

Citation: 2010 TCC 322  
Date: 20100622  
Docket: 2007-537(GST)G

BETWEEN:

COMPASS GROUP CANADA (BEAVER) LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

**Jorré J.**

#### **Introduction**

[1] “Berwick on the Lake” describes itself as a premier retirement residence. It is located on a lakefront setting in Nanaimo, British Columbia.<sup>1</sup>

[2] Berwick offers both independent living and licensed care suites.<sup>2</sup>

[3] Compass is a food service company that was contracted to cater all the meals, beverages and snacks at Berwick.

[4] Compass says that the supply of these food services to Berwick is an exempt supply for the purposes of the Goods and Services Tax because Berwick is a “health care facility”. On the other hand, the Minister of National Revenue takes the position that the *independent living units* are not part of a “health care facility” and that, accordingly, it properly reassessed Compass on the basis that the supply of the food services to Berwick in respect of the residents of the independent living units is a taxable supply.<sup>3,4</sup>

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<sup>1</sup> Joint book of documents, Tab 1, page 2.

<sup>2</sup> *Ibid.*, Tab 1, pages 8 and 11.

<sup>3</sup> In the Partial Statement of Agreed Facts and Definition of Issue, the parties state the issue as follows:

The sole issue in this appeal is whether the Appellant’s provision of food services to 124 beds of the 160 total beds operated by Berwick on the Lake (“Berwick”) is exempt from the collection of Goods and Services Tax (“GST”) because those units are part of a “health care facility” as defined in the *Excise Tax Act*.

(The evidence was quite clear that independent living residents were served meals in the dining room.)

[5] The Minister accepts that the licensed care units are part of a “health care facility” and reassessed on the basis that the food services provided to Berwick in relation to the residents of the care units were exempt supplies.<sup>5</sup>

### Legislation

[6] In the Goods and Services Tax:

“health care facility” means

(a) a facility, or a part thereof, operated for the purpose of providing medical or hospital care, including acute, rehabilitative or chronic care,

(b) a hospital or institution primarily for individuals with a mental health disability, or

(c) a facility, or a part thereof, operated for the purpose of providing residents of the facility who have limited physical or mental capacity for self-supervision and self-care with

(i) nursing and personal care under the direction or supervision of qualified medical and nursing care staff or other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents,

(ii) assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents, and

(iii) meals and accommodation;<sup>6</sup>

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If Berwick is a “health care facility” the parties agree that the supply is an exempt supply falling within section 11 of Schedule V, Part II, of the Goods and Services Tax (*Excise Tax Act*, Part IX). Section 11 reads:

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.

<sup>4</sup> The period in issue is from 28 January 2001 to 30 August 2002. Compass was assessed on 1 June 2005 for the period in question with respect to Berwick and other residences. Compass objected and after review the Minister issued a notice of decision and a notice of reassessment dated 30 November 2006. It is from this last reassessment that Compass appeals. Apparently the issues with respect to residences other than Berwick were resolved to everyone’s satisfaction.

<sup>5</sup> There are a total of 160 suites at Berwick of which 124 were independent living and 36 were licensed residential care. The Minister reassessed on the basis that 36/160 (22.5%) of the supplies were exempt supplies.

<sup>6</sup> Schedule V, Part II, section 1, definition of “health care facility”, Goods and Services Tax (*Excise Tax Act*, Part IX).

The French text reads:

« établissement de santé »

a) Tout ou partie d'un établissement où sont donnés des soins hospitaliers, notamment aux personnes souffrant de maladie aiguë ou chronique, ainsi qu'en matière de réadaptation;

b) hôpital ou établissement pour personnes ayant des problèmes de santé mentale;

c) tout ou partie d'un établissement où sont dispensés aux résidents dont l'aptitude physique ou mentale sur le plan de l'autonomie ou de l'autocontrôle est limitée :

(i) des soins infirmiers et personnels sous la direction ou la surveillance d'un personnel de soins infirmiers et médicaux compétent ou d'autres soins personnels et de surveillance (sauf les services ménagers propres à la tenue de l'intérieur domestique) selon les besoins des résidents,

(ii) de l'aide pour permettre aux résidents d'accomplir des activités courantes et des activités récréatives et sociales, et d'autres services connexes pour satisfaire à leurs besoins psycho-sociaux,

(iii) les repas et le logement.

