Docket: 2015-658(GST)G

BETWEEN:

LE GROUPE PPP LTÉE,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 5, 2016, at Québec, Quebec.

Before: The Honourable Mr. Justice Alain Tardif

Appearances:

Counsel for the appellant:	Nathalie Goyette Laurie Beausoleil
Counsel for the respondent:	Christian Boutin

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, the notice of which is dated May 7, 2013, for the period from October 1, 2008, to October 31, 2012, is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 16th day of January 2017.

"Alain Tardif"

Tardif J.

Translation certified true
On this 18th day of April 2017.

François Brunet, Revisor

Citation: 2017 TCC 2
Date: 20170116
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REASONS FOR JUDGMENT

Tardif J.

[1] The purpose of this appeal is to determine whether the respondent was justified in disallowing $520,512 in input tax credits ("ITCs") claimed by the appellant in its goods and services tax ("GST") return covering the period from October 1 to 30, 2012.

[2] The ITCs claimed were related to one aspect of the appellant's commercial activities for the period from October 1, 2008, to October 31, 2012, namely, that of payments made to dealers following a partial or total loss covered by the protection plan offered by the appellant.

[3] The appellant's Notice of Appeal is quite explicit; it is 90 paragraphs long. The respondent admitted the content of several of those paragraphs in its Reply to the Notice of Appeal.

[4] Given that the admissions cover the basic facts, it is worth reproducing the content of those paragraphs of the Notice of Appeal that were admitted by the respondent:

[TRANSLATION]

- This appeal involves the application of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "Act").

- The appellant is appealing from a notice of assessment issued by the respondent on May 7, 2013 (the "notice"), and the respondent's decision on the objection dated November 18, 2014 (the "decision on the objection"), in which the respondent disallowed the ITC at issue.

- The appellant is a corporation created on May 5, 1980, under the *Canada Business Corporations Act*, R.S.C. (1985) c. C-44.

- The appellant is—and was throughout the relevant period—a GST registrant with GST registration number 104333521RT0001.

- Prior to October 1, 2010, the appellant offered, among other things, a replacement warranty for motor vehicles (the "warranty").

- The warranty was offered to vehicle purchasers as a supplement to the primary insurance offered to them by their primary insurers.

- Indeed, at the time, primary insurance generally only indemnified the insured for the depreciated value of the vehicle at the time of the loss. For example, in the case of a vehicle purchased at the price of $25,000 in 2005 with a replacement value of $29,000 and a depreciated value of $9,000 in 2009, at the time of an accident leading to a total loss, the primary insurance offered the client an indemnity of $9,000[1] (the "primary indemnity").

- The replacement warranty was offered by the appellant through automobile dealers (the "merchants") based in Quebec and with whom the appellant had entered into a distribution contract (the "distribution contract").

- Under the distribution contract, the merchant, acting as an agent for the appellant, undertook to offer the warranty on the appellant's behalf at the time of sale of a motor vehicle.

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[1] The client also needed to pay the deductible.

- More specifically, under the distribution contract, the merchant undertook to comply with the following obligations:

  a. to sell the warranty on the appellant's behalf;

  b. to collect the sale price indicated in the warranty contract reached with the client (the "warranty contract"); and

  c. to hold the amounts as a trustee for the appellant until they are handed over to the latter.[2]

- To be entitled to a replacement vehicle in the case of loss of an insured vehicle, the client must have respected the conditions and obligations set out in the warranty contract. Among these obligations, the client was required to hold primary insurance on the insured vehicle at all times.

- Under the warranty contract, in the event of loss of the insured vehicle, the claim process (the "claim") was to be conducted through the merchant, under the appellant's management and on its behalf.

- In the event of a claim, the replacement vehicle was the object of a contract of sale between the merchant and the client (the "contract of sale").

- As set out in the contract of sale, the sale price of the replacement vehicle included, among other things, the applicable GST.

- Part of the sale price of the replacement vehicle was covered by the client's payment of the primary indemnity of the primary insurer, as set out in the warranty contract.

- To meet its obligations as a supplier of warranties, the appellant had entered into an agreement with La Capitale General Insurance ("La Capitale"), and the latter had, in accordance with that agreement,

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[2] The distribution contract provided that the merchant would be compensated for its services. This compensation was subject to GST under the Act. Hence, under the distribution, the amounts handed over to the appellant still were deducted from the merchant's compensation.

issued a compensatory insurance policy covering the appellant's obligations.

