Court File No. CV-09-8396-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

BOOK OF AUTHORITIES OF THE CMI ENTITIES AND THE LP ENTITIES

(Motion by Gluskin Sheff Regarding Stay of Proceedings)

June 14, 2010

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Lyndon A.J. Barnes (LSUC#: 13350D)
Tel: (416) 862-6679

Alexander Cobb (LSUC#: 45363F)
Tel: (416) 862-5964

Fax: (416) 862-6666

Lawyers for the Applicants

TABLE OF CONTENTS

Tab No.	
	Case Law
1.	*Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1991), 51 B.C.L.R. (2d) 84 (C.A.)
2.	*General Motors of Canada Limited v. Canada*, [2008] T.C.J. No. 80 (T.C.C.), aff'd [2009] F.C.J. No. 447 (F.C.A.)
3.	*General Motors of Canada Limited v. Canada*, [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C.)
4.	*Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 282 D.L.R. (4th) 625 (C.A.)
5.	*Morneau Sobeco Partnership v. Aon Consulting Inc.* (2008), 65 C.C.P.B. 293 (C.A.)
6.	*Re Boutiques San Francisco Inc.* (2004), 5 C.B.R. (5th) 174
7.	*Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Atlt. Q.B.)
8.	*Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.)
9.	*Re Nortel Networks Corp.* (2009), 57 C.B.R. (5th) 232 (S.C.J.)
10.	*Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611
	Secondary Sources
11.	Financial Services Commission of Ontario Policy A300-100: *Administrator – Roles and Responsibilities* (May, 1990)

TAB 1

The evidence of alleged irreparable damage to the plaintiffs is minimal and they have not established that the balance of convenience in granting an injunction is in their favour. It is in favour of the defendants.

It follows that no injunctive relief will be granted against Westar. I accept and make as part of these reasons the undertakings by Westar as set forth in Mr. Gouge's written submission on behalf of Westar which read as follows:

> If the injunction is refused, Westar will undertake to the Court that:
>
> (a) Westar will take the Plaintiffs on a guided tour of the proposed road route on or before December 15th, 1990.
>
> (b) If the Plaintiffs identify any archaeological sites which may be affected by the proposed route, and notify Westar of those sites by January 2, 1991, Westar will notify the Plaintiffs by January 31, 1991 of any proposed rerouting of the road to avoid those sites. If Westar is not willing to reroute the road, it will so advise the Plaintiffs by January 31, 1991.
>
> The Plaintiffs will then be free to make a further application in respect of any sites which are threatened by the proposed route.

Counsel may speak to costs.

Application denied.

Re CHEF READY FOODS LTD. and ISTONIO FOODS LTD; CHEF READY FOODS LTD. v. HONGKONG BANK OF CANADA

[Indexed as: **Chef Ready Foods Ltd. v. Hongkong Bank of Can.**]

Court of Appeal,
Carrothers, Cumming and Gibbs JJ.A.

Heard – October 12, 1990.
Judgment – October 29, 1990.

Corporations – Arrangements and compromises – Nature and effect – Company granting s. 178, Bank Act security to bank and subsequently seeking relief under Companies' Creditors Arrangement Act – Court granting order staying all proceedings by creditors – Holder of s. 178 security subject to operation of Companies' Creditors Arrangement Act.

The petitioner granted security to the respondent bank under s. 178 of the Bank Act. When the petitioner encountered financial difficulties, the bank demanded payment of

$365,318 and appointed an agent under a general assignment of book debts contained in the s. 178 security instrument, with instructions to realize on the petitioner's accounts. The petitioner applied for relief under the Companies' Creditors Arrangement Act ("C.C.A.A."), and a chambers judge granted an order under s. 11 staying all proceedings by creditors. The bank appealed, saying that its s. 178 security was not affected by the C.C.A.A.

Held – Appeal dismissed.

The purpose of the C.C.A.A. is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business. There is nothing in the C.C.A.A. which exempts any creditors of a corporate debtor from its provisions, and nothing in the Bank Act excludes the operation of the C.C.A.A. While ss. 178 and 179 of the Bank Act are concerned with the competing rights of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If the word "security" in the C.C.A.A. did not include s. 178 security, and if banks were immune from the operation of the C.C.A.A., then the protection afforded that constituency for any company which has granted s. 178 security would be largely illusory.

Cases considered

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 65 D.L.R. (4th) 361, 9 P.P.S.A.C. 177, 82 Sask. R. 120 – considered.

Feifer and Frame Mfg. Corp., Re, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.) – referred to.

Flintoft v. Royal Bank of Can., [1964] S.C.R. 631, 49 W.W.R. 301, 7 C.B.R. (N.S.) 78, 47 D.L.R. (2d) 141 – referred to.

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39 – referred to.

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.) – referred to.

Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can., 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.) – referred to.

Wynden Can. Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) [affirmed 45 C.B.R. (N.S.) 11 (Que. C.A.)] – referred to.

Statutes considered

Bank Act, R.S.C. 1985, c. B-1

s. 178 [am. R.S.C. 1985, c. 25 (3rd Supp.), s. 26]

s. 179

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 8

s. 11

Authorities considered

Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, pp. 590, 592.

APPEAL from stay order granted under Companies' Creditors Arrangement Act, s. 11.

D.I. Knowles and *H.M. Ferris*, for appellant.
R.H. Sahrmann and *L.D. Goldberg*, for respondent.

(Vancouver No. CA12944)

October 29, 1990. The judgment of the court was delivered by

GIBBS J.A.:– The sole issue on this appeal is whether a stay order made by a chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, is a bar to realization by the Hongkong Bank of Canada (the "bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, c. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly, the bank holds what is commonly referred to as "section 178 security."

Chef Ready encountered financial difficulties. On 22nd August 1990, following upon some fruitless negotiations, the bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.43 per day. Chef Ready did not pay.

On 27th August 1990 the bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on 27th August 1990 the bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on 23rd August 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On 28th August 1990, the day after the bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

The application was heard in chambers in the afternoon of 28th August 1990 and the following day. The bank learned "on the grapevine" of

the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On 30th August 1990 the chambers judge granted the order and delivered oral reasons at the end of which he said:

> I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable.

The reasons refer specifically to the accounts receivable because the bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under cl. 4 of the s. 178 security instrument:

> 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts.

The formal order made by the chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the *Bankruptcy Act* (Canada) or the *Winding-Up Act* (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that *the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed* . . . [emphasis added]

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding . . . against the company" is not before the court on this appeal. The bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A., it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the bank asks only that the stay order be varied to free up the s. 178 security:

> (NATURE OF ORDER SOUGHT)
>
> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security . . .

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of

holding the creditors at bay, hence the powers vested in the court under s. 11.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. nor orders made under it can penetrate. In support of its position, the bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 65 D.L.R. (4th) 361, 9 P.P.S.A.C. 177, 82 Sask. R. 120, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in *Flintoft v. Royal Bank of Can.*, [1964] S.C.R. 631, 49 W.W.R. 301, 7 C.B.R. (N.S.) 78, 47 D.L.R. (2d) 141.

The principal issue in *Hall* was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan legislature "to superadd conditions governing realization over and above those found within the confines of the *Bank Act*" (p. 154). In the course of arriving at its decision, the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However, a few extracts will serve to illustrate the bank's reliance:

Page 134:

> " . . . a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. . ."

Pages 139-40:

" . . . the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers . . . "

" . . . These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking. . ."

Page 143:

". . . The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights."

Pages 143-44:

. . . the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the *Bank Act* . . .

Page 152:

The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, an *immediate* right to seize and sell those goods . . .

Page 154:

. . . it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the *Bank Act* itself.

Page 155:

. . . Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest.

It is the insular theme which runs through these propositions that the bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of *the right* to seize and sell; it does not breach the "complete code." All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It

follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed – the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards (1947), 25 Can. Bar Rev. 587, entitled "Reorganizations Under the Companies' Creditors Arrangement Act," explain very well the historic and continuing purposes of the Act (p. 592):

> It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

Page 590:

> There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing

> companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations.

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, [1984] 5 W.W.R.

215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.*, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.); *Re Feifer and Frame Mfg. Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Can. Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 149, 72 C.B.R. (N.S.) 20 (Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the chambers judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

Appeal dismissed.

ANDERSON (TONAK) v. CO-OPERATORS GENERAL INSURANCE COMPANY

[Indexed as: **Anderson v. Co-operators Gen. Ins. Co.**]

Court of Appeal,
Taggart, Legg and Proudfoot JJ.A.

Heard – October 10, 1990.
Judgment – November 14, 1990.

Insurance – Motor vehicle insurance – Extent of liability of insurer – No-fault benefits – Alberta insured driver involved in motor vehicle accident occurring in British Columbia – Quantum of passenger's no-fault benefits to be determined as though policy issued in British Columbia and not governed by lower limit contained in driver's Alberta policy.

The infant plaintiff was severely injured when the vehicle in which he was a passenger was involved in an accident in British Columbia. The vehicle was insured by the defendant in Alberta under an Alberta standard automobile policy which covered all

TAB 2

Case Name:

General Motors of Canada Ltd. v. Canada

Between
General Motors of Canada Limited, Appellant, and
Her Majesty the Queen, Respondent

[2008] T.C.J. No. 80

2008 TCC 117

2008 G.T.C. 256

[2008] G.S.T.C. 41

67 C.C.P.B. 290

Court File No. 2004-3594(GST)G

Tax Court of Canada
Toronto, Ontario

Campbell T.C.J.

Heard: November 27 and 28, 2006; January 23, 2007.
Judgment: February 22, 2008.

(104 paras.)

Taxation -- Goods and Services Tax (GST) -- Tax credits -- Input tax credits -- Exemptions -- Appeal by taxpayer from assessment under Excise Tax Act disallowing input tax credits for GST paid to investment managers for management of appellant's pension assets -- Investment managers forwarded invoices to appellant for review and approval, after which appellant directed pension fund trust to pay obligations -- Appeal allowed -- Appellant was recipient of services and was liable for payment of services -- Appellant acquired services for consumption or use in the course of its commercial activities -- Supply of knowledge and expertise did not fall within s. 123 and therefore was not a financial service within subsection 123(1).

Appeal by taxpayer from assessment under Excise Tax Act disallowing input tax credits -- Appellant retained services of investment managers in respect to management of pension assets pursuant

to investment management agreements between individual managers and appellant -- Investment managers charged appellant management fees and GST -- Appellant was administrator of pension plan for salaried employees -- Investment managers forwarded invoices to appellant for review and approval, after which appellant would direct that pension fund trust pay these obligations -- Minister disallowed appellant's input tax credits in respect of GST paid to investment managers on basis that these services were acquired by appellant solely for consumption by registered pension trusts and not for appellant's commercial activity -- HELD: Appeal allowed -- Appellant contracted for and acquired services of investment managers and was thus recipient of the services -- Where a person was recipient of a supply, Act expressly contemplated that GST was payable by that person -- Appellant was liable for fees under investment management agreements -- Although appellant re-supplied investment services to pension trusts, and despite reimbursement to appellant by trust in the event that appellant paid these fees directly, appellant was still liable for payment pursuant to terms of agreements between appellant and investment managers -- Appellant acquired investment management services for consumption or use in the course of its commercial activities -- Definite nexus between services supplied and appellant's commercial activities -- Nexus met threshold embodied in phrase in the course of -- Considering various plan agreements, statutory provisions of Ontario Pensions and Benefits Act and responsibilities that appellant had to its employees, appellant used the services in the course of its commercial activities -- Investment services did not constitute exempt financial service under s. 123(1) -- Appellant paid for highly developed skill, knowledge and expertise of investment managers which was primary dominant element of supply of the services of the managers -- Supply of knowledge and expertise did not fall within s. 123 and therefore was not a financial service within subsection 123(1) -- Supply was merely one of knowledge and expertise in investment choices and portfolio management.

Statutes, Regulations and Rules Cited:

Excise Tax Act, s. 123(1)(a), s. 152(1), s. 165(1)(a), s. 165(2)(b), s. 169, s. 169(1)(c)

Ontario Pension Benefits Act, R.S.O. 1990 c.P.8, s. 1, s. 22, s. 267.1

Counsel:

Counsel for the Appellant: Al Meghji, Sean C. Aylward and D'Arcy A. Schieman.

Counsel for the Respondent: John McLaughlin and Michael Ezri.

JUDGMENT:-- The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated November 26, 2003 and bears number 05CP0117364 in respect to the period November 1, 1997 to December 31, 1999 is allowed and referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

1 CAMPBELL T.C.J.:-- This appeal is in respect to an assessment, under the *Excise Tax Act* (the "*Act*") for the period November 1, 1997 to December 31, 1999, which denied the Appellant's claim for input tax credits ("ITCs").

2 The Appellant, General Motors of Canada Limited ("GMCL"), is a Canadian corporation engaged in the business of manufacturing, assembling and selling of automobiles and trucks. GMCL provides various pension plans to its employees. The contributions to these plans are invested and administered using the services of investment managers ("Investment Managers"), who in turn charge investment management fees, together with goods and services tax ("GST"), in respect to those services. Between 1997 and 1999, a number of Investment Managers provided services to GMCL in respect to the management of the pension assets, pursuant to investment management agreements ("Investment Management Agreements"), which were between individual managers and GMCL. It is the GST on these investment management services ("Investment Management Services") and the adjustment to the Appellant's net tax to deny the ITC claim that form the basis for this appeal.

3 GMCL is the administrator of two registered pension plans, funded through trusts, created by GMCL to hold and invest the assets of these plans (the "Pension Plan Trusts"). As part of the compensation package for its hourly and salaried employees, GMCL established the following:

(a) The General Motors Canadian Retirement Program for Salaried Employees (together with any amendment thereof, the "Salaried Plan"); and
(b) The General Motors Canadian Hourly-Rate Employees Pension Plan (together with any amendments thereof, the "Hourly Plan").

4 The Salaried Plan provided benefits to those salaried employees of GMCL and certain affiliated corporations of GMCL. The Hourly Plan was created pursuant to the terms of a collective agreement between GMCL and the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada for the benefit of GMCL's hourly employees. The Salaried Plan was funded primarily by employer contributions with a very small portion funded by the employees. The Hourly Plan was a single employer plan funded by employer contributions only.

5 Pursuant to the constating documents of the Salaried Plan, GMCL was appointed as the plan's administrator and was granted "all powers and authority necessary to properly administer the Plan..." (Exhibit A-2, Tab 1, Article 16). Similarly, the constating documents of the Hourly Plan provided that "The general administration of the Plan shall be vested exclusively in the Company..." (Exhibit-A-2, Tab 2, Article IV). The powers and duties of GMCL as administrator, including the power to retain Investment Management Services, originate in these constating documents. Additionally, the *Ontario Pension Benefits Act* (the "*OPBA*"), R.S.O. 1990 c.P.8, imposes specific statutory responsibilities on GMCL as an administrator of these pension plans. In particular, section 22 of the *OPBA* imposes a general duty to exercise care, skill and due diligence in the investment of pension funds.

6 As administrator, GMCL's contractual and statutory responsibilities were in relation to the overall operation of the pension plans and included the calculation and payment of pension entitlements, disclosure of information to members of respective Plans, submitting required filings within specified time limits, ensuring the content and accuracy of required reports, investing the assets, and ensuring that all required contributions were made and that fees and expenses were reasonable.

7 The first witness was Craig William Marven, a Chartered Accountant, employed by GMCL during this period as a senior financial analyst in the compensation activities group. As company appointed administrator for over five years, he was responsible for the overall functioning of the Plans, including confirming that contributions were timely, that pertinent filings were made on time and that the Investment Managers were performing according to expectations. GMCL met with these managers twice annually to review their performance and to ensure that they were investing in the appropriate classes of assets as well as following asset allocation policies. In addition, the Investment Managers reported monthly on the performance of the assets and were compensated based on the value of the assets they managed.

