

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160822

Docket: A-15-15

Citation: 2016 FCA 207

[ENGLISH TRANSLATION]

**CORAM: GAUTHIER J.A.
BOIVIN J.A.
DE MONTIGNY J.A.**

BETWEEN:

HÔPITAL SANTA CABRINI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on June 22, 2016.

Judgment delivered at Ottawa, Ontario, on August 22, 2016.

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The Hôpital Santa Cabrini (the Hôpital) is appealing from a judgment rendered by a Tax Court of Canada (the Judge) on October 28, 2015 (2015 TCC 264). The Judge had dismissed the Hôpital's appeal against an assessment issued under Part IX of the *Excise Tax Act* (R.S.C., 1985, c. E-15) (the Act).

I. The facts

[2] In order to address a shortage of nurses (the nurses) between February 14, 2011, and April 24, 2012—the period relevant to this appeal—the Hôpital used three placement agencies: Agence M.D. Santé, Soins Intermédiaires Inc. and Placement de Personnel Formadic Inc. (the Agencies).

[3] The Agencies in question provided nurses to the Hôpital to provide health services. The Agencies then invoiced the Hôpital. The goods and services tax (GST) set out in the Act as well as an *Act Respecting the Québec Sales Tax*, CQLR c T-0.1 (QST) was added to the invoices issued by the Agencies.

[4] On February 14, 2013, the Hôpital presented a General Application for Rebate of GST in the amount of \$34,958.27 to the Agence du revenu du Québec (ARQ)—acting as an agent for the Canada Revenue Agency—on the grounds that the amounts the Hôpital paid to the Agencies for the healthcare services rendered by the nurses are exempt under section 6 of Part II of Schedule V of the Act, which provides:

SCHEDULE V – Exempt supplies
Part II
Health care services

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

ANNEXE V – Fournitures exonérées
Partie II
Services de santé

6. La fourniture de services de soins rendus à un particulier par un infirmier ou une infirmière autorisé, un infirmier ou une infirmière auxiliaire autorisé, un infirmier ou une infirmière titulaire de permis ou autorisé exerçant à titre privé ou un infirmier ou une infirmière

relationship.

psychiatrique autorisé, si les services sont rendus dans le cadre de la relation infirmier-patient.

[5] The ARQ, however, rejected the Hôpital's application for reimbursement and issued a notice of assessment on May 22, 2013, in the amount of \$34,958.27.

[6] The Hôpital appealed from the ARQ's decision before the Tax Court of Canada. The Judge dismissed the Hôpital's appeal without costs on October 28, 2015, and confirmed the validity of the notice of assessment. It is that decision that is challenged before our Court.

II. The Judge's decision

[7] The Judge initially noted that the evidence did not show that there was an agreement between the Hôpital and the nurses from the Agencies. The Judge's analysis therefore focused on the circumstances surrounding the relationship between the Hôpital and the Agencies.

[8] The Judge concluded that the employees of the Agencies, specifically the nurses, were under the management and control of the Hôpital in the performance of their duties, and that the delivery of medical care services fell under the jurisdiction of the Hôpital, not the Agencies. Before determining whether all the necessary conditions were met for the Hôpital to benefit from the exempt supply within the meaning of Schedule V, Part II, section 6 of the Act, the Judge considered the “legal and economic relationships” between the parties.

[9] To do so, the Judge conducted an extensive analysis to qualify the legal relationship between the various parties under the *Civil Code of Québec* (CCQ), namely the relationship between the Hôpital and the Agencies, and the relationship between the Agencies and the nurses.

[10] After defining the relationship among the parties (Hôpital - Agencies - agency nurses) as a “tripartite” relationship, the Judge noted that the CCQ, in the eighteen (18) contracts nominate and set out in articles 1708-2643, does not accurately define either the “tripartite” relationship or the relationship between the Hôpital and the Agencies. The Judge then went on to develop four possible scenarios to qualify the legal relationship between the various parties:

- (1) A contract of enterprise or for services under which the Agency agreed to provide health care services pursuant to article 2098 of the CCQ;
- (2) A contract for services under which the nurses are Hôpital employees;
- (3) A contract for services under which the Agencies act as agents for the Hôpital and covertly hire staff on behalf of the Hôpital, without the Hôpital having to openly recognize that it is the real employer of said staff (the nurses);
- (4) A contract of employment between the nurses and Agencies and a “staffing” contract between the Hôpital and the Agencies under which the work of its salaried employees is made available to the Hôpital.