In this case the Appellant argues that Berwick falls within alternative (c) of the definition. There is no suggestion that (a) or (b) applies.

[7] Thus, to succeed the Appellant must demonstrate that the following four conditions are met:

The independent living suite part of Berwick is operated to provide

1. residents who have limited capacity for self-supervision and self-care with:
2. nursing and personal care under the direction of qualified medical and nursing staff *or* other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents,
3. assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents, and
4. meals and accommodation.

There is no dispute that meals and accommodation are provided, the fourth condition.

### Facts

[8] The parties tendered a joint book of documents and the transcript of the examination for discovery of Patricia Towne.<sup>7</sup> They also reached an agreement on the following facts:<sup>8</sup>

1. The period in issue is from January 28, 2001 to August 30, 2002 (the “Period”).
2. The Appellant is a corporation that provided food management services and meals under a catering contract to Berwick during the Period.
3. Berwick is located on Long Lake, in Nanaimo, British Columbia.
4. The Appellant is a GST registrant . . . .
5. The Appellant did not collect GST in respect to the services it provided to Berwick during the Period.
6. By Notice dated June 1, 2005 the Minister of National Revenue (the “Minister”) assessed the Appellant for GST, inter alia, in respect of the Appellant’s failure to collect and remit GST on the services the Appellant provided to Berwick. The Berwick amounts were \$32,880 for the period ending August 24, 2001 and \$47,516 for the period ending August 30, 2002.

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<sup>7</sup> Transcript of 18 February 2009, page 5, lines 16-23.

<sup>8</sup> From the Partial Statement of Agreed Facts and Definition of Issue.

7. The Appellant objected . . . .
8. . . . [and] the Minister confirmed the assessment in respect of the services provided to Berwick.
9. The Appellant's head office is in London, Ontario. The Minister's review of this file was conducted out of the Canada Revenue Agency (CRA) London Tax Services Office in Ontario. No auditor visited Berwick. The Minister assessed the Appellant in part on the basis of telephone interviews and correspondence with Berwick officials and through telephone interviews with the British Columbia Ministry of Healthy Living and Sport Community Care Branch regarding the licensing requirements of adult residential care facilities.
10. Berwick has a total of 160 suites (the "160 Suites").
11. During the Period, 36 of the 160 Suites were licensed by the Vancouver Island Health Authority pursuant to the *Community Care Facility Act* (the "CCFA")<sup>1</sup> as an adult residential facility – private/non-funded (the "Care Unit").
12. During the Period, the remaining 124 suites (the "Residential Units") of the 160 Suites were not licensed under the CCFA or any licence other than a business licence.
13. Berwick applied for, and was granted, a business licence from the City of Nanaimo describing its business premises as having 55 parking spaces, 140,000 square feet of total floor area and 160 rental units.
14. In addition to the 36 Care Units there is a 37<sup>th</sup> room located in the same area as the Care Units. That room is intended for temporary use by tenants of the Residential Units ("Residential Tenants").
15. The Minister assessed the Appellant for additional GST on the basis that 77.5% (a percentage corresponding to the 124 Residential Units out of the 160 total number of units operated by Berwick) of Berwick's operations did not provide its tenants with the level of medical care required to meet the definition of "health care facility" as defined by the *Act* and therefore 77.5% of the Appellant's total contract services to Berwick were taxable at the rate of 7%.
16. The Minister accepted that the Care Units qualified as a health care facility and consequently allowed that 22.5% (a percentage corresponding to the 36 Care Units out of the 160 total number of units operated by Berwick) of the food services provided by the Appellant to Berwick were exempt.
17. During the Period, the Appellant supplied three meals a day plus snacks to all tenants of Berwick.

<sup>1</sup> The CCFA was repealed and replaced on May 14, 2004 by the *Community Care and Assisted Living Act*.

[References omitted.]

[9] There were five witnesses: Irene Pelter, a resident of Berwick, Diane Burt (Ms. Pelter's daughter), Gerald Gould, another resident of Berwick, and Patricia Towne, the vice-president of administration of Berwick Retirement Communities.

[10] I accept the evidence of the witnesses. There is no real dispute as to the facts. The debate is one of the proper characterization of the facts in relation to the definition of a health care facility.

[11] Independent living units are furnished and decorated by the residents and there are four kinds available: studios, one bedroom, one bedroom with den and two bedrooms. The units have either balconies or, on the ground floor, patios. The units have a kitchenette with a small fridge but no stove. Residents are free to put in a microwave.

[12] Independent living residents choose their unit and rent that specific unit. Berwick cannot decide unilaterally to move them to a different unit.

[13] Monthly rental includes all meals and snacks,<sup>9</sup> utilities and cable except telephone charges, weekly cleaning of the unit and weekly washing of towels and linens. It does not include washing of clothes; several laundry rooms are available for the use of residents.

[14] Meals are served in the dining room and residents always have a choice of the main course.

[15] Residents who drive and own a car also receive a parking space.<sup>10</sup> Many residents at Berwick have cars.<sup>11</sup>

[16] There is also a program of optional activities and excursions available to the residents. Among other facilities there is a hobby kitchen, an exercise room with fitness equipment, a billiards room and a bar with a happy hour on Friday afternoons.<sup>12</sup>

[17] It is clear that when Berwick was being conceived, well qualified persons were retained to plan the building and considerable thought went into the design of the building in order to facilitate life for seniors. For example, electrical outlets were installed higher than is normal in order to make it easier to reach them, reinforcement was built into the walls for towel bars so that they can also be used for support, hallways have extra lighting and handrails and the layout was designed to accommodate walkers passing.

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<sup>9</sup> Compass will not rent a unit on other terms. Thus it is not possible to rent a unit without the inclusion of meals.

<sup>10</sup> Joint book of documents, Tab 3, second page, clause 14.

<sup>11</sup> Transcript of 18 February 2009, pages 24 and 25.

<sup>12</sup> *Ibid.*, page 73, lines 6-12. There is an extra charge for alcoholic beverages whether in the bar or in the dining room.

[18] Each unit has a special phone system and pendant that allows residents to call for assistance in an emergency. If a resident hits the button on the pendant the phone system automatically calls a staff member who can speak to the resident; the system automatically shows the staff member which unit the call is from.

[19] The phone system is also used to monitor residents. It has an away button which residents are supposed to push when they leave Berwick. In addition, residents are supposed to pick up the phone at night when they go to bed and in the morning when they get up. This allows Berwick staff to monitor the residents' presence.

[20] Staff is trained to report residents missing meals or activities, falls and other incidents.<sup>13</sup> Cleaning staff is trained to report signs of possible problems such as incontinence. In some cases an incident form will be filled out.

[21] Berwick also has policies and procedures for such things as safety, infection control and flu outbreaks.

[22] Berwick provides emergency response to residents of the independent living units and determines what steps should be taken, such as, depending on the circumstances, sending the individual to the hospital or temporarily transferring them to a care unit.

[23] From time to time, physiotherapists, occupational therapists, podiatrists, massage therapists and persons taking samples for blood tests come to Berwick and are available to residents. These services are not provided by Berwick and are paid for by the resident to the particular service provider.

[24] The average age of residents is 84 plus and at any given time there are probably two residents in wheelchairs, half the residents using walkers and others using canes. A majority of the residents have health issues which may not be acute but may flare up at any time. Some residents are depressed and some have early stage dementia. It was not clear to what extent this evidence referred to all Berwick residents or just those in independent living units.<sup>14</sup>

[25] Berwick does not accept persons with severe dementia in either independent living or care units.

[26] With respect to the independent living unit residents:

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<sup>13</sup> Food service personnel, including the staff serving the meals, are employees of Compass and not Berwick.

<sup>14</sup> Transcript of 18 February 2009, page 91, lines 1-20. At page 93, there is a reference to the fact that a person with a degree of dementia may initially function in an independent living unit but later may need to move to a care unit.

- (a) Berwick does not provide assistance with eating, dressing, grooming, bathing and performing personal hygiene. It does not store, administer or monitor the taking of medication nor does it manage the cash or property of residents.
- (b) Berwick does not monitor food intake or adherence to therapeutic diets, provide structured behaviour management and intervention or provide psycho-social rehabilitative therapy or intensive physical therapy as described in the definition of “prescribed services” within the meaning of section 2 of the *Community Care and Assisted Living Regulation*<sup>15</sup> of British Columbia.
- (c) Berwick does not keep medical charts nor does it prepare individualized nursing or care plans.

[27] Potential residents are assessed in a very general way to determine whether an independent living unit or a care unit would be appropriate for them.<sup>16</sup> Berwick does not require a referral from a doctor or any medical test in assessing a potential resident nor does Berwick examine medical records; Berwick may talk to a potential resident’s doctor, but only in specific cases.

[28] There are no personalized care or nursing plans for independent living residents.

[29] The business licence application to the City of Nanaimo describes the business as “Independent Seniors Rental Complex” on one line and as “Intermediate Care Facility” on the following line. The first line reflects the independent living units while the second refers to the care units.

[30] The promotional literature in evidence would not lead anyone to think that that a person living in an independent living unit was living in what might be commonly thought of as a health care facility.<sup>17</sup>

[31] The licensed care units at Berwick were licensed as a community care facility pursuant to the *Community Care Facility Act*<sup>18</sup> of British Columbia.

[32] The licensed care units are grouped together in one part of Berwick.

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<sup>15</sup> B.C. Reg. 217/2004, deposited May 14, 2004 – made pursuant to the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75.

<sup>16</sup> Of course, there are no doubt a few cases where it is concluded that Berwick is not appropriate at all.

<sup>17</sup> This is apparent on the face of the documents at Tabs 1 and 2 of the joint book of documents.

<sup>18</sup> Subsequently replaced by the *Community Care and Assisted Living Act* of British Columbia (see note 15).

[33] Licensed care residents sign a different tenancy agreement from the one signed by independent living residents.<sup>19</sup> The cost is also different to reflect the care received in the licensed units.

[34] There are three levels of care available in the care units. It is useful to reproduce part of a document setting out the three different levels of care:<sup>20</sup>

Level	Type of Care Provided
1	<ul style="list-style-type: none"> <li>• Needs daily supervision, cueing and reminders for activities of daily living, e.g. bathing, dressing, washing, toileting, walking and eating.</li> <li>• Is independent to carry out these activities with reminders and cues.</li> <li>• Needs monitoring and supervision of medications and ongoing monitoring of medical or health problem that is currently stable.</li> </ul>
2	<ul style="list-style-type: none"> <li>• Needs minimal assist for activities of daily living, e.g. getting set up for bathing, dressing, washing and toileting, but manages independently once set up.</li> <li>• May be incontinent but manages independently.</li> <li>• Needs monitoring and supervision of medications and ongoing monitoring of medical or health problem[s] that fluctuate, e.g. daily blood glucose monitoring, dressing changes.</li> <li>• Eats in the small dining room.</li> </ul>
3	<ul style="list-style-type: none"> <li>• Needs assistance to complete any or all activities of daily living.</li> <li>• Is incontinent and needs assistance to manage.</li> <li>• Has treatments such as colostomy or catheters, or oxygen therapy.</li> <li>• Needs ongoing monitoring and frequent liaison with physician for medications and monitoring of medical or health problem(s) that are unstable.</li> <li>• May include palliative support.</li> <li>• Special diet requirements.</li> </ul>

[35] There is only one registered nurse on duty at a time at Berwick and that nurse is located on the ground floor at one end of the care unit.

[36] Residents of the care units, depending on their condition, have access to all the facilities and activities at Berwick. For example, if they are well enough they can eat with everyone else in the dining room.

[37] Independent living residents may temporarily move to a care unit.

[38] This may occur in a number of ways. For example, someone may feel dizzy and be put under observation for a couple of hours or someone may return to Berwick after being hospitalized and need extra care for a period before returning to their own unit and their regular routine. The first three days a year spent by an independent living unit

<sup>19</sup> Samples of a "Tenancy Agreement – Independent Living" are at Tabs 3 and 16 of the joint book of documents. A sample of a "Tenancy Agreement – Licensed Intermediate Care" is found at Tab 4.

<sup>20</sup> *Ibid.*, Tab 6.



resident in a care unit are free of charge. Any additional time beyond three days is subject to extra charges on a daily basis.

[39] There is a 37th unlicensed care unit which may be used for this purpose. Alternatively, if one of the 36 licensed care units is unoccupied, it may be utilized for a temporary stay by an independent living resident.