8 Mr. Marven explained that the role of the pension plans was to provide another form of compensation that would allow GMCL to attract and retain the highest quality employees. He considered GMCL to be at the top of the hierarchy or the "backstop" of the Plans, with the result that GMCL was responsible for the assets contained in the Plans. He referred to the Plans as "defined-benefit plans", meaning that GMCL was obligated to account for the difference if there was a funding shortfall. Mr. Marven's evidence-in-chief consisted primarily of taking the Court through the pension plan trust structures used for investing and administering the pension funds.

9 For each of the Pension Plans, the relevant Master Trust arrangements were two-tiered. First, GMCL paid into the Master Trusts the required contributions in respect to each of the Plans (in the case of the Salaried Plan, each affiliated corporation paid contributions commensurate with coverage provided to its employees). Second, the funds in each of the Master Trusts were invested in units of unitized trusts (the "Unitized Trusts").

10 For the purpose of funding benefits accrued under the two pension plans, GMCL created two Master Trusts, pursuant to trust agreements, which were amended and restated in their entirety on September 1, 1993 (the "Master Trust Agreements"):

- The General Motors Canadian Retirement Program for Salaried Employees Pension Plan Trust Agreement between GMCL, GMMD, GMAC, E.D.S., MIC, and Royal Trust Corporation of Canada ("Royal Trust"), which was the Master Trust Agreement for the trust fund created under the Salaried Plan (the "Salaried Master Trust") (Exhibit A-2, Tab 3).
- The General Motors Canadian Hourly-Rate Employees Pension Plan Trust Agreement between GMCL and Royal Trust, which was the Master Trust Agreement for the trust fund created under the Hourly Plan (the "Hourly Master Plan") (Exhibit A-2, Tab 4).

11 Under each of the Master Trusts, two Unitized Trusts existed as vehicles for the pooling of assets which were invested in both foreign and domestic investments. Mr. Marven testified that the flow of funds from the Master Trusts into the Unitized Trusts was "virtually seamless". On September 1, 1993, GMCL entered into four Unitized Trust Agreements:

(a) The General Motors Canadian Retirement Program for Salaried Employees Unitized Trust Agreement -- Foreign Pension Investments between GMCL, GMMD, GMAC, E.D.S., MIC, and Royal Trust, which established a Unitized Trust to invest in foreign investments, the units of which were held by the Salaried Master Trust (Exhibit A-2, Tab 5).

(b) The General Motors Canadian Retirement Program for Salaried Employees Unitized Trust Agreement -- Domestic Pension Investments between GMCL, GMMD, GMAC, E.D.S., MIC and Royal Trust, which established a Unitized Trust to invest in domestic investments, the units of which were held by the Salaried Master Trust (Exhibit A-2, Tab 6).

(c) The General Motors Canadian Hourly-Rate Employees Pension Plan Unitized Trust Agreement -- Foreign Pension Investments between GMCL and Royal Trust, which established a Unitized Trust to invest in foreign investments, the units of which were held by the Hourly Rate Master Trust (Exhibit A-2, Tab 7).

(d) The General Motors Canadian Hourly-Rate Employees Pension Plan Unitized Trust Agreement -- Domestic Pension Investments between GMCL and Royal Trust, which established a Unitized Trust to invest in domestic investments, the units of which were held by the Hourly Master Trust (Exhibit A-2, Tab 8).

12 Royal Trust was appointed as trustee of the Master Trusts and the Unitized Trusts. Although GMCL did not call a representative from Royal Trust, it is clear from the evidence that Royal Trust took bare legal title to the assets of the Unitized Trusts and discharged various duties including maintaining custody, safekeeping and registration of securities, transferring funds and processing information from third parties.

13 Allocation of assets to broad categories of investments, for both the Hourly and Salaried Plans, was determined by GMCL. Following GMCL's decision to allocate certain portions of Unitized Trust assets to particular categories of investment, GMCL entered into various Investment Management Agreements, pursuant to which Investment Managers were retained to manage the investment of funds within one or more of the asset categories of domestic equity, foreign equity, domestic fixed income, domestic short-term fixed income and domestic cash equivalents. The Investment Managers had discretion to purchase, receive or subscribe for securities, to retain such securities in trust, to purchase, enter, hold and generally deal in any contractual manner with contracts for the immediate or future delivery of financial instruments and to convert monies into Canadian and foreign currencies. This discretion, however, was moderated by and subject to investment guidelines established by GMCL and which were contained in Schedule "A" of the Agreements. These guidelines governed the nature and extent of the investments, which Investment Managers could be involved with, in the context of their power as full discretionary Investment Managers. They were also subject to the Trustee's ongoing monitoring and authority to approve or deny the buy/sell orders because the Investment Managers had no access to the funds.

14 While Royal Trust was the main trustee for the majority of the eight billion dollars held in trust assets, GMCL also had a separate Agreement, similar to the other Investment Management Agreements, with Standard Life Assurance Company ("Standard Life") which held several hundred million dollars of trust assets (Exhibit A-3, Tab 38). Mr. Marven referred to these assets as segregated funds, with Standard Life acting in a capacity similar to an Investment Manager. Although Standard Life was in the unique and slightly different position of having both investment management and custodial responsibilities, it had the right to be paid its fees directly from the fund.

15 The second witness, Owen Phillips, has approximately 20 years of experience in investment management and is currently employed with Legg Mason, Canada formerly Perigee Investment

Counsel Inc. ("Perigee"). He provided evidence with respect to the services provided by Investment Managers. Because of the similarity of the terms and conditions of all of the Investment Management Agreements, pursuant to which the Investment Managers were retained by GMCL, the evidence of Mr. Phillips provided an adequate and representative sample of the terms of all of these Agreements. He personally managed the domestic cash equivalents and, to some degree, the fixed income investments for the Hourly Plan.

16 Although the exhibits contain numerous Investment Management Agreements relating to the Salaried and Hourly Rate Employees for the various asset categories, the Agreement dated December 1, 1997, between GMCL and Perigee (Exhibit A-3, Tab 33) is representative of the collection. Clause 4 of this Agreement sets out the extensive "powers of the investment manager". Schedule "A" to the Agreement provided various investment guidelines to be used in managing the investments on behalf of GMCL. Mr. Phillips testified that Perigee made decisions about portfolios without consulting GMCL on buying and selling specific financial instruments. In other words, Perigee was a discretionary money manager that could buy and sell on behalf of the account without the need to seek prior approval. A portion of the preamble to the Agreement states:

> And whereas, pursuant to its appointment hereunder, the Investment Manager shall manage those assets of the Unitized Trust Fund allocated to an investment account (the "Investment Account") by GM Canada, in accordance with the Unitized Trust Agreement and shall provide investment advice and other related administrative services as requested from time to time by GM Canada. (emphasis added) (Exhibit A-3, Tab 33)

17 The Investment Managers received performance reviews twice yearly from GMCL. They were required to meet performance standards that not only outperformed an objective benchmark, but that also respected the boundaries of the prescribed investment guidelines outlined in Schedule "A" of the Investment Management Agreements. According to these agreements, Investment Managers were also required to provide monthly statements to GMCL "indicating all investments" (Transcript p. 288).

18 Articles 16 and 17 of the Salaried Plan, the Seventh Article of the Master Trust Agreement and the Thirteenth Article of the Unitized Trust Agreements set out the mechanism for payment of the cost of the administration of the pension plan and the pension fund as being:

> (a) Payment directly by GMCL to the Investment Manager, with reimbursement directed to GMCL from the trust; or
> (b) Payment directly by the relevant Master Trust or Unitized Trust to the Investment Manager upon the direction of GMCL.

19 With respect to the Unitized Trust Agreement, Article 13 provided that:

> Expenses and fees relating to the administration of the Unitized Trust Fund incurred (either internally or through external appointments) by the Company, including expenses and fees incurred in retaining Investment Managers, investment advisors, consultants, sub-trustees and sub-custodians, and reasonable and proper counsel fees of the Company, to the extent permitted by Pension Law, shall, at the direction of the Company or its delegate, be withdrawn and paid by the Trus-

tee out of the Unitized Trust Fund if not otherwise paid by the Company or the Trust Fund; provided, however, that if the Company has paid such expenses and fees it shall, upon direction to the Trustee, be reimbursed for such payments out of the Unitized Trust Fund. (emphasis added) (Exhibit A-2, Tab 5)

20 At paragraph 17 of Perigee's Investment Management Agreement, it stated:

> 17. Compensation for Services Hereunder. The Investment Manager shall be entitled to receive as compensation for services rendered hereunder, a fee determined and paid in accordance with a separate written agreement between GM Canada and the Investment Manager; provided that if and as soon as the Investment Manager charges a fee to other clients for the management of portfolios having similar characteristics or that are managed by a substantially similar process with substantially the same services under a fee rate schedule that would reduce the fee paid hereunder, then the Investment Manager shall promptly so notify GM Canada and the fee hereunder shall be reduced accordingly.

21 The parties then entered into a separate written agreement (Exhibit A-3, Tab 39A), as referred to in the preceding clause 17, that set out various rates of fees dependent upon the size of the investment portfolio and that provided a GMCL address to which the Investment Manager was instructed to forward invoices for approval.

22 This documentation is consistent with Mr. Marven's testimony. He explained that the Investment Managers forwarded the invoices to GMCL for review and approval, after which GMCL would direct that the pension fund trust pay these obligations. He explained that the Investment Managers billed GMCL for their services because the legal agreements for the management of the funds are between GMCL and the Investment Managers. Mr. Marven described the payment mechanism as follows:

> If we sign off on saying that the cheque is to be paid, that is part of the issuance of the cheque whether or not we cut the cheque. I am not sure what distinction you are making. Did we print the cheque? No, we did not print the cheque. Did we tell Royal Trust to print the cheque? We did tell Royal Trust to print the cheque. (Transcript p. 60)

23 When asked why the payments were paid out of the trust rather than by GMCL directly, he explained that, with GMCL's size, there were policies and procedures for everything. As well, on cross-examination the following exchange occurred:

Q: Why doesn't General Motors take the money and reduce any operating deficits?

A: We could not, no. No. There are laws against that.

Q: You really can't deal with the money. That is, General Motors can't deal with the money in these pension plans other than for purposes of paying pensions, is that a fair statement?

A: Yes, we cannot. That money is earmarked for pensions, yes.

(Transcript p. 67)

24 Mr. Phillips, in examination-in-chief, described this situation as follows:

Q: Why are these invoices being sent to General Motors of Canada Limited, when the assets you are managing are sitting in the unitized trust?

A: General Motors is the client and they are the ones who paid us to do this. They are paying us. They are the ones that we charge.

(Transcript pp. 229-230)

25 The third witness was Aaron Wong, the auditor. His evidence focused primarily on whether or not, in reassessing, he made the assumption of fact contained at paragraph 5(f) of the Reply.

26 The Appellant argued that this assumption of fact was never made by the Minister because Mr. Wong's evidence established that the sole basis of the assessment was the Advance Tax Ruling (Exhibit A-4), which did not address the issue of whether the Investment Management Services fell within the definition of financial services contained in paragraphs 123(1)(a) to (m). During Mr. Wong's testimony, there were numerous lengthy objections by both Appellant and Respondent counsel. While it is clear that objections served an essential tool in protecting the client's interests during the hearing, they also severely disrupted the flow of the hearing, consequently hindering the proceedings. I intend to address Mr. Wong's testimony in the context of deciding several preliminary matters. My decisions in those matters are essential to my approach respecting the two issues in this appeal.

Issues

27 This appeal raised two issues:

(1) Whether GMCL is entitled to claim input tax credits, pursuant to section 169 of the *Act*, in respect to GST paid to Investment Managers for the supply of Investment Management Services.
(2) Alternatively, whether the Investment Management Services are an exempt "financial service" as defined in subsection 123(1) of the *Act* such that GMCL is entitled to a rebate of tax paid in error on those services.

Preliminary Matters

28 The following two preliminary matters were the subject of much debate during the hearing:

(1) The Appellant argues that the Respondent's submissions are comprised overwhelmingly of arguments that are not properly before this Court as they were not pleaded in the Reply.
(2) The Appellant alleges that the Minister improperly included assumption 5(f) in the Reply and should not be permitted to defend the assessment on this basis.

Preliminary Matter #1 -- Crown's Arguments not Properly Before the Court and Issue # 1 -- Is GMCL Entitled to Claim ITCs paid to Investment Managers?

29 The general test for ITC entitlement is found in section 169 of the *Act*. The relevant parts of this section are:

169. General rule for credits

(1) [General rule for credits]

Subject to this Part, where a person acquires ... property or a service ... tax in respect of the supply, ... in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

A x B

where

A is the tax in respect of the supply, ..., that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

...

c) ... the extent (expressed as a percentage) to which the person acquired ... the property or service ..., for consumption, use or supply in the course of commercial activities of the person. (emphasis added)

30 In order for GMCL to be eligible to claim an ITC, pursuant to subsection 169(1) in respect of GST payable by it on receipt of Investment Management Services, three conditions must be satisfied:

(1) The claimant (GMCL) must have acquired the supply (the Investment Management Services);

(2) The GST must be payable or was paid by the claimant (GMCL) on the supply (the Investment Management Services);
(3) The claimant (GMCL) must have acquired the supply (the Investment Management Services) for consumption or use in the course of its commercial activity.

31 The Respondent argued that the Appellant must satisfy all three elements of this test for ITC entitlement. The Appellant argued that only the third element of that test is at issue because the Advance Ruling, issued by Canada Revenue Agency ("CRA") which denied the Appellant's claim for an ITC, conceded that GMCL acquired the Investment Management Services (the first condition of the test) and that GMCL was liable to pay for these Services and the applicable GST (the second condition of the test). The relevant portions of the Ruling stated:

RULING GIVEN

Based on the facts set out above, we rule that:

...

2. GMCL is not entitled to claim ITCs with respect to investment management services that is procured under agreements with investment managers **because these services are acquired by GMCL solely** for consumption by the registered pension trusts resident in Canada ...

EXPLANATION

...

... When contracting for the supply of services to the trusts, prior to April 18, 2000, **GMCL as the person liable under the agreement to pay the consideration for the supply of investment management services, is the 'recipient,' under the terms of the ETA, of the investment management services...**

Section 165 imposes GST/HST on the 'recipient' of a 'taxable supply'. The **supplies from the investment managers to GMCL are taxable supplies and GMCL is liable for the GST/HST relating to these supplies.** Subsection 169(1) sets out the general rule for ITCs. GMCL is not entitled to claim input tax credits (ITCs) with respect to investment management services procured by virtue of agreements with investment managers because, **GMCL as the administrator of the GMCL pension plans, has acquired the investment managers' services** for use otherwise than in the course of GMCL's commercial activities... **GMCL acquires these services in order to fulfil its responsibilities under paragraph 22(1)(a) of the *Ontario Pension Benefits Act*, which sets out that the administrator of a pension plan has a fiduciary duty** relating to the administration and investment of the pension fund. For these reasons, it is **our view that the services are acquired by GMCL in its role as administrator of the trusts,** solely for consumption by the trusts ... and not for use, consumption or supply by GMCL in the course of GMCL's commercial activities. [emphasis added] (Appellant's Reply, page 3)

32 The Appellant summarized its argument at page 4 of the Appellant's Reply:

> 9. The Reply to the Notice of Appeal put the Crown's position in this appeal on the same footing as the assessment -- that GMCL is not entitled to the input tax credit *solely* because the services were acquired for the consumption or use of the Plan trusts and not GMCL. This is clear in assumption 5(d) and in the reasons, paragraph 11.
> 10. The parties have now closed their cases and GMCL has filed its written argument to answer the case that was put to it in the Crown's reply. It would be completely unfair to allow the Crown to now put into issue these new matters. Raising these matters at this stage in an abuse of process of the Court.

33 In *Zelinski v. The Queen*, 2002 D.T.C. 1204 (T.C.C.) at paragraph 4, Bowie J. summarized the purpose of pleadings to be:

> The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. ...

34 In *Status-One Investments Inc. v. The Queen*, 2005 D.T.C. 821 (T.C.C.) at paragraph 8, Rip J. as he was then, stated:

> Pleadings fulfil several functions. Among other things, when drafted well, they enable the judge to determine clearly the matter submitted to him for decision, they enable the defendant (or respondent) to know what the plaintiff (or appellant) is alleging against him, and they enable the claimant to know what defences will be raised in answer to his claim. [FOOTNOTE 2] In addition, pleadings often give their drafters a better understanding of their case. After an exchange of pleadings, the parties should know exactly which points are in issue and what proof each of them will have to make.