[11] After conducting this analysis, the Judge concluded that the fourth scenario was the most accurate description of the legal relationships between the parties, namely an employment contract between the nurses and Agencies, and a “staffing” contract between the Hôpital and the Agencies. The Judge then asked whether the “staffing” carried out by the Agencies to meet the Hôpital's needs was an exempt supply for the purposes of the Act. The Judge referred to subsections 165(1) and 123(1) of the Act, as well as Schedule V, Part II, section 6 of the Act,

and noted the requirement that the supply provided by the supplier (in this case the Agencies) be a health care service. The Judge stated as follows:

[TRANSLATION]

[57] . . . On the basis of the analysis of the legal relationships above, I have concluded that the contract between the Hôpital and the Agencies was not a contract of enterprise or for services because no services were rendered by the Agencies. No health care services were provided by the Agencies. There were only rights afforded to the Hôpital by the Agencies, including the right to require the employees placed by the Agencies to work for a time and the right to manage and control that work. These rights constitute property not only for the purposes of the CCQ, but also within the meaning of the Act, as provided in subsection 123(1) according which property means “any property, whether . . . corporeal or incorporeal, and includes a right or interest of any kind . . .”

[Emphasis added.] Since the object of the contract is a property, it cannot be a service for the purposes of the Act. According to the definition set out in subsection 123(1) of the Act, “service” means “anything other than property, . . .” As a result, temporary staffing does not constitute a service for the purposes of section 6 of Part II of Schedule V of the Act, because property and not services were provided.

[12] Alternatively, the Judge stated that if he had erred in arriving at that conclusion, he would nevertheless have concluded that the supply provided by the Agencies does not constitute an exempt supply because the supply is not health care services, but rather “staffing” services. Nor did the Judge accept the Hôpital's submission that the exemption could apply to the input, which constitutes the supply acquired by the Hôpital. The Judge explained that if that had been the Parliament's intent, the same language as that found in section 11 of Part II of Schedule V of the Act would have been used, where the supply of food and beverages needed for the Hôpital to fulfill its purpose is explicitly exempt. Similarly, the Judge also rejected the Hôpital's alternative argument whereby it sought partial reimbursement on the grounds that the Agencies provide multiple services. The Judge was not convinced that the recruitment and care services could be distinct and separate, nor was the Judge convinced that even if they were separate, the health

care services would be exempt because the Agencies provided only one single supply: “staffing”.

[13] The Judge therefore concluded that the nurses are employees of the Agencies when they provide health care services to the Hôpital’s patients, but that the health care services are not provided by the Agencies but rather by the Hôpital, because the nurses provide those services under its management and control. As a result, the Hôpital was denied the exemption provided for in section 6 of Part II of Schedule V of the Act. The Judge also specified that the Act does not allow for any other alternatives:

[TRANSLATION]

[75] In conclusion, the conditions set out in section 6 are not fulfilled and consequently cannot apply in this case. Since there is also no specific provision in Schedule V of the Act concerning nurse staffing by placement agencies, the Court has no choice but to conclude that this supply does not constitute an exempt supply within the meaning of the Act, and that consequently, the Hôpital is not entitled to the reimbursement of taxes that were unduly paid.

[76] This result may obviously appear unfortunate for the Hôpital because its own nurses' salaries are not subject to GST while the amount paid to the placement agencies to obtain nursing services from the Agencies is, but it is up to the Minister of Finance and Parliament to correct this situation by amending the Act.

III. The relevant provisions

[14] The relevant provisions of the Act in this appeal are reproduced in the appendix.

IV. The Issue

[15] The issue is whether the Judge erred in concluding that the supply acquired by the Hôpital does not constitute an exempt supply under section 6 of Part II of Schedule V of the Act.