[40] However, if a care unit was not available, arrangements would have to be made to send the individual to another suitable facility either temporarily or permanently.

[41] Ms. Pelter resides in an independent living unit. She is in her 80s and appears to have some memory problems.<sup>21</sup> She chose her unit and brought her own furniture. She finds her unit to be like an apartment or condominium.

[42] She chooses what she eats at meals and does her own laundry. She looks after taking her own medication.<sup>22</sup> When she first came to Berwick she was still driving but she decided to stop driving after, one day, when she was walking up the hill next to Berwick, she had a lapse of memory and could not remember where she was going or what she was doing.

[43] She participates in "Pennies for Presents", a charitable activity whereby residents of Berwick roll pennies and have raised some \$30,000 for children's charities.

[44] Ms. Pelter has stayed in a care unit temporarily and found it more like a hospital room.

[45] Her daughter, Ms. Burt, finds it very reassuring that her mother is at Berwick because she knows that with the monitoring there will be intervention if something happens. In addition, her mother can function on her own at Berwick with its structured environment.<sup>23</sup>

[46] Mr. Gould and his wife Dorothy live in an independent living unit. They moved to Berwick because Dorothy found that she was gradually able to do less and less and finally found she could no longer do things such as grocery shopping and preparing meals. Dorothy has a number of medical issues and could not live on her own in an apartment.

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<sup>21</sup> It is not clear on the evidence whether these problems existed when she moved to Berwick.

<sup>22</sup> The medication is pre-arranged by day and time in blister packs by the pharmacy. Ms. Pelter's daughter does monitor whether the medication has been taken but not Berwick staff; the evidence does not disclose with what frequency her daughter did this. The daughter did not testify that she had to administer the medication to her mother or remind her to take it.

<sup>23</sup> Transcript of 18 February 2009, page 40, lines 6-12.

[47] Dorothy used the services of the care unit on three occasions but never stayed overnight. Mr. Gould drives and has a car.

### Analysis

[48] For the following reasons I am unable to conclude that the independent living portion of Berwick is a “health care facility” within the meaning of the legislation.

[49] Berwick offers its independent living residents the following:

- (a) residential units that are like an apartment or condominium apart from having the limited kitchenette instead of a kitchen,
- (b) all meals and weekly housekeeping,
- (c) a program of optional activities and various facilities,
- (d) relatively unobtrusive monitoring to make sure nothing has gone wrong and
- (e) the ability to respond to emergencies when something goes wrong.

All of this appears to be done and arranged in a thoughtful way taking into account common needs of seniors while leaving the residents entirely free to come and go as they wish.

[50] In addition, independent living residents know that if their needs change there is the possibility of moving to a care unit, temporarily or permanently, without having to move to another facility thereby allowing a relatively high degree of continuity in the person’s everyday life. Living in a care unit is a separate and different service. Independent living residents who go temporarily to a care unit pay additional charges for anything beyond a maximum of three days per year in a care unit.

[51] Independent living residents are free from most household tasks such as cooking, cleaning or cutting grass, allowing residents who have retired to be free not only from paid work but from much of the unpaid work in life related to maintaining a household. For some, it may be, as the Respondent put it, a “lifestyle choice”; for others, it may have become a necessity.

*FIRST CONDITION: Limited capacity for self-supervision and self-care (aptitude limitée de l'autocontrôle ou de l'autonomie)*

[52] The first condition in the definition of a “health care facility” is that the independent living suite portion of Berwick be operated to provide residents who have limited capacity for self-supervision and self-care with certain services.

[53] The Appellant argued that the limitation need only be either mental or physical. I agree.

[54] The Appellant further argued that the capacities of independent living residents of Berwick can be limited for many reasons “. . . none the least of which would be the elderly nature of the residents . . .”.<sup>24</sup>

[55] The Appellant also argues that the legislation does not specify any particular degree of limitation.

[56] I would first note that while residents typically have medical problems, the evidence was to the effect that the problems were not normally acute although there is always a risk that a resident’s medical problems will become acute.

[57] While the legislation does not specify in a detailed way the degree of limitation required, the very words “limited capacity” and “aptitude limitée” clearly indicate that the limitation must be significant and more than passing.

[58] Secondly, the legislation requires that the limitation be with respect to particular capacities, self-supervision and self-care, and not just any kind of limitation.

