

Docket: 2007-3806(GST)G

BETWEEN:

CALGARY BOARD OF EDUCATION,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on common evidence with the appeal of
Boardwalk Equities Inc. (2007-3723(GST)G)
on August 19 and 20, 2010, at Calgary, Alberta.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Salvatore Mirandola Jean-Philippe Couture
Counsel for the respondent:	Kathleen T. Lyons

JUDGMENT

For the reasons set out in the attached reasons for judgment, the appeal from the assessment made under the *Excise Tax Act* for the period from January 1, 2001 to February 28, 2002, notice of which is dated June 6, 2003, is dismissed with costs.

Signed at Ottawa, Ontario, this 8th day of January 2012.

“Gaston Jorré”

Jorré J.

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BETWEEN:

BOARDWALK EQUITIES INC.,

appellant,

and

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Appeal heard on common evidence with the appeal of
Calgary Board of Education (2007-3806(GST)G)
on August 19 and 20, 2010, at Calgary, Alberta.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant: Salvatore Mirandola
Jean-Philippe Couture
Counsel for the respondent: Kathleen T. Lyons

JUDGMENT

For the reasons set out in the attached reasons for judgment, the appeal from the assessment made under the *Excise Tax Act* for the period from January 1 to December 31, 2001, notice of which is dated July 8, 2003, is dismissed with costs.

Signed at Ottawa, Ontario, this 8th day of January 2012.

“Gaston Jorré”

Jorré J.

Citation: 2012 TCC 7
Date: 20120108
Dockets: 2007-3806(GST)G
2007-3723(GST)G

BETWEEN:

CALGARY BOARD OF EDUCATION,
BOARDWALK EQUITIES INC.,

appellants,

and

HER MAJESTY THE QUEEN,

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REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] At the beginning of 2001, energy prices in Alberta had risen significantly.

[2] On the one hand, the deregulation of the electricity market had led to significant increases in the price of electricity. On the other hand, demand for natural gas was very high and natural gas prices paid by customers in Alberta in January 2001 were roughly three times what they had been a year earlier.¹

[3] The Alberta government wanted to help. It took measures to improve the operation of the electricity market.

[4] It also took a number of measures to reduce the immediate impact of high energy prices on customers. One of the measures was a program of electricity rebates; another was a program of heating fuel rebates.² There was also a \$300 energy tax refund paid to each adult.

¹ See the Joint Book of Documents (Exhibit R-1), at Tab 7, pages 4 and 5.

² For convenience I have generally used the term rebate as does the Agreed Partial Statement of Facts. The underlying Alberta law and announcements by the province refer at times to grants, credits or rebates — see below; for example,

[5] The scale of these measures was quite significant; for residential customers the electricity rebate was \$40 a month for a year and the natural gas rebate was \$150 a month for a period of four months, a total of \$1,080.³

[6] Non-residential customers such as the appellants could also receive rebates although they were calculated on the basis of use, unlike the flat rate provided to residential customers.

[7] The issue in these appeals is whether or not the appellants' goods and services tax (GST) should be computed on the gross amount that their suppliers billed for electricity or gas, as the respondent contends, or whether it should be computed on

with respect to gas rebates, the relevant legislation, regulation and ministerial order refer to grants whereas the appendix to the order setting out the categories of beneficiaries and the rate of benefit uses the term rebate.

The use of the terms grant and rebate at the same time can be consistent as explained by the Ontario Court of Appeal in *Fourth Generation Realty Corp. v. Ottawa (City)*, 2005 CanLII 16568, a case challenging a municipal by-law:

52 Nor is there jurisprudence that assists in distinguishing grants from rebates. Indeed, in *Colony Farm Holding Ltd. v. British Columbia (Racing Commission)*, [1991] B.C.J. No. 2837 (B.C.S.C.), the application judge speaks of a grant as taking the form of a rebate. In the third paragraph of the reasons, he states:

What is at stake is an incentive grant by the government to a developer for the construction of a new racetrack to replace Exhibition Park when its lease at Hastings Park in Vancouver expires on December 31, 1993. *The grant takes the form of a 10-year rebate of a substantial portion of the revenue collected pursuant to the Horse Racing Tax Act, R.S.B.C. 1979, c. 175 [emphasis added].*

53 “Grant” is defined in *Black’s Law Dictionary*, 6th ed., (1990) at p. 699 as:

To bestow; to confer upon some one other than the person or entity which makes the grant. To bestow or confer with or without compensation... as of land or money.

54 “Rebate” is defined at p. 1266 as:

Discount; deduction or refund of money in consideration of prompt payment.... A deduction or drawback from a stipulated payment, charge, or rate... not taken out in advance of payment, but handed back to the payer after has paid the full stipulated sum.

Tax rebate is an amount returned... to the taxpayer after he has made full payment of the tax.

55 Based on these definitions, in my view, the distinction to be drawn between a grant and a rebate is this. The essence of a grant is the giving of a benefit, including money, from a fund. The word “rebate”, on the other hand, refers to the return of a portion of money actually paid. In certain circumstances, a rebate can be subsumed within the concept of a grant. In this case, a rebate would involve the return of part of the property taxes actually paid by an individual.

Here we are not dealing with a tax rebate and, as the Ontario Court of Appeal noted in paragraph 55, a rebate may be either a partial refund or a deduction from the amount to be paid; see also the definition of rebate in the *Canadian Oxford Dictionary*, second edition, 2004.

³ See the Alberta government news release of January 30, 2001, *More royalty revenues to be returned to Albertans through bigger natural gas rebates*, at Tab 7 of the Joint Book of Documents, where then Premier Ralph Klein is quoted as saying: “In fact, when you add up the \$300 energy tax refund, the residential electricity rebate of \$40 a month for one year, and the natural gas rebates, a two-adult home in Alberta is receiving a total of \$1,680 in rebates. . . .”

the price of the energy used after deducting the amount of the rebate, as the appellants contend.⁴

The Facts

Agreed Partial Statement of Facts/Joint Book of Documents

[8] There is no significant dispute as to the underlying facts.⁵ Most of the evidence in the present cases was put in by agreement. The parties provided a Joint Book of Documents as well as an Agreed Partial Statement of Facts.

[9] In addition, Terry Holmes, Director of Rural Utilities, Alberta Agriculture and Rural Development⁶ testified and portions of the transcript of the examination for discovery of Grant Breen of the Calgary Board of Education were read in.

[10] The parties advised me that there are no issues of quantum.⁷ The Agreed Partial Statement of Facts states:

Province of Alberta Rebate Programs — Introduction

1. In December 2000, the Province of Alberta (“Alberta”) announced energy rebate programs, for the provision of grants and credits for the benefit of and to assist Albertans, in respect of their consumption of energy, for heating and lighting of homes or other premises. The grants were for natural gas (“gas”), propane or other heating fuels for the period January 1, 2001 to April 30, 2001 (“relevant time”). The credits were for electricity for all of 2001 (“relevant time”). The GST claim periods in this action are the same as the relevant times.
2. Alberta introduced the grants and credits (“rebates”) for the relevant times to protect, shield and provide relief to Albertans from the sharp climb and increases in energy prices.
3. All residential and most non-residential consumers (“consumers”) were eligible to receive some form of rebate during the relevant times.