35 In D. Casson's *Odgers on High Court Pleading and Practice*, 23rd ed. (London: Sweet and Maxwell/Stevens, 1991) at pages 123 -- 24, the purpose of pleadings was described as follows:

> ...The pleadings should always be conducted so as to evolve some clearly defined *issues*, that is, some definite propositions of law or fact, asserted by one party and denied by the other, but which both agree to be the points which they wish to have decided in the action.
>
> ...
>
> The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision.

36 Based on my review of the case comments and of the wording contained in the Reply, I conclude that the Respondent has sufficiently defined the issues involved in this appeal to allow me to address all three components of the subsection 169(1) test. Paragraph 6 of the Reply succinctly states that the Respondent believes the issue to be: whether or not the Appellant can claim ITCs

with respect to GST payable on the Investment Management Services. This is a broad enough statement to have put the Appellant on notice and to therefore allow the Respondent to put in issue all three elements of the test under section 169. I make this conclusion, which is favourable to the Respondent, despite my rejection of the Respondent's argument that the Respondent did not know all of the facts prior to the hearing, particularly in respect to the payment of the invoices. That is simply not the case. It appears from the evidence that the Rulings Officer had the same documentation that I have before me.

(1) The first element of the subsection 169(1) test for eligibility by GMCL to claim ITCs: Did GMCL acquire the Investment Management Services?

37 The Advance Tax Ruling states that GMCL, as administrator of the Plans and by virtue of agreements with Investment Managers, has "acquired" the services. Although the language contained in the Ruling is straightforward, I am not bound by an admission in a failed Ruling.

38 The Respondent did not address the first element of this test from the perspective of dealing with the key word "acquires". Instead, the Respondent relied on the argument that acts done by GMCL, in acquiring the services, are deemed by section 267.1 of the *Act* to be acts of the Plan Trusts, not acts of GMCL, because GMCL is in essence a trustee of the Plan Trusts. Since section 267.1 recognizes that acts done by a person who represents a trust are really acts of the trust, then GMCL's acts on behalf of the trust are, for GST purposes, acts of the trust. The Respondent defined the issue under this first element of the test as "whether GMCL should be considered a trustee so that section 267.1 can apply". Essentially the Respondent's argument is that:

(a) subsection 123(1) provides that a "person" includes a trust;
(b) the trust, not GMCL, acquired the services;
(c) section 267.1 deems acts of the trustee to be those of the trust; and
(d) GMCL's role in respect to the trust funds is no different than the role that a trustee would play, except that GMCL's role is defined by the *OPBA* and, under that statute, GMCL is called an administrator instead of a trustee.

39 Underhill, *Law of Trusts and Trustees*, 11th ed., provides a widely accepted and often quoted definition of a trust:

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (or are called the beneficiaries or *cestuis que* trust), of whom he may himself be one, and any one of whom may enforce the obligation.

40 *Black's Law Dictionary*, 8th ed. (St. Paul, Minn.: West Pub. Co., 2004) defines trust and trustee as:

> **trust**, *n.* **1.** The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settler*) for the benefit of a third party (the *beneficiary*) ...

> **trustee**, *n.* **1.** One who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary ... (emphasis added)

41 In section 1 of the *OPBA*, administrator is defined as the person or persons that administer the pension plan.

42 Section 267.1 has no application here. There was no evidence produced during the hearing that would suggest that GMCL took title, legal or otherwise, to the assets under the deed of trust. All of the Agreements reference Royal Trust as the legal title holder. Thus GMCL cannot fall within the ambit of the definition of trustee. The trust agreements expressly established Royal Trust as the trustee. Clearly GMCL's role, in relation to the trusts, was as an administrator, as defined and contemplated under the *OPBA*. It did not include, nor was it intended to include, the role of trustee in relation to the trusts. For the purposes of section 267.1, the role of GMCL was that of an administrator to these plans. The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers.

(2) The second element of the subsection 169(1) test for eligibility by GMCL to claim ITCs: Was GST "payable" by GMCL?

43 The Respondent's position is that GST was not paid by GMCL because the actual payment of GST on the services was paid to the Investment Managers out of the trust funds and GMCL only "approved" payment of the invoices. In addition, the Respondent argued that, since GMCL was not liable to pay the consideration, under the various agreements, no GST could be payable by GMCL. Since section 169 does not expressly contain the word "recipient", the Respondent argued that the definition of "recipient" is not relevant to my determination. Alternatively, the Respondent claimed that GMCL would not be the recipient as GMCL had no personal liability under the trust agreements.

44 Again the Ruling presupposed that GMCL was the recipient of the Investment Management Services.

45 Under the *Act*, whether tax will be "payable" by GMCL depends on whether GMCL was the "recipient" of the services. Subsection 169(1) was amended in 1997. The phrase "supplied to" was replaced with the term "acquires".[1] There is an abundance of CRA administrative policy emphasizing that the determination of the recipient is essential to an ITC entitlement. There has also been much debate about whether the term "acquires" imports a new requirement in the *Act* in respect to the meaning of recipient.

46 David Schlesinger described the issue as follows:

> While we understand from Finance's Technical Notes that the intent may not have been to change the original scope of the subsection, the word "acquires" was introduced and may be interpreted by some as to introduce a new requirement. We understand that the CRA agrees that the "recipient" of a supply is the

> person that may be able to claim an ITC for GST/HST paid on the supply. However, based on the meaning given by the CRA to the word "acquires" and the recent jurisprudence on the meaning of "recipient", the recipient of a supply may not necessarily be the person that "acquires" the supply.[2]

47 Contrary to an abundance of CRA administrative policy which appears to state otherwise, the Respondent now contends that the determination of the "recipient" is not germane to an ITC entitlement, as the word "recipient" is not found in subsection 169(1).

48 Subsection 165(1), the charging provision, provides that a "recipient" of a supply "shall pay tax" with respect to that supply.

49 Subsection 123(1) defines recipient as:

> "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 ... (emphasis added)

50 It appears that, where a person is the recipient of the supply, the *Act* expressly contemplates that GST is payable by that person.

51 Subsection 152(1) of the *Act* places emphasis on the issuance of an invoice and section 168 provides that:

> Tax ... is payable by the recipient on ... the day the consideration for the supply becomes due.

52 While the amendment to subsection 169(1) in April 1997 replaced the phrase "supplied to" with the term "acquires", a determination as to who is the recipient of the supply remains directly relevant in dealing with the question "was GST payable by GMCL?" I do not believe that the 1997 amendment replaced the focus on the central determination in this appeal of which party is contractually liable to pay GST pursuant to the Agreements.

53 This determination is one of both fact and law. GMCL and the relevant Investment Managers were the parties to all of the Fee Agreements. According to Mr. Phillips, GMCL, as the client, was solely liable to pay their accounts. No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.

54 Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment. Thus, GMCL is the recipient of the supply of the services of the Investment Managers and GST was "payable" by GMCL. Under subsection 169(1), ITCs are available only to the person who "acquires" the supply if tax is payable by that person. While tax will be payable by the recipient under subsection 165(1), it does not necessarily follow that the eventual recipient will always be the person who "acquired" the supply. Subsection 123(1) states that "recipient" will be the person to whom a supply is made. Therefore in certain circumstances the person who acquired the supply (GMCL) may not be the person to whom the supply is eventually made (the pension trusts). GMCL has satisfied this requirement under subsection 169(1) since it is the only person liable to pay the consideration for the supply of services of the Investment Managers under the relevant Agreements. Although some of the financial statements of the Hourly and Salaried Plans suggest that payments are treated as being made by the trust, these accounting documents are subordinate to the primary Investment and Fee Agreements and do not alter the contractual provisions in those Agreements. The pension trusts are not liable to pay for the services and cannot be the recipient, although the supply of services was eventually re-directed to the assets in the trusts. I also believe that the conclusion reached by Dussault J. in *163410 Canada Inc. v. The Queen*, [1998] T.C.J. No. 827, supports my reasons in this appeal, contrary to the view of both counsel for the Appellant and the Respondent. In that decision, although the facts were confusing, in determining that the Appellant was entitled to claim ITCs, Dussault J. focused on the Agreement which identified the Appellant as the party liable to pay. Dussault J. determined that regardless of the nature of the ancillary agreement between Midland and the Appellant respecting the payment of the Appellant's legal services and regardless of the fact that Midland was identified as the supplier's client, and not the Appellant, it was the Appellant that remained liable to pay the consideration for the services. This was so, even though Midland was instructed to pay for the services with the Appellant's funds. Following Dussault's reasoning then, even if the investment advice had been given directly by the managers to the pension plans (which it was not), where the fees were invoiced to GMCL, by virtue of the Fee Agreements, this liability to pay would prevail.

55 In the course of the proceeding, both Respondent and Appellant addressed my findings in *Bondfield Construction Company (1983) Limited v. The Queen*, [2005] T.C.J. No. 239, 2005 TCC 78. In that decision, I canvassed the former subsection 169(1) as well as the meaning of recipient, as I am doing in the present appeal. The determination of ITC entitlement in *Bondfield* focused on which person was the recipient. I found it to be the person who was ultimately liable to pay the supply. *Bondfield* is certainly distinguishable from the present appeal on the facts and it is not necessary to review that decision, except to state that my reference to "ultimately liable" in the *Bondfield* decision should not be taken to mean that the definition of recipient requires a determination of the person who ultimately receives the supply but rather to a determination of the person who is ultimately liable under the agreements, to pay consideration.

56 Finally, it should be noted that the parties to this appeal did not have an opportunity to address the decision in *Y.S.I.'S Yacht Sales International Ltd. v. The Queen*, [2007] T.C.J. No. 187,

2007 TCC 306, which was rendered subsequent to this hearing. In that decision Justice Woods stated the following at paragraphs 56 and 57:

> [56] ... In my view, YSI is the only person that is liable for the consideration under the agreements with suppliers. Mr. Huntingford testified that he requested that Platinum provide a source of funds up front so that he would not have to chase Platinum when YSI needed money to pay its suppliers. This banking arrangement was nothing more than a funding mechanism, which is entirely consistent with YSI purchasing for purpose of a resupply to Platinum.
>
> [57] The bottom line is this: A person is not a recipient under the *Excise Tax Act* unless they are liable to pay the consideration under the agreement. In this case, Platinum was not liable to pay the consideration under the agreements with suppliers.

57 It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment of the fees is irrelevant because the bottom line, as reiterated by Woods J. in *Y.S.I.'S Yacht Sales*, is that the person who satisfies the requirement at subsection 169(1), and who carries the contractual liability to pay, will be the person entitled to claim ITCs.

(3) The third and final element of the subsection 169(1) test for eligibility by GMCL to claim ITCs: Did GMCL acquire the Investment Management Services for Consumption or Use in the course of its commercial activities?

58 The Respondent submits that GMCL acquired the Investment Management Services on behalf of the Trust Funds and not for use in its own commercial activities. Technical Information Bulletin B-032R, "Registered Pension Plans" (June 8, 1993) provides background in respect to CRA's position on ITC claims by employers with employee pension plans. It provides for a separation between "Employer Expenses" and "Plan Trust Expenses" where "only the employer, and not the plan trust, is entitled to claim an ITC on Employer Expenses to the extent they are acquired or imported by the employer for consumption or use in the course of its commercial activities and the GST on the Employer Expenses is paid or payable by the employer".

59 The GST Headquarters Letters 59990 "Application of the *Excise Tax Act*" (June 15, 2006) reflects the Respondent's position:

> ... If a trust is engaged in commercial activities it will be entitled to claim input tax credits to the extent the property and services are for consumption, use or supply in the course of commercial activities of the trust and all the requirements are met in order to claim input tax credits under section 169 of the ETA. Otherwise, the trust may not claim any input tax credits in respect of property or services acquired in the administration of the pension plan and trust.
>
> Where the employer invoices the trust, and the trust pays the invoice from the trust assets, the trust is paying the employer to undertake activities in respect of

> the plan and trust, and therefore generally the amount is consideration for a taxable supply made by the employer to the trust. The employer is either supplying or re-supplying property or services, as the case may be, to the trust. The only exception to this situation is where the employer is the administrator of the plan and it has acquired property or services from a third party (as opposed to supplying property or services itself, e.g. it using its own employees to provide investment management services to the trust instead of acquiring the services from a third party for the trust) in its fiduciary capacity of administrator of, and for the benefit of the plan and trust. Where the employer acquires a particular property or a service from a third party in its capacity of administrator and the trust pays for the supply directly, or indirectly by reimbursing the employer for the amount, and thus the amount is charged against the trust assets, the property or service is considered to have been acquired by the employer in its fiduciary capacity of administrator of, and for the benefit of the plan and trust, and therefore for consumption, use or supply by the trust. The employer is not considered to have acquired the property or service for consumption, use or supply in the course of its commercial activities and is not entitled to an input tax credit in respect of the tax paid on the consideration for the supply. [emphasis added]

60 "Commercial Activity" is defined in subsection 123(1) as:

> (*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, (emphasis added)

61 Although the term "business" is also defined in subsection 123(1), the *Act* does not define the phrase "in the course of". However, the Courts, in considering this phrase, have given wide latitude to those words emphasizing "...that only the smallest connection to employment is required to trigger the operation of the section" (*The Queen v. Blanchard*, 95 D.T.C. 5479 (F.C.A.). As well, in reference to deductions for expenses incurred "in the course of issuing and selling shares", the Federal Court of Appeal in *M.N.R. v. Yonge-Eglington Building Ltd.,* 74 D.T.C. 6180, at page 6184 observed that:

> ... the words ... are used in the sense of 'in connection with' or 'incidental to' or 'arising from' and refer to the process of carrying out the borrowing for or in connection with which the expenses are incurred.

62 A definite nexus exists between the services supplied by the Investment Managers and the commercial activities of GMCL. However, this alone is insufficient. The question, therefore, becomes twofold: (1) whether that particular nexus meets the threshold embodied in the phrase "in the course of"; and (2) whether GMCL used or consumed the services of the Investment Managers in the course of its commercial activities. My answer to both of these queries is in the affirmative.

63 The various Plan Agreements, the statutory provisions under the *OPBA* and the responsibilities that GMCL had to its employees, all support my conclusion that GMCL used the services in the course of its commercial activities.

64 All of the documentary evidence clearly establishes that the Custodial Trustee took bare legal title to the Plan assets. GMCL is the only person, according to the oral and documentary evidence, that bears any responsibility whatsoever for the financial well-being of the Plan assets and the only person that can use the services of the Investment Managers. The Custodial Trustee certainly had no authority, contractual or statutory, to contract these same services. The transfer of legal title of the assets to the Custodial Trustee in no way diminishes the responsibility of GMCL to its employees to manage these assets prudently. How could this be otherwise when the Master Trust Agreements contain explicit provisions that Royal Trust is not accountable for the proper investment of the trust assets and consequently has no liability for loss resulting from the investment decisions of the Investment Managers. According to the Agreements, it was the Investment Managers who had the authority to manage the Plan assets. The Respondent's argument that the services are consumed or used by the Custodial Trustee is simply untenable because the Trustee bears no liability for the success or loss that could be associated with the investments. This was clearly the evidence of Mr. Marven who explained that under a defined-benefit plan, GMCL is at the top of the hierarchy or the Plan's "backstop". In other words, the buck stopped there. Funding pension plan financial shortfalls was GMCL's problem. Since GMCL is the only person responsible for the assets, it is the only person who could use or consume the services of the Investment Managers. The Custodial Trustee could not contractually use these services, which the Investment Managers legally supplied to GMCL "in relation to the Trust Assets". I do not accept that because assets are held in a pension trust, which is artificially deemed to be a person under subsection 267.1(5), that it is fatal to the claim by GMCL for ITCs. To do so, would be to ignore the contractual and statutory obligations of all parties, GMCL, the Custodial Trustee, and the Investment Managers.

