Docket: 2022-1640(IT)G

BETWEEN:

ROYAL ONTARIO MUSEUM,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

2026 TCC 201 (CanLII)

Appeal heard on May 20-22, 2026, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Florence Sauve Vivian M. Esper Alexei Paish
Counsel for the Respondent:	Laurent Bartleman Devlin Williams

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JUDGMENT

WHEREAS the Court has published its written reasons for judgment on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal of the Minister's determination of the Appellant's entitlement to the Canadian Emergency Wage Subsidy for the periods of October 25, 2020, to November 21, 2020, November 22, 2020, to December 19, 2020, June 6, 2021, to July 3, 2021, and July 4, 2021, to July 31, 2021, is dismissed because the Appellant is a public institution within the meaning of subsection 125.7(1) and paragraph 149(1)(d) of the *Income Tax Act* and is therefore not an eligible entity; and,

2. Costs under the Tariff are provisionally awarded to the Respondent and payable by the Appellant within 30 days of this Order, subject to the right of the Respondent to make further written submissions within 30 days of this judgment and the Appellant's right to respond thereto within 30 days thereafter to any written submissions, all submissions not to exceed 10 pages (excluding authorities); provided that should no submissions be made, this provisional cost order shall become final.

Signed at Ottawa, Ontario, this 17th day of November, 2026.

"R.S. Bocock"

Bocock J

2026 TCC 201 (CanLII)

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REASONS FOR JUDGMENT

I. OVERVIEW

[1] This appeal questions whether the Appellant, the Royal Ontario Museum (the "ROM"), is eligible for the COVID-19 prompted Canada Emergency Wage Supplement ("CEWS") for various weeks during 2020 and 2021? There is but one refined issue dependant upon two statutory provisions which informs the ROM's eligibility for CEWS: whether the ROM is a "public institution" for the purposes of subsection 125.7(1) of the Income Tax Act RSC 1965, c1 (5th Supp) as amended (the "Act"). If the ROM is a "public institution" then it is not eligible for CEWS. If not, then it is. In turn, this Court's interpretation of paragraph 149(1)(d), and what is

the applicable test to determine the ownership of the ROM's capital, will decide the ROM's "public institution" designation, and consequently determine whether the ROM is a "eligible entity" for the CEWS under subsection 125.7(1).

II. FACTS

a) Legal Creation, Construction and Evolution of ROM

[2] The parties handed up a partial agreed statement of facts ("PASF") at the outset of the trial. After that, very few, if any facts remained in dispute.

What is the ROM?

[3] The ROM is a renown museum in Toronto, which showcases art, culture and nature from Canada and the world. It also operates field research in those areas.

How the ROM came to be?

[4] The ROM was incorporated without share capital in 1912 and thereafter continued most recently by the Ontario Legislature under the Royal Ontario Museum Act, RSO 1990, c R 35 (the "ROM Act"). As well, it is registered as a "charitable organization", under 149.1(1) of the Act, and is a "registered charity" as defined in subsection 248(1). Consequently, it is exempt from Part I tax under the Act.

ROM's board of trustees

[5] During the appeal period, the ROM's board of trustees ("Board") consisted of:

a) 15 trustees appointed by the Lieutenant Governor-in-Council of Ontario (the "Ontario Cabinet");

b) three trustees elected by the members; and,

c) the chair of The Governing Council of the University of Toronto, the President of the University of Toronto, and the Director of the ROM, all as *ex officio* trustees.

ROM chair chosen by Ontario

[6] The Ontario Cabinet unilaterally chooses the Board chair ("Chair control"). In turn, the Board elected an executive committee (the "Executive Committee") of

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not less than five trustees: the Chair, the Director of the ROM and any other three trustees.

Trustees' powers re: membership

[7] The ROM Act provides that the Board has the power to prescribe membership qualifications, terms of membership and fees, if any. The Board has done so. As stated, unlike most corporations without share capital, the ROM members do not choose the Board, and the Board does not choose the Chair. The ROM Board sets various classes of membership and fees, sometimes complimentary for supporters wishing to join.

Ontario's view of the ROM

[8] The Province of Ontario ("Ontario") has designated the ROM as a board governed provincial agency, under the Agencies and Appointments Directive. The ROM has operational autonomy from Ontario, but operates within the policy parameters set by the Ontario Minister of Heritage, Sport, Tourism and Culture now, the Minister of Tourism, Culture and Gaming, the ("Minister").