V. The Standard of Review

[16] In my opinion, the Judge's analysis is firmly based on the factual matrix of the agreements between the parties and subject to contractual interpretation. However, the Supreme Court of Canada was unequivocal in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 [*Sattva*]: “Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.” (*Sattva* at paragraph 50). Based on the doctrine propounded by the Supreme Court of Canada decision, the standard of review that applies in this case to the Judge's conclusions of fact and conclusions of mixed fact and law is the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

VI. Analysis

[17] At the outset, it should be recalled that the Hôpital is in a contractual relationship pursuant to the agreements between it and the Agencies. However, there is no contractual relationship between the Hôpital and the nurses placed by the Agencies. The nurses are under contract with the Agencies only. This case therefore requires only an analysis of the legal relationship between the Hôpital and the Agencies. It must be determined whether the Agencies provide health care services to the Hôpital, which would provide grounds for the exemption set out in section 6 of Part II of Schedule V of the Act.

[18] The Hôpital essentially submits that the Judge erred in deciding that it is the Hôpital—and not the Agencies—that provides the health care services in question. The Hôpital's main—albeit convolutedly presented—argument can be summarized as follows: it is the Agencies that provide the health care services to the Hôpital through their nurses, who themselves provide these services to the Hôpital, with the result that the exemption being claimed applies.

[19] I do not agree with the Hôpital for the following reasons.

[20] There is no ambiguity in the wording of section 6 of Part II of Schedule V of the Act: the exemption applies only to a supply of nursing services rendered to the Hôpital. To determine whether this exemption applies in this case, the nature of the services provided by the Agencies to the Hôpital must be ascertained.

[21] The Judge analyzed the agreements between the Hôpital and the Agencies—except for the Placement de Personnel Formadic Inc. agency, with which the Hôpital had an oral agreement. The evidence submitted before the Judge and the testimony heard reveal the following:

- There is no agreement between the Hôpital and the nurses placed by the Agencies;
- The Hôpital agreed not to recruit a nurse placed by an Agency that it has employed in the previous twelve (12) months;
- The only object of the agreement between the Hôpital and the Agencies is the supply of nursing staff;
- The Agencies' function is not to provide health care services but rather to place nurses;

- The Hôpital is responsible for the delivery of health care services and the management and control of nurses;
- The Agencies have no control over the work of nurses placed at the Hôpital.

(Judge's reasons at paragraphs 22, 23, 40, 41, 42, 44, 57 and 67).

[22] In addition, the Judge correctly took the *Act Respecting Health Services and Social Services*, CQLR c S-4.2, into consideration. That provincial act could not be any clearer: hospitals are responsible for carrying out the duties related to health care services. Common sense dictates that a hospital cannot delegate control of health care services to a placement agency, whether it be in its emergency room or for intensive care. As the Judge carefully noted at paragraph 32 of the reasons:

[32] In addition, it would not be appropriate in the context of operating a hospital for the hospital to subcontract a part of the health care offered at its institution, since its function pursuant to section 100 of the *Act Respecting Health Services and Social Services* is to “ensure the provision of safe . . . quality health . . . services.” Subsection 101(2) also stipulates that the institution must in particular: “dispense the required health or social services directly, or have them provided by an institution, body or person with which or with whom it has entered into a service agreement under section 108.” . . .

[23] Several indicia also emphasize the fact that the Hôpital is responsible for the management and control over nurses from the Agencies, which confirms that it is the Hôpital—not the Agencies—that provides the health care services. In particular, I note: (i) that no representative of the Agencies is on site when the nurses are working at the Hôpital; (ii) that the Agencies have no access to patients' files at the Hôpital; (iii) that the nurses do not hold themselves out to patients as nurses from an agency, even though they wear the agency's identity card; and (iv) that the Hôpital remains the entity responsible for providing the care in question.

I also note that the Hôpital is not contesting that the nurses placed there by the Agencies are under its control and management.

[24] In the light of the above, it was open to the Judge to conclude that the object of the agreements between the Hôpital and the Agencies is the supply of nurses by the Agencies, that the Hôpital is responsible for the provision of health care services by nurses from the Agencies and that the nurses from the Agencies are under the Hôpital's control and management. In short, the Agencies provide a placement services system, meet a need for nursing services for the Hôpital and do not provide health care services, while the exemption in section 6 of Part II of Schedule V of the Act is explicitly limited to the supply of care. That, in itself, is sufficient to dismiss the appeal.