65 The responsibility of GMCL to properly manage the Pension Plan assets is not only derived through the Agreements but also through its duties as an Administrator under the *OPBA* and its duties to provide pension benefits to its employees.

66 Pursuant to the *OPBA*, GMCL, the employer acting as a plan administrator of pension assets, assumes various fiduciary responsibilities in connection with the Plan's administration and management. Non-compliance by GMCL under the *OPBA* equates to non-compliance with the law. Under the *OPBA*, liability for the successful management of the pension assets rests squarely with the Plan's Administrator, GMCL. GMCL is also the employer under the Plans and consequently liable for funding deficiencies in addition to successful management performance. To limit liability, GMCL contracts for the expertise of the Investment Managers.

67 In addition to these contractual and statutory obligations, GMCL has agreed to provide, maintain and administer a compensation package, not only as one of the terms of employment extended to its employees, but as a vehicle for attracting and keeping the most qualified individuals within its organization. Without a profitable pension plan, GMCL's capacity to successfully compete in the market is substantially diminished. While the expenses associated with the administration of these pension assets may be viewed as being only indirectly related to the manufacture of vehicles, they are nonetheless an integral component to the overall success of GMCL's commercial activities in the market place. According to Mr. Marven's evidence, he likened the provision of a pension plan to other forms of employee compensation such as the provision of health care benefits. The only logical, common sense conclusion is that all of the functions of GMCL, in relation to these pension assets, are for the sole benefit of its employees, both the salaried and hourly employees and, consequently, they are an essential component to GMCL's business activities. Therefore, GMCL acquired the services of the Investment Managers for use in its commercial activities. As such,

while GMCL does not directly utilize the services in making GST supplies in its operations, those services are part of its inputs toward its employee compensation program, which is a necessary adjunct of its infrastructure to making taxable sales. The expenses are not personal in nature. They are ancillary to the primary business activities of GMCL and meet the need of attracting and maintaining an adequate employee base to support its primary business operations. Therefore these expenses, although indirect expenses to GMCL's business, qualify as expenses paid for in the consumption or use in the course of the commercial activities of GMCL. Subsection 169(1) does not require that managing a pension plan be the sole commercial activity of a person, only that the supply be consumed or used "in the course of commercial activities". To divorce the services of the Investment Managers from the commercial activities of GMCL, in the manner that the Respondent would have me do, ignores not only the contractual and statutory obligations of GMCL but also the commercial realities of a competitive marketplace.

68 On a final note, both parties addressed the principles in several United Kingdom Valued Added Tax ("VAT") cases, which have allowed an employer to claim ITCs on investment management fees on the basis that where an employer is responsible for the trust asset management, those expenses are part of the business activities. Although I feel no need to place reliance upon these decisions to support my conclusions, and although they do address substantially similar issues, the statutory scheme in the United Kingdom differs from the *Excise Tax Act* in that the U.K. legislation does not deem trusts to be a separate person from the trustee.

69 Although my conclusions with regard to the first issue effectively dispense with this appeal, I intend to address the second preliminary matter and issue, for the sake of thoroughness, and because a substantial portion of the hearing, together with most of Mr. Wong's evidence, was devoted to these matters.

Preliminary Matter #2 -- Improper Pleading of Assumption 5(f); and Issue # 2 -- Are the Investment Management Services an Exempt Financial Service?

70 Paragraph 5(f) of the Reply states:

> 5. In assessing the Appellant to deny the input tax credits claimed by the Appellant, as pleaded in paragraph 10 of the Notice of Appeal, the Minister of National Revenue (the "Minister") relied on, *inter alia*, the following assumptions or findings of fact:
>
> ....
>
> (f) the investment management services were not a service listed in paragraphs (a) to (m) of the definition of a financial service under the *Act*; ...

71 This is not the first time I have considered this assumption of fact. In a pre-hearing Motion, the Appellant requested the Court to either instruct the auditor, Aaron Wong, to answer questions posed to him during the examination for discovery concerning paragraph 5(f) or to strike paragraph 5(f). Although I concluded that it would be premature to strike the paragraph, I ruled that those questions posed to Mr. Wong by Appellant counsel had been properly put to him and that the examination for discovery should be continued to give Mr. Wong an opportunity to respond. I also concluded that Respondent counsel's objections were inappropriate and amounted to interference by

counselling and cuing the witness to give essentially the same response of "the services are taxable" to all of those questions.

72 It was the Appellant that called Mr. Wong as a witness. It is clear from his evidence that the voluntary disclosure provided by GMCL to CRA was the sole basis of the initial assessment. However, this disclosure made no reference to whether the supply of Investment Management Services was a financial service as referenced in paragraph 5(f) of the Reply. Instead it dealt only with the subsection 169(1) issue. In response to questioning by both Appellant and Respondent counsel, it is evident that Mr. Wong never considered or addressed in any manner whether these services were exempt financial services under the *Act*. His repeated parroting of the response that "the services were taxable" was entirely non-responsive. It comes nowhere close to a consideration of whether those Investment Management Services fell within each of the paragraphs (a) through (m) of subsection 123(1) of the *Act*. It was apparent that Appellant counsel was frustrated with this response, and with good reason, particularly given my directions subsequent to the hearing of the Motion. What is conspicuously offensive here is the approach which Respondent counsel took with this issue. After hearing the Motion, I concluded that counsel's actions were tantamount to cuing and coaching Mr. Wong to state that "the services were taxable". Mr. Wong was true to this response and kept to his script during the hearing of the appeal.

73 Respondent counsel argued that the Appellant's position of the Respondent improperly pleading paragraph 5(f) in the Reply, is both "irrelevant and wrong" (Respondent's Written Submissions, p. 21). I am quite frankly shocked by the Respondent's position. Essentially the position of the Respondent was that since sufficient evidence was adduced during the hearing, issues of assumptions and burden of proof became merely academic. While this, on its face, is true, it cannot transform the Crown's actions, which I consider to be intrinsically appalling, into something that is right and therefore acceptable.

74 Respondent counsel argued that the cross-examination of Mr. Phillips elicited sufficient facts pertaining to the specifics of the Investment Management Services to enable the Court to determine whether those services are a financial service as contemplated by subsection 123(1). While this may be true, it does not assist the Respondent in defending its position that in fact this assumption was made.

75 In reviewing the transcripts, I believe I have sufficient testimony together with documentary evidence to make a determination on whether the supply was a financial service. However, this line of reasoning does not negate the fact that the Crown was wrong in pleading assumption 5(f) in the first place which became more blatantly evident after the Motion and the continuation of the examination for discovery.

76 Respondent counsel also relied on a quote of Justice Bowman, as he was then, from *Cadillac Fairview Corporation Limited v. The Queen*, 97 D.T.C. 405 (TCC) at page 407:

> ... An inordinate amount of time is wasted in income tax appeals on questions of onus of proof and on chasing the will-o'-the-wisp of what the Minister may or may not have "assumed". ...

In that case, the Court was dealing with an argument by the taxpayer that the Crown could not rely on something that had not been pleaded in an assumption. Justice Bowman was simply stating that if all material facts have been adduced in evidence, the Court must dispose of the appeal on its mer-

its without regard to the Minister's assumptions. Respondent counsel, in relying on this quote, has taken it out of context because I do not believe that this quote can or should be used to support the position that the Minister can plead any assumptions in the Reply whether or not they were actually made.

77 Since the decision in *Cadillac Fairview*, both Chief Justice Bowman and Associate Chief Justice Rip have been abundantly clear in their judgments that it is improper to plead assumptions that were never made. In *Holm et al. v. The Queen*, 2003 D.T.C. 755 (TCC), at paragraph 18, Justice Bowman stated:

> It is undeniable that there is a strongly held view in this court that to plead as assumptions facts that were not assumed on assessing is improper and reprehensible. Also, it seems the practice is widespread. In an appropriate case I would have no hesitation in allowing an appeal, striking out a reply or awarding costs on a solicitor and client basis either against the respondent or, in a flagrant case, against a counsel who drafted a misleading reply. ... (emphasis added)

78 In *Anchor Pointe Energy Limited v. The Queen*, 2002 D.T.C. 2071 (TCC), at paragraph 26, Justice Rip stated the following with respect to the Crown's inaccurate allegations regarding the Minister's assumptions:

> The Crown has a serious obligation to set out honestly and fully the actual assumptions upon which the Minister acted in making the assessment, whether they support the assessment or not. Pleading that the Minister assumed facts that he could not possibly have assumed is not a fulfilment of that obligation. ...

79 In confirming the decision of Justice Rip, the Federal Court of Appeal (2003 D.T.C. 5512 (FCA) at paragraph 23) stated the following:

> The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet. There is no reason why the requirement for precision and accuracy does not apply to the Crown accurately stating the circumstances in which the assumptions arose, that is, on an assessment, reassessment or confirmation. ... (emphasis added)

80 The most recent *Anchor Pointe* decision ([2007] F.C.J. No. 687, 2007 FCA 188) again reiterates the importance of pleading assumptions honestly and accurately.

81 Respondent counsel also argued that paragraph 5(f) of the Reply was "implicitly assumed" by Mr. Wong when the assessment was made. The Respondent's position is that when the Appellant made the request to CRA for a ruling on input tax credits, an assumption, that the services were taxable supplies, implicitly attached to the request. Paragraph 47(d) of the Respondent's Written Admissions states:

> (d) The Appellant is wrong to assert that the Minister made no assumption with respect to the tax status of the investment management services. Implicit in the Appellant's filing position was the assertion that the services were taxable; the

Minister's assumption can hardly be less well established than the filing position of the Appellant from which it is derived.

82 This is an interesting argument. In Exhibit A-4 at page 7, the Ruling states that "The supplies from the investment managers to GMCL are taxable supplies ...". A taxable supply is defined in section 123 to mean a supply that is made in the course of a commercial activity. In section 123 "commercial activity" of a person means (a) a business carried on by the person ... except to the extent to which the business involves the making of exempt supplies by the person." In section 123 "exempt supply" means a supply included in Schedule V. Schedule V, Part VII, s.1 states "A supply of a financial service that is not included in Part IX of Schedule VI". "Financial Service" is defined according to paragraphs (a) through (m) of section 123. Therefore a finding that a supply is a taxable supply, by extension, means, according to the Respondent's argument, that the supply is considered not to be a financial service. I think this reasoning is weak but it could provide some foundation for the Respondent to argue that the nature of the supply was considered prior to the assessment being raised. The question is whether this procedurally implicit assumption may be sufficient to support assumption 5(f) in the Reply. The Respondent could have called the CRA official responsible for the Ruling, which might have assisted with this position, but they did not and I reject this argument as it is insufficient to support the inclusion of assumption 5(f) in the Reply.

83 Paragraph 5(f) of the Reply explicitly refers to the various sub-provisions of the definition of financial services. This undoubtedly gives the impression that the Minister had put his mind to the various components of the definition, going through each and every subparagraph, before finally concluding that the service in question did not fall under each individual subcomponent of that definition. Although Mr. Wong's testimony for the most part was simply of no assistance, he did admit that he did not review each of the paragraphs (a) through (m) of subsection 123(1) and therefore did not consider whether the Investment Management Services fit under any of them. At page 113 of the Transcript, the following exchange occurred between Appellant counsel and Mr. Wong:

> Q: ... I am putting to you did not ask yourself that question. I want you to answer the precise question I am asking. Not that you thought it was taxable. I know you thought it was taxable. That is not what the assumption says. The assumption doesn't say it is taxable. The assumption speaks specifically as to whether it is a financial service under (a) to (m). You did not ask yourself that question, did you, sir?
>
> A: No.
>
> Q: Your answer was no, I think?
>
> A: No.
>
> Q: In fact, sir, you did not open the sections, the definition in 123, and say to yourself, what is the investment management service and then ask yourself does it fit in (a)? What is the investment management service, does it fit into (b)? You didn't do that because your audit was only about the input tax credit. Would you agree with me, sir?

A: Yes.

84 I believe that my directions were very clear in the Order issued in the pre-hearing Motion and as a result the Respondent should have been on notice of the impugned assumption.

85 At the subsequent examination of Mr. Wong, it should also have been abundantly clear to Respondent counsel, if it was not previously, that Mr. Wong never considered in any manner the financial service issue. The proper next step was to amend the Reply to delete this assumption of fact. This step was not taken and I consider this to be a very serious matter.

86 The Respondent cannot be permitted to trivialize the inclusion of assumption 5(f) in its pleadings and I am not persuaded by any of its arguments. There were ample warning signs along the way. They were all ignored. The fact that there is sufficient evidence before me to make a factual determination of the issue does not negate the Respondent's duty to honestly plead assumptions at the outset or to amend the pleadings once it becomes abundantly clear that an assumption had not been made. Assumptions relied upon in pleadings must be stated fairly, honestly and accurately. That was not done here.

87 So what is the appropriate remedy where the Minister improperly pleads an assumption of fact, but where there is sufficient evidence before the Court to make a determination of the issue? Appellant counsel argued that the Respondent ought to be prevented from defending the assessment based on the argument that the investment services were not financial services as contemplated by paragraphs 123(1)(a) to (m). Although I agree with Appellant counsel that the breach here is flagrant, I do not agree or support one of Mr. Meghji's arguments on this point. His position was that the breach in this appeal is all the more serious because "the within appeal is a serious, general procedure case" (paragraph 27(i), page 10 of Appellant's Reply) as opposed to the informal cases, which contain many of this Court's pronouncements to the Crown respecting this very issue. Of course this view implies that in some way this type of approach may be more acceptable in the informal cases because it would be a less serious breach. I take strong exception to that position. The duty which is upon the Crown to honestly plead assumptions is no less important in the informal procedure than in the general and in fact may be far more important because of the detrimental effect it may have on a taxpayer that is often self-represented. At paragraph 19 of *Holm*, Bowman J. (as he was then) states:

> The practice is reprehensible whenever it occurs but it is particularly pernicious in informal procedure cases where the taxpayer is often self-represented. ...

88 Although this may be a case akin to what Justice Bowman in *Holm* described as "flagrant and reprehensible behaviour", I believe that I can and should address this issue pleaded in the alternative, based on the evidence adduced through Mr. Phillips, and that I can best deal with the seriousness of the Respondent's actions and the attempt to trivialize this issue through an award of elevated costs. The Appellant cannot claim to be completely unaware of this potential argument because the wording of paragraph 9 of the Reply under the heading "Grounds Relied and Relief Sought" clearly references paragraphs (a) to (m) of subsection 123(1):

> The investment management services are not included in any of paragraphs (a) to (m) of the definition of the term "financial service" in subsection 123(1) of the Act and hence are not an exempt supply for purposes of the Act.

In addition, in the Notice of Appeal, the Appellant submits that the services provided by the Investment Managers were GST exempt financial services, as defined in subsection 123(1).

89 The Appellant's position is that Investment Management Services, although not specifically referenced in paragraphs (a) to (m), may be included under paragraphs (a), (d) and (l) when the nature of the services are considered. The evidence of Mr. Phillips and the documentary evidence potentially support the finding that the provision of Investment Management Services involves the provision of financial services. The Appellant likened this to brokerage and investment banking services which are not specifically itemized in paragraphs (a) to (m) but which include the provision of financial services. The Appellant argues that these services involve the transfer of ownership of financial instruments, the transfer or receipt of money and the arrangement for or provision of such services. Relying on Mr. Phillips' evidence, the Appellant contends that the services of the Investment Managers were comprised of the essential components of buying and selling of securities. As such, the services of the Investment Managers fall within the definition of subsection 123(1) so that they remain GST exempt supplies, and further, they do not fall within the exclusions paragraph (p) or (q) of subsection 123(1). Therefore GST has been paid in error.

90 The Respondent's position is that the supply was investment management expertise to the trusts and that this element was the dominant element of the supply. The Respondent argued that a brokerage firm could, and in fact did, execute trade orders subject to the expertise and knowledge of the Investment Managers. Since the services do not fall within any of the paragraphs (a) to (m) of the definition of financial services, there is no need to consider the exclusions in subsection 123(1).