ROM's revenue and funding

[9] The following comprise ROM's usual operating revenues:

(a) self-generated revenues from membership fees, donations, admission fees, events, concessions, and other sources;

(b) grants from The Royal Ontario Museum Foundation in its capacity as an associated charitable organization for which the ROM is an exclusive beneficiary; and,

(c) grants from His Majesty in right of Ontario ("Ontario").

[10] Moneys raised by the ROM are applied ostensibly and exclusively for the benefit of the public.

Government of Ontario financial oversight

[11] A subsisting memorandum of understanding (MOU), executed between the Minister and the Chair of the ROM, provides that:

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(i) the ROM submits its business plans to the Minister for approval;

(ii) the ROM adopts policies which comply with the guidelines and directives established by Ontario's Treasury Board and Minister of Finance;

(iii) the Auditor General of Ontario oversees the ROM by virtue of its finances being susceptible to audit and review powers, including value-for-money audits;

(iv) subject to the ROM Act, the ROM has the power to borrow money upon the credit of the Museum, and may issue bonds, debentures and other securities; and,

[12] the ROM's operations and assets are consolidated by the Province of Ontario into its financial statements.

b) Reassessment History

The CEWS Applications

[13] By virtue of subsection 125.7(2) of the Act, the ROM applied for the CEWS under 3 distinct applications. The "deemed overpayments", defined in subsection 125.7(5) are essential for CEWS qualification. They are quantitatively detailed in the chart below. Such overpayments are related to the periods from October 25, 2020 to November 21, 2020 (the "Ninth qualifying period"), November 22, 2020 to December 19, 2020 (the "Tenth qualifying period"), June 6, 2021 to July 3, 2021 (the "Seventeenth qualifying period"), and July 4, 2021 to July 31, 2021 (the "Eighteenth qualifying period") (collectively, the "Qualifying Periods").

[14] There is no dispute that the ROM employed individuals in Canada and all applications, amounts and eligibility requirements otherwise comply, but for the "public institution" issue.

Payroll Account			
	xxxxx8256RP0001	xxxxx8256RP0002	xxxxx8256RP0003
Ninth qualifying period	n/a	n/a	$669,598
Tenth qualifying period	$50,380	n/a	$673,355

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Seventeenth qualifying period	$38,031	$179,519	$754,985
Eighteenth qualifying period	$47,331	$167,858	$604,260

[15] By way of notices of determination (the "determinations") issued pursuant to subsection 152(3.4) of the ITA, the Minister of National Revenue notified the ROM that the Minister had determined that the ROM was not entitled to the CEWS for the Qualifying Periods because it was a public institution and therefore not an "eligible entity" under subsection 125.7(1). After objection, the Minister confirmed the determinations and hence, this appeal is pursued by the ROM.

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c) Written Testimony

Facts from additional witnesses

[16] To give additional context, colour and texture to the relationship between the ROM's Board, Chair and Executive Committee and Ontario, the Appellant chose to call two witnesses. Since the testimony took the better part of two days, the Court recounts below those salient facts extracted. As a general conclusion, the PASF and five (5) volumes of documents *per se*, support the Court's factual conclusions necessary in order to determine the "public institution" issue.

[17] To the extent the witnesses' testimony was not overly burnished or legally speculative, but rather confirmatory of the non-regulatory and non-legislative documentary evidence, it co-exists collaterally, with the noted documents having preferable and objective provenance. This Court assigns this preference because ultimately this appeal concerns the interpretation of constating legislation and other regulatory documents which apply to the relevant authorizing and enabling provisions of the Act and to the appropriately applicable test needed to determine the critical legal issue.

The active volunteer

[18] Mr. Brian Astl holds the present position of the Vice-Chair of the ROM and has served almost 3 full terms on the Board. He is an active donor and served as chair of the Finance Committee for several critical years. He confirmed the avidity, pride and quasi-propriety felt by ROM volunteers and Board members alike. Ultimately, he confirmed in testimony that the operative relevant documentary evidence speaks for itself. Although superfluous from the witness, the Court agrees.

The former CFO

[19] Mr. Dan Wright, Certified Public Accountant, was the Chief Financial Officer and Deputy Directory of the ROM during the appeal period. As an officer of the ROM, he served and answered to the Board and its Executive Committee. His views were generally reflective of this reality, and his sub-Minister level dealings with Ontario staff reflected an undisguised insouciance to the one-on-one direct relationship mandated by the ROM Act between the Minister and the Chair of the Board, the Minister's own appointee and delegate at the ROM. This was reflected in Mr. Wright's minimization of the right of Ontario to call for payment to it of the ROM's working capital surplus (the "discretionary surplus recoup"), the necessity for annual business plan approval by Ontario ("regulatory oversight") and the mere characterization of Ontario as "one major funder". At one point, he was cautioned by the Court concerning his evasive testimony. Ultimately, all was moot when Mr. Wright conceded, like his co-witness, that the documents, legislation and regulations before the Court speak for themselves.

MOU: the ties that bind

[20] The MOU was placed before the Court. One suspects it is not entitled an agreement because Ontario does not sign "agreements" with entities upon whom it exercises the level of control enumerated in the MOU. Unequivocal clauses concerning accountability achieved through reporting to Ontario ("direct reporting"), Ontario's discretionary surplus recoup, designation of ROM as agency of Ontario ("descriptive agency") and ROM compliance with applicable Ontario policies and procedures ("legislative control") figure prominently, unilaterally and unequivocally within the MOU.

Versions of annual reports: "Royal Ontario Museum" and "Ontario" disappear:

[21] The ROM's Annual Report 2018-2019 subsisting just before and during the early COVID-19 pandemic states… "as an agency of the Province of Ontario, the Museum is closely aligned with provincial priorities". This restates the notion of descriptive agency noted above. The report begins with… "the Royal Ontario Museum has been one of Ontario's beloved cultural institutions for over one hundred years". This confirms regulatory oversight and legislative control during the operative period. Of note, the next annual report published after the onset of COVID and the CEWS applications removes reference to both. Instead, only reference to "the ROM [acronym only] is Canada's largest and most-visited museum" is made.

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A-G's view of ROM's Status

[22] The Ontario Auditor-General's report of December 2020 indicates in the report summary that "The AGO, ROM and McMichael are accountable to the Ministry […] ROM and McMichael are board governed provincial agencies". It continued, "The Ministry's role is to inform them of its board expectations for their performance and oversee that they fulfill their legislative mandates and comply with applicable government policies, direction and agreements".

[23] The Ontario Agencies and Appointments Directive identifies a description, applicable by virtue of the MOU to the ROM. It states…"Provincial agencies provide goods and services as part of government but are not organizationally part of a Ministry". Again, descriptive agency proffered by Ontario appears again.

Ontario: present for COVID funding

[24] A copy of two transfer payment agreements ("TPAs") was placed before the Court. Respectively, each memorialized the payment by Ontario of approximately 10.4 and 16.3 million dollars to the ROM in 2020 and 2021, respectively. These emergency "stabilization" payments reflect the goal of Ontario to provide additional funding to its agencies as support during the COVID-19 Pandemic "shutdowns". during the COVID-19 Pandemic "shutdowns". The usual annual grants from Ontario were also advanced at a faster pace than usual during COVID-19.

III. THE LAW

a) Statutory Provisions

(i) Subsection 125.7 (1) – CEWS "eligibility entity".

[25] To qualify for the CEWS, ROM is required to be eligible in the first instance. The eligibility requirements and exceptions relevant to the ROM, in subsection 125.7(1) are as follows:

> 125.7(1) The following definitions apply in this section and in subsections 163(2.901) and (2.902).
>
> (a) a corporation or trust, other than a corporation or a trust that is exempt from tax under this Part or is a public institution; [and]
>
> (c) a registered charity, other than a public institution;

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(ii) Subsection 125.7(1)

[26] The relevant direction to the definition of "public institution" is found in subsection 125.7(1), which reads as follows:

> Public institution means
>
> (a) an organization described in any of paragraphs 149(1)(a) to (d.6); or;
>
> (b) a school, school board, hospital, health authority, public university or college.

(iii) Paragraph 149(1)(d) – characteristics of tax exemption

[27] Paragraph 149(1)(d), relevant to this appeal, is found within the direction of paragraph 125.7(1)(a) of the "public institution" definition. Such organizations are generally described in paragraphs 149(1)(a) to (d.6) of the Act. Only paragraph 149(1)(d) is relevant to this appeal, given the ROM's status as a charitable organization with only non-share capital. As the ultimate "definition", paragraph 149(1)(d) reads as follows:

> 1. Paragraph 149(1)(d)
>
> (1) No tax is payable under this Part on the taxable income of a person for a period when that person was
>
> […]
>
> (d) a corporation, commission or association all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;
>
> (d.1) a corporation, commission or association not less than 90% of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(iv) Subsection 149(1.3) – "non-conforming" owner nullifies tax exemption

[28] For completeness, the Court notes subsection 149(1.3) of the Act affords exemption from income taxation for public institutions under paragraphs (a) or (b), as applicable, where the "ownership" of the described "shares of capital stock" resides with the Crown or a municipality and maintained at a threshold not less than 90%. This provision applies a *de jure* test exclusively to share capital corporations