[25] As a result, once the essential provision of services by the Agencies has been identified, namely the placement of nurses to meet the Hôpital's needs, it is not necessary to discuss the legal effects stemming from the contractual relationship between the Hôpital and the Agencies at length. The controversy is limited to the issue of what is subject to GST. In this case, it is the placement of nurses and not nursing services as such. Given that this answer has been provided in the light of the circumstances, there is no reason for this Court to rule on the formal qualification of the agreements in question under the CCQ. That said, this conclusion should not be interpreted as confirming the Judge's entire analysis on the characterization of the legal relationship between the various parties in this case.

[26] The Hôpital also submits that the Judge erred in his analysis of the various provisions related to the exempted supplies under Part II of Schedule V and the related explanatory notes. The arguments are essentially the same as those made before, and addressed by, the Judge, and I find no error in that regard.

[27] I also cannot accept the Hôpital's argument that the supply provided by the Agencies constitutes an input as per the supply of food and beverages (section 11 of Part II of Schedule V of the Act) and therefore should be considered an exempted supply. I can only note that the legislator did not use similar wording to that in section 11 of Part II of Schedule V of the Act to exempt the supplies in question. I therefore adopt the explanations of the Judge at paragraphs 63 to 65 of his reasons.

[28] For all of these reasons, I would dismiss this appeal. The respondent did not seek costs, and given the circumstances, I will not award any.

“Richard Boivin”

J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
Yves de Montigny J.A.”

**APPENDIX
APPLICABLE LEGISLATION**

Excise Tax Act, R.S.C., 1985,
c. E-15

Loi sur la taxe d'accise, L.R.C.
(1985), ch. E-15

Definitions

Définitions

123. (1) In section 121, this Part and Schedules V to X,

123. (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.

recipient of a supply of property or a service means

acquéreur

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

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

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

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

(c) where no consideration is payable for the supply,

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

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

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

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

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

(iii) in the case of a supply of a service, the person to whom the service is rendered,

(iii) personne à qui un service est rendu.

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

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

commercial activity of a person means

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

...

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

property means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;

service means anything other than

(a) property,

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

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

activité commerciale
Constituent des activités commerciales exercées par une personne :

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

[...]

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

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

service Tout ce qui n'est ni un bien, ni de l'argent, ni fourni à un employeur par une personne qui est un salarié de l'employeur, ou a accepté de l'être,

(b) money, and

relativement à sa charge ou à son emploi.

(c) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person;

employee includes an officer;

salarié Est assimilée à un salarié la personne qui reçoit un traitement, une rémunération ou toute autre rétribution

employer, in relation to an officer, means the person from whom the officer receives remuneration;

employeur Est considérée comme l'employeur d'un salarié la personne qui lui verse un traitement, un salaire, une rémunération ou toute autre rétribution.

exempt supply means a supply included in Schedule V;

fourniture exonérée Fourniture figurant à l'annexe V.

...

[...]

Imposition of goods and services tax

Taux de la taxe sur les produits et services

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

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

SCHEDULE V – Exempt supplies

ANNEXE V – Fournitures exonérées

Part II

Partie II

Health care services

Services de santé

6. A supply of a nursing service rendered to an individual by a registered nurse, a registered nursing assistant, a licensed or registered practical nurse or a registered

6. La fourniture de services de soins rendus à un particulier par un infirmier ou une infirmière autorisé, un infirmier ou une infirmière auxiliaire autorisé, un infirmier ou une infirmière titulaire

psychiatric nurse, if the service is rendered within a nurse-patient relationship.

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

...

[...]

11. A supply of food and beverages, including the services of a caterer, made to an operator of a health care facility under a contract to provide on a regular basis meals for the patients or residents of the facility.

11. La fourniture d'aliments et de boissons, y compris les services de traiteur, effectuée au profit de l'administrateur d'un établissement de santé aux termes d'un contrat visant à offrir des repas de façon régulière aux patients ou résidents de l'établissement.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-15-15

**(APPEAL OF A JUDGMENT BY THE HONOURABLE MR. JUSTICE PIERRE
ARCHAMBAULT OF THE TAX COURT OF CANADA DATED OCTOBER 28, 2015,
DOCKET NO. 2014-1195(GST)G.)**

STYLE OF CAUSE: HÔPITAL SANTA CABRINI v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JUNE 22, 2016

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

DATED: AUGUST 22, 2016

APPEARANCES:

Claude Nadeau FOR THE APPELLANT

Huseyin Akyol FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laflamme Nadeau, avocats FOR THE APPELLANT
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada