (see Exhibit A-8) and another with Agence S.I. (see Exhibit A-9).[11] There was only a verbal agreement with Agence P.F. for the Centre Dante.

[41] Since the first three scenarios are not applicable here, the fourth one will allow us to more specifically characterize the nature of the contract binding the Agencies and the Hôpital. First, it is important to note again that there is no legal relationship between the Hôpital and the Agencies’ workers. As mentioned repeatedly, the only legal relationship binding these workers stems from their contract of employment with the Agencies. The only legal relationship binding the Hôpital stems from the agreement with the Agencies. Consequently, it cannot be found that a contract of employment existed between the Hôpital and the

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the provisions of the *Labour Code*. (However, in her dissent, Justice L’Heureux-Dubé conducts a contractual analysis and raises highly relevant questions such as how a client can be the real employer for the purposes of the *Labour Code* when there is no contract of employment between the employee and the client.) It is recognized that this legislation is aimed at a specific legal context and that it does not involve the application of common law principles to determine the nature of the legal relationship between the parties. Since the issue here is not whether the workers could be considered employees to be included in a union bargaining unit, I believe that consideration must be limited to the provisions of the *Civil Code of Québec* to determine the real legal relationship between the parties.

11 For a similar analysis by Justice Malone of the Federal Court of Appeal, see *Minister of National Revenue v. Mastech Quantum Inc.*, 2002 FCA 131.

Agencies' workers. These workers are employees of the Agencies and the Agencies do not act as agents of the Hôpital when they hire said personnel. It should be noted that the Agencies recruit the workers. The evidence showed that these Agencies may have contracts binding them to hundreds of workers (from 400 to 600) which allow them to meet the hospitals' staffing needs.

[42] Because the workers employed by the Agencies are bound by a contract of employment, there is a relationship of subordination between each of the Agencies and their workers. By signing their contract of employment, the workers undertake to accept the Agencies' assignments to work in various hospitals. What the Agency obtains from this contract of employment—which is the essence of a contract of employment—is the right or power to exercise direction and control over its workers' work. The Agencies could certainly decide to provide health care services themselves and require their workers to provide services to the Agencies' clients. However, that is not their mission. As for the Hôpital, the Agencies merely transfer to it for a limited period the right to require their employees to perform work, and they delegate to it as an accessory the right to exercise direction and control over said work.

[43] How then can we characterize the nature of the contract binding the Agencies and the Hôpital? Is it one of the 18 nominate contracts of the C.C.Q.? The more likely to apply, at first blush,[12] is the contract of enterprise or for services, provided for in articles 2098 *et seq*. of the C.C.Q. It is useful to reproduce again articles 2098 and 2099:

> 2098. A <u>contract</u> of enterprise or <u>for services</u> is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes <u>to carry out physical or intellectual work</u> for another person, the client or <u>to provide a service</u>, for a price which the client binds himself to pay.
>
> 2099. The contractor or the provider of services <u>is free to choose the means</u> of performing the contract and <u>no relationship of subordination exists</u> between the contractor or the provider of services and the client <u>in respect of such performance</u>.

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[12] In any case, that appears to be the respondent's position. See Note 16 and paragraph 59 below.

[Emphasis added.]

[44] It seems clear to me that the Agencies do not carry out physical or intellectual work. Nor do they provide services: no health care is provided by the Agencies. It is the Hôpital that provides them owing to its own personnel and the personnel placed by the Agencies. If these Agencies acted as subcontractors, article 2098 C.C.Q. would clearly apply as the object of the prestation would be health care, as seen in the first scenario. Here, in my opinion, the object of the prestation is the right conferred on the Hôpital by the Agencies to require their employees to carry out work for a period of time to which is added as an accessory the delegation of the right of direction and control over the work, a right held by the Agencies with respect to the work performed by their employees under their contracts of employment. The Agencies' employees are in some way loaned or leased to the Hôpital. That is what happens when the Agencies assign their employees to the Hôpital: these employees become subject to the Hôpital's rights to require them to perform their work and to exercise direction and control over said work. The rights exercised by the Hôpital do not stem from a contract of employment binding the Hôpital and these employees, as there is no contract (written or verbal) between them. The legal source of those rights is the contract binding the Hôpital and the Agencies.