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to preclude tax exemption where control resides with a "non-conforming" person. Subsection 149(1.3) reads as follows:

> (1.3) Paragraphs (1)(d) to (d.6) do not apply in respect of a person's taxable income for a period in a taxation year if at any time during the period;
>
> (a) the person is a corporation shares of the capital stock of which are owned by one or more other persons that, in total, give them more than 10% of the votes that could be cast at a meeting of shareholders of the corporation, other than shares that are owned by one or more persons each of which is
>
> (i) Her Majesty in right of Canada or of a province,
>
> (ii) a municipality in Canada,
>
> (iii) a municipal or public body performing a function of government in Canada, or
>
> (iv) a corporation, a commission or an association, to which any of paragraphs (1)(d) to (d.6) apply; or
>
> (b) the person is, or would be if the person were a corporation, controlled, directly or indirectly in any manner whatever, by a person, or by a group of persons that includes a person, who is not
>
> (i) Her Majesty in right of Canada or of a province,
>
> (ii) a municipality in Canada,
>
> (iii) a municipal or public body performing a function of government in Canada, or
>
> (iv) a corporation, a commission or an association, to which any of paragraphs (1)(d) to (d.6) apply.

b) Jurisprudence

(i) No authoritative caselaw

[29] Both parties agree that relevant sections of the Act, concerning the public ownership of non-share capital of a "ROM type" corporation, have previously not been considered by the Tax Court. Further, the statutory eligibility and prescription in the respect of the CEWS is likely dated and unique because of the nature of the temporary benefit and the speedy legislative constructs used to quickly deploy the CEWS and related COVID-19 benefits in a taxation statute. The rapid "statutory grafting" is evident.

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(ii) Interpretive Method of the Statutory Provisions

Is the text alone sufficient?

[30] The Supreme Court of Canada has directed that words in legislation are to be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[1] Provided the text is "clear and unambiguous" it will be conclusively effective and "the anchor of the interpretive exercise".[2] In tax law, this directive empowers clear text to provide certainty and predictability to taxpayers prospectively structuring their affairs.[3]

In a different context and purpose the text is clear

[31] The interactive elements of subsection 125.7(1) and paragraphs 149(1) and 149(1.3), when applied to CEWS for corporations with share capital suffices all round. One simply determines who owns the shares in the capital stock: His Majesty or someone else. One then measures the quantum and decides based on the arithmetic.

What is the ownership threshold for non-share corporations?

[32] The murk appears when entering the waters of corporations without share capital. Circuitously, almost all non-share corporations have legal title to their assets: current, long-term or otherwise.[4] That capital includes the moneys and other personal and real property which comprise its capital. Frankly, such unitary ownership imbues the convenience and practicality of selecting a corporate structure.[5] Hence, Crown and "near Crown" non-share capital corporations, which by law "own their capital", are excluded almost *prima facie* from the ambit of this test, if one simply uses the plain text. This yields a starkly different result arising from using a simple, ordinary meaning of "capital" compared to shares in the "capital stock" of share capital corporations. Since this divergent result in the context of CEWS does not happen for corporations with share capital, ambiguity through application exists when used for non-share corporations. Context and purpose must be examined.

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[1] *Canada Trustco Mortgage Co. v. Canada* 2005 SCC 54 at para 10.
[2] *Thomas Hunt v. HMK* 2026 FCA 88 at para 11.
[3] *Canada Trustco, supra* at para 75.
[4] *Kennedy v. Acadia Pulp and Paper Mills Co., 1905 Carswell 56 at para.47.*
[5] *McClung v. MNR* [1990] SCR 1020 at paras. 60 and 61. Some minor exceptions exist and are *de minimus* to the group total.

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Context and some legislative history

[33] Both parties agree classes of "public sector entities" were not intended by Parliament to be eligible entities for the CEWS. The utilization of "public institution" in subsection 125.7(1) bears witness to this. From its inception, through the inaugural *War Income Tax Act*, 1917, inclusion has been made for corporations, both with share capital and without, owned by the Crown and those not. In fact, just before passage of a precursor piece of legislation, the *Business Profits War Tax Act*, 1916, the identified and needed term of "companies without share capital" was added during Parliamentary debate of the during committee of the whole. In making his point the member of the House of Commons asserted the amendment "covers a number of cases in the province of Ontario where the corporations are practically owned by municipalities… but under the *Ontario Public Utilities Act*, there are a number of corporations that have no capital stock" … He continued, "I would fear that, under this section [as proposed], they might be subject to taxation unless they were explicitly exempted".[6] Thereafter, the inaugural *War Tax Act*, 1917, and subsequent iterations contained the distinction of the ownership of "capital stock" for share capital corporations and only the word "capital" for non-share capital corporations.

What is the "capital" of a non-share corporation?

[34] A test focused simply on who holds legal title to the assets of ROM renders the application of the inclusion provisions of subsection 125.7(1) and paragraph 149(1)(d) practically inapplicable to CEWS where "public institutions" are corporations without share capital. This is because such corporations generally own their own capital, in its ordinary, plain sense. The text, context and purpose ("TCP") test of CEWS applicability to the "broader public sector" non-share capital corporations created by provincial legislatures or their subsidiary levels of government requires a more fulsome and harmonious test. The question remains: what is the appropriate test to determine ownership and control capital for legislatively created non-share capital corporations?

IV. ANALYSIS

a) The Competing Visions

[6] *Hansard* House of Common Debates, 12-6 vol. Geo. V-IV 123 (March 17, 1916) at p.1896.

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[35] The parties' respective summarized legal positions follow below. They part company on the test or standard to be used to determine if Ontario "owned" the capital of the ROM.

ROM's view in brief

[36] The ROM states that TCP analysis leads to the conclusion that the ROM is a corporation, whose money and assets comprise its capital, and such are not:

(a) vested in the Crown by statute; or,

(b) subject to express Crown agency.

[37] The ROM further asserts that the absence of either of these two legal constructs confers upon the ROM the bundle of exclusive ownership rights and control concerning its property (i.e. capital). Concluding that the Crown (Ontario) owns the ROM's capital is necessary in order to define the ROM as a public institution under the Act. And by using this absence of Crown agency test, Ontario does not. Since the ROM is a registered charity and exempt from Part I tax, but not a public institution because no Crown Agency exists, therefore, the ROM is an eligible entity for the CEWS.

Respondent's view in brief

[38] In contrast, Respondent's counsel states that the historical test deployed by the Canada Revenue Agency ("CRA") concerning indicia of "who owns the capital" of corporations without share capital sufficiently provides the test to be employed. This test uses control factors. The mechanics of that test:

a) uses the following 7 factors: the members' identities; corporate structure; effective control over finances; operation and direction; right to elect and change directors; who can contribute capital; asset distribution upon winding up; and who other than His Majesty in Right of Ontario/Canada may acquire capital; and,

b) once properly analyzed within the fact set before the Court, more factors favour His Majesty in Right of Ontario as the owner of the ROM's capital by virtue of control.

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Therefore, the Respondent asserts applying the 7 factors reveals that the ROM's capital is owned by Ontario within the meaning of 125.7 and 149(1)(d). Since the ROM is a public institution, it is therefore not an eligible entity.

b) Some Preliminary Observations

Parties competing "asks" and apparent limitations

[39] The Respondent asks the Court to elevate the existing CRA's 7 factor test to the status of law (the "CRA Test"), but the application of the CRA Test does not overwhelmingly meet the threshold in the context of the facts of this appeal. Unconvincingly as well, the ROM asks the Court to consider the absence of an agent-principal relationship between the ROM and Ontario *qua* "Crown Agency" (the "No Agency Test") as the critical test of who owns the ROM's capital. However, the ROM's analysis downplays the evidence of *de facto* constating, executive and reversionary control by Ontario of the ROM's undertaking (i.e. capital).

The oddity embedded in the legislative method chosen

[40] At play in this appeal is a odd and anomalous statutory and jurisdictional construct. The CEWS is a temporary benefit authorized within a paramount taxing statute. The ROM, as the benefit recipient, is exempt from paying federal income tax while the main purpose of the Act is to raise income taxes. As possibly entitled to the CEWS benefit, the ROM's entitlement will be determined based upon its exempt status from tax; but only if ROM is not a provincial public institution because ROM's capital is not owned by the provincial Crown which created and may effectively control it. Stated another way: a charitable corporation's eligibility for a unilateral socio-economic benefit, conferred by a statute exclusively and purposively designed for federal taxation, is contingent upon the corporation falling within an exception contained within its exemption from income taxation.

c) Analysis and Decision

ROM: no asset ownership or Crown agency, no public institution

[41] ROM's counsel requests that the Court adopt a new test to determine ownership of the capital of a non-share corporation. Specifically, the ROM requests the Court to consider and apply two ostensibly common situations where, if present, the federal or provincial Crown would own the capital of a non-share corporation; namely:

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1. Where the capital of the non-share corporation is vested in the Crown by express statutory provision; or,
2. Where the non-share corporation holds the capital as agent of the Crown, either by express statutory provision or under the common law Crown agency test.

No Agency Test: only relevant measure per ROM

[42] Absent any statutory provision assigning ownership of the ROM's non-share capital to Ontario or clear *prima facie* evidence of Crown ownership of assets or chattels, the remaining branch within the No Agency Test to be considered is the common law Crown agency test. The ROM's application of this test, and the relevant case law, concludes that Ontario does not exercise sufficient control over the ROM.

Crown agency factors considered

[43] Broadly, the ROM asserts the presence of common law Crown agency relationship would reveal that an entity such as the ROM holds its capital as agent for the Crown. Significant control must be exercised by His Majesty in right of Canada or a province to establish a Crown agency relationship. In *City of Halifax v Halifax Harbour Commissioners*,[7] the Supreme Court of Canada concluded that a Crown agency relationship did exist because the rights and powers of the Halifax Harbour Commissioners under their incorporating statutes were "subject at every turn in executing [their] powers to the control of the Governor."[8] Conversely, in *Westeel-Rosco Ltd v South Saskatchewan Hospital Centre*, the Supreme Court concluded that the South Saskatchewan Hospital Centre was not a Crown agent because "only two aspects of the board's activities…[were] controlled by the Crown."[9] In that decision, the Court assigned no value to the fact that the board of trustees was appointed by the province as evidence of "significant control". Similarly, the SCC determined that the hospital's obligation to submit an annual business report to the responsible provincial Minister was to not evidence of significant control.[10]

Crown agency not achieved and also not preferred

[7] [1935] SCR 215
[8] [1935] SCR 215 at pages 226-227.
[9] [1977] 2 SCR 238 at page 253.
[10] *Ibid* at page 253.

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[44] Based on the authorities, ROM is on a narrow and precise basis correct. The Court acknowledges this. Factually, Ontario's level of control does not reach either branch of Crown agency *per se*; however, the critical issue in this appeal is different. The issue is whether the Crown agency test is preferable to the CRA Test advanced by the Respondent to give voice to the TCP of the CEWS provisions applicable to "public institutions". Ironically, while ROM's counsel argues that the CRA Test should not be elevated to the status of law, the ROM itself proposes application of new "control" test for the determination of "public institution". In doing so, the ROM, despite admonishing the Respondent's position, itself introduces unpredictability and uncertainty into the Act. ROM cites paragraph 41 of *Canderel Ltd v Canada,*[11] wherein the Supreme Court of Canada stated, "The law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking…new rules of tax law must be left to Parliament". However, the Supreme Court balances this by stating that "administrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation."[12] Moreover, in *Canderel*, the Supreme Court acknowledged this Court's right to engage in the interpretation of the provisions of the Act, especially when such provisions involve otherwise undefined concepts.[13] Here, one has "capital" of corporations without shares and circuitous definitions of "public institution" and "owned". Thus, the ROM's argument against the CRA Test somewhat overstates the complexity of statutory interpretation, and would deny this Court an existing and previously used interpretive tool to which the Supreme Court of Canada directs recourse in circumstances such as this: where there is doubt as to the meaning of legislation.

Control has various elements

[45] The ROM's argument overlooks *de facto* control and instead narrowly focuses on whether *de facto* control would be exercised by an "offside" person, pursuant to the application of subsection 149(1.3).[14] However, such argument impliedly suggests that subsection 149(1.3) considers only *de facto* control should an "offside" ("non-conforming") person have such control. While a strictly literal reading of this provision supports nullification of tax exemption where a non-conforming person has control, such simplicity ignores Parliament's tacit confirmation that

[11] [1998] 1 SCR 147 at para 41.
[12] *Nowegijick v The Queen*, [1983] 1 SCR 29 at page 37.
[13] *Canderel Ltd v Canada*, [1998] 1 SCR 147 at para 42.
[14] Appellant's Written Argument at para 71.; by "offside" the Court prefers the more legal notion of "non-conforming"

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"governmental" or Crown control is essential to the proper application of paragraph 149(1)(d) and subsection 149(1.3) to corporations.

[46] Why would Parliament be concerned if a non-conforming person has *de facto* control, but not if the federal or a provincial government has *de facto* control of a corporation, commission or association? A contextual reading of subsection 149(1.3) directs that only the federal or provincial governments may have *de facto* control under subsection 149(1.3). Clearly, once *de jure* control is established, the test of "controlled directly or indirectly…" is also met.[15] This returns one to the CRA Test, which outlines the test for evaluating who owns and/or controls the capital of non-share corporations, and the relevant markers and proxies of control.

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CEWS limited shelf life

[47] The CEWS is a very novel, (hopefully) historically time-limited section within the Act. As such, there is virtually no authority on the subsisting interpretation or application of its various provisions in these circumstances. The case law advanced by the ROM concerning the No Agency Test has been applied to provisions of the *Excise Tax Act*, but not to the CEWS or any noted provisions housed under the Act. In contrast, the CRA guidance embodied within the CRA Test offered by the Respondent directly considers the CEWS and the interpretation of paragraph 149(1)(d).

CRA rule of thumb: should it become law?

[48] The Respondent's proposed CRA position does not have prescribed legal authority. However, the Supreme Court of Canada indicates that a balanced CRA methodology can be an "important factor" to properly interpret legislation where there is doubt about the meaning of legislation.[16] Topically, the absence of applicable case law on the proper method for determining who owns and controls the capital of a non-share corporation for the purposes of subsections 125.7(1) and 149(1)(d) militates toward giving the CRA position situational weight.

Some factors more important than others

[49] The CRA Test is weakened by the fact that only a numerical minority of factors support its application. However, the factors present strongly demonstrate

[15] *1164708 BC Ltd v British Columbia*, 2025 BCCA 76 at para 17.
[16] *Nowegijick v. the Queen* [1983] 1SCR 29 at pg.37.

control and ownership. Specifically, the nature of the "effective control" that Ontario exerts on the ROM, along with the Ontario's ability to appoint a super majority of the ROM's Board ("Board control") and its CEO control communicates *de jure* and *de facto* control. Likewise, Ontario's right to control or its power to transfer the ROM's assets on dissolution ("dissolution control") by legislative prerogative signal further evidence of ownership, both *de facto* and *de jure* control, to the extent such a distinction is necessary. Historically by legislative act, Ontario transferred real property entitled to the University of Toronto to the ROM.[17] Ultimate ownership or control is the ability to legally vest capital assets from one entity to another first by legislative fiat.

Ontario decides whither the ROM

[50] While the ROM correctly identifies various markers of financial and operational independence, the unavoidable truth is that the ROM is an institution created and regulated by a single, specific targeted public Act of the Ontario legislature. The ROM Act[18] outlines various limitations on the management, operation and financial actions of the ROM. Most importantly, section 5 of the ROM Act outlines the various powers of the ROM's board of trustees—over which Ontario exerts Board control. That Board control and CEO control directly establishes Ontario's control over the actions of the ROM. Moreover, sections 8 and 11 of the ROM Act outline limitations on the ROM by legislative control. Provisions of section 8 place restrictions on the ROM's ability to dispose of real property. Subsection 11(2) stipulates that the ROM must seek approval from the province if it borrows more than $100,000. Moreover, subsection 11(1) reminds that the Board is responsible for approving and pursuing any loan opportunities on behalf of the ROM. The powers of the Board and the limitations on those powers both communicate Ontario's effective control of the ROM.

How Ontario speaks publicly of the ROM

[51] The ROM is, according to Ontario:

(i) a board-governed principal agency under Ontario's Agencies and Appointment Directive,

[17] *Royal Ontario Museum Act, SO 1968, c.119 at sections. 7 and 12.*
[18] RSO 1990, c R.35.

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(ii) a prescribed public body within Ontario Regulation 146/10 under the Public Service of Ontario Act, 2006.[19]

(iii) an agency of Ontario,

(iv) required to submit a business plan for approval to the Ontario Minister, and

(v) required to submit its annual report to Ontario for review and approval.

Structural control when it matters most

[52] By the ROM's own admission, control, possession and management are important incidents of ownership. As evidence, the ROM itself concedes it is required to submit an annual business plan to the Ontario Minister of Heritage. Similarly, the ROM cannot acquire or sell any real property it owns without the approval of Ontario.[20] As well, the Ontario's control over the ultimate disposition of the ROM's capital in the event of its disposition or winding up indicates that the ROM does not itself possess all the incidents of ownership. Nor does Ontario, to be balanced, but the control and management that Ontario can exert over the ROM and its undertaking, through the Board and Chair appointment process and Ontario's residual legislative powers, manifest a heightened degree of ownership.

How important are the factors numerically?

[53] While the CRA Test identifies seven factors to be considered when determining who owns the capital of a non-share corporation, only three factors clearly and *prima facie* support Ontario's ownership and/or control of the capital of the ROM: finance control; right to appoint and change directors; and asset distribution On a weight basis, the three factors are the "important factors" while the factors that are inapplicable, or neutral, seem less important to the issue of *de facto* or practical control. CRA commentary on the CRA test does not stratify or rank the seven factors or otherwise identify certain factors as being more or less important.[21] The Court's meted contextual weight of what matters in these circumstances is relevant.

[19] SO 2006, c 35, Sch A.
[20] Subsections 8(2) and (3) of the ROM Act.
[21] See CRA Interpretation Bulletin 2009-00310631E5—Paragraphs 149(1)(d) and 149(1)(d.1).

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CRA Test preferable, previously used and more durable

[54] The CRA Test attracts greater weight than the ROM's No Agency Test because the CRA Test directly considers the relevant provisions and their interpretation. Conversely, the No Agency Test was not developed to answer the questions of CEWS applicability or definitions within paragraph 149(1)(d) and Subsection 125.7(1). Contrary to what the ROM argues, neither argument is able to strictly reflect the intentions of Parliament; Parliament has not provided such clear directions on the interpretation of paragraph 149(1)(d) in the context of non-share capital corporations in the context of CEWS. Therefore, the Court is, almost by default, correct to apply the pre-existing CRA Test criteria rather than the binary choice of No Agency Test to conclude the ROM's "public institution" status.

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V. Conclusion

Ontario has effective control of ROM

[55] The sole issue of this appeal hinges on the concepts of "ownership" and "control" and the interaction between paragraph 149(1)(d) and subsection 149(1.3). If subsection 149(1.3) could apply to deny the application of paragraph 149(1)(d), then the ROM would be eligible for CEWS because it would not be a "public institution" within the meaning of the paragraph 125.7(1)(a) definition of that term. But this is not the case; Ontario has effective control of the ROM's capital and undertaking, such that subsection 149(1.3) does not apply, and the ROM is otherwise captured within paragraph 149(1)(d).

Minister's factual assumptions remain

[56] Deductively, the CRA Test provides an interpretative tool that aids this Court in properly determining ownership through control of non-share capital in the context of paragraph 149(1)(d). Residually, ROM's argument insufficiently addresses the Minister's surviving assumptions concerning practical control, ineffectively rebutting the Respondent's factual assumptions which carry the legal conclusion.

CEWS object fulfilled

[57] Adopting either argument is not perfect. The concept of "significant control" advanced by the Respondent is equally novel in the context of the CEWS but is used in other analogous contexts under the Act. Moreover, the CRA Test offers a more

nuanced, harmonious and logical interpretation: an exemption test within a conveniently available taxing statute to convey an emergency economic benefit to "help businesses keep Canadians in their job"[22] rather than an inter-provincial transfer to a public institution.

ROM is a public institution for CEWS

[58] Admittedly, the presence of only three of the seven determining factors identified by the CRA Test lacks numerical heft, however those factors present sufficiently meet the need in this appeal. Ontario, although perhaps historically unexercised, has practical *de jure* and *de facto* control of the ROM. The three factors favourable to the argument and assumptions of the Respondent are exercised in multi faceted forms. Ontario's effective ownership and/or control of the ROM are by virtue of: Board control, Chair control, financial control, regulatory control, legislative control, discretionary surplus recoup and descriptive agency. The "ownership" recognized by paragraph 149(1)(d) is engaged by these factual means. The ROM is a public institution whose capital is "owned" by Ontario. It is not an eligible entity entitled to the CEWS. The appeal is dismissed.

VI. COSTS

[59] Costs are awarded to the Respondent in accordance with the applicable Tariff, subject to the right of the Respondent to make further written submissions within 30 days of this judgment and the ROM's right to respond thereto within 30 days thereafter to any written submissions. No submissions shall exceed 10 pages (excluding authorities). Should no further submissions be made, this provisional cost order shall become final.

Signed at Ottawa, Ontario, this 17th day of November, 2026.

"R.S. Bocock"

Bocock J.

[22] Department of Finance, News Release "Government Announces Details of the [CEWS] (April 1, 2020) online: https://www.canada.ca/en/departmentfinance/news/2020/04

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CITATION:	2026 TCC 201
COURT FILE NO.:	2022-1640(IT)G
STYLE OF CAUSE:	ROYAL ONTARIO MUSEUM AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 20-22, 2026
REASONS FOR ORDER BY:	The Honourable Justice Randall Bocock
DATE OF ORDER:	November 17, 2026

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