[59] “Self-supervision” (*autocontrôle*) is, as the words indicate, the ability to make oneself the decisions needed to function in everyday life.

[60] The *Canadian Oxford Dictionary*, second edition, 2004, gives the following definition of “self-care”:

*noun Medicine* the practice of activities that are necessary to sustain life and health, carried out by individuals for themselves.

[61] The dictionary definition indicates that the word is used in a medical context. Given that the context is the definition of a “health care facility” in Schedule V of Part II of the Goods and Services Tax, a part dealing with health care services, it is appropriate to consider this definition.

[62] Given that the definition relates to that which is *necessary to sustain life and health* it is clear that we are dealing with basic activities such as getting up, getting

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<sup>24</sup> Second page of the Appellant’s written representations. While generally medical issues increase with age one must be cautious with generalizations.

dressed, eating, washing, taking medication, getting a certain amount of exercise and interacting with others.<sup>25,26</sup>

[63] There is no evidence that the medical issues, physical or mental, of most, or even a significant number, of independent living residents are such that they have limited capacity for self-supervision and self-care. We only have specific evidence concerning three residents.

[64] On the contrary, what general evidence there is suggests that the residents are actively deciding what to do and are taking care of themselves. Many are doing more than just taking care of themselves. They are participating in activities, going on excursions and doing charitable work.<sup>27</sup>

[65] Indeed, many are still driving their cars. It is hard to conceive how those individuals who are still driving can be said to have limited capacity for self-supervision and self-care.

[66] With respect to the three residents in respect of which we heard evidence, it should first be noted that nothing in Mr. Gould's evidence suggested that there were any limits in his ability to care for or supervise himself.

[67] Although the evidence was that he and Dorothy moved because Dorothy tired easily and as a result could no longer do such things as cooking and the housework, the evidence did not reveal that she was unable to care for or supervise herself. There was no suggestion she needed help for such activities as dressing or eating.

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<sup>25</sup> In *Le Nouveau Petit Robert*, 2006, the only meaning of "autonomie" which could apply is the contemporary sense of the second meaning given:

Liberté, indépendance matérielle ou intellectuelle.

(Note that while the outside of the dictionary shows 2006, the last copyright shown inside is 2004.)

*Le grand dictionnaire terminologique* of the *Office québécois de la langue française* proposes both "autonomie" and "autosoins" as a translation of "self-care" the first being indicated as in the domain of psychology and the second in the domain of medicine. It gives the following definition of "autonomie":

Ensemble des habiletés permettant à une personne de se gouverner par ses propres moyens, de s'administrer et de subvenir à ses besoins personnels.

[http://www.granddictionnaire.com/BTML/FRA/r\\_Motclef/index1024\\_1.asp](http://www.granddictionnaire.com/BTML/FRA/r_Motclef/index1024_1.asp)

While "autonomie" in *Le Nouveau Petit Robert* seems to be wider than "self-care", the definition in *Le grand dictionnaire terminologique* has a similar meaning to "self-care". Given that it is within the health field, the meaning in *Le grand dictionnaire terminologique* is the appropriate one to consider.

<sup>26</sup> This meaning of limited capacity of self-supervision and self-care is consistent with the package of services that must be provided under the remaining conditions in the definition.

<sup>27</sup> Berwick's promotional material at Tabs 1 and 2 of the joint book of documents is instructive in this regard.

[68] While Ms. Pelter may need the structured environment at Berwick, not only is she able to take care of herself but it is quite clear that she is self-directed. For example, her decision to stop driving shows that she is quite capable of making reasoned judgments about her own capacity.

[69] Thus the Appellant has failed to demonstrate that the independent living portion of Berwick has a clientele made up of *residents limited in their capacity for self-supervision and self-care*. Accordingly the Appellant fails to meet the first condition and the appeal should be dismissed for this reason alone.<sup>28</sup>

*SECOND CONDITION: Nursing and personal care under the direction of qualified medical or nursing staff or other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents*

[70] The second condition is that Berwick provide either nursing and personal care *or* personal and supervisory care according to individual requirements of the residents. There is no evidence of Berwick providing personal and supervisory care to independent living residents in accordance with individual requirements.

