Docket: 2006-3036(GST)G

BETWEEN:

ROCKPORT DEVELOPMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to December 31, 2003 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3037(GST)G

BETWEEN:

PINE GLEN SUPPLY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to December 31, 2003 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3038(GST)G

BETWEEN:

GOLDSBORO CONTRACTING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to December 31, 2003 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3039(GST)G

BETWEEN:

C M J STORAGE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to March 31, 2004 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3040(GST)G

BETWEEN:

ASA CONSTRUCTION COMPANY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
M R Martin Construction Inc.(2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to March 31, 2004 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3041(GST)G

BETWEEN:

M R MARTIN CONSTRUCTION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to December 31, 2003 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3042(GST)G

BETWEEN:

THE BEND ELECTRIC LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
Asa Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to March 31, 2004 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3043(GST)G

BETWEEN:

CODIAC DRILLING & BORING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G) and
Robinson Construction Company Ltd. (2006-3044(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to March 31, 2004 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Docket: 2006-3044(GST)G

BETWEEN:

ROBINSON CONSTRUCTION COMPANY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Rockport Developments Inc. (2006-3036(GST)G),
Pine Glen Supply Ltd. (2006-3037(GST)G),
Goldsboro Contracting Ltd. (2006-3038(GST)G),
C M J Storage Ltd. (2006-3039(GST)G),
ASA Construction Company Ltd. (2006-3040(GST)G),
M R Martin Construction Inc. (2006-3041(GST)G),
The Bend Electric Ltd. (2006-3042(GST)G) and
Codiac Drilling & Boring Ltd. (2006-3043(GST)G)
on May 12, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	Edward J. McGrath
Counsel for the Respondent:	John Bodurtha

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2001 to December 31, 2003 is allowed in part with partial 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 Edmundston, New Brunswick, this 4th day of May 2009.

« François Angers »

Angers J.

Citation: 2009 TCC 180
Date: 20090504
Dockets: 2006-3036(GST)G, 2006-3037(GST)G,
2006-3038(GST)G, 2006-3039(GST)G,
2006-3040(GST)G, 2006-3041(GST)G,
2006-3042(GST)G, 2006-3043(GST)G,
2006-3044(GST)G

BETWEEN:

ROCKPORT DEVELOPMENTS INC., PINE GLEN SUPPLY LTD.,
GOLDSBORO CONTRACTING LTD., C M J STORAGE LTD.,
ASA CONSTRUCTION COMPANY LTD.,
M R MARTIN CONSTRUCTION INC., THE BEND ELECTRIC LTD.,
CODIAC DRILLING & BORING LTD.,
ROBINSON CONSTRUCTION COMPANY LTD.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] The present appeals concern reassessments of tax under the *Excise Tax Act* (the "*Act*") by the Minister of National Revenue (the "Minister") for taxation periods from January 1, 2001 to either December 31, 2003 or March 31, 2004, as the case may be. Rockport Developments Inc. (Rockport), Pine Glen Supply Ltd. (Pine Glen), Goldsboro Contracting Ltd. (Goldsboro), C M J Storage Ltd. (CMJ), ASA Construction Company Ltd. (ASA), M R Martin Construction Inc. (Martin), The Bend Electric Ltd. (Bend), Codiac Drilling & Boring Ltd. (Codiac) and Robinson Construction Company Ltd. (Robinson), collectively referred to as the appellants are appealing the Minister's decision to assess, and to make adjustments to the reporting and remittance of, Goods and Services Tax (GST) and Harmonized Sales Tax (HST) for the aforementioned periods.

[2] Robinson entered into a contract with MRM Technical Group Inc. (now Exelon), an American firm which had obtained a contract with Enbridge Gas New Brunswick Inc. (Enbridge) for the development of a natural gas distribution system in New Brunswick. Robinson subcontracted some of the work and services to its affiliated companies, namely the other appellants.

[3] Robinson was involved in the provision of construction labour and administrative services; Pine Glen provided non-unionized labourers to Robinson, 031781 NB Ltd., CMJ, Codiac and Exelon; Goldsboro provided construction labour and administrative services; CMJ was involved in the rental of commercial properties; ASA provided pipe fitting and welding services; Martin was involved in drilling for water and sewer lines; Bend provided labour services; and Codiac was involved in drilling for water and sewer lines.

[4] Due to Enbridge's inability to obtain the necessary permits, there were delays of up to four months beyond the required start date, which resulted in a substantial increase in equipment lease and labour costs. As well, late design changes were made by Enbridge, which resulted in extra costs for the various appellants, particularly Robinson.

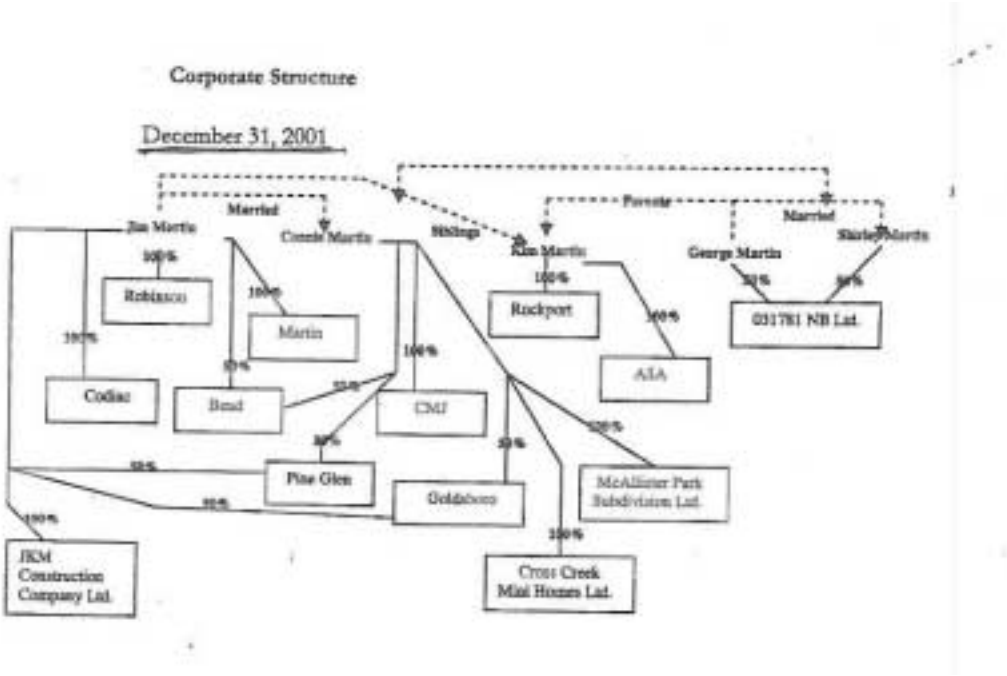
[5] Robinson submitted these extra costs to Exelon, which in turn presented them to Enbridge. Payment of many of these extra costs was refused and, as a result, Robinson filed a statement of claim against Exelon and Enbridge seeking payment. The claim was for 3.25 million dollars plus costs but it was eventually settled for $545,000. As a result, and due, obviously, to the significant reduction in the claim amount, the other appellants, who were subcontractors for Robinson were unable to receive payment for services rendered.

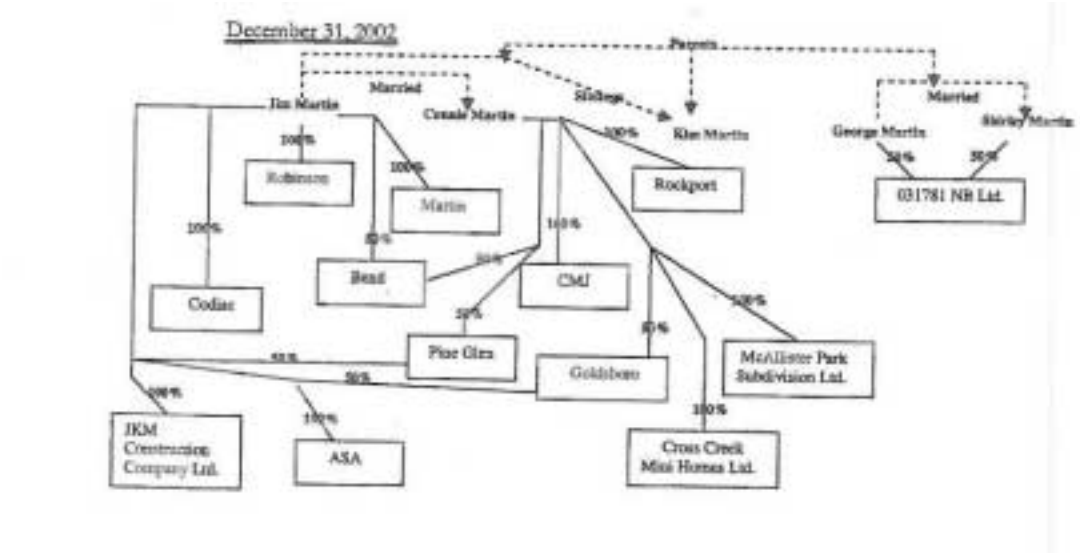
[6] By notices of reassessment and further notices of reassessment, the net tax amount was confirmed but the Minister waived pursuant to subsections 281.1(1) and 281.1(2) of the *Excise Tax Act* (the "*Act*") all penalties and interest in excess of 4% of the tax not properly collected. The following are the assessments under appeal:

Taxation Period	**Net Tax $**	**Interest $**	**Penalty $**	**Total $**
January 1, 2001 to December 31, 2003				
Goldsboro	23,790.21	122.44	1,273.80	25,186.45

Martin	122,816.39	1,737.10	8,043.73	132,597.22
Pine Glen	23,954.62	0.00	1,092.40	25,047.02
Robinson	101,849.11	17,722.18	40,564.43	160,135.72
Rockport	35,413.32	12.00	1,642.49	37,067.31
January 1, 2001 to March 31, 2004				
ASA	36,185.08	209.85	525.94	36,920.87
Bend	60,322.44	213.36	2,380.96	62,916.76
CMJ	39,408.01	(531.52)	1,941.21	40,817.70
Codiac	225,773.15	(649.83)	6,211.06	231,334.38

[7] All appellants were GST registrants who filed returns on a quarterly basis. The corporate structure of the appellants is reproduced below. The relationship between the shareholders is as follows: Jim Martin and Connie Martin are married; Jim is the son of George and Shirley Martin; and Jim and Kim Martin are siblings.





[8] At the beginning of the trial, many of the points in dispute were admitted by the appellants. Following are the issues raised in each appellant's appeal with an indication of what is still being disputed.

ASA

[9] In computing its net tax for the quarterly period ending March 31, 2004, ASA deducted an amount of $14,088.05 representing the HST component of a receivable from Robinson for services rendered to Robinson by ASA, and Robinson claimed input tax credits (ITCs) in the same amount on account of the HST charged by ASA.

[10] The issue is whether ASA was entitled to an adjustment to net tax in relation to a bad debt arising from supplies made to Robinson.

Bend

[11] Bend charged Robinson $60,032 for labour services for each of the periods ending December 31, 2001 and December 31, 2003, and deducted from its net tax the amount of $9,004.87 for each period on account of tax payable on a bad debt. In addition, Bend did not collect HST totalling $36,426.03 with respect to services provided to and received by Robinson, Codiac, 031781 NB Ltd. and Martin. Bend also overcollected HST in the amount of $788.42 and overstated its ITC entitlement by $2,626.81.

[12] The issues are:

a) whether Bend is entitled to a net tax adjustment in relation to a bad debt arising from supplies made to Robinson;
b) whether Bend was required to collect HST on the supply of services to the above-mentioned companies;
c) whether Bend overcollected an amount of HST of $788.42 and whether it overclaimed ITCs in the amount of $2,626.81.