91 The Appellant's position places great reliance on the decision in *The College of Applied Arts & Technology Pension Plan v. The Queen* ("*CAAT*"), 2003 GSTC 143. The narrow issue discussed in *CAAT* was whether the Appellant's principal activity was the investing of funds as required by paragraph (q) of the definition of "financial service". Bowie J. stated at the end of paragraph 9 that:

> ... In my view, the measure of "principal activity" must be the importance of the activity to the achievement of the organization's goals or purposes.

92 Bowie J. concluded that the investment function was not the principal activity of the plan trusts. The Appellant contended that *CAAT* decided that the services of discretionary investment managers were financial services within paragraphs (a) to (m) of the definition and that this finding remains unaltered by the legislative amendment to paragraph (q) on July 29, 1998. However, I disagree with the Appellant's view of *CAAT* because the decision did not deal with paragraphs (a) to (m). There was no argument before the Court respecting these paragraphs as reliance on those paragraphs had been withdrawn after discoveries. Another distinguishing point was that the Appellant in *CAAT* was the trust plan itself, not the plan administrator as in the present appeal; therefore, it is GMCL's principal activity which would warrant analysis under paragraph (q), since the supply was provided to that "corporation", and not to the investment plan. Finally, it is important to note that *CAAT* was decided based upon former versions of paragraph (q). Neither of these former versions made reference, as the present version does, to an "investment plan" as defined in subsection 149(5). Although the facts are similar to those in this appeal, the applicability of *CAAT* to this appeal is diminished to a great extent by these factors.

93 While the purchase and sale of securities is a necessary component to the provision of the services, in actual fact, it was not the Investment Managers who were completing the actual buying and selling. It was brokers or traders. Although Mr. Phillips testified that managing the assets meant

making decisions and then going on to buy and sell the securities, it was Mr. Phillips' own evidence that he issued buy/sell orders to brokers to complete the financial transactions. Royal Trust, which always held the money, then proceeded to review the orders, and provide funds to the broker to do the deal. According to the Investment Management Agreements, the Investment Managers had the authority to buy and sell securities but they never engaged in the actual buying and selling. On cross-examination, Mr. Phillips stated that Perigee did not purchase or sell securities but forwarded buy/sell orders to Royal Trust and the brokers. Although these documents give the Investment Managers this discretionary authority, according to the uncontradicted evidence of Mr. Phillips, it was not exercised to that degree. The brokers were directed to perform the acquisition/sale after the decision-making by the Investment Managers. How could it have been otherwise since Royal Trust exclusively maintained control of the funds. Brokers' claims could only be settled by the Trustee. At page 270 of the Transcript Mr. Phillips states:

> **A.** ... We have expertise and that is what the clients are paying us for.
>
> **Q.** They are paying you for that expertise?
>
> **A.** They are paying us to beat the benchmark.

And at pages 281-83, he goes on to state:

> **Q.** Did Royal Trust hold all of this money as the trustee that you described, this billion dollars?
>
> **A.** They are the trustee for the fund.
>
> **Q.** They would hold it, actually?
>
> **A.** Yes. They have a fiduciary responsibility. They wouldn't release funds. Basically, they are told by General Motors officially by letter, by written consent, that Perigee Investment Counsel are managing the funds. They should allow for all buy and sell tickets that are sent to them, that they should settle all the trades.
>
> ...
>
> The thing I also always liked the best about the trustee is we never physically touch the money. There is no way I could ever have called up and say, "Send $10 million over to my account," or "Send us money over." Everything had to be done through GM. The trustee holds on to the money. The money moves between General Motors and the trustee or between the trustee and the brokers who are settling the trades that we have done. (emphasis added)

94 In Appellant counsel's submissions, he summarized Mr. Phillips' evidence as:

> I do all the smart thinking and then I do the trade. That is how I deliver results. However the service provided to GMCL is primarily for the "smart thinking" of Mr. Phillips together with the arranging for the trade. However, the fee charged

> is for the "smart thinking" and not the actual trade. As Mr. Phillips explained on cross-examination, the brokers were contacted to do the trade and they received a commission for completing the trade. (emphasis added) (Transcript p. 293)

95 The Appellant submitted that the value provided through knowledge and expertise could not change the essential nature of the supply provided. The Appellant relied on an analogy of the supply of a 99cent(s) McDonald's hamburger to the $40.00 hamburger at an exclusive restaurant, where they have value differentials but their character remains the same. The supplies are distinguished as the $40.00 hamburger represents a supply of expertise and skill which accounts for the higher price. Applied to the facts here, and according to the Appellant, GMCL's purchase of financial services was in respect to the purchase and sale of securities but only in respect to the high-end variety. This argument is misleading because GMCL is not paying for the acquisition/sale of higher-end securities but for portfolio management that would maximize returns. As Mr. Phillips testified, the Investment Managers were paid to "beat the benchmark".

96 The Appellant argued that the services provided are exempt financial services based on paragraphs (a), (d) and (l) of subsection 123(1). A review of many of the cases respecting financial services discloses that financial services tend to be characterized as transactional in nature (for example cheque writing, tracking payments). *Drug Trading Co. v. R.*, [2001] G.S.T.C. 48 (T.C.C.); *Elgin Mills Leslie Holdings Ltd. v. Canada*, [2000] G.S.T.C. 8 (T.C.C.); *Collins v. R.*, [2002] G.S.T.C. 66 (T.C.C.); *Locator of Missing Heirs Inc. v. Canada*, [1995] G.S.T.C. 63 (T.C.C.), aff'd. [1997] G.S.T.C. 16 (F.C.A.). In this last case quoted, the Court found that the transfer of property was incidental to the research involved in locating missing persons. As a result, this was characterized as a single supply that did not fall within the definition of financial services.

97 In the recent decision in *Banque Canadienne Impériale de Commerce v. The Queen*, [2006] T.C.J. No. 303, 2006 TCC 336, although Justice Angers found some overlap between the elements of the services of debt collection and the broad definition of financial services, he nevertheless concluded that the service did not fall under the definition of financial services and was taxable because the "dominant element" of the supply by the collection agencies was the provision of the services of debt collection. Also in *O.A. Brown Ltd. v. The Queen*, [1995] G.S.T.C. 40 (T.C.C.), where other expenses were incurred in the purchase and supply of livestock that could have been a taxable supply, the Court held that the separate expenses were so interconnected to the purchase service and so integral to the entire service that it was one composite service. The reasons in *O.A. Brown* for this single supply theory were approved by the Court of Appeal in *Hidden Valley Golf Resort Assn. v. R.*, [2000] G.S.T.C. 42.

98 In *Royal Bank of Canada v. R.*, [2007] F.C.J. No. 232, 2007 FCA 72, [2007] G.S.T.C. 18, 2007 G.T.C. 1554, the FCA recently determined that the actual selling of financial instruments on behalf of another party, did constitute a financial service and went beyond mere advice. The FCA agreed with the Tax Court judge's finding that the selling of these securities was the dominant element of the supply provided:

> 9 In essence, the Judge concluded that the services provided by the Appellant consisted in the distribution or arranging for the distribution of Units of the mutual funds. ...

> 12 The services provided by the Appellant were much more than clerical in nature and advice. It was agreed by the parties that the services should be treated as a single supply of services and not be broken down. It is obvious that the dominant and, we would say essential, characteristic of this supply of services by personnel duly licensed in conformity with the regulatory scheme was the selling of securities on behalf of RMFI, i.e. the distribution of the units of the Funds.

The Investment Managers in the case before me do not sell or buy. They merely provide buy/sell orders, which are decisions by the Investment Managers which the Trustee may or may not abide by. As per Mr. Philips' testimony at page 282, Royal Trust, in fulfilling its fiduciary responsibility toward the Pension Plans and after receiving instructions to provide funds to brokers for a security transaction, could: "call General Motors of Canada and say:

> Did you know that Perigee Investment Counsel is buying this weird bank that we have never heard of? Is that ok with you? Should we settle this?"

99 In reviewing the facts, at paragraph 16 of my reasons, I quoted a portion of the Preamble to one of the Investment Management Agreements. In that Preamble it clearly states that the Investment Managers are to "provide investment advice and other related administrative services". At paragraph 4 of that Agreement, it states:

> Powers of Investment Manager. The Investment Manager shall have the following powers ... Such powers shall be exercised by providing written or electronic direction to Royal Trust, provided that the purchase or sale of securities may be effectuated by direct communication between the Investment Manager and the broker handling the transaction ... (Exhibit A-3, Tab 33) (emphasis added)

An entire paragraph in this Agreement is devoted to the brokerage aspect. At paragraph 10 it states:

> Brokerage. The Investment Manager will endeavour to secure the best available execution and terms of brokerage transactions for the Unitized Trust Fund with due regard to the quality of research and other services provided by the broker to the Investment Manager on behalf of the Unitized Trust Fund. Except as otherwise specifically directed by GM Canada, the Investment Manager shall have complete discretion to select any broker or dealer to effect securities transactions under the Investment Account, provided that if the Investment Manager or an affiliate is selected to effect such transactions, GM Canada must approve any such arrangement in accordance with a separate agreement. Prior to the execution of such separate agreement, the Investment Manager shall have furnished GM Canada with a description of its brokerage placement practices and shall have disclosed any and all "soft dollar" or other directed commission arrangements. (Exhibit A-3, Tab 33) (emphasis added)

It is clear that GMCL contemplates that certain services will be supplied by the brokers and that a certain level of competency is anticipated. The Investment Manager has discretion to select the best broker but it is the broker that will be "handling" and effecting the transaction. It is interesting that this paragraph contemplates a situation where the Investment Managers might be "effecting" such transactions themselves, as per paragraph 4 which gives them that inherent power. However, in this

instance, GMCL must approve such an arrangement by way of a separate agreement. If this had occurred it may well have been that the Investment Managers were "arranging for" the transfer of securities in some instances. But the evidence does not support that this ever occurred. The Investment Managers were clearly employed to apply their knowledge, skill and expertise in picking the securities. This is the value of the Managers to GMCL -- the "smart thinking" as Appellant counsel characterized it. If they exercised the inherent power to arrange for the completion of a transaction, whatever that entailed, GMCL thought it significant enough and sufficiently separate an activity to impose its approval according to the terms of another agreement. This is another example of Mr. Phillips' evidence that "everything had to be done through GM". In fact according to the evidence, the brokers dealt directly with GMCL in respect to their commissions. The Investment Managers did not complete the buying and selling. Once they applied their expertise and made the calls to Royal Trust and the broker, the deal came together as a result of the activities that flowed between these two latter entities, which completed the arranging for the purchase/sale of the security for GMCL. The evidence additionally provided that GMCL insisted that any changes in the relevant personnel with the Investment Managers, which might alter "the nature of the firm" be brought to its attention (Transcript p. 285). The evidence as a whole points conclusively to the fact that the Investment Managers, in reality, did not exercise exclusive authority over the investment choices, and did not possess access to the funds to permit the "arranging for" transfers of financial instruments. Given that no less than two additional parties, the Trustee and GMCL, could veto the execution of the buy/sell orders, and the fact that the Investment Managers did not have access to the funds, support my determination, on a balance of probabilities, that the Investment Managers did not possess the authority nor the means to "arrange for" the transfer of financial instruments for GMCL. The English and French versions of paragraph (l) read as follows:

> (l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), or
>
> l) le fait de consentir à effectuer un service visé à l'un des alinéas a) à i) ou de prendre les mesures en vue de l'effectuer;

The French version refers to taking measures to effectuate one of the services outlined in paragraphs (a) to (i). Neither version causes divergence or ambiguity in the interpretation of this paragraph.

100 I therefore cannot conclude that the services supplied by the Investment Managers fall within paragraphs (a), (d) and (l) or for that matter within any of the remaining paragraphs of subsection 123(1). Based on the evidence, the Investment Managers are not providing any of these items listed in paragraph (a) or (d). The role of the Investment Managers was clearly and precisely described by Mr. Phillips. The "arranging for a service" aspect was confined to a call to a broker to complete the trade and, according to his evidence, the Investment Managers never physically touched the money because it moved between GMCL and the trustee or between the trustee and the brokers.

101 GMCL was paying for the highly developed skill, knowledge and expertise of the Investment Managers as GMCL did not possess that itself. This is the primary dominant element of the supply of the services of the managers. The balance of the necessary infrastructure for the transfer of Plan assets, as it occurred in the facts of this appeal, was provided for by GMCL, the Plans' Trustee and the brokers. Mr. Phillips testified at length respecting his expertise in the market. The application of this expertise resulted in the decision for the acquisition/sale of the security. That decision was communicated to a broker who acted on those instructions and conducted the necessary

arrangements to complete the transaction. When that decision is communicated to the broker, the Investment Manager is no longer involved, directly or indirectly, in the purchase/sale of the financial instruments. The actual acquisition/sale is connected, but connected in such a way to be merely ancillary to the primary service provided, that is, the use of the knowledge and expertise of the Investment Managers to determine which trade to complete. Although there appears to be some overlapping between the subordinate component of the service and the broad definition of financial service, the essential element for which the service is employed, the supply of knowledge and expertise, does not fall within any of the paragraphs (a) to (m) and therefore it is not a financial service within subsection 123(1). The supply is merely one of knowledge and expertise in investment choices and portfolio management, and therefore is not one which is captured by subsection 123(1).

102 Based on my conclusion, I need not consider whether the services are excluded from the definition by virtue of paragraph (p) or (q), because the supply must first fall within paragraphs (a) to (m) before those exclusions will be considered. At any rate, the intent of the legislator is very clear in this section of the *Act*, paragraph (p) clearly excludes advice, (which includes the provision of skill and expertise or "smart thinking"), from the definition of a financial service.

103 In conclusion, GMCL will be entitled to claim ITCs in respect to the provision of the Investment Management Services.

104 The parties shall have thirty days from the date of this judgment to provide the Court with written submissions respecting a disposition on the issue of costs.

CAMPBELL T.C.J.

cp/e/qlaim/qlpxm/qltxp/qljxl/qlcas

1 *GST New Memoranda Services*, chapter 8.1, "ITCs -- General Eligibility Rules"; *GST New Memoranda Services*, chapter 17.16, "GST/HST Treatment of Insurance Claims" (March 2001), paragraph 20; *GST/HST Rulings and Interpretations*, "Who Can Claim Input Tax Credits?", *GST & Commodity Tax* (Carswell) Vol. XIII, No. 4 (May 1999), pp 25-27; Finance's Technical Notes (July 1997).

2 "Claiming an ITC in the Course of Commercial Activity", 2005 Commodity Tax Symposium (CICA) at pp 11-12.

TAB 3

Case Name:

General Motors of Canada Ltd. v. Canada

Between
Her Majesty the Queen, Appellant, and
General Motors of Canada Limited, Respondent

[2009] F.C.J. No. 447

[2009] A.C.F. no 447

2009 FCA 114

74 C.C.P.B. 1

2009 CarswellNat 880

[2009] G.S.T.C. 64

391 N.R. 184

Docket A-136-08

Federal Court of Appeal
Toronto, Ontario

Desjardins, Nadon and Blais JJ.A.

Heard: December 2, 2008.
Judgment: April 16, 2009.

(69 paras.)

Taxation -- Goods and services tax (GST) -- Input tax credits -- Commercial activities -- Appeal by Crown of Tax Court decision where issue was whether respondent corporation was eligible for input tax credits (ITCs) under s. 169(1) of the Excise Tax Act in respect of GST paid to investment managers of pension plans -- Appeal dismissed -- The pension plan was not simply another business objective -- The pension plans and their management were not a stand-alone business, even if trust funds had been set up -- The plans were an integral component to the commercial activities of the corporation.

Appeal by Crown of Tax Court decision. At issue was whether GMC was, during the relevant period, eligible for input tax credits (ITCs) under s. 169(1) of the Excise Tax Act in respect of GST paid to investment managers of pension plans. The Tax Court Judge found that GMC was eligible for the ITCs based on the three-prong test of s. 169(1), namely (1) that GMC acquired the supply (the investment management services), (2) that the GST was payable or paid by GMC on the supply (the investment management services) and (3) that the supply (the investment management services) was acquired for consumption or use in the course of GMC's commercial activities. On appeal, the Crown claimed that the acts performed by GMC, in acquiring the services, were deemed by s. 267.1 of the Act to be acts of the Plan Trusts. Therefore, GMC was not entitled to claim input tax credits in respect of such Plan Trust expenses. The Crown further asserted that the Tax Court Judge erred when she concluded that an indirect nexus was sufficient to hold that the supplies were for the use in the course of the commercial activities of GMC. Finally, the Crown alleged that the Tax Court Judge effectively applied an "economic substance over form" analysis in finding that the denial of input tax credits would ignore the commercial realities of the marketplace.