⁴ Both appellants have paid the tax and sought refunds of tax paid in error; the Minister of National Revenue disagreed and refused to refund the tax. Technically, the appellants applied for a rebate of tax and the Minister issued notices of assessment disallowing the rebate of tax claim. In the case of the Calgary Board of Education, the Board is a public service body within the meaning of section 259 of Part IX of the *Excise Tax Act* and, as such, received a public service body rebate of 68% of the tax payable; what it seeks through this appeal is the remaining 32% difference.

⁵ There is a dispute as to what inferences should be drawn from these underlying facts.

⁶ Mr. Holmes held the same position both in 2001 and at the time of the hearing.

⁷ They also advised me that there are a number of other appeals where it has been agreed that the outcome of the present appeals will be followed with respect to the applicable principles.

4. Alberta had the choice of providing the rebates directly to the consumers or provide the rebates to the energy suppliers for the benefit of consumers.
5. Issuing cheques directly to consumers would have been administratively unwieldy and time consuming for Alberta, in that Alberta would have had to construct a system and gather consumption and rate class information. Since the suppliers already had a system to contact all customers, and records of their energy consumption, using the suppliers' billings systems saved the need to create a system. In most cases, for 2001 Alberta chose to provide the rebates to the energy suppliers. The energy suppliers then applied the rebates to consumers' monthly bills sent by the energy suppliers such as Atco Gas ("Atco") and Enmax for electricity ("Enmax") and other energy suppliers ("suppliers"), so as to provide immediate assistance to Albertans.
6. An application process was necessary in less common situations — for example, if consumers of energy for heating premises did not receive bills from the energy suppliers or having received a bill were not given a rebate on the bills; if the consumers purchased propane or other heating fuels, or wanted a review of the amount of the gas rebate on their bill or an alternate gas rebate to what they had been provided; or if the gas supplier billing system was not available. In these types of situations, consumers could complete a form and apply directly to Alberta for the gas rebates or an adjustment to the gas rebates. If the consumer provided the supporting information, Alberta then provided cheques directly to the consumer for the rebates.⁸
7. The suppliers participated in the process of providing rebates without any written agreement or formal arrangement with Alberta. Alberta's view was that delivering the rebates in this manner enabled the suppliers to maintain good customer relations at a time of rising energy costs.
8. The rebates were distributed, with the participation of the suppliers, by applying the rebates on the gas bills. In the case of the electricity rebates, the *Balancing Pool Allocation Regulation* provided that electricity suppliers were to distribute the rebates by including the rebates on the electricity bills.
9. The rebates were provided to suppliers and applied to consumers' energy bills.
10. During the relevant times, Alberta had no obligation to provide gas or electricity to consumers.

Gas Rebate Program and Rebates

⁸ Examples of the application forms are found at Tabs 13, 14 and 15 of the Joint Book of Documents. (This footnote has been added in these reasons for judgment and is not part of the Agreed Partial Statement of Facts.)

11. Alberta had an opportunity, with rising royalties, to soften the impact on consumers during a period of unprecedented high gas bills. An existing regulation was amended to allow for the provision of rebates (that is, gas grants). The gas rebate program operated between January 1, 2001 to April 30, 2001. Rebates totalling \$1.1 billion were provided to Albertans during the relevant time. The gas rebates were funded from royalty revenues.
12. Initially, residential consumers were to receive a rebate of \$50 per month. The rebate amount was then increased to \$150 per month on their gas bills during the relevant time regardless of how or from whom they purchased gas.
13. Non-residential consumers received a rebate, based on actual consumption of gas, of \$6 per gigajoule (“GJ”) to a maximum of 5,000/GJ or \$30,000 per month on their gas bills during the relevant time regardless of the rate they paid to their supplier under contract or default supplier. Commercial consumers of a “residential building” received a rebate, based on consumption of gas, of \$6 per GJ.
14. Consumers of propane or heating fuels were eligible to receive an equivalent consumption-based rebate upon application to Alberta.

Administration of Gas Rebate Program and Rebates

15. In 2001 there were approximately 110 gas suppliers. The process for the provision of gas rebates was that the gas suppliers would bill consumers according to their normal billing practices. Some bills were based on actual consumption, if the meter was read, and others were estimates.
16. Except for the rare instances, as described at paragraph 22 of this document, in 2001 gas suppliers did not provide Alberta with an estimate of the rebates that they would apply to consumers’ bills. For non-residential consumers, the rebates were calculated and provided based on the amount of consumption of energy that was actually shown on the bills to consumers. The amount of the rebate was applied on the bills generated from the gas supplier’s billing systems. Bills were sent to consumers according to the gas supplier’s billing practices, and with whatever consumer payment date was that gas supplier’s practice. The time span between billing and payment ranged from 21 to 35 days, depending on the supplier.
17. Gas suppliers then provided Alberta with a request for the amount of the rebates that they had actually applied to their consumers’ bills. Suppliers could send their request for the amounts of the rebates to Alberta as soon as they had finished their billing processes, or at anytime after.
18. After reviewing the request, Alberta then provided the gas suppliers the amounts of the actual rebates as reflected on consumers’ bills. In most cases,

Alberta provided the amounts for the rebates to the gas suppliers by direct deposit to the gas suppliers' bank account on or the day before the consumers' bills were due. However, if a gas supplier was late in making its request to Alberta for the rebate, the direct deposit amounts would have been made after the consumer's due date for the bill. It was the consumer, not Alberta, that was responsible for paying interest and penalties to the gas supplier on any amounts outstanding on the bill after the due date.

19. In the case of residential consumers, a flat rebate amount of \$150 per month was applied to consumers' bills. However, the same process for tallying the rebates, requests by the suppliers to Alberta for the rebate amounts, and the direct deposit of the amounts of the rebates, by Alberta, on or the day before the consumers' bills were due was also followed, as the requests were relative to a billing cycle.
20. The rebate amounts provided by Alberta to the gas suppliers were not required to be segregated.
21. Smaller gas suppliers normally were on monthly billing — that is, they only did one bill run per month. Larger gas suppliers did cycle billing — that is, they ran bills for a portion of their customers each day. Most of the larger suppliers do 20 to 21 cycles per month. The grouping of consumers in a specific cycle is associated with the schedule for meter reading. For example, everyone that normally has their meter read on the 3rd of the month would be on the same billing cycle. Generally, a billing cycle would be composed of a blend of residential, commercial and industrial customers.
22. In rare instances, Alberta provided rebate amounts to suppliers for rebates based on estimates. This occurred when Alberta was dealing with smaller suppliers that had challenges with administering the rebate program. If a small supplier was unable to provide the actual month consumption in time to meet deadlines for this information, Alberta would estimate consumption based on prior months' actuals and rebate amounts would be provided to suppliers on that basis. This actual amount would be reconciled prior to the provision of the next month's rebate amount and the appropriate adjustment applied. In the end, Alberta ensured that the correct amount was provided to each supplier. The suppliers in these appeals are not small suppliers.
23. At the end of the rebate programs, there were reconciliations by Alberta with all gas suppliers, as follows, and any shortfall or excess was paid or reimbursed. All suppliers, except Atco, provided Alberta with a data extract from their billing systems and Alberta reconciled that information to the information it had as to the amounts of the rebates that Alberta had provided to suppliers. Atco, as a large supplier, was audited so as to confirm that all of the rebate amounts provided to Atco by Alberta had been applied to consumers as rebates on consumers' bills.