Bend has informed the Court that paragraph c) above is no longer in dispute.

CMJ

[13] CMJ under-reported HST by $12,833.36 with respect to transactions involving Bend, 031781 NB Ltd., Cross Creek Mini Homes Ltd. and Pine Glen and under-reported an additional $76,668.59 in HST that should have been collected. CMJ received commercial rental income but did not collect HST of $691.48 thereon, and failed to claim ITCs in the amount of $54,946.12.

[14] The issues with regard to CMJ are:

a) whether CMJ was required to collect HST in the amount of $12,833.36 as a result of the supply of services to the above-mentioned companies whose shareholders are Jim, George, Connie and Shirley Martin;
b) whether CMJ under-reported additional HST in the amount of $76,668.59;
c) whether CMJ failed to report HST in the amount of $691.48 with respect to commercial rental income ?
d) whether CMJ is entitled to ITCs in excess of the amount allowed by the Minister.

CMJ has informed the Court that paragraphs b), c) and d) above are no longer in dispute.

Codiac

[15] Codiac under-reported HST collectible by amounts of $40,361.09 and $1,444.82. It also, during the period under appeal, understated its ITC entitlement by $74,730.45. Codiac defaulted on lease payments to TD Asset Finance Corp., John Deere and G.E. Capital (the lessors). Demand letters were sent to Codiac for payment of the outstanding amounts, which did not include HST. The appellant paid the amounts to the lessors and claimed ITCs in the amount of $103,344.59, but no such

HST amount had been paid. Finally, Codiac did not report HST in the amount of $471.40 collectible with respect to a taxable benefit relating to an automobile it provided to David Ross, an employee of Codiac.

[16] The issues with regard to Codiac are:

a) whether Codiac underreported HST in the amount of $41,805.91;
b) whether Codiac is entitled to ITCs in excess of the amount allowed by the Minister;
c) whether Codiac is entitled to ITCs in the amount of $103,344.59 with respect to payments made to the lessors;
d) whether Codiac under-reported HST collectible in the amount of $471.40 with respect to the automobile benefit.

Codiac has informed the Court that paragraphs a), c) and d) above are no longer in dispute.

Goldsboro

[17] Goldsboro claimed a bad debt expense of $424.66 involving Robinson and Codiac. It also provided services to 031781 NB Ltd., Codiac and Martin between December 31, 2001 and December 31, 2003. The total taxable amount of those services was $114,661.77, on which $17,199.27 in HST was payable, but none was collected.

[18] In addition, Goldsboro was required to collect an additional HST amount of $5,256.83 and overclaimed ITCs in the amount of $910.

[19] The issues with regard to Goldsboro are:

a) whether Goldsboro is entitled to an adjustment to net tax in relation to a bad debt expense of $426.66 arising from supplies made to Robinson and Codiac;
b) whether Goldsboro was required to collect HST in the amount of $17,199.27 on the supply of services to the Martin Group;
c) whether Goldsboro was required to collect additional HST in the amount of $5,256.83;
d) whether Goldsboro overclaimed additional ITCs in the amount of $910.

Goldsboro has informed the Court that paragraphs c) and d) above are no longer in dispute.

Martin

[20] During the period under appeal, Martin did not collect $102,791.92 in HST with respect to services it provided to various companies. It also failed to collect additional HST of $90,795.82. Martin underclaimed its ITCs by $78,365.68, but ITCs relating to payments made to CitiCapital for leased drilling equipment were overstated by $15,480.54.

[21] The issues in Martin are:

a) whether Martin was required to collect HST in the amount of $102,791.92 with respect to services provided to the Martin Group;
b) whether Martin was required to collect an additional amount of HST of $90,795.82 during the period under appeal;
c) whether Martin was entitled to ITCs in excess of the amount allowed by the Minister.

Martin has informed the Court that paragraphs b) and c) above are no longer in dispute.

Pine Glen

[22] Pine Glen under-reported $23,411.91 in HST in relation to services provided to Robinson, 031781 NB Ltd., CMJ, Martin and Codiac, and overstated ITCs by a total of $541.36 .

[23] The issues in Pine Glen are:

a) whether Pine Glen under-reported HST collectible by the amount of $23,411.91 with respect to transactions involving the Martin Group;
b) whether Pine Glen overstated its ITC entitlement by $541.36.

Pine Glen has informed the Court that paragraph b) above is no longer in dispute.

Robinson

[24] Robinson commenced its lawsuit against Exelon and Enbridge in January 2002. Exelon counterclaimed against Robinson for work not performed by the latter or not provided for in the contract. Exelon, on February 7, 2002, issued a request to Robinson for a refund of $1,431,037.60 ($1,244,380.52 + 15% HST of $186,657.08) with respect to payments made to Robinson by Exelon and not billable to Enbridge. In December 2003, Robinson claimed an ITC of $186,657.08 relating to the request for refund made by Exelon, but did not pay any amount pursuant to that request.

[25] In addition, Robinson deducted for the period ending December 31, 2003, $440,984.14 worth of HST on amounts that were not paid by Exelon. The HST component of bad debts for the period ending December 31, 2003 was $369,897.18 ($440,984.14 – (545,000 x 15/115)), $545,000 being the settlement amount.

[26] Robinson also wrote off as the HST component of a bad debt an amount of $35,958.87 relating to an amount not paid by Codiac and an amount of $2,159.30 relating to an amount not paid by Marco Electric Ltd. (Marco). During the period under appeal, Jim Martin owned 50% of the shares of Marco and the other 50% were owned by a person related to Jim Martin as defined in the *Income Tax Act*.

[27] Robinson also over-reported HST by $679,115.03 and overstated its entitlement to ITCs by $176,163.93. Finally, Robinson did not include in its February 2002 return HST of $554 collectible with respect to a taxable benefit relating to an automobile provided to David Ross, an employee of Robinson.

[28] The issues with regard to Robinson are:

a) whether Robinson is entitled to ITCs in the amount of $186,657.08 relating to a refund request made by Exelon;
b) whether Robinson is entitled to deduct from net tax an amount in excess of the $369,897.18 allowed by the Minister in relation to bad debt;
c) whether Robinson is entitled to deduct from net tax amounts of $35,958.87 and $2,159.30 owed to it by Codiac and Marco respectively;
d) whether Robinson is entitled to claim ITCs in excess of the amount allowed by the Minister with respect to the period under appeal;
e) whether Robinson under-reported HST in the amount of $554 collectible for the period ending February 28, 2002.

Robinson has informed the Court that paragraphs a), d) and e) are no longer in dispute. As for paragraph b), Robinson agrees with the amount of $369,897.18 but argues that the amount is not a bad debt.

[29] Robinson, in its notice of appeal, sought a face-to-face meeting with representatives of Justice Canada to resolve these issues and requested that the interest and penalties be overturned, that a guide be provided for taxpayers to help them understand how penalties are applied, and finally, that there be a global settlement with the Canada Revenue Agency covering all the related companies. The Court has no jurisdiction to grant those kinds of relief.

Rockport

[30] Rockport claimed a deduction from net tax in respect of bad debt expenses in the amount of $2,007.94 involving Robinson and Codiac . In addition, Rockport did not collect HST in the amount of $27,814.81 on services rendered to Codiac, 031781 NB Ltd. and Martin. It also under-reported HST in the amount of $3,281.85 which should have been collected, and overstated its ITCs by $2,310.47.

[31] The issues with regard to Rockport are:

a) whether Rockport is entitled to a net tax adjustment in the amount of $2,007.94 in relation to bad debt expenses arising from the provision of services to Robinson and Codiac;
b) whether Rockport was required to collect HST in the amount of $27,814.81 on the supply of services to the Martin Group;
c) whether Rockport was required to collect additional HST in the amount of $3,281.85;
d) whether Rockport overstated its entitlement to ITCs by $2,310.47.

Rockport has informed the Court that paragraphs c) and d) above are no longer in dispute, thus leaving a) and b).

[32] The construction project was known as the Enbridge/New Brunswick gas distribution project and Exelon was awarded four of the seven contracts the project required in both Moncton and Fredericton. The arrangement Robinson had with Exelon was that the latter was to assist in training and provide the rental of specialized tools and Robinson was hired as a subcontractor to do construction work. Once the training was completed, Exelon was only involved in the paperwork. The services were paid for on a per-unit-of-construction basis pursuant to the

Exelon/Enbridge prime contract. Exelon kept 10% of the payment as compensation for training services and equipment rental and Robinson was paid the remaining 90%. According to James Martin, Robinson was to be paid weekly, as it was not financially capable of covering the costs of such a project, and Exelon was comfortable with that arrangement.

[33] Robinson made progress payment every week and submitted them to Exelon. A representative from Exelon was present on a weekly basis and served as liaison with Enbridge. The project was delayed for lack of proper permits, and Enbridge and Exelon were very demanding. Robinson was expected to begin work on all four contracts or projects at the same time (two in Fredericton and two in Moncton), with the result that there was a lot of standby time.

[34] The project finally got underway in September of 2000 and many people were put to work. Payment certificates were being forwarded but disputes arose regarding some measurements and not all payments were being made. In addition to the 10% kept by Exelon, a further 15% was kept as holdback. By December 2000, Robinson's expenditures were up to two million dollars and it did not have the financial means to cover this amount. Suppliers were not being paid and Robinson was being sued by them. It nevertheless completed the work during the winter and spring of 2001 and began the process of suing Exelon and Enbridge for payment. At that point, Robinson had payment certificates totalling the $3.25 million it eventually sued for.

[35] During construction, Robinson's employees doubled in number, with over 100 skilled workers being employed. The regular bookkeeper had left the year before and was replaced by James Martin's sister. The demands on her were overwhelming and David Ross was hired in December 2000. The situation for the appellants was, in James Martin's own words, "disorganized at best".

[36] David Ross is a chartered accountant. His main responsibilities when hired consisted of collecting major accounts and maintaining good relations with the bank, suppliers and key customers. He quickly became aware of the difficulties Robinson was experiencing with Enbridge, which was refusing to accept certain extra costs. A meeting was held in Fredericton on December 13, 2000 with a representative from each of Enbridge and Exelon to review the major issues such as delays and the extra winter costs caused by the delays in starting work on the project. Enbridge was pushing for the work to proceed quickly and said it would discuss these outstanding issues later.

[37] In order for Robinson to be paid by Exelon, Enbridge had to approve and sign the Daily Progress Report (DPR) that Exelon produced using Robinson's payment claim sheets. Enbridge also requested that Robinson provide invoices so that Enbridge could claim ITCs. The payment claims were reviewed by one Brad Olsen of Exelon and if approved by him they were forwarded to Enbridge.

[38] In January, Exelon began returning claim packages to Robinson insisting on changes or chargebacks that actually came from Enbridge. They were, in fact, reductions in approved quantities. According to Mr. Ross, the amounts charged for the provision of services were those listed on a price agreement sheet and the claims submitted by Kim Martin on behalf of Robinson were made accordingly. Exelon would add its 10% to the pricing and submit the claim to Enbridge. Enbridge replied to Exelon, and Exelon to Robinson. Mr. Ross found that the way in which things were done was rather unique in that Enbridge did not rely on independent professionals such as engineers in reviewing the billings. If Enbridge disagreed with a claim, it would put it aside to be dealt with later. Enbridge, he found, was very difficult to deal with.

[39] The other appellants all became affected financially as a result. Some were operating construction companies, some were satellite manpower companies offering special skills, and others, such as Codiac, were hired as subcontractors for specific purposes such as reducing the risk associated with horizontal directional drilling. All these appellants were billing Robinson for their services as independent entities, and as the project moved along all the appellants encountered serious cash flow problems and had difficulties remitting the tax on those billings. They were able to partially resolve that problem in that one of the appellants would bill Robinson. Robinson would claim the ITC on that billing. The local tax office would call Robinson saying it had a tax refund cheque for Robinson but that there were also taxes payable by one of the other appellants. The local tax office used Robinson's refund cheque to pay the other appellants' tax owing. In other words, Robinson was using its ITCs to pay the other appellants' tax.

[40] In early 2001, Mr. Ross recognized the financial difficulties which the non-payment of HST by the appellants caused with respect to the payment of operating expenses by Robinson and suggested as a solution that Exelon be viewed as the only customer for all the appellants and that Robinson ultimately bill Exelon. The process was changed immediately in that some of the appellants stopped billing Robinson for their work so that the HST did not need to be reported and remitted by them. The assessments against these appellants now reflect the unremitted HST, but the appellants are arguing that the corresponding ITCs should be considered in the

calculation of net tax for assessment purposes. In other words, the question is whether the auditor should have credited input tax credits to these appellants. It is the respondent's position that since none of the appellants charged or paid tax on the supplies made to the recipients, ITCs cannot be credited to the recipients of the supplies in calculating net tax. The respondent also raised the fact that the appellants are not closely related corporations.

[41] The facts and circumstances of these appeals give rise to three main issues, which are as follows:

1. In the appellant Robinson's appeal, there is no dispute that tax is due and owing. The question is: when did the tax become payable? Robinson submits that the invoice was created in 2005 at the time of the settlement. The respondent submits that it was created in 2001. The answer to this question will affect the amount of interest and the penalty that can be assessed against the appellant Robinson.
2. Can Goldsboro, Robinson, Rockport, ASA and Bend be allowed a deduction for bad debt pursuant to section 231 of the *Act*? Should they be considered to be related pursuant to subparagraphs 251(2)(*c*)(ii) and (iii) of the *Income Tax Act* and as such to be dealing with each other at arm's length?
3. Are the appellants Goldsboro, Martin, Pine Glen, Rockport, Bend and Codiac closely related and should the auditor have allowed them ITCs?

[42] Issue number one has to do with the unpaid extra charges and other charges based on the daily progress reports that Enbridge had put aside to be dealt with later. Invoices for these items were actually prepared when it became necessary for Robinson to crystallize its claim against Enbridge and Exelon so that a notice of lien could be filed. Robinson had filed a mechanic's lien to collect what it was owed, but had to abandon that avenue since a lien could not be had on public property. The procedure was then reduced to a regular action for non-payment. A list of the outstanding invoices is found in Exhibit A-3.

[43] According to Robinson's general ledger entries for December 31, 2003, the debt had not been written off as of that date and was still on the books as accrued settlement receivables because Robinson felt that some of this money was recoverable. Entries were made by Mr. Ross to indicate the debt had been written off, but as an effort to recover was ongoing, the amounts owed were also termed receivables for the purposes of the claim of lien. The auditor concluded that the

amounts were not written off since they still appeared in the books as receivables and therefore are not considered a bad debt.

[44] The ITC in respect of the settlement amount receivable was eventually allowed by Appeals, but at the time of the audit the claim was still before the courts. The issue is therefore not the amount of the ITC but the interest and penalty amounts that accrued on the ITC, and they depend on when the actual value of the bad debt can be ascertained or, put differently, on whether the consideration for the taxable supply was due at the time of the settlement or at the time the daily progress reports and so-called invoices were made.

[45] The respondent's position is that the invoices are all listed in Exhibit A-3 and identified as being outstanding invoices as of September 28, 2001. In addition, they were listed in Robinson's books and records and, accordingly, the tax was due and payable on the day these invoices were issued.

[46] The appellants' position is that a request or application for payment is not an invoice as contemplated in subsection 152(1) of the *Act*, for that request must first be approved by the recipient for an invoice to be created. The appellants therefore argue that the invoice for the services and materials provided to both Enbridge and Exelon was only created in 2005 when the settlement was reached. That is the moment in time that there was actual approval. They further submit that the mere creation of a document to quantify one's claim of lien does not constitute an invoice as contemplated in subsection 152(1).

[47] The date of the invoice determines tax liability. In that regard, sections 152 and 168 of the *Act* are of assistance. Section 182 may also be of assistance in this fact situation because the court settlement establishes the value of the consideration and the date on which it was determined.

[48] Subsections 152(1) and 168(1) read as follows

> **152.(1) When consideration due** – For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the earliest of
>
> (*a*) the earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice,
>
> (*b*) the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part, and

> (*c*) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.
>
> . . .
>
> [Emphasis added.]

> **168.(1) General rule** – Tax under this Division in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.

[49] Subsection 123(1) of the *Act* defines an invoice as follows:

> **"invoice"** includes a statement of account, a bill and any other similar record, regardless of its form or characteristics, and a cash register slip or receipt.

[50] Tax liability is determined by the date on which the consideration is due. Subsection 152(1) establishes when the consideration is due. It should therefore follow that subsection 152(1) assumes that a valid and an agreed upon consideration exists such that, if the value of the consideration is contested or disputed, the consideration cannot be said to be valid and agreed upon. In the present fact situation, the so-called invoices all represent extra charges and other charges based on the daily progress reports that Enbridge and Exelon refused to recognize and accept for all kinds of, reasons including their not having been approved by Enbridge. All these requests for payment were specifically set aside by Enbridge to be dealt with at a later date. The refusal of Enbridge and Exelon to pay these extra charges and other expenses forced Robinson to file a claim for lien under the New Brunswick *Mechanics' Lien Act*, and invoices were prepared in order for Robinson to meet the requirements of that Act and be able to quantify its claim. Only those contested amounts were not paid by Enbridge and Exelon, and this was on a contract whose value was almost 12 million dollars.

[51] In the settlement agreement dated April 29, 2005, the appellants, Exelon and Enbridge agreed that Exelon would pay Robinson the sum of $545,000 "in full settlement" of all amounts allegedly owing to Robinson by Exelon. The parties agreed that the work had been completed and the only remaining issue was putting a pecuniary value on that supply. The preamble to that 2005 agreement states that the work under the contracts has been completed and that a dispute has arisen between Robinson and Exelon as to the amounts owed to Robinson for work performed under the contracts. It therefore follows, in my opinion, that although invoices may have been tendered to Exelon, the exact value of the consideration had not been determined prior to this second agreement. The value of the consideration was in

dispute from the time the requests for payment were made and the invoices were issued. It was therefore impossible to establish the tax owing until the exact amount of the consideration was ascertained, which is what the settlement agreement did.

[52] In *Douglas (K.S.) v. Canada*, [1996] G.S.T.C. 39, Judge Hamlyn's view on the effect of subsection 168(1) and subsection 168(6) is that until the final amount is ascertained and as long as contractual disputes remain unresolved, ITCs cannot be claimed. Paragraph 168(6)(*b*) reiterates that the tax becomes payable on the day the consideration becomes ascertainable. As long as there is any uncertainty by reason of a contractual dispute, tax cannot be payable because the amount owing under the contract has not been determined. Section 168(6) reads as follows:

> **Value not ascertainable —** Where under subsection (3) or (5) tax is payable on a day and the value of the consideration, or any part thereof, for the taxable supply is not ascertainable on that day,
>
> (*a*) tax calculated on the value of the consideration or part, as the case may be, that is ascertainable on that day is payable on that day; and
>
> (*b*) tax calculated on the value of the consideration or part, as the case may be, that is not ascertainable on that day is payable on the day the value becomes ascertainable.

[53] It is fair to say that it is not the legislator's intention to collect tax under the *Act* on an amount of consideration which has been subsequently reduced. Paragraph 232(2) of the *Act* appears to address this issue.

> **Adjustment [reduction of consideration] —** Where a particular person has charged to, or collected from, another person tax under Division II calculated on the consideration or a part thereof for a supply and, for any reason, the consideration or part is subsequently reduced, the particular person may, in or within four years after the end of the reporting period of the particular person in which the consideration was so reduced,
>
> (*a*) where tax calculated on the consideration or part was charged but not collected, adjust the amount of tax charged by subtracting the portion of the tax that was calculated on the amount by which the consideration or part was so reduced; and
>
> (*b*) where the tax calculated on the consideration or part was collected, refund or credit to that other person the portion of the tax that was calculated on the amount by which the consideration or part was so reduced.

[54] The agreement of April 2005 makes it clear that the value of the consideration had not been agreed upon prior to that time. It is clear from the evidence that the amount of the consideration was disputed by the parties from the moment work began and the alleged invoices were issued. The value of the consideration on which tax was collectible under the contract between Robinson and Exelon was ascertained on April 29, 2005 by an agreement in writing as contemplated in paragraph 152(1)(*c*) of the *Act*, and was therefore due and payable on that day.

Bad Debts

As we know from the evidence, Robinson subcontracted work under its contract with Exelon to other companies of the Martin Group, and sometimes companies within the Martin Group provided services to other companies within the Group. It has also been established and admitted by the parties that the appellants are in fact related, as shown by the share ownership and structure described at paragraph 7 of these reasons. Once it is established that the appellants are related, subsection 126(1) of the *Act*, which states that related persons shall be deemed not to deal with each other at arm's length, comes into play.

[55] The appellants Robinson, Bend, Rockport, Goldsboro and ASA sought to deduct from their net tax the HST component of the bad debts owed them by other members of the related group. The respondent's position — and I believe it to be right — is that the deduction is not available to these appellants because a deduction for bad debt is only available in the case of a supplier and a recipient who deal with each other at arm's length. Subsection 231(1) of the Act reads as follows:

> **Bad debt — deduction from net tax** — If a supplier has made a taxable supply (other than a zero-rated supply) for consideration to a recipient with whom the supplier was dealing at arm's length, it is established that all or a part of the total of the consideration and tax payable in respect of the supply has become a bad debt and the supplier at any time writes off the bad debt in the supplier's books of account, the reporting entity for the supply may, in determining the reporting entity's net tax for the reporting period that includes that time or for a subsequent reporting period, deduct the amount determined by the formula
>
> A x B/C
>
> where
>
> A is the tax in respect of the supply;

> B is the total of the consideration, tax and applicable provincial tax remaining unpaid in respect of the supply that was written off at that time as a bad debt; and
>
> C is the total of the consideration, tax and applicable provincial tax in respect of the supply.

[56] By reason of the application of these legislative provisions, the appellants Robinson, Bend, Rockport, Goldsboro and ASA are unable to deduct the tax portion of the bad debt in the calculation of their net tax for the reporting period under appeal.

Closely-related Corporations

[57] The appellants were assessed on the general basis found in paragraph 168(1)(*c*) of the *Act*. Subsections 168(2) and (3) provide exceptions to this general rule. Subsection 168(2) provides for the payment of tax where there is partial consideration. In such a case, tax is due on the part of the consideration paid or becoming due on a particular day, and the amount of taxes determined by reference to the value of the partial consideration. Subsection 168(3) requires that in certain situations the full amount of tax owing be remitted when the supply has been substantially completed.

[58] Another exception with regard to the remittance of tax is found in section 156 of the *Act*, which provides for an election by any pair of closely-related corporations (and certain partnerships) to have certain transactions take place without GST. The purpose is to provide the kind of relief that the appellants were after when they began having cash flow problems shortly after the work on the project began and they were providing services to one another. Subsection 156(2) provides for zero-rating of certain transactions conducted within a group. This zero-rating is achieved by deeming the taxable supply to have been made for no consideration. The election is limited to "specified members" of a "qualifying group". Subsection 156(1) of the *Act* defines a "qualifying group" as consisting of corporations that are closely related as defined in subsection 128(1) of the *Act*, 90% ownership within the same corporate group being generally required.

[59] The corporate structure of the appellants herein does not meet the definition of closely-related corporations and therefore the election in section 156 of the *Act* was not available to the appellants. Neither Goldsboro, nor Martin, nor Pine Glen, nor Rockport, nor Bend, nor CMJ, nor Codiac could rely on section 156 of the *Act*, which would have allowed their transactions to take place without the HST being levied. I

cannot leave this issue without commenting on the fact that the respondent has considered the transactions between the appellants as wash transactions in order to reduce the interest and penalty amounts assessed under section 280 of the *Act*. Wash transactions occur notably between closely-related groups or associated persons. According to memorandum 16-3-1 in the GST/HST Memoranda Series, the following conditions have to be met:

> **Conditions to be met**
>
> 11. The CCRA will consider waiving or cancelling the portion of the penalty and interest that is in excess of 4% of the tax not collected in a wash transaction where the following conditions are satisfied:
>
> (a) it must be demonstrated that the taxable supply in question was made to a registrant who would have been entitled to a full ITC if the tax had been correctly applied, or to a federal department, or to a participating provincial government entity;
>
> (b) the supplier must not have been previously assessed for the same mistake and must have a satisfactory history of voluntary compliance;
>
> (c) the supplier must have remedied the situation to ensure that tax is collected on future supplies of a similar nature; and
>
> (d) the supplier must not have been negligent or careless in the conduct of its affairs to ensure that tax is collected on all taxable supplies.
>
> [Emphasis added.]

[60] The Minister was satisfied that these conditions were met. The appellants exercised due diligence in all of the circumstances of these appeals. It is to be noted as well that none of the appellants ever defaulted in their HST reporting, and had it not been for the transactions between them in relation to the Enbridge project and had it not been for the corporate structure existing at the time, the audit would have given different results.

Input Tax Credits

[61] The evidence has established clearly that the auditor did not allow a corresponding ITC for the other appellants against whom tax was assessed because the purpose of the audit was to calculate the net tax of the particular appellant being audited and not the net tax of the related appellants as a group. In other words, the auditor, in assessing unreported net tax of one appellant, did not give any

consideration to the corresponding ITC in assessing the appellant that was the recipient of the supply. This situation was created either because some of the invoices issued by one appellant to another did not account for HST or because no invoices were actually prepared by one appellant (supplier) and then sent by that appellant to another appellant. Things were done this way in order to reduce cash withdrawals and maintain cash flow at a respectable level. These circumstances could have been avoided had the appellants been a closely-related group having duly made an election under section 156 of the *Act*. Since such is not the case and since some of the invoices did not account for HST, Robinson did not have the proper documentation for claiming an ITC with respect to those invoices and, in particular with respect to its dealings with Bend. The respondent agrees, though, that upon reassessment, a registrant could submit a claim for ITCs, as long as the HST has been reported and paid by the claimant. The auditor acknowledged that he did not inform the newly assessed companies that some of them could now claim ITCs. That information could have reduced the amount owed by Robinson substantially, had the appellants acted on it.

[62] That being said, subsection 296(2) of the *Act* also imposes on the Minister an obligation to take into consideration the allowable tax credits in assessing the net tax of a person for a particular reporting period, provided the following condition is met, namely: that there is sufficient information to allow the ITC.

[63] In 1997, subsection 296(2) was amended to read that the Minister shall (instead of may) take into account an ITC in assessing the net tax for a reporting period, as if the person assessed had claimed the allowable credit in a return filed for the period. The Technical Notes (July 1997) dealing with this amendment state that this requirement persists "even if the limitation period for claiming the credit has expired".

[64] Subsection 169(5) of the *Act* allows the Minister some discretion in waiving the documentary requirements of subsection 169(4). The books and records of each appellant provided more than sufficient evidence to permit the auditor to assess each appellant with regard to HST owing. It seems completely appropriate in these circumstances that this same evidence should be sufficient to place all the appellants within subsection 169(5), which reads as follows:

> **Exemption [from documentation requirement] —** Where the Minister is satisfied that there are or will be sufficient records available to establish the particulars of any supply or importation or of any supply or importation of a specified class and the tax

> in respect of the supply or importation paid or payable under this Part, the Minister may
>
> (*a*) exempt a specified registrant, a specified class of registrants or registrants generally from any of the requirements of subsection (4) in respect of that supply or importation or a supply or importation of that class; and
>
> (*b*) specify terms and conditions of the exemption.

[65] In addition, GST Memorandum 400-1-2 (Input Tax Credits series) on Documentary Requirements states the following regarding a registrant's inability to satisfy the documentary requirements and the consequences thereof:

> **Exemptions**
>
> **Inability to Meet Subsection 169(4) Requirements**
>
> 32. If registrants are unable to fulfil the documentary and information requirements pursuant to subsection 169(4), or they are unable to obtain the information required prior to filing a return in the period in which the ITC is claimed, registrants will be required to determine whether these taxable supplies fall under the ministerial discretionary exemptions established pursuant to subsection 169(5).
>
> 33. Pursuant to subsection 169(5), the Minister is given discretionary power in certain circumstances to exempt a specified registrant, a specified class of registrants or registrants in general from the statutory and regulatory documentary and information requirements of subsection 169(4), or any provision thereof, in respect of a taxable supply or a class of taxable supplies.
>
> 34. This provision also permits the Minister to specify the terms and conditions of the exemption.
>
> 35. At this time, ministerial discretionary exemptions for all registrants, generally, from the application of paragraph 169(4)(a), ITC documentary and information requirements, include:
>
> (a) unvouchered cash payments made to coin- and/or dollar- bill-operated machines;
> (b) computerized records;
> (c) contractual agreements;
>
> [Emphasis added.]

[66] Given that the respondent made a number of assumptions in reassessing the appellants for tax owing, and assumed in particular that the appellants were related

and that they were associated persons under the wash provision, and given that, for all intents and purposes, they were all assessed as a group and treated as such for collection purposes in the early days of the project, I find that the circumstances are such as to warrant the Minister's being obliged to calculate the net tax of each appellant by taking into consideration the ITCs of the other appellants. If the information obtained was sufficient for the auditor to assess the appellants' taxes, that same information has to be sufficient to establish ITCs for those same appellants. That, I believe, was Parliament's intent in enacting subsection 296(2). The Memorandum (fairness) and subsection 169(5) provide for an exemption from the documentation requirement.

[67] Contractual agreements were the foundation of the services provided between the various appellants in the construction businesses they were in, and regard must be had in particular to the fact that all these agreements that gave rise to the assessments were in relation to Robinson's contract with Exelon and Enbridge. The Memorandum specifically recognizes that:

> **Contractual Agreements**
>
> 45. Given the extensive use of contractual agreements covering supplies of goods and/or services over a fixed period of time between registrants, the particulars of these taxable supplies and the tax paid or payable on them may not necessarily be available in such a manner as to permit registrants to comply with the ITC documentary and information requirements established pursuant to paragraph 169(4)(a).
>
> 46. In cases where the contractual agreement by itself, or combined with related supporting documentation issued pursuant to the governing contract, can and does meet the statutory and regulatory requirements under paragraph 169(4)(a), such supporting documentation must be obtained by the registrant prior to the filing of a return.
>
> 47. However, <u>if the registrant is unable to meet these requirements prior to the filing of a return in which such an ITC is claimed, or if the said documentation fails to satisfy the requirements under subsection 169(4), the Minister will exempt registrants, generally, from the requirements of subsection 169(4)</u>.
>
> 48. This exemption will apply when a registrant maintains proper books and records, including the contractual agreement and all related documentation issued pursuant to the governing contract, and these books and records capture the following:
>
> (a) sufficient information to identify the supplier's name or trading name;
> (b) the supplier's registration number;

> (c) sufficient information to identify the reporting period when the GST in respect of the supply was paid or became payable and the amount of GST paid or payable;
> (d) sufficient information to identify the name or trading name of the recipient of the supply (or that of the recipient's duly authorized agent or representative); and
> (e) sufficient information to identify the nature of the supply.
>
> [Emphasis added.]

[68] The intent is clearly and explicitly to afford ITCs to registrants who are unable to meet the documentary requirements of subsection 169(4). That subsection read together with the imperative wording of subsection 296(2), it makes it difficult to ignore the fact that the ITC entitlement had to be taken into account during the net tax audit conducted with respect to all of the appellants. I reiterate the fact that if there was sufficient information in the books and records to allow the Minister to assess, then there is enough to determine and allow the ITCs.

[69] I do recognize the fact that this Court has no jurisdiction with regard to the exercise of the Minister's discretion, but I cannot disregard subsection 296(2), in which the legislator has chosen to impose an obligation to take into consideration eligible ITCs. In addition, GST/HST News No. 52 expressly addresses the element of fairness now expected in net tax audits, specifically with regard to consideration of possible ITCs. The relevant passages read as follows:

> Auditing for GST net tax – It's a matter of fairness
>
> The “audit to net tax” principle ensures that the entitlements and obligations of a GST/HST registrant under audit are given proper consideration. After all, it’s a matter of fairness.
>
> Generally, a registrant has a four-year time limit (two years in the case of a specified person) in which to claim an input tax credit (ITC). In reporting the net tax for a reporting period, the registrant may include the ITCs that became available in that period and any unclaimed ITCs from the previous four years (or in the case of a specified person, two years).
>
> . . .
>
> In assessing a registrant’s net tax for a reporting period under audit, the CRA is required to take into account any ITCs that the registrant did not claim for that reporting period even if the normal time limit for claiming these ITCs has expired. These unclaimed ITCs must be for tax that became payable during the particular reporting period under audit.

[Emphasis added.]

[70] There is no doubt that until the change in the wording of subsection 296(2) became law, the Minister had full discretion with regard to whether or not ITCs would be considered in a net tax audit. Subsection 169(5) of the *Act*, the aforementioned Memorandum concerning documentary requirements and fairness, subsection 296(2) of the *Act*, and the fact that the information available was sufficient to conduct a full audit of the group of related appellants and to assess the HST they owed, lead me to the conclusion that ITCs should have been considered in making the HST assessments for all the appellants notwithstanding the strict requirements of subsection 169(4) of the *Act*.

[71] The respondent argued that to be expected to consider ITCs for all the appellants in this case would mean that, in other net tax audits, the Minister, in order to determine eligible ITCs for one registrant, would need to determine the net tax of all the parties with whom the registrants concerned had had dealings. I agree with the respondent on that point, but the facts of this case offer a clearly different perspective in that the appellants are related and are an associated group. They were audited simultaneously so that the Minister was in possession of all the information necessary to take into account the ITCS. That fact was confirmed by Mr. Leblanc's testimony. He chose not to consider the ITCs, but subsection 296(2) says he should have done otherwise.

[72] The appeals are allowed in part and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons. The appellants are entitled to 60% of their costs on one set of costs.

Signed at Edmundston, New Brunswick, this 4th day of May 2009.

"François Angers"

Angers J.

CITATION:	2009 TCC 180
COURT FILE NOS.:	2006-3036 (GST)G, 2006-3037 (GST)G, 2006-3038 (GST)G, 2006-3039 (GST)G, 2006-3040 (GST)G, 2006-3041 (GST)G, 2006-3042 (GST)G, 2006-3043 (GST)G, 2006-3044 (GST)G
STYLES OF CAUSE:	Rockport Development Inc. v. HMQ Pine Glen Supply Ltd. v. HMQ Goldsboro Contracting Ltd. v. HMQ C M J Storage Ltd. v. HMQ ASA Construction Company Ltd v. HMQ M R Martin Construction Inc. v. HMQ The Bend Electric Ltd. v. HMQ Codiac Drilling & Boring Ltd. v. HMQ Robinson Construction Company Ltd. v. HMQ
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APPEARANCES:

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