HELD: Appeal dismissed. For the purposes of s. 267.1 of the Act, the role of GMC was that of an administrator to the Plans. The roles and respective duties of GMC, as administrator, and Royal Trust, as the trustee, were entirely separate. The pension plans and their management were not a stand-alone business, even if trust funds had been set up. Without a collective agreement between GMC and its employees, such pension plans would not exist. The pension plan was not simply another business objective. GMC's pension plans were an integral component to the commercial activities of the corporation. There was no re-characterization of GMCL's legal relationship.

Statutes, Regulations and Rules Cited:

Excise Tax Act, R.S.C. 1985, c. E-15, s. 123(1), s. 169(1), s. 267.1

Appeal From:

Appeal from a judgment or Order of Campbell J. of the Tax Court of Canada dated February 22, 2008, [2008] T.C.J. No. 80.

Counsel:

Bonnie F. Moon, for the Appellant.

Al Meghji and Sean Aylward, for the Respondent.

The judgment of the Court was delivered by

1 **DESJARDINS J.A.**:-- This appeal of a decision of Campbell J. (the Tax Court Judge), *Her Majesty the Queen v. General Motors of Canada Limited*, 2008 TCC 117, was heard consecutively to appeal A-243-08, *Her Majesty the Queen v. the Canadian Medical Protective Association,* 2008 TCC 33, rendered by Bowman C.J.

2 At issue is whether General Motors Canada Ltd. (GMCL) was, during the relevant period, eligible for input tax credits (ITCs) under subsection 169(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) in respect of GST paid to investment managers.

3 If GMCL is not entitled to claim ITCs, the question becomes whether GMCL is entitled to a rebate of GST paid in error pursuant to subsection 296(2.1) of the Act, on the basis that the investment services would not be subject to GST at all, since they would be an exempt supply of a "financial service" as defined in subsection 123(1) of the Act.

4 The Tax Court Judge found that GMCL was eligible for the ITCs based on the three-prong test of subsection 169(1), namely (1) that GMCL acquired the supply (the investment management services), (2) that the GST was payable or paid by GMCL on the supply (the investment management services) and (3) that the supply (the investment management services) was acquired for consumption or use in the course of GMCL's commercial activities.

5 The Tax Court Judge rejected GMCL's submission that it was entitled to a rebate for GST paid in error. She found that the services of investment managers did not involve the exempt financial service of buying and selling securities or arranging for such buying and selling.

6 The appellant (the Crown) appeals on the first issue. The respondent raises the second issue as an alternative in the event that we decide the first issue in favour of the Crown.

THE FACTS

7 The facts are not in dispute. A detailed description can be found in the reported decision of the Tax Court Judge. For the purpose of this appeal, the salient facts follow.

8 GMCL is engaged in the business of manufacturing, assembling and selling cars and trucks. In addition, it is the administrator of the pension plans of its employees.

9 There are two registered pension plans: the Hourly Plan and the Salaried Plan (the Plans). The Hourly Plan was created pursuant to the terms of a collective agreement between GMCL and the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada for the benefit of GMCL' hourly employees. The Hourly Plan is a single employer plan funded by employer contributions only. The Salaried Plan for the salaried employees of GMCL and certain affiliated corporations of GMCL is funded primarily by employer contributions with a very small portion funded by the employees.

10 As administrator of these Plans, GMCL's responsibilities include the calculation and payment of pension entitlements and the disclosure of information to the members of the respective Plans. GMCL also submits filings and accurate reports, it invests the assets, it ensures that all required contributions are made and that the fees and expenses are reasonable.

11 The Plans are funded through trusts which hold and invest the assets of the Plans. For each of the Plans, the relevant Master Trust arrangements are two-tiered. Firstly, GMCL pays into the Master Trusts the required contributions for each Plan. Secondly, the funds in each of the Master Trusts are invested in units of Unitized Trusts.

12 Royal Trust Company of Canada Limited (Royal Trust) is appointed as trustee of the Master Trusts and the Unitized Trusts. Royal Trust takes bare legal title to the assets of the Unitized Trusts and discharges various duties, including maintaining custody, safekeeping and registration of securities, transferring funds and processing information from third parties.

13 GMCL retains investment managers in order to manage the investment funds within one or more investment asset classes. Its powers and duties as administrator originate in a number of constating documents. In addition, Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the OPBA), imposes specific statutory responsibilities on GMCL.

14 The responsibilities of the investment managers are described in the following terms by the respondent at paragraph 13 of its memorandum of fact and law:

> The Investment Management Agreements pursuant to which the Investment Managers were retained provided that the Investment Managers had, among other things, full discretion to purchase, receive or subscribe for securities, to retain in trust such securities, to purchase, enter, sell, hold and generally deal in any manner in and with contracts for the immediate or future delivery of financial instruments, and to convert monies into Canadian and foreign currencies, subject to certain prudential investment guidelines determined by GMCL which governed the nature and/or extent of investment which Investment Managers could undertake in the context of their power as fully discretionary Investment Managers.

15 An Investment Management Agreement is entered into between GMCL and each individual investment manager. In each case, GMCL is the person liable under the Investment Management Agreement to pay both the consideration for the supply of services by the investment managers and the GST payable on such consideration.

16 The investment managers are entitled to receive a fee determined as per a separate agreement between GMCL and each investment manager.

17 The separate agreements confirm that fees will be calculated based on a percentage of the market value of the assets under management. The agreements provide that "invoices should be sent quarterly for approval to..." and specify an employee of GMCL.

18 Section 2 of the Hourly Supplemental Agreement, Articles 16 and 17 of the Salaried Plan, the Seventh Article of the Master Trust Agreements and the Thirteenth Article of the Unitized Trust Agreements set out the mechanism for payment of the cost of administration of the Plans as being:

a. payment directly by GMCL to the investment manager, with reimbursement directed to GMCL from the Plan Trust; or
b. payment directly by the relevant Plan Trust to the investment manager upon the direction of GMCL.

19 The investment management fees are recorded as expenses of the trusts.

20 At the material times, the investment managers invoiced GMCL directly for a "supply" of investment management services on which the investment managers collected GST from GMCL.

21 GMCL paid the invoices by directing payment from the Plan Trusts.

DECISION OF THE CANADA REVENUE AGENCY

22 GMCL obtained an advance GST ruling (the ruling) from the Canada Revenue Agency (CRA) concerning its entitlement to claim an input tax credit in respect of the investment management services. In the ruling, the CRA acknowledged that GMCL was the only person "liable to pay"

the investment manager and was, therefore, the "recipient" of the services as that term is defined in subsection 123(1) of the Act. In addition, the CRA also acknowledged in the ruling that GMCL was the person who "acquired" the investment management services. The sole reason given by the CRA in rejecting GMCL's input tax credit claim was that GMCL did not acquire investment management services for consumption, use or supply in the course of its commercial activities. The ruling read in relevant part as follows:

RULING GIVEN

...

Based on the facts above, we rule that:

> ...2. GMCL is not entitled to claim ITCs with respect to investment management services that it has procured under agreements with investment managers because these services are acquired by GMCL solely for consumption by the registered pension trusts resident in Canada...
>
> **EXPLANATION**
>
> ...
>
> ... When contracting for the supply of services to the trusts, prior to April 18, 2000, GMCL as the person liable under the agreement to pay the consideration for the supply of investment management services, is the 'recipient', under the terms of the ETA, of the investment management services...
>
> "Section 165 imposes GST/HST on the "recipient" of a "taxable supply". The supplies from the investment managers to GMCL are taxable supplies and GMCL is liable for the GST/HST relating to these supplies. Subsection 169(1) sets out the general rule for ITCs. GMCL is not entitled to claim input tax credits (ITCs) with respect to investment management services procured by virtue of agreements with investment managers because, GMCL as the administrator of the GMCL pension plans, has acquired the investment managers' services for use otherwise that in the course of GMCL's commercial activities. The terms of the investment agreements clearly indicate that the services provided by the investment managers are to be provided in relation to the trust assets, through direct communication with the custodial trustee, and that the parties intend that the services be for use by the trusts as set out in each of the IMAs, viz., "the consummation of all purchases, sales, deliveries and investments made pursuant to the investment manager's direction, in accordance with the terms of this agreement, shall rest with Royal Trust and its sub custodian." GMCL obtains these services in order to fulfil its responsibilities under paragraph 22(1)(a) of the Ontario Pension Benefits Act, which sets out that the administrator of a pension plan has a fiduciary duty relating to the administration and investment of the pension fund. For these reasons, it is our view that the services are acquired by GMCL in its role as administrator of the trusts, solely for consumption by the trusts, in the

hands of the custodial trustee, and not for use, consumption or supply by GMCL in the course of GMCL's commercial activities.' (A.B., vol.5, tab 6(D), p. 1162-1163).

[Emphasis added.]

23 In 2001, GMCL claimed input tax credits of $861,366.82 for GST on investment managers' fees for services rendered from November 1, 1997 to December 31, 1999. The claim was disallowed by the CRA by notice of assessment dated November 26, 2003.

THE RELEVANT LEGISLATION

24 The general rule for ITC entitlement is found in section 169 of the Act. The relevant parts are the following:

> 169. (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> A X B
>
> where
>
> A A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B B is
>
> (*a*) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,
>
> (*b*) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(*c*) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[Emphasis added.]

* * *

169. (1) Sous réserve des autres dispositions de la présente partie, un crédit de taxe sur les intrants d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle acquiert, importe ou transfère dans une province participante, correspond au résultat du calcul suivant si, au cours de cette période, la taxe relative à la fourniture, à l'importation ou au transfert devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :

A X B

où :

A A représente la taxe relative à la fourniture, à l'importation ou au transfert, selon le cas, qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable;

B:

a) dans le cas où la taxe est réputée, par le paragraphe 202(4), avoir été payée relativement au bien le dernier jour d'une année d'imposition de la personne, le pourcentage que représente l'utilisation que la personne faisait du bien dans le cadre de ses activités commerciales au cours de cette année par rapport à l'utilisation totale qu'elle en faisait alors dans le cadre de ses activités commerciales et de ses entreprises;

b) dans le cas où le bien ou le service est acquis, importé ou transféré dans la province, selon le cas, par la personne pour utilisation dans le cadre d'améliorations apportées à une de ses immobilisations, le pourcentage qui représente la mesure dans laquelle la personne utilisait l'immobilisation dans le cadre de ses activités commerciales immédiatement après sa dernière acquisition ou importation de tout ou partie de l'immobilisation;

c) dans les autres cas, le pourcentage qui représente la mesure dans laquelle la personne a acquis ou importé le bien ou le service, ou l'a transféré dans la province, selon le cas, pour consommation, utilisation ou fourniture dans le cadre de ses activités commerciales.

[Je souligne.]

25 "Commercial Activity" is defined in subsection 123(1) of the Act as:

"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;

* * *

"activité commerciale" Constituent des activités commerciales exercées par une personne :

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

b) les projets à risque et les affaires de caractère commercial (à l'exception de quelque projet ou affaire qu'entreprend, sans attente raisonnable de profit, un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où le projet ou l'affaire comporte la réalisation par la personne de fournitures exonérées;

c) la réalisation de fournitures, sauf des fournitures exonérées, d'immeubles appartenant à la personne, y compris les actes qu'elle accomplit dans le cadre ou à l'occasion des fournitures.

26 The term "business" is also defined in subsection 123(1) of the Act:

"business"

"*entreprise*"

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

* * *

"entreprise"

"*business*"

"entreprise" Sont compris parmi les entreprises les commerces, les industries, les professions et toutes affaires quelconques avec ou sans but lucratif, ainsi que les activités exercées de façon régulière ou continue qui comportent la fourniture de biens par bail, licence ou accord semblable. En sont exclus les charges et les emplois.

27 Section 267.1 of the Act reads thus:

Definitions

267.1 (1) The definitions in this subsection apply in this section and in sections 268 to 270. "trust"

"fiducie"

"trust" includes the estate of a deceased individual.

"trustee"

"fiduciaire"

"trustee" includes the personal representative of a deceased individual, but does not include a receiver (within the meaning assigned by subsection 266(1)).

Trustee's liability

(2) Subject to subsection (3), each trustee of a trust is liable to satisfy every obligation imposed on the trust under this Part, whether the obligation was imposed during or before the period during which the trustee acts as trustee of the trust, but the satisfaction of an obligation of a trust by one of the trustees of the trust discharges the liability of all other trustees of the trust to satisfy that obligation.

Joint and several liability

(3) A trustee of a trust is jointly and severally liable with the trust and each of the other trustees, if any, for the payment or remittance of all amounts that become

payable or remittable by the trust under this Part before or during the period during which the trustee acts as trustee of the trust except that

(a) the trustee is liable for the payment or remittance of amounts that became payable or remittable before the period only to the extent of the property and money of the trust under the control of the trustee; and
(b) the payment or remittance by the trust or the trustee of an amount in respect of the liability discharges the joint liability to the extent of that amount.

Waiver

(4) The Minister may, in writing, waive the requirement for the personal representative of a deceased individual to file a return for a reporting period of the individual ending on or before the day the individual died.

Activities of a trustee

(5) For the purposes of this Part, where a person acts as trustee of a trust,

(a) anything done by the person in the person's capacity as trustee of the trust is deemed to have been done by the trust and not by the person; and
(b) notwithstanding paragraph (a), where the person is not an officer of the trust, the person is deemed to supply a service to the trust of acting as a trustee of the trust and any amount to which the person is entitled for acting in that capacity that is included in computing, for the purposes of the Income Tax Act, the person's income or, where the person is an individual, the person's income from a business, is deemed to be consideration for that supply.

...

* * *

Définitions

267.1 (1) Les définitions qui suivent s'appliquent au présent article et aux articles 268 à 270. "fiduciaire"

"trustee"

"fiduciaire" Est assimilé à un fiduciaire le représentant personnel d'une personne décédée. N'est pas un fiduciaire le séquestre au sens du paragraphe 266(1).

"fiducie"

"trust"

"fiducie" Sont comprises parmi les fiducies les successions.

Responsabilité du fiduciaire

(2) Sous réserve du paragraphe (3), le fiduciaire d'une fiducie est tenu d'exécuter les obligations imposées à la fiducie en vertu de la présente partie, indépendamment du fait qu'elles aient été imposées pendant la période au cours de laquelle il agit à titre de fiduciaire de la fiducie ou antérieurement. L'exécution d'une obligation de la fiducie par l'un de ses fiduciaires libère les autres fiduciaires de cette obligation.

Responsabilité solidaire

(3) Le fiduciaire d'une fiducie est solidairement tenu avec la fiducie et, le cas échéant, avec chacun des autres fiduciaires au paiement ou au versement des montants qui deviennent à payer ou à verser par la fiducie en vertu de la présente partie pendant la période au cours de laquelle il agit à ce titre ou avant cette période. Toutefois :

a) le fiduciaire n'est tenu au paiement ou au versement de montants devenus à payer ou à verser avant la période que jusqu'à concurrence des biens et de l'argent de la fiducie qu'il contrôle;
b) le paiement ou le versement par la fiducie ou le fiduciaire d'un montant au titre de l'obligation éteint d'autant la responsabilité solidaire.

Dispense

(4) Le ministre peut, par écrit, dispenser le représentant personnel d'une personne décédée de la production d'une déclaration pour une période de déclaration de la personne qui se termine au plus tard le jour de son décès.

Activités du fiduciaire

(5) Les présomptions suivantes s'appliquent dans le cadre de la présente partie lorsqu'une personne agit à titre de fiduciaire d'une fiducie :

a) tout acte qu'elle accomplit à ce titre est réputé accompli par la fiducie et non par elle;
b) malgré l'alinéa a), si elle n'est pas un cadre de la fiducie, elle est réputée fournir à celle-ci un service de fiduciaire et tout montant auquel elle a droit à ce titre et qui est inclus, pour l'application de la Loi de l'impôt sur le revenu, dans le calcul de son revenu ou, si elle est un particulier, dans le calcul de son revenu tiré d'une entreprise est réputé être un montant au titre de la contrepartie de cette fourniture.

...

THE STANDARD OF REVIEW

28 The appellant claims that the standard of review to be applied is correctness since the issues at stake are questions of law (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 paras. 8 ff.). The respondent claims that the question as to whether the services were acquired by GMCL for use in its commercial activity has a substantial factual component to it. Consequently, the standard to be applied is whether the Tax Court Judge has made a palpable and overriding error (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 paras. 26 ff.).

29 I agree with both with the qualifier that although issues of law have been raised in argument, particularly with regard to the concept of trust, this case rests far more on the application of the law to the facts and on the evidence adduced before the Tax Court Judge.

DECISION OF THE TAX COURT JUDGE

30 At paragraph 30 of her reasons, the Tax Court Judge set the three conditions which must be satisfied in order for GMCL to be eligible to claim an ITC:

> (1) The claimant (GMCL) must have acquired the supply (the Investment Management Services);
> (2) The GST must be payable or was paid by the claimant (GMCL) on the supply (the Investment Management Services);
> (3) The claimant (GMCL) must have acquired the supply (the Investment Management Services) for consumption or use in the course of its commercial activity.

[Emphasis in original.]

31 She found that GMCL met the three conditions.

32 The appellant submits she erred in doing so.

ANALYSIS

> *(1) The claimant (GMCL) must have acquired the supply (the Investment Management Services).*

33 With regard to the first condition, the appellant argued before the Tax Court Judge and before us that the acts performed by GMCL, in acquiring the services, are deemed by section 267.1 of the Act to be acts of the Plan Trusts. Therefore, GMLC is not entitled to claim input tax credits in respect of such Plan Trust expenses.

34 The issue then becomes "whether GMCL should be considered as trustee so that section 267.1 can apply" (paragraph 38 of the Tax Court Judge's reasons for judgment).

35 The respondent claims that the application of section 267.1 of the Act was not specifically indicated as a statutory provision relied on by the Crown in its reply to the appellant's notice of appeal before the Tax Court (A.B., vol. 1, tab 6(A)(2), p. 69) and that it is only before us, in her notice of appeal, that the Crown raised specifically the fact that the Tax Court Judge erred in law in the interpretation of sections 169 and 267.1 of the Act (A.B., vol. 1, tab 1).

36 It is unclear whether the respondent raised before the Tax court this flaw in the Crown's proceedings. What is clear is that the Tax Court Judge did not discuss it in her reasons.

37 Before us, the Crown's proceedings, in conformity with Rule 337 of the *Federal Courts Rules*, SOR/98-106, indicate that the Crown relies on section 267.1 of the Act. Since the matter was not raised before the Tax Court, where the defect originated and where it should have been dealt with, I need not indulge further on this procedural dispute.

38 The Tax Court Judge found (at para. 42 of her reasons) that section 267.1 of the Act had no application. She wrote that there was no evidence produced during the hearing that would suggest that GMCL took title, legal or otherwise, to the assets under the deed of trust. She found that the trust agreements expressly established Royal Trust as the trustee. GMCL's role in relation to the trusts was of an administrator, as defined and contemplated under the OPBA. It did not include, nor was it intended to include, the role of trustee in relation to the trusts. For the purposes of subsection 267.1 of the Act, the role of GMCL was that of an administrator to these Plans. The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. She noted that while GMCL may have exercised some fiduciary duties as the Plan's administrator, this did not mean that GMCL was a trustee to the trust. She concluded that it was GMCL which contracted for and acquired the services of the investment managers. She said:

> 42 Section 267.1 has no application here. There was no evidence produced during the hearing that would suggest that GMCL took title, legal or otherwise, to the assets under the deed of trust. All of the Agreements reference Royal Trust as the legal title holder. Thus GMCL cannot fall within the ambit of the definition of trustee. The trust agreements expressly established Royal Trust as the trustee. Clearly GMCL's role, in relation to the trusts, was as an administrator, as defined and contemplated under the *OPBA*. It did not include, nor was it intended to include, the role of trustee in relation to the trusts. For the purposes of section 267.1, the role of GMCL was that of an administrator to these plans. The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers.

39 In view of her finding based on the evidence, I find no reviewable error in her first conclusion.

> *(2) The GST must be payable or was paid by the claimant (GMCL) on the supply (the Investment Management Services).*

40 With regard to the second condition, namely, whether GST was payable or was paid by GMCL, the Tax Court Judge proceeded with an analysis of the mode of payment provided in the various agreements. She concluded, at paragraph 57 of her reasons, that although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for pay-

ment of the supply of these services by the investment managers, pursuant to the terms of the agreements between GMCL and the investment managers.

41 What she said, at paragraphs 54 and 57, is the following:

> 54 Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment. Thus, GMCL is the recipient of the supply of the services of the Investment Managers and GST was "payable" by GMCL. Under subsection 169(1), ITCs are available only to the person who "acquires" the supply if tax is payable by that person. While tax will be payable by the recipient under subsection 165(1), it does not necessarily follow that the eventual recipient will always be the person who "acquired" the supply. Subsection 123(1) states that "recipient" will be the person to whom a supply is made. Therefore in certain circumstances the person who acquired the supply (GMCL) may not be the person to whom the supply is eventually made (the pension trusts). GMCL has satisfied this requirement under subsection 169(1) since it is the only person liable to pay the consideration for the supply of services of the Investment Managers under the relevant Agreements. Although some of the financial statements of the Hourly and Salaried Plans suggest that payments are treated as being made by the trust, these accounting documents are subordinate to the primary Investment and Fee Agreements and do not alter the contractual provisions in those Agreements. The pension trusts are not liable to pay for the services and cannot be the recipient, although the supply of services was eventually re-directed to the assets in the trusts. ...
>
> [...]
>
> 57 It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment of the fees is irrelevant because the bottom line, as reiterated by Woods J. in *Y.S.I.'S Yacht Sales*, is that the person who satisfies the requirement at subsection 169(1), and who carries the contractual liability to pay, will be the person entitled to claim ITCs.

[Emphasis in original]

42 I find no reviewable error in her second finding.

> *(3) The claimant (GMCL) must have acquired the supply (the Investment Management Services) for consumption or use in the course of its commercial activity.*

43 The third and final condition of the subsection 169(1) test for eligibility to claim ITCs by GMCL is whether GMCL acquired the services for consumption or use in the course of its commercial activities.

44 The Tax Court Judge gave to the words "in the course of", found in paragraph 169(1)(*c*), a wide meaning given by this Court in *The Queen v. Blanchard*, 95 D.T.C. 5479 (F.C.A.) and in *M.N.R. v. Yonge-Eglington Building Ltd.*, 74 D.T.C. 6180, at page 6184, where the words "in connection with", or "incidental to", or "arising from" were suggested. She held that GMCL's responsibilities to properly manage the Pension Plan assets were derived not only through the agreements but also through its duties as administrator under the OPBA and its duties to provide pension benefits to its employees (her para. 65). She noted that pension benefits, like salaries, are part of the compensation package which is an integral component to the commercial activities of the corporation. She fully explains these considerations at paragraphs 66-67. At paragraph 67 she stated:

> In addition to these contractual and statutory obligations, GMCL has agreed to provide, maintain and administer a compensation package, not only as one of the terms of employment extended to its employees, but as a vehicle for attracting and keeping the most qualified individuals within its organization. Without a profitable pension plan, GMCL's capacity to successfully compete in the market is substantially diminished. While the expenses associated with the administration of these pension assets may be viewed as being only indirectly related to the manufacture of vehicles, they are nonetheless an integral component to the overall success of GMCL's commercial activities in the market place. According to Mr. Marven's evidence, he likened the provision of a pension plan to other forms of employee compensation such as the provision of health care benefits. The only logical, common sense conclusion is that all of the functions of GMCL, in relation to these pension assets, are for the sole benefit of its employees, both the salaried and hourly employees and, consequently, they are an essential component to GMCL's business activities. Therefore, GMCL acquired the services of the Investment Managers for use in its commercial activities. As such, while GMCL does not directly utilize the services in making GST supplies in its operations, those services are part of its inputs toward its employee compensation program, which is a necessary adjunct of its infrastructure to making taxable sales. The expenses are not personal in nature. They are ancillary to the primary business activities of GMCL and meet the need of attracting and maintaining an adequate employee base to support its primary business operations. Therefore these expenses, although indirect expenses to GMCL's business, qualify as expenses paid for in the consumption or use in the course of the commercial activities of GMCL. Subsection 169(1) does not require that managing a pension plan be the sole commercial activity of a person, only that the supply be consumed or

> used "in the course of commercial activities". To divorce the services of the Investment Managers from the commercial activities of GMCL, in the manner that the Respondent would have me do, ignores not only the contractual and statutory obligations of GMCL but also the commercial realities of a competitive marketplace.

[Emphasis added.]

45 The appellant makes three points:

(a) the first relates to the fact that pension plan trusts are a third person involved in the process;
(b) the second relates to the notion of indirect nexus; and
(c) the third relates to the concept of economic substance over form.

(a) the trust as a third person

46 The appellant submits (at para. 42 and following of her memorandum of fact and law) that even if section 267.1 of the Act does not apply, GMCL cannot claim input tax credits because the investment management services are not acquired for use in its commercial activities. The commercial activities of GMCL, she claims, is the manufacture, assembly and sale of cars. GMCL, as administrator of the pension plans, exercises a separate activity. According to Her, the pension plan trusts are a third person involved and their existence and role should be considered in determining the activity in which the investment management services are used. She notes that the trusts pay the fees and GST on the fees, and show them as an expense in their financial statements. She contends that "it was not open to the trial judge to find that GMCL was acting both as fiduciary in respects of interests of the pension plan trusts while carrying on its own commercial activities in its own interests".

47 The appellant's assertion fails, in my view, to take into account the collective agreement between GMCL and its employees under which GMCL undertakes to provide pension benefits to its employees. GMCL is the key contributor to the trust funds and is the entity liable to pay the investment management fees under the agreement it signed with the investment managers. The fact that, as determined by GMCL, those fees and the GST on these fees are ultimately borne by the trustees does not change the nature of the operation. Moreover, as indicated by the Tax Court Judge at paragraph 53 of her reasons, no evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts.

48 The appellant's first point is untenable.

(b) indirect nexus

49 The appellant claims that the Tax Court Judge erred in law in concluding that an indirect nexus was sufficient to hold that the supplies were for the use in the course of the commercial activities of GMCL.

50 In support to her position, the appellant relies on the decision of this Court in *398722 Alberta Ltd. v. Canada*, [2000] F.C.J. No. 644 (C.A.), where she says "...this Court has held that it is the direct use of a supply that governs the entitlement to input tax credits".

51 The *398722 Alberta Ltd.* case dealt with a "four-plex" apartment building for residential housing built as a condition precedent for obtaining a permit to build a hotel. The corporation, 398722 Alberta Ltd., argued that the operation of the residential housing was an integral part of its hotel business and thus was a "commercial activity" within the statutory definition of subsection 123(1) of the Act and that the corporation's GST liability under the self-supply rule of subsection 191(3) should be offset, in the same amount, by an input tax credit under subsection 169(1) of the Act.

52 One issue in that case turned on whether the operation of the residential housing fell within the ambit of the hotel's commercial activity. The answer to this question rested on the interpretation of the closing words of the definition of "commercial activity" found in subsection 123(1) of the Act. For ease of reference, these words were

> [...] "commercial activity" of a person
>
> means
>
> (a) a business carried on by the person ... except to the extent to which the business involves the making of exempt supplies by the person.

53 This Court held that input tax credits under subsection 169(1) of the Act were not available to the taxpayer who was fulfilling an obligation to meet another business objective and that 398722 Alberta Ltd. was not entitled to an input tax credit to offset the GST payable on the self-supply of the four-plex.

54 Sharlow J.A. said for the Court at paragraphs 22 and 23 of her reasons:

> 22 Any business may consist of a number of components, each of which is integral to the business as a whole. The definition of "commercial activity" recognizes that possibility but requires, for GST purposes, that any part of the business that consists of making exempt supplies be notionally severed. The statutory definition dictates that the business of the respondent is not a "commercial activity" in so far as it consists of the rental of the units of the four-plex. On that basis I agree with the Crown that the respondent is not entitled to an input tax credit to offset the GST payable on the self-supply of the four-plex.
>
> 23 The respondent is in exactly the same position as anyone who acquires an apartment building and rents out the apartments. It should not and does not matter whether the acquisition is motivated by the prospect of receiving rent or, as in the respondent's case, is the fulfilment of a legal obligation that must be met in order to accomplish another business objective.

55 The factual situation in the case at bar is distinct for the case above. Contrary to the hotel in *398722 Alberta Ltd.*, which had a legal obligation to accomplish another business objective, GMCL, as found by the Tax Court Judge, is contractually obligated to maintain a benefits pension plan as part of its employee compensation program.

56 In the case of GMCL, the pension plans and their management are not a stand alone business, even if trust funds have been set up. Without a collective agreement between GMCL and its employees, such pension plans would not exist. The pension plan is not simply another business objective.

57 The finding of the Tax Court Judge that the services were part of GMCL's inputs towards its employee compensation program does not warrant the intervention of this Court.

(c) economic substance over form

58 Finally, the appellant argues that the Tax Court Judge effectively applied an "economic substance over form" analysis in finding that the denial of input tax credits would ignore the commercial realities of the marketplace.

59 The Tax Court Judge's application of the concept of "economic substance", says the appellant, is contrary to the principles set out in *Shell Canada Limited v. R.*, [1999] 3 S.C.R. 622, paragraphs 39 and 40. As a matter of law, she says, pension plans are separate and distinct from other businesses, and a pension plan fund cannot be considered as being part of an employer's business activity.

60 The following principles were set out in *Shell Canada Limited v. R.* at paragraphs 39 and 40:

> 39 This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form:*Bronfman Trust*, [1987] 1 S.C.R. 32 *supra*, at pp. 52-53, *per* Dickson C.J.; *Tennant*, [1996] 1 S.C.R 305 *supra*, at para. 26, *per* Iacobucci J. But there are at least two *caveats* to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21, *per* Bastarache J.
>
> 40 Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: *Continental Bank*, *supra*, at para. 51, *per* Bastarache J.; *Tennant*, *supra*, at para. 16, *per* Iacobucci J.; *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27 and 330, *per* Iacobucci J.; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 11, *per*

Major J.; *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at para. 15, *per* Cory J.

[Emphasis Added.]

61 I fail to understand that the Tax Court Judge would have betrayed the teaching of the Court in the *Shell Canada Limited* case.

62 The Supreme Court of Canada first sets out the general rule that the courts must be sensitive to the economic reality rather than being bound to what first appears to be the legal form of a transaction.

63 The Supreme Court of Canada then sets out two caveats, first that the economic realities of a situation cannot recharacterize a *bona fide* legal relationship and, secondly, that economic realities should not supplant the operation of an otherwise unambiguous legal provision.

64 I do not find, as claimed by the appellant that, as matter of law, pension plans are necessarily separate and distinct from other businesses. An examination of the circumstances of each case is necessary.

65 In the case at bar, the Tax Court Judge found as a fact that GMCL's pension plans were an integral component to the commercial activities of the corporation. There is no recharacterization of GMCL's legal relationship.

66 I find no reviewable error in the Tax Court Judge's analysis.

67 Consequently, it becomes unnecessary to analyze the alternative issue dealt with by the Tax Court Judge at paragraphs 70 to 102 of her reasons and, in particular, on whether investment management services are an exempt financial service.

68 The Tax Court Judge's conclusion, at paragraph 103 of her reasons, that GMCL is entitled to claim ITCs with respect to the provision of investment management services should stand.

CONCLUSION

69 I would dismiss this appeal with costs.

DESJARDINS J.A.
NADON J.A.:-- I agree.
BLAIS J.A.:-- I agree.

cp/e/qlaim/qlpxm/qlmxl/qlmxl/qlhcs

TAB 4

Kerry (Canada) Inc. v. DCA Employees Pension Committee, representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc. et al.

[Indexed as: Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)]

Court File No. C45720

Ontario Court of Appeal
Laskin, Gillese and Rouleau JJ.A.

Heard: January 10 and 11, 2007
Judgment rendered: September 7, 2007

Civil procedure — Costs — General — Pensions — Litigation adversarial in nature — Costs not payable out of fund.

Pensions — General — Costs — Litigation adversarial in nature — Costs not payable out of fund.

A committee of pension plan members challenged the administration of the plan by an employer. The Divisional Court ordered the employer to pay costs to the committee on a partial indemnity basis of $90,000 plus disbursements. An appeal was allowed and a cross-appeal dismissed by the Ontario Court of Appeal. The court held that neither the employer nor the committee was entitled to costs of the initial proceedings before the tribunal. The question then arose as to costs of the appeals to the Divisional Court and the Court of Appeal.

Held, costs should not be awarded out of the fund.

Given the employer's success on appeal and cross-appeal, it was awarded costs of the Divisional Court appeals on a partial indemnity basis. Costs were fixed at $45,000.

The court had the power to order costs from the pension fund. There was no special rule or presumption applicable to pension cases that entitled plan members to have pension litigation financed by the pension fund. A request that the Superintendent examine a matter attracted a risk of a costs sanction.

The pension trust approach was adopted. Unless a court proceeding fitted within one of two categories the usual civil litigation costs rules applied. The first category reflected the public interest in ensuring that all trust funds, including those in which pension money were held, were properly administered. The second category were those proceedings taken for the benefit of all of the beneficiaries.

The claims advanced were adversarial in nature rather than being directed at the due administration of the fund. Whether litigation was adversarial or directed at the due administration of a trust was critical in deciding whether to order costs from the

trust fund. Where the matters in issue were truly administrative there was no unfairness in ordering costs from the pension fund. Costs in those circumstances were a legitimate expense of ensuring that the fund was properly administered. Where the litigation was adversarial in nature there was an inherent unfairness in ordering costs from the fund because it resulted in less money being in the fund and available for the benefit of all plan members. The committee did not bring the proceedings on behalf of fund beneficiaries.

As the claims did not fall within either category, the usual costs rules were applied and the committee was ordered to pay the costs of the employer on a partial indemnity basis. The costs were properly payable by the committee rather than from the pension fund.

In light of the employer's success, it was entitled to the costs of this appeal and cross-appeal on a partial indemnity basis. Those costs were fixed at $40,000, which were fair and reasonable.

Cases referred to

Buckton (Re), [1907] 2 Ch. 406 — **not apld**

C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd. (2001), 198 D.L.R. (4th) 504, 27 C.C.P.B. 209, 250 W.A.C. 117, 89 B.C.L.R. (3d) 29, 104 A.C.W.S. (3d) 954, 2001 BCCA 303 — **refd to**

Patrick v. Telus Communications Inc. (2005), 49 C.C.P.B. 297, 361 W.A.C. 179, 49 B.C.L.R. (4th) 74, 145 A.C.W.S. (3d) 442, 2005 BCCA 592 [leave to appeal to S.C.C. refused [2006] 1 S.C.R. xii, 393 W.A.C. 320*n*, 356 N.R. 395*n*] — **refd to**

Sutherland v. Hudson's Bay Co. (2006), 53 C.C.P.B. 154, 24 E.T.R. (3d) 253, 148 A.C.W.S. (3d) 206, [2006] O.J. No. 2009 (QL) — **apld**

White v. Halifax (Regional Municipality) Pension Committee (2007), 59 C.C.P.B. 1, 252 N.S.R. (2d) 39, 155 A.C.W.S. (3d) 345, 2007 NSCA 22 — **refd to**

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1)

Authorities referred to

Financial Services Tribunal of Ontario, *Practice Direction on Costs Awards* (August 1, 2004)

CONSIDERATION of submissions respecting costs in a judgment of the Ontario Court of Appeal, 282 D.L.R. (4th) 227, 60 C.C.P.B. 67, 32 E.T.R. (3d) 161, 158 A.C.W.S. (3d) 1006, 2007 ONCA 416, allowing an appeal from a judgment of the Ontario Divisional Court, 52 C.C.P.B. 1, 209 O.A.C. 21, 146 A.C.W.S. (3d) 731, allowing appeals from two decisions of the Financial Services Tribunal of Ontario, March 1, 2004, and 42 C.C.P.B. 119, finding that most pension plan expenses could be paid from the pension fund and that the employer was entitled to take contribution holidays.

Ronald J. Walker and *Christine P. Tabbert*, for appellant/respondent by way of cross-appeal, Kerry (Canada) Inc.

Ari N. Kaplan and *Clio M. Godkewitsch*, for respondents/appellants by way of cross-appeal, Elaine Nolan, George Phillips, Elisabeth Ruccia, Kenneth R. Fuller, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.

Deborah McPhail and *Mark Bailey*, for respondent/respondent by way of cross-appeal, Superintendent of Financial Services.

The judgment of the court was delivered by

[1] GILLESE J.A:—On June 5, 2007, this court released its reasons for decision in this matter in which it allowed the appeal and dismissed the cross-appeal [282 D.L.R. (4th) 227]. As explained in those reasons, this court held that neither Kerry nor the Committee was entitled to costs of the initial proceedings before the Tribunal. However, the parties were invited to make written submissions on what party or parties were entitled to costs of the appeals to the Divisional Court and to this court, from what source or sources, and on what scale. After considering those submissions, I would make the following orders in respect of costs.

Kerry (Canada) Inc.

[2] The Divisional Court ordered Kerry to pay costs to the Committee, on a partial indemnity basis, of $90,000 plus disbursements and GST, for the two appeals that it heard and decided. Given Kerry's success on the appeal and cross-appeal to this court, I would set aside the Divisional Court's costs order and award Kerry costs of the Divisional Court appeals on a partial indemnity basis. The fact that a number of the issues were novel and important and that their resolution benefitted the broader pension community augurs in favour of a modest award. Accordingly, I would fix those costs at $45,000, inclusive of disbursements and GST. As I explain below, in my view, those costs are properly payable by the Committee, rather than from the pension fund (the "Fund").

[3] Similarly, in light of Kerry's success, it is entitled to its costs of this appeal and cross-appeal on a partial indemnity basis. I see nothing in the appeal or cross-appeal that warrants costs being awarded on a substantial indemnity basis. Thus, I would further order that the Committee pay Kerry's costs of the appeal

and cross-appeal. For the reasons given below, I would fix those costs at $40,000, inclusive of disbursements and GST.

The Committee

[4] The Committee submits that this court should order that its costs of the appeals to the Divisional Court and to this court be paid from the Fund, on a substantial indemnity basis.[1] It argues that the courts have "repeatedly" awarded costs from pension funds in situations similar to the present case, regardless of the degree of success of the parties.

[5] I accept that, pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43,[2] this court has the power to order costs from the Fund. However, when determining whether to exercise that power, I begin from the proposition that there is no special rule or presumption applicable to pension cases that entitles plan members to have pension litigation financed by the pension fund. This view is informed by the fact that there is a regulatory system in place that provides pension plan members with the opportunity to have concerns investigated with little risk that costs will be ordered against them. As I understand it, a request that the Superintendent examine a matter attracts no risk of a costs sanction. And, costs at the Tribunal level are not generally imposed absent "clearly unreasonable, frivolous or vexatious" behaviour by a party (see *Financial Services Tribunal Practice Direction on Costs Awards* (August 1, 2004)). In the present case, both the Superintendent of Financial Services and the Financial Services Tribunal scrutinized Kerry's impugned actions with no costs awards being made against any party.

[6] In determining whether to order the Committee's costs from the Fund, guidance can be taken from the approach followed in trusts litigation. That approach was well-summarised by Cullity J. in *Sutherland v. Hudson's Bay Co. Ltd.*, [2006] O.J. No. 2009 at para. 11, 148 A.C.W.S. (3d) 206 (S.C.J.):

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settler who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund.

[7] In determining whether to award costs from a pension fund, courts in other jurisdictions[3] have relied on the following passage from *Re Buckton*, [1907] 2 Ch. 406 at 414 - 415:

> In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. ...
>
> There is a second class of cases differing in form, but not in substance from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
>
> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation and order the unsuccessful party to pay the costs.

[8] For a number of reasons, I favour the approach articulated by Cullity J. (which I will refer to as the "pension trust approach"). I do not find the categories set out in *Buckton* to be particularly helpful in the pension trust context. There is significant overlap in the first two categories in *Buckton*. Both categories are based on the same public policy consideration, namely, that it is desirable that parties have access to the courts to ensure that trusts are properly administered. The only difference between the first two *Buckton* categories is in who brings the matter to court. In category one, the proceedings are brought by the trustee whereas in category two, they are brought by the beneficiaries.

[9] Furthermore, the third category in *Buckton* is problematic when dealing with pension trusts. To determine whether a matter falls within the third *Buckton* category, the court must decide whether the claims that have been advanced are adverse to other beneficiaries. While that determination is usefully made when considering traditional trusts, it is often irrelevant in pension trusts where there are numerous categories of beneficiaries, many with conflicting interests. For example, in a merged plan, one group of beneficiaries may claim full surplus entitlement based on historical plan language. Their claim is adverse to those of other classes of beneficiaries, such as those made by new employees or by employees who have been "imported" from the merging plan. But, if an issue arises as to the proper distribution of surplus, costs are properly payable from the trust fund as public policy dictates that the issue of entitlement be resolved before the trust fund is distributed. The fact that the interests of one group of beneficiaries is adverse to those of other groups is irrelevant.

[10] By contrast, the two categories set out in the pension trust approach reflect different public policy reasons for granting costs from the trust fund. The first category reflects the public interest in ensuring that all trust funds, including those in which pension monies are held, are properly administered. If there is ambiguity about the rights of beneficiaries, those administering the pension fund are to be encouraged to bring the matter to the courts for direction so that when they perform, they do so in accordance with the law. By awarding costs from the pension trust fund, there is no penalty or disincentive to seeking such direction.

[11] That same public policy interest exists when direction is sought by the beneficiaries in pursuance of their right to compel due administration of the trust. To be meaningful, beneficiaries must be able to exercise that right without risk of costs consequences, so long as they act reasonably.

[12] The second category of court proceedings referred to in the pension trust approach are those proceedings taken for the benefit of all of the beneficiaries. As all beneficiaries stand to reap the benefits of such a proceeding, an award of costs from the trust fund is fair as all beneficiaries bear the cost of the proceedings.

[13] Under the pension trust approach, unless a court proceeding fits within one of those two categories, the usual civil litigation costs rules ought to apply.

[14] Using that approach, I now consider the Committee's claims.

[15] It will be recalled that the first category in the pension trust approach is litigation that is necessary to ensure that a trust is properly administered. Typically, the litigation is required to determine the rights of beneficiaries and arises as a result of ambiguity in the trust documents.

[16] At a general level, the present case could be said to be aimed at ensuring that the Fund was properly administered. And, clearly, interpretation of the pension and trust documents was essential to resolving this case. However, this litigation was not directed at having the courts determine the rights of beneficiaries. Compare it to the surplus cases – a classic example of pension litigation. Unlike the surplus cases, in which the courts' interpretation of plan documents is necessary to determine the rights of beneficiaries, this litigation arose because of the Committee's claim that Kerry was improperly administering the Fund by paying Plan expenses from it and taking contribution holidays in respect of the Part 2 members. This litigation was not about beneficiaries' rights; it was about the propriety of actions taken by those responsible for the administration of the Fund and its aim was to force the employer to make payments into the Fund to the benefit of a limited group. In my view, the claims advanced were adversarial in nature; they were not directed at the interpretation of documents to ascertain beneficiaries' rights.

[17] In so concluding, I note that certain members of the Committee made the very decisions that were attacked in these proceedings. The record shows that those members had been senior members of the management team which had overall responsibility for administering the Plan. When the management team made the decisions to take contribution holidays and pay plan expenses from the Fund, it did so with the benefit of appropriate legal and actuarial advice and with the belief that the decisions were properly made. It was open to management to have applied to the court for advice and directions at the time such

actions were being contemplated, had there been serious concern about the legality of such actions.

[18] These comments are not intended to suggest that costs ought never to be awarded from a trust fund in "after-the-fact" proceedings. Nor are they intended as a criticism of any members of the Committee. I make these observations to assist in explaining why I see the proceedings as adversarial rather than as being directed at the due administration of the Fund.

[19] Whether litigation is adversarial or directed at the due administration of a trust is critical in deciding whether to order costs from the trust fund because, where the matters in issue are truly administrative, there is no unfairness in ordering costs from the pension fund. Costs in those circumstances are a legitimate expense of ensuring that the fund is properly administered.

[20] Where the litigation is adversarial, however, there is an inherent unfairness in ordering costs from the Fund because it results in less money being in the Fund and, therefore, available for the benefit of all plan members. That unfairness is compounded in the present case because the pension plan is ongoing. As the employer and plan sponsor, Kerry is responsible for the Fund's solvency. If costs are paid from the Fund, Kerry may be required to contribute more in future than it might otherwise have been required to pay. If that occurred, Kerry, the successful litigant, would be paying the costs of the unsuccessful litigants. That does not accord with our basic notions of fairness in the adversarial litigation process.

[21] The second category of cases in which costs are awarded from a trust fund is where the claims can reasonably be considered to have been advanced for the benefit of those beneficially interested in the trust. In my view, the Committee's claims do not fall within this category either.

[22] Two considerations lead me to this conclusion. First, the Committee did not bring the proceedings on behalf of all of the Fund beneficiaries. Indeed, as discussed in the reasons for decision, there is no evidence of the level of support that the Committee had from the Plan membership. Further, the central thrust of the Committee's position throughout the litigation was

that a second pension plan and fund had been established. Had the Committee been successful, Kerry would have been required to pay money into the original fund which, on the Committee's view, was to be held for the benefit of a particular class of plan beneficiaries, namely, the Part 1 members. Thus, contrary to the Committee's contention, its claims were not brought for the benefit of all those beneficially interested in the Fund.

[23] As the Committee's claims do not fall within either category, I would apply the usual costs rules in respect of civil litigation and order the Committee to pay Kerry its costs on a partial indemnity basis. In determining the quantum, I again note that a number of the issues were novel and important and that resolution benefitted the broader pension community. A competing consideration, however, is that the proceedings were protracted by virtue of the position the Committee took on the cross-appeal. The law governing the contribution holiday issue raised on the cross-appeal was well-known. Its application was straightforward and acknowledged as such by the Tribunal and the Divisional Court. While the Committee was entitled to pursue that issue, the reasonableness of its position on all issues is a factor that must be taken into consideration.

[24] After balancing all of the relevant considerations, in my view, awarding costs Kerry of the appeal and cross-appeal, fixed at $40,000, all inclusive, is fair and reasonable.

The Superintendent

[25] As the Superintendent made no claim for costs and no claim was advanced against him, I would make no order as to costs in respect of the Superintendent.

DISPOSITION

[26] Accordingly, I would order costs to Kerry payable by the Committee fixed at $45,000, all inclusive, in respect of the Divisional Court appeals and $40,000, all inclusive, in respect of the appeal and cross-appeal to the court.

Order accordingly.

ENDNOTES

[1] It was the Committee's position that Kerry should be awarded costs on the same basis.

[2] Section 131(1) reads as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[3] See, for example, *Canadian Assn. of Smelter and Allied Workers, Local 1 v. Garvin* (2001), 89 B.C.L.R. (3d) 29, 198 D.L.R. (4th) 504 *sub nom. C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.* (C.A.); *Patrick v. Telus Communications Inc.* (2005), 49 B.C.L.R. (4th) 74 (C.A.); and *White v. Halifax (Regional Municipality) Pension Committee* (2007), 252 N.S.R. (2d) 39 (C.A.).