Electricity Rebate Program and Rebates

24. The electricity rebate program operated in 2001. The restructuring of the electricity industry, prior to 2001, was to foster a competitive retail market for electricity by allowing that market to be responsive to changes in supply and demand, resulting in more competitive prices and more choices of electricity suppliers to consumers. The Power Pool Council administers the Balancing Pool (“BP”). The BP was established in 1999 as a financial account to receive and disburse funds arising from the transition to a competitive generation market on behalf of electricity consumers.
25. A significant component of that transition was the public auction of the Power Purchase Arrangements (“PPAs”), for the rights to purchase future generation of electricity. The PPAs were created to provide greater competition. The PPAs were sold at public auctions to bidders, energy suppliers and BP participants, in August and December 2000. The \$2.1 billion net proceeds from the auctions were placed in the BP.
26. Legislation set out the roles and responsibilities of electricity suppliers and of the BP in respect of the distribution of the electricity rebates (that is, BP credits) for and to consumers. In 2001, the rebates were provided by the Power Pool Council from the BP to electricity suppliers and then applied to consumers’ bills using the billing operations of electricity suppliers. Electricity suppliers were required by the Balancing Pool to apply the rebates on the electricity bills sent to consumers. These rebates were intended to provide assistance to consumers in a period of high prices.
27. The rebate amounts provided by Alberta to the electricity suppliers were not required to be segregated.
28. In 2001, electricity rebates totalling \$2.1 billion were distributed to Albertans. The high electricity pool prices led to a quicker delivery of the rebates from the BP to provide assistance to consumers.
29. Residential consumers received a rebate of \$40 per month on their electricity bills, during the relevant time, based on consumption of 650 kilowatt hours per month for an average household.
30. Non-residential consumers (industrial, commercial, consumer groups and businesses) received a rebate each month, during the relevant time, on the electricity bills based on the total actual eligible consumption. The rebate was calculated by multiplying 3.6 cents per kilowatt hour by the consumers’ actual eligible consumption. Farmers received rebates as residential and non-residential consumers of electricity.

Administration of Electricity Rebate Program and Rebates

31. In 2001, electricity suppliers were to calculate the rebates for consumers monthly and then apply the rebates on the electricity bills sent to consumers each month. The amounts of the monthly rebates were based on the actual eligible monthly consumption of electricity consumed.
32. Data was to be submitted by the suppliers to the BP on or before the 7th business day of each month. Suppliers with residential consumers had to provide the prior month's actual eligible consumption. All suppliers, regardless of the type of consumer, had to report any adjustments to rebate amounts allocated in prior months as soon as practicable. Adjustments had to align with the amounts applied to consumers' bills.
33. In the fall of 2001, a supplier was to forecast for the remaining months of 2001 for the monthly allocation for residential consumers and the monthly eligible consumption allocation for non-residential consumers. Had a supplier been provided with rebates based on forecasts, a one-time adjustment would be made to align rebate amounts from forecasts to the actual eligible consumption.

Price Deregulation and Rate

34. In 2001 Alberta consumers could purchase gas from a supplier under a contract that typically provides the gas at a fixed price per GJ for a specified period, or it can be a variable rate. Consumers that did not choose to purchase gas under a contract were provided gas at the default rate (the so-called "regulated rate"). In 2001, this default rate was determined under a methodology approved by the Energy and Utilities Board (EUB) but the rate reflected market forces. The methodology is to provide consistency amongst suppliers. The suppliers would seek approval from the EUB. EUB would ensure the suppliers followed the methodology. Rebates were applied to consumers' bills whether they purchased gas under a contract from a supplier at a fixed or variable rate or from a default supplier under the default rate.
35. The *Electric Utilities Act* was enacted in May 1995. It established the power pool, the new spot market and the legislative hedges. Electricity generated throughout Alberta goes into the Power Pool. This restructuring of the electricity industry was to foster a competitive retail market for electricity by allowing that market to be responsive to changes in supply and demand, resulting in more competitive prices and more choices of electricity suppliers to consumers. A system of "legislative hedges" maintained the regulated price regime for the vast majority of customers until the hedges expired on December 31, 2000. The hedging was to maintain regulated pricing for regulated generation existing in 1995 — a specific volume of generation capacity — and share the regulated price of electricity among the distribution

utilities according to its proportionate share. That is, if a distribution utility served a percentage of the provincial load, it would be entitled to its proportionate percentage at the regulated price of electricity. In 2001 consumers were then exposed to prices determined in the wholesale market.

36. On January 1, 2001 electricity consumers who had not chosen to sign a contract with an electricity supplier were automatically moved to the Regulated Rate Option (“RRO”); the electrical service would continue with the existing energy supplier. In 2001, all RRO suppliers were required to charge 11 cents per kilowatt per hour on their electricity bills for RRO customers. If it subsequently turned out that the RRO had a deficit or surplus as it relates to the 11 cents, because they were buying electricity in the competitive market, they could apply to the EUB, after October 2001, to seek approval to collect or be reimbursed from their customers for the difference in the amounts. The RRO was based on each energy supplier’s purchasing strategy and the price would vary with the market price.

Calgary Board of Education (“CBE”)

37. CBE is the school board for the City of Calgary and a public service body within the meaning of section 259 of Part IX of the *Excise Tax Act*.
38. CBE claimed, and was allowed, a public service body rebate of 68% of the tax payable with respect to the supplies of gas and electricity (“energy”) that it acquired during the relevant times.
39. At the relevant times, CBE was a non-residential consumer of energy.
40. At the relevant time, CBE had entered into a written agreement with Atco that was similar to the agreement CBE had with Enmax. Under the agreement, CBE was liable to pay Atco for the price of the gas supplied by Atco to CBE based on the quantity of energy consumed.
41. CBE received monthly invoices from Atco detailing various charges some of which include the cost for the delivery of the gas, the cost for the gas based on the quantity consumed in the billing period, the gas rates and municipal franchise fee. The invoice also showed the Alberta Government Natural Gas Rebate adjustment arising from the Alberta Government Natural Gas Rebate program, that was calculated and based on the actual quantity of gas consumed.
42. In December 2000, CBE entered into a written agreement, the Electricity Services Agreement (“Agreement”), with Enmax effective January 1, 2001. Pursuant to the Agreement:

- (i) CBE chose Enmax for the provision of the supply of electricity services effective January 1, 2001;
 - (ii) Enmax agreed to supply and CBE agreed to purchase electricity from Enmax;
 - (iii) CBE received monthly invoices from Enmax detailing various charges, including the cost of electricity based on the quantity consumed in a particular billing cycle, and the system access charge, distribution access charge, and municipal consent and access fee for the electricity supplied to CBE during the relevant time;
 - (iv) the price of the supply of electricity is determined by amounts agreed to between CBE and Enmax per kilowatt hour during peak and off peak periods based on quantities consumed;
 - (v) CBE was liable to pay Enmax the price for supplies of electricity supplied by Enmax to CBE based on the quantity of electricity consumed.
43. The invoices from Enmax also showed the Alberta Non-Residential Electricity Rebate, provided each month, was calculated and based on the actual amount of electricity consumed.
44. GST of 7% was calculated on the amount on the value of the charges on the invoices that CBE each received from the energy suppliers. GST was calculated on the cost of gas, the cost to distribute the gas and a municipal consent charge, before the energy rebates were applied. CBE paid the invoices.
45. CBE sought to obtain refunds of GST from the Minister of National Revenue for the portion of GST it claims it paid in error relating to the amounts of GST attributable to the amounts of the rebates.
46. CBE would contact the suppliers directly, not Alberta, if there was a concern with respect to the payment of the invoice. The suppliers would pursue CBE if there was a concern with the agreement or the invoice or the energy supplied.
47. At the relevant times, Alberta:
- a) did not get involved, nor insist, in any way which energy suppliers CBE could select;
 - b) was not responsible for ordering gas and electricity supplies on behalf of CBE from Atco or Enmax;
 - c) was not a party to the agreements between CBE and Atco or CBE and Enmax regarding any gas or electricity supply;
 - d) did not co-sign any of the gas or electricity accounts that CBE had with Atco or Enmax; and
 - e) was not responsible for any services on the invoices sent by Atco or Enmax to CBE.

48. If consumers had a problem with their agreement with an energy supplier or invoice with an energy supplier, Alberta did not get involved in the relationship between the supplier and the consumer for the supply of energy. Alberta had a Program Office that assisted and responded to consumer inquiries related to rebate issues. Alberta was contacted directly by a number of consumers seeking explanations of the rebate programs.

Boardwalk Equities Inc. (“Boardwalk”)

49. Boardwalk owns buildings and rents multi-family residential units in those buildings; there are from 40 to 100 plus rental units in each of the buildings in the complexes.
50. In 2001, Boardwalk:
- a) Operated 17,000 residential rental units in Alberta and 9,000 in two other provinces, and owned townhouse projects that were rented for a minimum of one month and most units were on long-term leases.
 - b) May have been responsible for the energy supplies for the rental units in each residential complex or the tenant may have been responsible, and Boardwalk may have been responsible for arranging for energy to be turned back on when a unit is vacated without the tenant paying the energy suppliers.
 - c) Arranged for the supply of energy for the common areas for all of the building complexes.
 - d) Rented a portion of the residential complexes as a commercial space.
 - e) Was a non-residential consumer of gas (that is, a commercial consumer of energy for residential buildings containing rental units for gas) under the gas rebate program.
 - f) Was a non-residential consumer of electricity and in isolated situations a residential consumer of electricity under the electricity rebate program.
51. Boardwalk chose the suppliers for the supply of gas and supply of electricity at the relevant times.
52. The suppliers agreed to supply and Boardwalk agreed to purchase gas and electricity from the respective suppliers of energy.
53. At the relevant times, Boardwalk had entered into agreements with Atco for gas, Enmax for electricity and other suppliers of energy and agreed to pay and be liable to pay the suppliers for the supplies of energy based on the quantity of energy consumed.

54. The price of the supply of gas was determined by the price, fixed or variable, per GJ as agreed between Boardwalk and the gas suppliers based on the actual quantity of gas consumed by Boardwalk.
55. The price of the supply of electricity was determined by the price per kilowatt hour during peak and off peak periods as agreed to between Boardwalk and the electricity suppliers based on the actual quantity of electricity consumed by Boardwalk.
56. Under agreements between Boardwalk and the gas suppliers and electricity suppliers, Boardwalk was liable to pay the price for the supplies of electricity and gas supplied by Boardwalk.
57. Boardwalk received monthly bills from gas suppliers detailing various charges, some of which include the cost for the delivery of the gas, the cost for the gas based on the actual quantity consumed in the billing period, the gas rates and municipal franchise fee. The bill also shows the Alberta Government Natural Gas Rebate adjustment arising from the Alberta Government Natural Gas Rebate program. This was calculated and based on the actual quantity of gas consumed for non-residential consumers.
58. Boardwalk received monthly bills from the electricity suppliers detailing various charges. These included the cost of electricity based on the actual quantity consumed in a particular billing cycle, and the system access charge, distribution access charge, and municipal consent and access fee for the electricity supplied to Boardwalk during the relevant time. The bills from the electricity suppliers show the Alberta Non-Residential Electricity Rebate that was provided each month, was calculated and based on the actual amount of electricity consumed as a non-residential consumer. One bill shows a rebate of \$40, as a flat fee, other bills show rebates as variable amounts as a residential consumer.
59. GST of 7% was calculated on the amount on the value of the charges on the bills that Boardwalk received from each of the gas and electricity suppliers. For gas, GST was calculated on the cost of gas, the cost to deliver the gas and a municipal franchise fee/charge, before the gas rebates were applied. For electricity, GST was calculated on various charges some of which include the energy charge, distributions charge and Municipal Consent and Access Fee before the electricity rebates were applied. Boardwalk paid the bills.
60. Boardwalk sought to obtain refunds from the Minister for the portion of GST it claims it paid in error relating to the amounts of GST attributable to the amounts of the rebates.

61. Boardwalk would contact the suppliers directly, if there was a concern with respect to the agreements or the bills or the energy supplied.
62. At the relevant times, Alberta:
 - a) did not get involved, nor insist, in any way which energy suppliers Boardwalk could select;
 - b) was not responsible for ordering gas and electricity supplies on behalf of Boardwalk from energy suppliers;
 - c) was not a party to the agreements between Boardwalk and energy suppliers regarding any gas or electricity supply;
 - d) did not co-sign any of the gas or electricity accounts that Boardwalk had with the energy suppliers; and
 - e) was not responsible for any services on the invoices sent by the energy suppliers to Boardwalk.
63. In 2001 there were no written or other trust agreements between or among Alberta, BP, and the energy suppliers in respect of the provision of any of the gas and electricity rebates in issue.
64. In 2001 there were no written or other agency agreements between or among Alberta, BP, the energy suppliers of consumers in respect of the provisions of any of the gas and electricity rebates in issue.
65. Other than the agreements referred to at paragraphs 40, 42 and 53 of this document, there were no other agreements (specifically, no written or other trust or agency agreements) that CBE or Boardwalk had entered into in 2001.
66. At the end of the rebate programs, there were reconciliations as between all gas suppliers and Alberta and any shortfall or excess was provided . . . to each other.

[11] The natural gas rebate was funded by the province from general revenues.⁹

[12] As indicated above at paragraphs 24 and 25 of the Agreed Partial Statement of Facts, auctions of the power purchase arrangements yielded some \$2.1 billion which was placed in the balancing pool and was the source of funds for the electricity rebates.

[13] In order to generate the \$2.1 billion, the successful bidders must have believed that in the deregulated market, they would be able to sell the electricity for prices in

⁹ See the Joint Book of Documents, at Tab 1, page 2; high natural gas royalty revenues helped the province fund the gas rebates, see the Joint Book of Documents, at Tab 5, page 1, as well as paragraph 11 of the Agreed Partial Statement of Facts, above.

excess of the total of the amounts bid at the auction plus the cost of the electricity pursuant to the power purchase arrangements.¹⁰

Testimony of Mr. Holmes

[14] Much of the testimony of Mr. Holmes confirmed facts already in the Agreed Partial Statement of Facts.

[15] Mr. Holmes helped design the natural gas rebate program and its administration. He also had some knowledge of the electricity rebate program but not to the same degree as with respect to the gas rebate program.

[16] Mr. Holmes explained that the gas heating fuel rebate program was put in place very quickly and that the province could not have organized and operated in a timely way a system where all the rebate beneficiaries applied for the rebate and then received a cheque from the government. Setting up an application and refund system would have been too slow in providing relief to customers.¹¹

[17] As a result, the government sought an administratively efficient way to deliver the gas rebate and made the arrangements with the gas suppliers. There were no written agreements with the gas suppliers.¹²

Read-ins from the Discovery of Mr. Breen

[18] Mr. Breen was the nominee of the Calgary Board of Education. He agreed that under the agreements for supply of the energy in issue here the Board was liable to pay the invoiced amounts for gas or electricity and the province had no obligation to pay for the supplies on behalf of the Board.

[19] The appellant also read in some qualifications by counsel to the effect that it was the Board's position that the rebate reduced the value of the consideration and that if the Board had not paid its bill the energy supplier would only have gone after the Board for the net amount due after the rebate was deducted from the bill.

Issues

¹⁰ The statutory provisions relating to the power purchase arrangements are in Part 4.1 of the *Electric Utilities Act*, R.S.A. 2000, chapter E-5.

¹¹ See, among other passages, page 41 of the transcript of August 19, 2010. The gas rebate program was announced in mid-December 2000 and provided rebates for the months of January to April 2001 inclusively.

¹² Mr. Holmes also dealt with the legal authority for the rebates. I shall deal with that below on the basis of the relevant law.

[20] In their notices of appeal the appellants framed the legal issues as follows:

For the supply of the electricity:

- (i) Does the value of the consideration for the supply to the Appellant include the reduction on the invoices to reflect the Balancing Pool credit?
- (ii) Is the Balancing Pool credit consideration paid by the Government of Alberta for a supply?

If (i) or (ii), or either of them, are answered in the affirmative, the result will be that the consideration payable by the Applicant was reduced and GST should have applied on that reduced amount.

For the supply of the natural gas:

- (iii) Does the value of the consideration for the supply to the Appellant include the amount of the reduction on the invoices to reflect the Grant?
- (iv) Is the Grant consideration paid by the Government of Alberta for a supply?

If (iii) or (iv), or either of them, are answered in the affirmative, the result will be that the consideration payable by the Applicant was reduced and GST should have applied on that reduced amount.¹³

[21] In her amended replies the respondent framed the issues as follows:

The issues to be decided are whether, for GST purposes, the Energy Rebates:

- (a) reduce the consideration the Appellant was liable to pay under the agreements to the Gas Suppliers or the Electricity Retailers for the Gas Supplied and the Electricity Supplied?
- (b) constitute consideration paid by Alberta for supplies?¹⁴

[22] The parties' view of the issues evolved somewhat by the time the trial began.

Analysis

[23] It is useful to begin by examining the situation of the appellants apart from the Alberta government rebate program.

¹³ See paragraph 35 of the notice of appeal of Boardwalk Equities Inc.

¹⁴ See paragraph 25 of the amended reply to Boardwalk Equities Inc.

[24] It is quite clear that the two appellants entered into contractual agreements with the suppliers of energy, be it gas or electricity, and those agreements provided that:

- (a) the price of the energy supplied was
 - (i) the price for each unit of energy determined in accordance with the contractual agreement
 - (ii) multiplied by the quantity of energy consumed
- (b) and the appellants agreed to pay and were liable to pay the suppliers that price for the amount of electricity supplied.¹⁵

GST Legislation

[25] The basic charging section, subsection 165(1) in Part IX of the *Excise Tax Act* (hereinafter, the “GST”¹⁶), provides:

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.*

[Emphasis added.]

At the relevant time, the rate was 7%.

[26] The following definitions contained in subsection 123(1) of the GST are also relevant:

In section 121, this Part and Schedules V to X,

...

¹⁵ See paragraphs 40, 42 (especially (iv) and (v) thereof), 53, 54 and 55 of the Agreed Partial Statement of Facts as well as Tab 16 of the Joint Book of Documents, particularly clause 4 on the first page of the tab, Schedule B and clause 2 of Schedule C.

I also note that paragraph 18 of the Agreed Partial Statement of Facts states that, in the case of gas, if Alberta provided the amount of the gas rebate to a supplier after the customer’s due date for paying his account, the customer remained liable for any interest and penalty on any outstanding amounts due on the bill after the customer’s due date.

¹⁶ While technically the *Act* is the *Excise Tax Act*, it is simpler and clearer to refer to Part IX of the *Excise Tax Act* as the GST. Part IX is entitled “Goods and Services Tax”.

“consideration” includes any amount that is payable for a supply by operation of law;

...

“recipient” of a supply of property or a service means

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

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

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

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

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

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

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

...

“service” means anything other than

(a) property,

(b) money, and

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

...

“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;

[Emphasis added.]¹⁷

¹⁷ I also note the following definitions contained in subsection 123(1):

“business” includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or

Situation in the Absence of the Rebate Programs

[27] In the absence of the rebate programs there can be no dispute that in providing energy, whether in the form of gas or electricity, the energy suppliers are making a supply to the appellants and the consideration for the supply is the price provided for under the contracts multiplied by the number of units of energy supply. The consequence is that the GST will be payable on the entire consideration paid by the appellants.

[28] Do the rebate programs change this?

Legal Framework of the Rebate Programs

[29] The legal framework of the two rebate programs is important and I will reproduce below certain portions of the relevant Alberta law.

[30] With respect to gas rebates,

- (a) section 13 of the *Government Organization Act* of Alberta, R.S.A. 2000, chapter G-10, provides:

continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

...

“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,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in 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 adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

...

“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;

...

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

[Emphasis added.]

13(1) A Minister may make grants if

- (a) the Minister is authorized to do so by regulations under this section, and
- (b) there is authority available in a supply vote for the purpose for which the grant is to be made.

(2) The Lieutenant Governor in Council may make regulations applicable to a Minister

- (a) authorizing the Minister to make grants;
- (b) respecting the purposes for which grants may be made;
- ...
- (m) authorizing the Minister to enter into an agreement with respect to any matter relating to the payment of a grant.

(3) A regulation made under subsection (2) may be specific or general in its application.

(4) Notwithstanding subsection (2)(g), the Minister may impose further conditions not prescribed in the regulations on the making of a particular grant.

(b) the *Transportation and Utilities Grants Regulation* (Alberta Regulation 355/1986) provides:

1 The Minister is hereby authorized to make grants in accordance with this Regulation.

Agreement

2 The Minister is authorized to enter into an agreement with respect to any matter relating to the payment of a grant and the Minister may require any applicant for a grant under this Regulation to enter into an agreement with respect to any matter relating to the payment of the grant.

3 Repealed.

Purpose of grant

4 A grant recipient under this Regulation shall use the grant only

(a) for those purposes described in the Schedule under which the grant was made,

(b) for those purposes for which the application for the grant was made, or

(c) where the original application for a grant or the purposes for which the grant is made have been varied by the Minister and the applicant for a grant, for those varied purposes.

Evidence of use of grant

5 A grant recipient shall, at the times that the Minister may require, produce evidence satisfactory to the Minister of the manner in which the grant was used, is being used or will be used and in the case of a person or organization that receives a grant in trust for a grant recipient the person, organization or grant recipient shall, at the times that the Minister may require, produce evidence satisfactory to the Minister of the manner in which the grant was used, is being used or will be used.

Payment

6(1) The Minister may provide for the payment of a grant in a lump sum or by way of installments and may prescribe the time or times at which the grant is to be paid.

(2) The Minister may pay the grant to the grant recipient or may pay the grant in trust to a person or organization for the intended grant recipient.

...

SCHEDULE 10

GRANTS IN RESPECT OF HEATING COSTS

1(1) *The Minister may make grants for the purpose of alleviating the impact on consumers of increased natural gas, propane and heating oil prices in Alberta.*

(2) *The Minister may make a grant under this section to a consumer directly or to another person for the benefit of a consumer.*

(3) Subject to subsection (4), the Minister may not make grants under this section in respect of any month other than January, February, March and April of 2001.

...

[Emphasis added.]

(c) ministerial order No. 6/01, dated February 12, 2001,¹⁸ has the following appendix:

1. *The natural gas rebate will be paid to Alberta users of natural gas.*
2. The rebates are for the period January to April 2001.
3. Qualifying users of natural gas who do not receive an automatic natural gas rebate through their natural gas supplier as a deduction from their monthly natural gas bills, or who request a review of the amount of their rebate, will be required to apply for an adjustment. Completed forms and supporting information must be mailed, faxed or delivered to the addresses or fax numbers indicated on the application forms by July 31, 2001.
4. Categories and rate of rebate:

- Residential

<u>Definition</u>	<u>Maximum Monthly Rebate</u>
Single family residence	\$150
Boarding house (i.e., house with one or more residential rental rooms)	\$150
Foster home (i.e., family residence into which one or more foster children have been accepted)	\$150
Single family residence (\$150) with one or more self-contained residential rental suites (\$75)	\$225
Each unit of a multi-unit building containing 4 or fewer self-contained residential units	\$150
A residential building with a master meter only used as a group home, shelter, dormitory, or other similar multi-resident facility	\$150

...

- Commercial

<u>Definition</u>	<u>Maximum Monthly Rebate</u>
A residential building with a master meter only and having more than 4 residential self-contained units, including apartment buildings, condominiums, seniors' lodges, assisted living facilities, long-term care facilities, and other similar multi-resident facilities	\$6/Gigajoule
Any non-residential commercial building, including	\$6/Gigajoule to a

¹⁸ Ministerial order No. 17/01, dated May 16, 2001 (Alberta Minister of Infrastructure), rescinded order No. 6/01 and, in effect, replaced it (orders provided by both counsel in their Book of Authorities). The two orders are very similar. They do not differ in any respect material to these appeals.

offices, stores, municipal buildings, community halls, recreational facilities, farm buildings, greenhouses, etc.	maximum of \$30,000/month
--	------------------------------

...

[Emphasis added.]¹⁹

[31] With respect to electricity,

- (a) section 45.97(r) of the *Electric Utilities Act* of Alberta, R.S.A. 2000, chapter E-5, provides:

The Minister may make regulations

...

- (r) respecting the establishment and operation by the Power Pool Council of a balancing pool, including the calculation of amounts to be paid into or out of the balancing pool, at what interval those amounts are to be paid into or out of the balancing pool and by whom;

- (b) the *Balancing Pool Allocation Regulation* (Alberta Regulation 330/2000) provides:

2(1) The balancing pool administrator must establish and implement processes and procedures that will result in

...

- (b) each residential customer

receiving a balancing pool credit of \$40 for each calendar month in 2001.

...

3(1) *The balancing pool administrator must establish and implement processes and procedures that will result in*

...

- (b) *each non-residential customer*

receiving a balancing pool credit in 2001 based on the customer's total eligible consumption in 2001 at all sites for which the customer is responsible for paying the electricity bill.

(2) *A customer's balancing pool credit under this section is calculated by multiplying 3.6 cents per kilowatt hour by the customer's eligible consumption in 2001 at all sites for which the customer is responsible for paying the electricity bill.*

¹⁹ I have removed the footnotes from the two tables reproduced above.

...

Duty to maintain records and disclosure of records

6(1) *A person involved in the distribution of balancing pool credits or the collection of balancing pool charges must maintain*

(a) a record of any information provided to the balancing pool administrator and others involved in the distribution of balancing pool credits and the collection of balancing pool charges, and

(b) *a record of the balancing pool credits provided to customers and the balancing pool charges collected from customers.*

(2) A person involved in the distribution of balancing pool credits or the collection of balancing pool charges must disclose to the balancing pool administrator on request any information in the records referred to in subsection (1).

...

9(1) Balancing pool credits and balancing pool charges referred to in sections 2, 3 and 4 must be shown on electricity bills provided to customers in the normal billing cycle.

(2) A balancing pool credit under section 2 must be identified on electricity bills as an “Alberta residential electricity rebate”.

(3) *A balancing pool credit under section 3 must be identified on electricity bills as an “Alberta non-residential electricity rebate”.*

...

Duty to co-operate

10 Any person involved in the distribution of balancing pool credits and the collection of balancing pool charges

(a) must co-operate with the Power Pool Council and the balancing pool administrator, and

(b) must carry out in a timely and efficient manner the procedures, processes and requirements established by the Power Pool Council and the balancing pool administrator.

[Emphasis added.]

- (c) the *Balancing Pool Rules*, Balancing Pool for Alberta's Electricity Consumers, revised October 1, 2001,²⁰ provide:

1.1 General Definitions

In these **rules**:

...

"BPAR" means the *Balancing Pool Allocation Regulation (330/2000)*, as amended from time to time;

...

"monthly allocation" means, in respect of each **month**, the **balancing pool credit** or **balancing pool charge** that will be paid to or received from each site for which a **residential customer** or a **farm customer** is responsible for paying the **electricity bill** and may be prorated under these **rules**;

"monthly eligible consumption allocation" means, in respect of each **month**, the **balancing pool credit** or **balancing pool charge** based on **eligible consumption** that will be paid to or received from each **non-residential customer** and **farm customer site**;

...

3.1 Balancing Pool Allocation

3.1.1 2001 Balancing Pool Credits

- a) The **monthly allocation** for 2001 is a **balancing pool credit** of \$40.00.
- b) The monthly eligible consumption allocation for 2001 is a balancing pool credit of 3.6 cents per kilowatt hour.

3.1.2 2001 Residential Credit for Retailers

- a) Each **retailer** shall credit the **monthly allocation** against each **electricity bill** for each of its **residential customers** . . . for each **billing period** in 2001.
...
- e) Subject to the other provisions of rule 3, each **retailer** shall be entitled to receive out of the **balancing pool** for each **month** during 2001 and applicable **months** in 2002 an amount equal to the

²⁰ Joint Book of Documents, Tab 18.

aggregate of the **monthly allocations** attributed to the 2001 **billing** period of all of its **residential customers** . . . during such **months**.

3.1.3 2001 Non-Residential Credit for Retailers

- a) *Each **retailer** shall credit the **monthly eligible consumption allocations** against each of its **non-residential customers** . . . for 2001.*
- b) Each **retailer** shall ensure that the **monthly eligible consumption allocations** are identified on the **electricity bills** of its customers, as stipulated in section 9(3) of the **BPAR**.
- . . .
- d) Subject to the other provisions of rule 3, *each **retailer** shall be entitled to receive out of the **balancing pool** for each **month** during 2001 and applicable **months** in 2002 an amount equal to the aggregate of the **monthly eligible consumption allocations** attributed to 2001 of all of its **non-residential customers** . . . during such **months**.*

[Emphasis added.²¹]

Submissions of the Parties

[32] At this point, it is useful to set out part of the parties' arguments.

[33] The core of the appellants' argument is that the rebates in issue represented a reduction in the consideration payable by the appellants for the gas and electricity purchased during the period in issue.

[34] The appellants further submit that to reach this conclusion one must first answer two questions:

- (a) Were the rebates paid to and for the account:
 - (i) of customers or
 - (ii) of the energy suppliers?

The appellants submit that the rebates were paid to and for the account of the suppliers on condition that the rebates would then be

²¹ The emphasized portions are in italics. The portions in bold are reproduced from the original text.

passed on by energy suppliers to customers as reductions in the consideration payable by the appellants for the energy.

- (b) If the rebates were paid to and for the account of the energy suppliers, were the rebates consideration for a supply to the province or the Power Pool Council?

The appellants submit that the answer is yes.

[35] Part of the respondent's response was that there was no reduction in the consideration for the supply of energy to the appellants and that the energy suppliers were simply a conduit for transferring the rebates from the province, or the balancing pool (administered by the Power Pool Council), to customers such as the appellants.²²

[36] I agree with the parties that the nature of the relationship between the rebate providers, Alberta and the Power Pool Council, on the one hand, and the energy suppliers, on the other, is critical to the issues in these appeals.

[37] Put simply, one must first determine:

- (a) whether the funds (rebates) were paid to the energy suppliers in return for the suppliers reducing the price per unit of energy to customers,²³ including the two appellants

or, alternatively,

- (b) whether the suppliers were transferring the funds (rebates) to the customers by crediting to the accounts of customers the amount of the rebate, thereby offsetting part of the customers' energy bills?

[38] The appellants argued that the respondent's conduit theory implied either that the energy suppliers must be in an agency relationship with the rebate payors or, alternatively, that the rebate amounts were paid to the energy suppliers in trust for the energy consumers.

²² See the transcript of August 19, 2010, at pages 168 (middle) and 170 (top).

²³ Put differently: whether the funds were paid in return for reducing the consideration per unit of energy.

[39] The respondent stated that she was not arguing the law of agency or that there was a trust relationship. Accordingly, I will proceed on the basis that there was no trust or contract of agency.²⁴

[40] I do not agree with the appellants. For someone to act as a conduit it is not necessary that there be a contract of agency or a trust. If A enters into an arrangement with B, whereby B carries an envelope containing cash to C, that arrangement involves no contract of agency nor does it involve the creation of a trust; the same is true here if the arrangement was one where the energy suppliers acted as a conduit.

Nature of the Relationship Between Rebate Providers and Energy Suppliers

[41] Accordingly, in order to determine if the rebate program alters the relationship between the appellants and the energy suppliers, we need to determine the relationship between the energy suppliers and the rebate providers.

Gas Rebates

[42] With respect to gas rebates, what exactly is the relationship between Alberta and the gas suppliers?

[43] There were no written agreements.

[44] We know that operationally the natural gas suppliers insured that the customer benefited from the rebates in accordance with the legal framework created by Alberta.

[45] This is reflected in the bills which show the cost of gas before the rebate, the rebate as a credit to the customer's account and a net cost after the rebate.²⁵

[46] The net cost is the amount the customer pays. However, in the case of gas if the gas supplier received the amount of the rebate after the due date the customer remained liable for any interest or penalties that arose as a result of late payment.²⁶

²⁴ While I need not examine either question, I would observe that nothing in these cases suggests the existence of the trust. Further, there cannot be a contract of agency given that nothing in these cases suggests a legal relationship whereby the energy suppliers had the authority or capacity to create or alter legal relationships between the rebate providers and any third party.

²⁵ See, for example, the Atco bills to the Calgary Board of Education at Tab 10 of the Joint Book of Documents.

²⁶ See paragraph 18 of the Agreed Partial Statement of Facts. In my view this admission is more an admission of law than of fact; as I understand the law, one cannot make an admission of law.

[47] The rebate is usage based with the consequence that the customer must first consume the gas before the province makes any payment.

[48] Administratively, the suppliers requested from Alberta the amount of the rebates once they had sent the bills to the customers showing the rebates.²⁷

[49] Then the government provided to the suppliers an amount equal to the rebates.

[50] The actual conduct of the gas suppliers and the government is more suggestive of a conduit given that generally the actions of the government and the suppliers do not suggest that there is a reduction in the price of the natural gas to the customers.

[51] The bill shows the full price of the gas and then deducts the rebate.²⁸ If there were a price reduction one would expect the gas suppliers to make some reference to it in bills.

[52] One would also expect the Alberta government news releases to refer to a price reduction; generally the news releases talk of rebates although there is a backgrounder that has a table showing three columns “Winter Rate”, “Rebate” and “Price after rebate”.²⁹ The term “Price after rebate” is ambiguous as to whether the price itself is reduced.

[53] By itself, the apparent conduct of the gas suppliers and the government between themselves does not tell us definitively what the arrangement is between them.

[54] What makes the question difficult is that, apart from GST, the practical effect for the two appellants is the same whether the suppliers were paid to reduce the price or to act as a conduit.³⁰

[55] However, the Alberta legislative framework does assist the determination.

However, it could be viewed as a statement that the appellants do not contest that the customer remained liable for the entire bill if the province did not pay the rebate. I will view the statement as such; this is the correct conclusion since nothing in the evidence shows any kind of agreement or arrangement to relieve the customer of the obligation to pay the bill and the consequences of late payment.

²⁷ See paragraph 17 of the Agreed Partial Statement of Facts.

²⁸ See, for example, the Atco bills to the Calgary Board of Education at Tab 10 of the Joint Book of Documents.

²⁹ See page 5 of 6 at Tab 7 of the Joint Book of Documents.

³⁰ There is one other respect in which there is a difference. If the suppliers received the funds in return for reducing the price of the natural gas, it is hard to understand how the customer could be liable for interest where the government was late in making a payment.

[56] As we saw above, the Minister may make grants if, among other requirements, authorized by regulation and the *Transportation and Utilities Grants Regulation* provided authority to make grants, notably:

... for the purpose of alleviating the impact on consumers of increased natural gas, propane and heating oil prices in Alberta.

The Minister could also make such a grant:

... to a consumer directly or to another person for the benefit of a consumer.

[57] The Minister then implemented a program of grants by ministerial order No. 6/01, above, that provided:

1. *The natural gas rebate will be paid to Alberta users of natural gas.*
...
3. Qualifying users of natural gas *who do not receive an automatic natural gas rebate* through their natural gas supplier as a deduction from their monthly natural gas bills ... will be required to apply for an adjustment. ...

[Emphasis added.]

[58] While the *Regulation* authorizes the Minister to make grants either to the consumer or to someone for the benefit of the consumer, when he implemented the grants he issued an order that is crystal clear: the “rebate will be paid to Alberta users of natural gas”.³¹ This is a very clear choice to make payments to consumers and not to make payments to suppliers for the benefit of consumers.

[59] Given that, the conclusion seems unavoidable that the only arrangement the province could enter into was one where the gas suppliers were acting as a conduit,³² the Minister did not choose to create the authority to enter into arrangements that

³¹ More precisely, ministerial order No. 6/01, and No. 17/01 which replaced it, delegate, pursuant to section 9 of the *Government Organization Act* of Alberta, above, the Minister’s authority to administer and pay grants for the natural gas rebate program pursuant to Schedule 10 of the *Transportation and Utilities Grants Regulation* to persons occupying certain positions “according to the criteria set out in the attached appendix”, thereby imposing the conditions in the appendix on the grant program.

³² The appellants attached importance to the wording of paragraph 3 in the appendix of ministerial order No. 6/01 where it refers to “an automatic natural gas rebate ... as a deduction from their monthly natural gas bills”.

Given the clear words in paragraph 1, the “rebate will be paid to ... users of natural gas”, and given that neither the ministerial order nor Schedule 10 of the *Transportation and Utilities Grants Regulation* make any reference to reducing the price of natural gas, I am satisfied that the correct way to read paragraphs 1 and 3 together is that the rebate will be credited to the customer’s account thereby reducing the amount payable.

paid the companies to reduce the price. As a result, the arrangement entered into had to be one where the energy suppliers were a conduit.

[60] Consequently, there was no change to the relationship between the appellants and the gas suppliers as it was prior to the rebate programs and there was no reduction in the consideration payable by the appellants.

Electricity Rebates

[61] The situation is clearer in the case of electricity.

[62] While there are no written agreements between the electricity suppliers and the Power Pool Council, the operation of the rebate scheme is clearly set out in the legal framework created by the province.

[63] The *Balancing Pool Allocation Regulation* provides that the balancing pool administrator must see to it that “*each non-residential customer* [receives] a *balancing pool credit* in 2001 based on the customer’s total eligible consumption in 2001” (emphasis added). The credit is 3.6 cents per kilowatt hour, the amount of the rebate received by the appellants.³³

[64] The *Regulation* imposed on electricity suppliers:

(a) record keeping requirements and the obligation to disclose information to the balancing pool administrator,³⁴

(b) the obligation to:

... co-operate with the Power Pool Council and the balancing pool administrator, and ... carry out in a timely and efficient manner the procedures, processes and requirements established by the Power Pool Council and the balancing pool administrator.³⁵

and

(c) the requirement that:

³³ *Balancing Pool Allocation Regulation*, above, subsections 3(1) and (2).

³⁴ *Ibid.*, section 6.

³⁵ *Ibid.*, section 10.

A balancing pool credit under section 3 must be identified on electricity bills as an “Alberta non-residential electricity rebate”.³⁶

[65] In turn, the *Balancing Pool Rules*,³⁷ above, defined the “monthly eligible consumption allocation” for non-residential customers, such as the appellants, as “the balancing pool credit . . . based on eligible consumption that will be *paid to . . . each non-residential customer*”³⁸ (emphasis added), and provided that:

- a) Each retailer shall *credit* the monthly eligible consumption allocations against each of its non-residential customers . . . for 2001.
- b) Each retailer shall ensure that the monthly eligible consumption allocations are identified on the electricity bills of its customers, as stipulated in section 9(3) of the BPAR.
...
- d) . . . each retailer shall be entitled to receive out of the balancing pool for each month during 2001 . . . an amount equal to the aggregate of the monthly eligible consumption allocations attributed to 2001 of all of its non-residential customers
.....³⁹

[66] This legal framework has two main effects in relation to the issues here.

[67] First, it creates a system of allocating credits (the rebates in issue) from the funds in the balancing pool that “will be paid” to non-residential customers.

[68] Second, the framework creates the obligation for the electricity suppliers to cooperate in the administration of the system.

[69] In support of their position, the appellants submit that the *Balancing Pool Rules* clearly provide that the electricity suppliers received the rebates on their own account. While rule 3.1.3 d), quoted above, clearly states that they shall receive an amount equal to the “monthly eligible consumption allocations”, that is equally compatible with the suppliers receiving the amounts in return for a price reduction or

³⁶ *Ibid.*, subsection 9(3).

³⁷ Joint Book of Documents, Tab 18. I also note the obligation of the Power Pool Council to establish the rules of the balancing pool pursuant to section 2 of the *Balancing Pool Regulation* (Alberta Regulation 169/1999) as well as pursuant to section 8 of the *Balancing Pool Allocation Regulation*, above. I also note that section 2.3 of the *Balancing Pool Rules* provides that “[t]he Council will cause the balancing pool to be administered and operated in accordance with these rules”.

³⁸ *Ibid.*, page 2, section 1.1.

³⁹ *Ibid.*, page 7, section 3.1.3. In this paragraph, I have removed the bold from the quoted portions of the *Balancing Pool Rules*.

with the suppliers receiving the amounts in return for crediting an equal amount to the accounts of customers.

[70] The language of the definition of “monthly eligible consumption allocation” is unambiguous; the credits “will be paid to . . . each non-residential customer”. There is simply no way this language can be read as somehow creating a system where the electricity suppliers are being paid to lower prices.

[71] Accordingly, there is no reduction in the consideration payable by the appellants to the electricity suppliers during the period in issue.

Other Arguments

[72] Given these conclusions it is unnecessary for me to deal with the other arguments made by the parties.

[73] In particular, I note that, assuming there is a supply for consideration by the energy suppliers to the province and the Power Pool Council, that supply is for the service of transferring funds to the accounts of customers; that has no effect on the consideration payable by the appellants.⁴⁰

Conclusion⁴¹

[74] Given that the rebate program did not change the consideration payable by the appellants, the Minister of National Revenue made the correct decision in refusing the rebates. The appeals are dismissed with costs.

Signed at Ottawa, Ontario, this 8th day of January 2012.

“Gaston Jorré”

Jorré J.

⁴⁰ I also note that, as a result, it is unnecessary for me to deal with the cases cited, notably, *Commission scolaire Des Chênes v. Canada*, 2001 FCA 264, and *Canada v. Calgary (City)*, 2010 FCA 127. Again, assuming that there is consideration and a direct link between the supply of the service of transferring funds to the account of customers, that does not affect the consideration payable by the appellants.

⁴¹ It is not surprising that the province would choose to set up the entire rebate system so that it went to customers as opposed to having a system where it paid for a reduction in energy prices; by making that choice, the province made the assistance it provided to customers more visible.

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COURT FILE NOS.: 2007-3806(GST)G
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STYLE OF CAUSE: CALGARY BOARD OF EDUCATION,
BOARDWALK EQUITIES INC.
v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATES OF HEARING: August 19 and 20, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF JUDGMENT: January 8, 2012

APPEARANCES:

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