[71] As to nursing and personal care, the evidence did not suggest it was provided in any continuing way to independent living residents although there is what one might describe as an incidental provision<sup>29</sup> if something happens in determining what action to take such as sending the person to the hospital, the doctor or the care unit.

[72] Given that paragraph (c) of the definition of health care facility requires that the facility be “. . . operated for the purpose of providing . . .” the residents with “. . . nursing and personal care . . .” (subparagraph (i)) together with the other required services, this incidental provision of nursing and personal services does not fall within the scope of subparagraph (c)(i) of the definition. The said subparagraph of the definition requires some continuing personal care whether or not of a medical nature.

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<sup>28</sup> No doubt there may be independent living residents of Berwick who at some point cross the threshold from being independent to having limited capacity for self supervision and self-care. Those individuals will not stay in independent living units because it is only in a care unit that Berwick could provide the services they need. This is illustrated with level 1 care in a care unit which, providing the lowest level of care, will ensure that someone who needs reminders to dress or eat will be so reminded. It will also provide supervision of taking medication. These services are not provided to independent living residents.

<sup>29</sup> Incidental, bearing in mind that residence in a care unit is a different service not in issue.

*THIRD CONDITION: Assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents*

[73] The third condition is that the facility provide assistance with the activities of daily living and other related services to meet the psycho-social needs of the residents.

[74] With respect to the third condition, the Respondent argued that in considering the meaning of activities of daily living in subparagraph (c)(ii) of the definition of health care services one should consider the use of the term in other statutes considering the same subject matter. In support of this, the Respondent cites *Soper v. R.*, [1997] 3 C.T.C. 242 (FCA), at paragraph 19, where Robertson J.A. says:

19 In my view, it is not simply a fortuitous occurrence that subsection 227.1(3) of the *Income Tax Act* adopts the same language as found in subsection 122(1)(b) of the *Canada Business Corporations Act*, for both statutory provisions relate to the standard of care to be exercised. Admittedly, the *CBCA* provision deals with the standard of care owed to the corporation while the taxation provision concerns the standard of care owed to the Crown and Canadian taxpayers. However, that distinction does not serve to nullify the relevance of the standard set out in the *CBCA*, if only because of the presumption of coherence between statutes. That elementary principle of statutory interpretation is explained by P.-A. Côté in *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1991) at 288, 290:

Different enactments of the same legislature are supposedly as consistent as the provisions of a single enactment. All legislation of one Parliament is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislator.

This presumption of coherence in enactments of the same legislature is even stronger when they relate to the same subject matter, *in pari materia*. Apparent conflicts between statutes should be resolved in such a way as to re-establish the desired harmony.

.....

To sum up, the presumption of coherence in related legislation applies particularly to statutes of the same legislature. But it is also relevant to statutes of different jurisdictions, as one legislature may be deemed to imitate the form or be consistent with the substance of a statute enacted by another.

Thus, in order to determine whether the common law standard of care was modified by statute, it is both appropriate and instructive to consider not only the due diligence provision set out at subsection 227.1(3) of the *Income Tax Act* but also the analogous,

and virtually identical, standard of care provisions found in the *Canada Business Corporations Act*.

[75] Specifically the Respondent argued that one should consider the definition of “basic activity of daily living” in paragraph 118.4(1)(c) of the *Income Tax Act*. Paragraph 118.4(1)(c) is used in relation to the determination of the eligibility for the credit for mental or physical impairment.

[76] The context in which the term “activity of daily living” is used is somewhat different. In the Goods and Services Tax, the question is whether assistance with the activities of daily living is provided to individuals while, in the income tax context, the question is individuals’ ability to carry out the activities.

[77] However, in both cases the objective appears to be to provide assistance directly, or indirectly in the case of the Goods and Services Tax,<sup>30</sup> to persons with certain mental or physical limitations.

[78] The *Excise Tax Act* refers to the “activities of daily living” and the *Income Tax Act* refers to the “basic activities of daily living”. The French texts refer to « activités courantes » and « activités courantes de la vie quotidienne ».

[79] I am satisfied that the subject matter is sufficiently close to the subject matter here to consider the definition in the *Income Tax Act* as general guidance in determining the meaning of “activities of daily living” for the purpose of the definition of “health care facility”.