[45] Can we then characterize the contract binding the Hôpital and the Agencies as a loan or lease contract? The ARQ uses the expression "loan of personnel" in its communiqué dated December 20, 2010, appearing in *Tax News*, the relevant excerpt of which is reproduced further on at paragraph 51 of these reasons. In the Superior Court decision *Revera*, *supra*, Justice St-Pierre uses the expression [TRANSLATION] ". . . personnel agency"[13] as a synonym for "employment agency" and speaks of [TRANSLATION] "respiratory therapists . . . placed or <u>supplied</u> by it . . . in health care facilities," at paragraphs 1 and 2 of his decision. Generally speaking, the expressions "loan of personnel" and [Translation] "lease of personnel" provide a fairly good description of the economic reality. But there is no contract called "loan of personnel" or "lease of personnel" in the C.C.Q. The only loan contracts described by the C.C.Q. are those involving property or money:

> 2312. There are two kinds of loans: loan for use and simple loan.

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13 As does the Chief Justice of the Supreme Court of Canada in *Pointe-Claire*, *supra*.

> 2313. A loan for use is a contract by gratuitous title by which a person, the lender, hands over property to another person, the borrower, for his use, under the obligation to return it to him after a certain time.
>
> 2314. A simple loan is a contract by which the lender hands over a certain quantity of money or other property that is consumed by use to the borrower, who binds himself to return a like quantity of the same kind and quality to the lender after a certain time.

[Emphasis added.]

[46] The C.C.Q. does not define the term "property" but it describes different kinds of property in article 899: "Property, whether corporeal or incorporeal, is divided into immovables and movables." (Emphasis added.) Movable property is described as follows in article 907: "All other property, if not qualified by law, is movable." We could thus describe as movable property the incorporeal rights conferred by the Agencies on the Hôpital, namely, the right to require the Agencies' nurses to perform work and the right of direction and control over said work. As I believe this incorporeal right is not consumed like money and that it can be returned after a certain time, it could not be a loan contract because a loan for use is a contract by gratuitous title.

[47] However, a lease, which also involves property, is not a contract by gratuitious title:

> 1851. Lease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of movable or immovable property for a certain time.

[Emphasis added.]

[48] The agreement between the Hôpital and the Agencies is really a contract for lease of property rather than a contract for services because the Agencies do not provide services, but rather provide the Hôpital, in return for a sum of money, with the enjoyment of property, that is, the right to exercise over the Agencies' employees the rights conferred by the employees' contracts of employment. The Hôpital, as the lessor, exercises these rights as it sees fit, particularly by exercising the right of direction and control over the work of the Agencies' workers for the

duration of the lease.[14] The services of said workers are therefore provided on behalf of the Hôpital and not the Agencies. It is therefore more appropriate to speak of [TRANSLATION] "contract for lease of personnel" than "loan of personnel."

[49] This characterization, in my opinion, makes it possible to properly define the tripartite relationship between the Hôpital, the Agencies and the Agencies' employees. This relationship involves a contract of employment between the workers and the Agencies and a contract for lease of personnel between the Agencies and the Hôpital under which an Agence delegates to the Hôpital its right to require the workers to perform work and the right of direction and control over the work, thus allowing the Hôpital to integrate the Agencies' employees with the rest of its personnel and provide health care services to its patients.

[50] In my view, this fourth scenario is the one which most adequately reflects the legal relationships intended and put in place by the parties. Not only does the evidence reveal here that the parties wanted two contracts, one being a contract of employment between the nurses and the Agencies, and the other, a contract for lease of personnel between the Hôpital and the Agencies under which the work of its employees is made available to the Hôpital. It is not necessary to conclude, as the Court of Québec did in *Agence Océanica inc.*, *supra*, that there is a contract of mandate to characterize the tripartite relationship.

Tax analysis

[51] Once the nature and scope of the legal agreements binding the Hôpital and the Agencies and that between the Agencies and their workers is clear, it becomes easier to find the answer to the question posed in this appeal: does the lease of the Agencies' personnel to meet the needs of the Hôpital constitute an exempt supply

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[14] Characterizing the lease of personnel as a lease of property may seem surprising at first glance. However, in my view, this characterization is more descriptive of the real situation. Moreover, this situation is similar to that of business speculators who enter into exclusive working agreements for many years with exceptional professional athletes, such as hockey or soccer players, without they themselves having a team to use their services, but who sell their rights to teams at high prices in these agreements to allow these athletes to become employees of these teams. In these circumstances, it is more appropriate to speak of sale of rights in an exclusive contract than of sale of services. The employment agencies essentially exercise the same activity as these business people, except that they do not sell their rights, they lease them for a period of time.

for purposes of the Act? It is important to note that the relevance of this determination is important to decide whether the Minister, through the ARQ, was correct in rejecting the application for a rebate of the GST that the Hôpital paid when it paid the rent provided for in the contracts with the three Agencies. It should be recalled that the Agencies, when they invoiced the Hôpital for the rent for the lease of personnel, calculated an amount of GST consistent with the interpretation adopted by the tax authorities, notably the ARQ acting as agent of the CRA in the application of the Act. This interpretation is found in *Tax News* dated December 20, 2010, and deals with supplies of nursing personnel made by employment agencies. (See the appellant's book of authorities—Volume 2, Tab 44.) The second paragraph states as follows:

> Nurses working for an agency under an agreement concluded between the agency and a healthcare institution generally perform their duties under the direction or daily supervision of the management of the healthcare institution. In this case, Revenu Québec considers the <u>services rendered by the</u> employment <u>agency</u> to its clientele <u>to be a loan of personnel</u> that constitutes a <u>taxable supply</u> for the purposes of the GST and the QST.

[Emphasis added.]

[52] Federal authorities, namely, the Minister regarding the application of the GST in provinces other than Quebec, adopted the same conclusion in a document entitled *Excise and GST/HST News*, no. 89, published in summer 2013. This also appears to have reversed the CRA's previous position, as is clear from reading the commentary of Robert G. Kreeklewetz and John Bassindale entitled "Nurse Staffing Agencies: GST," published in *Canadian Tax Highlights*, Vol. 22, Number 4, April 2014, of the Canadian Tax Foundation, at page 7:

> Because of the memorandum's position [*GST Memorandum* 300-4-2 on exempt supplies of health-care services]—and particularly the statement in paragraph 14—many tax practitioners and nurse staffing agencies thought that the supply by a qualified nurse of nursing services to an individual within a nurse-patient relationship was exempt, regardless of whether the nurse provided the nursing services directly or through an employment agency. More than 20 years later, *Excise and GST/HST* News no. 89 (Summer 2013) appears to have quietly reversed the CRA position, and the first assessments to reflect this change have arisen. . . . [See Tab 47 of Volume 2 of the appellant's book of authorities.]

[53] Among the relevant provisions of the Act for resolving the issue raised by this appeal is the following:

165. (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

165. (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur de la contrepartie de la fourniture.

[Emphasis added.]

[54] There are also the following definitions in subsection 123(1) of the Act:

"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

« acquéreur »

a) Personne qui est tenue, aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

b) personne qui est tenue, autrement qu'aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

c) si nulle contrepartie n'est payable pour une fourniture :

(i) personne à qui un bien, fourni par vente, est livré ou à la disposition de qui le bien est mis,

(ii) personne à qui la possession ou l'utilisation d'un bien, fourni autrement que par vente, est transférée ou à la disposition de qui le bien est mis,

(iii) personne à qui un service est rendu.

Par ailleurs, la mention d'une personne au profit de laquelle une fourniture est effectuée vaut mention de l'acquéreur de la fourniture.

(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;

"taxable supply" means a supply that is made in the course of a commercial activity;

« fourniture taxable » Fourniture effectuée dans le cadre d'une activité commerciale.

"commercial activity" of a person means

(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

. . .

« activité commerciale »

Constituent des activités commerciales exercées par une personne :

a) l'expActtation d'une entreprise (à l'exception d'une entreprise expActtée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;

[…]

"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

« fourniture » Sous réserve des articles 133 et 134, livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.

"property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a

« bien » À l'exclusion d'argent, tous biens — meubles et immeubles — tant corporels qu'incorporels, y compris un droit quelconque, une action ou une part.

chose in action, but does not include money;	
"service" means anything other than (*a*) property, (*b*) money, and (*c*) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person;	« service » Tout ce qui n'est ni un bien, ni de l'argent, ni fourni à un employeur par une personne qui est un salarié de l'employeur, ou a accepté de l'être, relativement à sa charge ou à son empAct.
"employee" includes an officer;	« salarié » Est assimilé à un salarié la personne qui reçoit un traitement, une rémunération ou toute autre rétribution.
"employer", in relation to an officer, means the person from whom the officer receives remuneration;	« employeur » Est considérée comme l'employeur d'un salarié la personne qui lui verse un traitement, un salaire, une rémunération ou toute autre rétribution.
"exempt supply" means a supply included in Schedule V.	« fourniture exonérée » Fourniture figurant à l'annexe V.

[Emphasis added.]

[55] The relevant provision of the definition of exempt supplies, for the purposes of this analysis, is found in section 6 of Part II of Schedule V, which is useful to reproduce again here:

6. A supply of a nursing service rendered to an individual by a registered nurse, a registered nursing assistant, a licensed or registered practical nurse or a registered psychiatric nurse, if the service is rendered within a nurse-	6. La fourniture de services de soins rendus à un particulier par un infirmier ou une infirmière autorisé, un infirmier ou une infirmière auxiliaire autorisé, un infirmier ou une infirmière titulaire de permis ou autorisé exerçant à

patient relationship.	titre privé ou un infirmier ou une infirmière psychiatrique autorisé, si les services sont rendus dans le cadre de la relation infirmier-patient.

[Emphasis added.]

[56] For a supply to be exempt under section 6, a number of conditions must be met. David Sherman—in *Canada GST Service*—provides as follows:

> A supply is exempt under this section if it meets the following conditions:
>
> • It is a "service", as defined in subsection 123(1). This excludes a supply of property (such as a right, which is intangible property).
>
> • It is a "nursing service". See section Sch. V:Part II:6 D below.
>
> • It is "rendered" (meaning physically provided) to an "individual", as defined in subsection 123(1) (meaning a human being). See the commentary to Sch. V:Part II:5, under the heading "Rendered by a Medical Practitioner To an Individual".
>
> • The person who renders the service is any of the following:
>
> - registered nurse
> - registered nursing assistant
> - licensed practical nurse
> - registered practical nurse
> - registered psychiatric nurse.
>
> • The service is "rendered within a nurse-patient relationship". This condition was added effective for supplies made after February 26, 2008. See section Sch. V:Part II:6 C below.
>
> • The service is neither a "cosmetic service supply" as defined in section 1 of this Part, nor a "supply, in respect of a cosmetic service supply, that is not made for medical or reconstructive purposes". See

Sch. V:Part II:1.1. Thus, for example, a nursing service to assist in non-medical cosmetic surgery is not exempt. This condition applies to supplies made after March 4, 2010, and other supplies in some cases.

- The supply has a health care purpose, rather than being for purposes of litigation, insurance or some other purpose. See Sch. V:Part II:1.2 and the definition "qualifying health care supply" in Sch. V:Part II:1. This condition applies to supplies made after (meaning under an agreement entered into after) March 21, 2013. (*Canada GST Service,* Binder C10, Toronto, Carswell, 2043, pages V.272 and V.273; also published in Taxnet Pro.)

[57] To this, I would like to add the further point that the supply made by the supplier[15] must be a nursing service. This condition poses a problem here. In the foregoing analysis of legal relationships, I concluded that the contract binding the Hôpital and the Agencies did not constitute a contract of enterprise or for services because there were no services rendered by the Agencies. No health care services were provided by them. There were only rights conferred on the Hôpital by the Agencies, namely, that to require the employees leased by the Agencies to carry out work for a period of time and that of direction and control over the work. These rights constitute property not only for the purposes of the C.C.Q., but also within the meaning of the Act, as appears from subsection 123(1) which provides that the property includes "any property . . . corporeal <u>or incorporeal, and includes a right or interest of any kind</u>." [Emphasis added.] Because the object of the contract is property, it cannot be a service for the purposes of the Act. According to the definition in subsection 123(1) of the Act, "service" means "anything other than property . . . ." Consequently, the lease of personnel does not constitute a service for the purposes of section 6 of Part II of Schedule V of the Act, as there is a supply of property and not services.

[58] This conclusion is sufficient to dismiss the Hôpital's appeal.

[59] Even if I had erred in law in so concluding that the object of the supply for the purposes of the Act is property when in actual fact it is a service, I would

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[15] It should be noted that section 6 does not establish a requirement regarding the provider's status, contrary to section 2 of the same part with respect to the exemption of an institutional health care service. Indeed, the provider in that case must be the operator of the health care facility. For the purposes of section 6, the provider could, for instance, be a company that offers its employees nursing services rendered by a nurse.

nonetheless conclude that the supply made by the Agencies does not constitute an exempt supply because it is not a nursing service.[16] It is rather a lease of personnel. It was not the Agencies who were supplying the service provided for in section 6 of Part II of Schedule V of the Act. I will now explain my conclusion.

[60] Owing to the interrelationship between the charging provision set out in subsection 165(1) of the Act and, *inter alia*, the definition of "taxable supply"—a definition that encompasses the concept of "supply," which is defined by "service," which excludes the services rendered by an employee with respect to his or her employment—the salary of the employees of the Hôpital and the employees of the Agencies for the health care services they render to the Hôpital is not subject to the Act. Consequently, the exemption of the supply provided for in section 6 of Part II of Schedule V is of no relevance to the salary paid to these workers.

[61] Nor is the exemption provided for in section 6 of any relevance to the fees paid to the Hôpital by the patients for the supply of services by the nurses employed by the Hôpital. Indeed, in this case it is the exemption provided for in section 2 of Part II of Schedule V that is relevant, namely:

2. A supply of an institutional health care service made by the operator of a health care facility if the institutional health care service is rendered to a patient or resident of the facility.	2. La fourniture de services de santé en établissement, rendus à un patient ou à un résident d'un établissement de santé, effectuée par l'administrateur de l'établissement.

[Emphasis added.]

[62] However, the exemption provided for in section 6 is necessary with respect to the services rendered by the Agencies' employees as the expression "institutional health care services" is defined in section 1 of Part II of Schedule V[17] and said definition requires that the services be rendered by persons who

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16 This is the position of counsel for the respondent, who believed that a "loan of personnel" constituted a service, but not a nursing service. See p. 315 of the transcript.

17 The definition is as follows:

"institutional health care service" means any of the following when provided in a health care facility:

. . .

(*h*) services rendered by persons who receive remuneration therefor from the operator of the facility.

receive remuneration from the operator of the facility. Here, the Agencies' employees receive no remuneration from the Hôpital. The Hôpital pays rent to the Agencies. However, it is the Hôpital that makes the supply of nursing services to its patients owing, in particular, to the nursing services rendered by the Agencies' nurses within a nurse-patient relationship. This illustrates the relevance of section 6 for health care services rendered in a hospital facility.[18]

[63] The remaining question is whether the interpretation put forth by counsel for the Hôpital is well founded, that is to say, whether it is also possible under section 6 to consider as an exempt supply the one made by the Agencies in leasing their personnel to the Hôpital. In other words, does the exemption in section 6 apply with respect to the input that constitutes the supply made by the Agencies?

[64] Indeed, what the Hôpital asks in this appeal is that an exemption be granted with respect to one of its inputs: the lease of the Agencies' personnel. The Hôpital requires, in carrying out its mission—to provide health care services to its patients —numerous inputs—the supplies of goods and services, notably its employees' work (supply not covered by the Act) and medical equipment (that may constitute an exempt supply under Schedule VI). There is one example of an input of the Hôpital that receives preferential treatment, i.e., the services of a caterer who provides services to the patients of the Hôpital. Section 11 of Part II of Schedule V of the Act states as follows:

11. A supply of food and beverages, including the services of a caterer, made to an operator of a health care facility under a contract to provide on a regular basis meals for the patients or residents of the facility.	11. La fourniture d'aliments et de boissons, y compris les services de traiteur, effectuée au profit de l'administrateur d'un établissement de santé aux termes d'un contrat visant à offrir des repas de façon régulière aux patients ou résidents de l'établissement.

[Emphasis added.]

« services de santé en établissement » Les services et produits suivants offerts dans un établissement de santé :
…
(*h*) les services rendus par des personnes rémunérées à cette fin par l'administrateur de l'établissement.

18 It is also relevant in the case where nurses provide the care on their own account.

[65] Thus, one of these supplies, that of food and beverages, including the services of a caterer, may, in specific circumstances, constitute an exempt supply. Unfortunately for the Hôpital, there is no similar provision for the supply of a lease of personnel by an employment agency.

[66] It remains to be determined whether the conditions set out in section 6 of Part II of Schedule V are met and whether they can be given a reasonably broad interpretation to conclude that the Hôpital received an exempt supply. Despite the able arguments compellingly presented by counsel for the Hôpital, the supply in the contracts binding the Agencies and the Hôpital represents the lease of personnel and not the provision of nursing services.

[67] One of the able arguments put forward by counsel of the Hôpital—and for good reason, in my opinion—distinguished between the expressions "supply made by" and "service rendered to," which are both found in section 2 of Part II of Schedule V.[19] The second expression is also found in section 6 whereas the first is implicit. Nursing services were rendered by the Agencies' workers who were

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[19] Counsel's analysis was conducted in the context of a historical analysis of the provisions of the Act, notably those in force prior to the amendments of 2008 to section 5 of Part II of Schedule V, which deals with the supply of health care services rendered by a physician. The section reads as follows:

> 5. A supply of a consultative, diagnostic, treatment or other health care service that is rendered by a medical practitioner to an individual.
>
> 5. La fourniture de services de consultation, de diagnostic ou de traitement ou d'autres services de santé, rendus par un médecin à un particulier.

[Emphasis added.]

Prior to the amendment made by S.C. 2008, c. 28, subsection 80(1) with respect to supplies made after February 26, 2008, the section read as follows:

> 5. A supply made by a medical practitioner of a consultative, diagnostic, treatment or other health care service rendered to an individual (other than a surgical or dental service that is performed for cosmetic purposes and not for medical or reconstructive purposes).
>
> 5. La fourniture par un médecin de services de consultation, de diagnostic ou de traitement ou d'autres services de santé rendus à un particulier, à l'exclusion de services chirurgicaux ou dentaires exécutés à des fins esthétiques plutôt que médicales ou restauratrices.

[Emphasis added.]

The Explanatory Notes accompanying the amendment state that section 5 was "amended to exempt the supply of those services if they are rendered by a licensed physician . . . regardless of whether they are supplied through a corporation or directly by the licensed physician . . . ."

nurses and therefore one of the conditions of section 6 is met. On that point, I agree with counsel for the Hôpital. However, I have come to a different conclusion from his with respect to one of the other conditions, that the supply made by the Agencies must be a "supply of a nursing service." In my view, when the Agency's employees render their nursing services, they are supervised by senior personnel of the Hôpital and integrated with other nurses who are employees of the Hôpital: they render them under the direction and control of the Hôpital (right delegated by the Agencies). Their services are not rendered on behalf of the Agencies, but rather on behalf of the Hôpital, notwithstanding the fact that the ID card the Agencies' employees carried indicated the logo and name of their Agency.[20] If the workers had rendered their services on behalf of the Agencies, the position advocated by the Hôpital would have been valid. Unfortunately for the Hôpital, the supply made by the Agencies—and the object of the prestation, to use the words of the C.C.Q.—is not a supply of health care services,[21] but rather a lease of personnel.

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[20] The Federal Court of Appeal decision *Manship Holdings Ltd. v. The Queen*, 2010 FCA 58 relied on by counsel for the Hôpital does not support his client's position because the employees do not work at the Agencies' facility. It could even be argued that this decision supports the conclusion I adopt as the Court of Appeal bases its finding that the masseuses worked for the appellant on the fact that they provided their services within the appellant's premises. See paragraph 6 of the decision.

[21] Counsel for the Hôpital seems to share this view when he submits as follows in oral argument:

> [TRANSLATION]
> Thus, it is obvious that when they render their services, it is the nurses who render those services – so I entirely agree with Your Lordship there. My point is that it is the nurse who renders the nursing service. I never meant to say that that it is the employment agency who renders the nursing service.
>
> [p. 238 of the transcript]

I do not want to take this out of context. He adds:

> [TRANSLATION]
> . . . It is clear that it is the nurse who renders this service but it is also what the law prescribes. The law indeed provides that regardless of whether the provider renders the service, okay, it is the requirement which must be met. It is not the provider who is required to render the service. It is the nurse who is required to render the service.
> . . .
> So, no, the agency does not render the nursing service, okay. Does the nurse, when he or she renders a nursing service, act for and in the name of the employment agency? My answer is yes. Not only does the nurse identify himself or herself as such but he or she is also the employee of the

[68] According to counsel for the parties, the issue raised by this appeal has yet to be the subject of a Canadian decision. However, counsel for the respondent produced a decision from the United Kingdom which adopts the same conclusion as the one I adopt. Paragraphs 12 to 14 briefly summarize the relevant facts, the respective position of the parties and the conclusion of the two judges of the Upper Tribunal in this decision of the Upper Tribunal (Tax and Chancery Chamber) in *Moher v. Commissioners for Her Majesty's Revenue and Customs*, 2012 UKUT 260 (TCC):[22]

> 12. Here, the appellant supplied qualified nurses who in turn provided medical treatment to the dentists' patients. The nurses had no contractual relationship of their own with the dentists and had no control over the charges made for their services. The appellant charged the dentists hourly rates; she did not add a discrete commission charge. It followed that the appellant, acting as a principal, was making exempt supplies of medical care, provided on her behalf by the nurses. The exemption is dependent upon the nature of what is supplied, and not on the characteristics of the supplier: see *Ambulanter Pflegedienst Kügler GmbH*

> employment agency, consistent both with the findings of Your Lordship and the law.

[pp. 278 and 279 of the transcript]

[22] Counsel for the respondent also cited employment insurance decisions in which the issue involved was whether the activities of a business constituted those of an employment agency. The following passage from the decision of Deputy Judge Porter in *Supreme Tractor Services Ltd. v. Canada (Minister of National Revenue - M.R.N.)*, [2001] T.C.J. No. 580 (QL), 2001 CanLII 748, clearly illustrates the relevance of this determination and the distinction to be made in order to describe the object of the supply made by such an agency:

> 12 Thus, the first question to be asked is whether the worker is performing services for entity A as part of the business of the latter, albeit part of that business may be a contract for entity A to provide a service for entity B, or whether entity A is simply acquiring personnel as its very business with no contract to undertake anything further than to pass the worker on to entity B to undertake whatever the business of entity B might be. The simple question to ask is whether entity A is under any obligation to provide a service to entity B other than simply provide personnel. Is it obligated to perform in some other way than simply to make people available? If the answer is yes, it clearly has business of its own as does any general contractor on a building site and the worker is not covered by the Regulations under either statute. If however, the answer is no, that is, it is not obligated to carry out any service other than to provide personnel, then clearly the worker in such a situation is covered by the Regulations under both statutes.

[Emphasis added.]

> *v Finanzamt für Körperschaften I in Berlin* (Case C-141/00) [2002] ECR I-6833, a case whose outcome is in any event consistent with Note (2).
>
> 13. For the respondents, Miss Jessica Simor of counsel argued that the tribunal's conclusion that the appellant's supplies were of staff and not of medical services was a finding of fact, unassailable in this tribunal unless it could be shown to be irrational, a task which the appellant had not even attempted. The tribunal had, she said, examined all the relevant evidence, particularly about the contractual relationship between the appellant and the dentists, had considered the appellant's concession that once assigned to a dentist the nurses and auxiliaries were under the dentist's control and merely did as they were directed, and had correctly concluded from all those factors that the appellant supplied staff to the dentists, and it was the dentists who supplied the medical care to their patients.
>
> 14. In our judgment those arguments are unanswerable; indeed, it is difficult to see how one could rationally conclude that the appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentist to whom they were assigned. This is so even if (assuming, in the appellant's favour) that the nurses were to be regarded as employees of the appellant. The appellant did not control – or even know – whether, and if so, the extent to which, the dentist directed a nurse or auxiliary to carry out other duties which themselves were not exempt supplies, such as acting as receptionist or assisting with cosmetic dentistry. Even in relation to dental services which were exempt, the appellant did not dictate the treatment offered to the patients, or play any part at all in determining what treatment was offered or how it was provided, nor did she supervise the nurses and auxiliaries. She had no relationship, contractual or otherwise, with the patients to whom the medical care was provided. It is in our view beyond argument that her supply was of staff to dentists, who (as the tribunal found) assumed all the responsibility for directing the nurses as to what they should do, and for determining the treatment to be offered to the patients and the manner of its delivery. That the staff (and, indeed, the appellant herself) had a medical qualification cannot affect the nature of the supply. The tribunal correctly concluded that the appellant could not benefit from the exemption, and that the respondents were right to refuse the repayment.

[69] As a final comment, I will use the following analogy: no one would dare state that a truck dealership leasing a truck to a transportation company operates a transportation business. The dealership rather operates a business that sells and leases vehicles. Similarly, the Agencies lease their personnel; they do not provide health care services.

[70] Since one of the conditions required by section 6 was not met, the Hôpital did not receive an exempt supply. Rather, it was a taxable supply.

<u>Multiple supplies</u>

[71] Alternatively, counsel for the Hôpital argued that it was possible to consider that the Hôpital should be entitled to a partial rebate owing to the fact that the Agencies provided multiple services to the Hôpital, namely, (i) a recruitment service, which is a taxable supply, and (ii) nursing services rendered by the Agencies' nurses, which are an exempt supply. For it to make a finding that such an entitlement to a partial rebate existed, the Court must be satisfied that there were multiple supplies and that one of the services provided was exempt. However, I have already concluded that the Agencies did not provide a nursing service. That should therefore suffice to dismiss the rebate application. I would add, nevertheless, that there were no multiple supplies for the following reasons.

[72] Counsel for the Hôpital cited several decisions dealing with this issue, including the decision it described as a leading case, *O.A. Brown Ltd. v. Canada*, [1995] T.C.J. No. 678 (QL.), [1995] G.S.T.C. 40, also cited by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn. v. Canada*, [2000] F.C.J. No. 869 (QL), 257 N.R. 164, [2000] G.S.T.C. 42, 98 A.C.W.S. (3d) 341, at paragraph 17:

> 17 The analysis of Rip T.C.J. in O.A. Brown is worth repeating (at 40-6 to 40-9):
>
> > 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. <u>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</u>. The test was set out by the Value Added Tax Tribunal in the following fashion [*Dyrham Park Country Club v. Customs and Excise Commissioners*, [1978] V.A.T.T.R. 244 (U.K.) at 252]:
> >
> > > In our opinion, where the parties enter into a transaction involving a supply by one to another, the tax (if any) chargeable thereon falls to be determined by reference to the substance of the transaction, but the substance of the transaction is to be determined

> by reference to the real character of the arrangements into which the parties have entered.

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. The position has been framed in the following terms *[Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported)]:

> . . . For this purpose 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. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but for the reasons given above are not conclusive. Taking the nature, content and method of execution of the services, and all the circumstances, into consideration against the background of the value added tax system, particularly its methods of accounting for and payment of tax, if the services are found to be so interdependent and intertwined, so much integral parts or mere components or items of a composite whole, that they cannot sensibly be separated for value added tax purposes into separate supplies of services . . . .

. . .

Cumming-Bruce LJ, then asked a simple question: what did the taxpayer supply in consideration of the money that he charged the client per week in respect of the keep of the mare in respect of the service that he provided? [Scott, at 194]? The answer, as a matter of common sense, was that he had supplied the keep of the mare for the period she was at the stud, and although that involved the fulfilment of each of the obligations

> under the contract, those obligations, which were the necessary components of the entire transaction, constituted the supply of one service, i.e. the service of keeping the mare.
>
> [Emphasis added.]

[73] In my view, there is nothing here to identify two supplies. There is only one, the lease of personnel by the Agencies. The Hôpital only pays one rent for the working time supplied the Agencies' employees. There is no breakdown between that time and the recruitment time.[23] When workers are hired, the Agencies generally already have under contract a number of employees. When a request for personnel comes in at an Agency's office, the Agency consults its data banks and finds among its employees a qualified person meeting the specific needs of the Hôpital.

[74] Basically, the Agencies do not recruit personnel as said personnel are already among their employees. The Agencies simply determine who is best suited to fill the needs of the Hôpital. Essentially, the Agencies do not receive any remuneration for the recruitment work. Thus, it cannot be concluded that there were two services, recruitment and the supply of health care services, although it is true that the Agencies had to at a one point consistently look for new personnel to meet the needs of their clients and that they probably continue to do so. However, recruitment is a transaction inherent in the operation of any employment agency. Consequently, the money that an Agency receives from the Hôpital constitutes rent for the lease of personnel. It is obvious that, in determining the rent that the Agency will require from its clients, it takes into consideration all its fixed and variable costs, notably the salary of its employees, the price of the equipment necessary for the operation of its business and the fees for the creation of a Web

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[23] Counsel for the Hôpital seems to share this view:
[TRANSLATION]
JUSTICE ARCHAMBAULT: So, you say there was a single supply here. Correct?
MR. NADEAU: Yes.
. . .
MR. NADEAU: Single supply because if you look at the – not the agreements. If you look at the invoices for which the considerations were paid, there is the name of a nurse with the department in which she worked along with the number of hours she worked with her hourly rate. And what was paid for was the nurse's work. Okay.

[p. 294 of the transcript]

site. After deducting all its expenses, the Agency, it is assumed, makes a profit in the operation of its employment agency business.

[75] In conclusion, the conditions of section 6 are not met and consequently it cannot apply here. Since there is no specific provision either, in Schedule V of the Act, involving the lease of nursing personnel by employment agencies, the Court has no other choice but to conclude that said supply does not constitute an exempt supply within the meaning of the Act and, accordingly, the Hôpital is not entitled to a rebate of an unduly paid tax.

[76] This outcome may certainly seem unfortunate for the Hôpital because the salary of its own nurses is not subject to GST when the rent paid to the employment agencies to obtain the services of the Agencies' nurses is, but it is up to the Minister of Finance and Parliament to rectify this situation by amending the Act.

[77] For all these reasons, the Hôpital's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 28th day of October 2015.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 29th day of January 2016
Daniela Guglietta, Translator

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