[80] Paragraph 118.4(1)(c) provides that:

(c) a basic activity of daily living in relation to an individual means

- (i) mental functions necessary for everyday life,
- (ii) feeding oneself or dressing oneself,
- (iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,
- (iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,

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<sup>30</sup> In the case of the Goods and Services Tax, Parliament is, in effect, relying on the marketplace to be sufficiently competitive that any benefit of the Goods and Services Tax exemption gets passed on.

- (v) eliminating (bowel or bladder functions), or
- (vi) walking;

[81] Given this and the definition of “health care facility” as a whole, I am satisfied that this branch of the third condition requires that Berwick provide assistance with such functions, for example, as eating, getting dressed, washing and making oneself understood.

[82] Nothing in the evidence suggests that any such assistance is provided to independent living residents. Accordingly the third condition is not met.<sup>31</sup>

### Conclusion

[83] For these reasons, I have concluded that the Minister was correct in concluding that the individual living part of Berwick cannot be considered as a “health care facility”. The appeal will, in substance, be dismissed with costs to the Respondent.<sup>32</sup>

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<sup>31</sup> And it is unnecessary for me to deal with whether or not the additional requirement in the second branch of the third condition has been met. I also do not need to deal with the remainder of the Respondent’s argument and do not need to express a view thereon, but would note that while provincial legislation is not determinative, it may be considered in helping ascertain the meaning of the terms. (See the passage of *Soper* quoted above and *North Shore Health Region v. The Queen*, 2006 TCC 585, at paragraphs 24 to 29 – although the Federal Court of Appeal overturned the result in *North Shore*, it did so for reasons unrelated to these paragraphs.)

I would also add (i) that the individual care residents here clearly did not receive the kinds of services received by the residents in the Kiwanis Care Centre in the appeal of *North Shore Health Region v. Canada*, 2008 FCA 2 (see paragraphs 21 to 32), and (ii) that, as recognized by counsel, the circumstances in *Riverfront Medical Evaluations Ltd. v. Canada*, [2001] T.C.J. No. 381 (QL), were quite different.

<sup>32</sup> Schedule V, Part I, section 6.2 of the Goods and Services Tax reads as follows:

A supply of meals made by a person who is making a supply, described by paragraph 6(a), of a residential complex or unit where the meals are provided, to the occupant of the complex or unit, in the complex or unit or in the residential complex in which the unit is located under an arrangement whereby at least 10 meals per week are supplied for a single consideration determined before any meal is provided under the arrangement.

This provision was not raised and it has no application here insofar as Compass makes its supplies to Berwick.

Normally one of the general objectives of value added taxes such as the Goods and Services Tax is to be neutral in relation to the structure of economic or business relationships. For example, when a tax is neutral in relation to economic structure, it should not affect the total amount of tax paid whether a car manufacturer only assembles major components that are bought from other companies or whether it makes everything itself, including the steel and glass used, and it mines the iron ore made into steel. The inclusion of categories of exempt supplies in the Goods and Services Tax results in the tax not being completely neutral and probably makes it inevitable that there will be anomalies.

Having said that, it is somewhat surprising that if Berwick had used its own staff to cook and serve meals, the value added in preparing and serving meals would not have been taxed whereas the value added performing the same work is taxed in this case because Berwick contracted out the service to Compass. A structurally neutral outcome for this kind of exempt supply (as opposed to a more general neutrality) would have been to legislate the same tax outcome whether or not a residence like Berwick contracted out the food services. If such a result were desired by Parliament, that might not be all that straightforward to accomplish given that a company like Compass, that supplies a number of different customers, may be integrated somewhat further back into the supply chain than Berwick preparing its own food, thereby making it somewhat difficult to draft a provision that is entirely neutral as between different structures.



[84] However, in view of the discussion between the Court and the parties on the second day of the hearing relating to input tax credits, I will contact the parties through the registry as to the form of the judgment.

[85] Finally, I wish to thank counsel.

Signed at Ottawa, Ontario, this 22nd day of June 2010.

"Gaston Jorré"

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Jorré J.

CITATION: 2010 TCC 322

COURT FILE NO.: 2007-537(GST)G

STYLE OF CAUSE: COMPASS GROUP CANADA (BEAVER)  
LTD. v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Victoria, British Columbia

DATES OF HEARING: February 18 and 19, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

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FOR JUDGMENT: June 22, 2010

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