- In about 2012, the relationship between the appellant, the merchants and the clients was the subject of a request for interpretation sent to the respondent.

- On March 8, 2012, the respondent issued a letter of interpretation stating that the appellant (as opposed to the merchants) was the supplier of the taxable supply to the client, with the merchants acting as the appellant's agents.

- Prior to October 1, 2010, the sale of such insurance was not regulated by the Autorité des marchés financiers ("AMF").

- Since October 1, 2010, the AMF has been regulating the warranty, which has become an insurance product called "Q.P.F. No. 5". Therefore, any person wishing to issue such a product must hold an insurer's licence duly issued by the AMF.

- However, in accordance with its obligations, the appellant continued to honour the warranty contracts entered into before October 1, 2010.

Claim

- On November 30, 2012, the appellant filed a claim with the respondent.

- In the assessment, the respondent disallowed the ITC at issue.

- On November 21, 2013, the appellant objected to the assessment through a notice of objection sent to the respondent.

- On November 18, 2014, the respondent confirmed the assessment in its decision on the objection.

- The respondent cites sections 169 and 175.1 of the Act in support of its position.

[5] In support of its appeal, the appellant also called Mario Champagne, in his capacity as vice-president of the appellant, and Silvia Di Tommaso, in her capacity as comptroller for a major automobile dealer.

[6] The testimonial evidence brought to light the following facts, beyond those that had been admitted:

[7] Mario Champagne, representing the appellant, explained how the various plans offered and sold by automobile dealers until October 2010 had been created.

[8] Since that date, dealers have continued to offer the product covering a partial or total loss, but it now originates from an insurer, in accordance with a decision of the AMF.

[9] To put it simply, what had been a warranty before October 2010 became an insurance policy after that date, essentially because the appellant lacked the permits and accreditations required by the financial authorities.

[10] Mario Champagne also explained the various steps and the nature of the appellant's and dealers' rights and obligations, as well as with respect to consumers. He laid out the components of the various plans available. In particular, he addressed coverage applicable to replacement parts commonly referred to as "jobbers", as opposed to original parts.

[11] He also stated that in the event of a partial or total loss, the consumer had to hold a standard primary insurance policy, meaning that the appellant was merely concerned with the difference between that covered by the primary insurer and the replacement value of the good covered by the protection plan acquired from the appellant.

[12] Mario Champagne also explained that the appellant had to reach an agreement with a reputable insurer, La Capitale, to gain access to all of the automobile dealers in Quebec. The appellant obtained from La Capitale a [TRANSLATION] "compensatory policy". He provided several explanations of the contract entered into by the appellant and La Capitale and the objects of the contract.

[13] Overall, Mario Champagne's testimony provided more specifics, nuance and detail about the facts mentioned in the written proceedings such as the Notice of Appeal and the Reply to the Notice of Appeal.

[14] Silvia Di Tommaso also testified. In her role as a comptroller for a major automobile dealer in the Montréal region, she testified about the steps, procedures, signup forms and claim forms at the time of purchasing a protection plan and at the time a claim is made.

[15] She explained that the relationship with the appellant was advantageous in that it generated commissions at the time the protection plans were sold, but also generated profits from the sale of parts and/or repairs by the dealer selling the plans.

[16] The holder of such a contract or the consumer purchasing the protection plan formally undertook to return to the dealer who had sold the protection contract, building valuable consumer loyalty from a maintenance perspective, but also generating potential profits on the replacement car in the event of a total or partial loss.

[17] She insisted on the importance, quantity and quality of the work to be performed in the case of a claim to obtain a cheque from the appellant in the appropriate amount to cover the part of the payment not compensated by the primary insurer.

[18] Mario Champagne also stated that the appellant and the dealers were completely independent entities with independent tasks, to ensure impartiality and objectivity.

[19] On the other hand, he stated that the automobile dealers were intermediaries, agents. Later, the witness referred to an agreement between the appellant and the dealers regarding premium financing for the various coverage plans.

[20] Later, Mario Champagne stated that the obligation to replace the vehicle in the event of a total loss rested with the dealer. He added, [TRANSLATION] “That is to say that the consumer can call us, at the Groupe PPP office, but we will refer them to the dealer.”

Application of section 175.1 of the Act

[21] The appellant submits that its case is based in particular on section 175.1 of the Act; one of the issues, therefore, is whether the appellant meets the conditions of section 175.1 of the Act.

[22] Section 175.1 of the Act sets out exceptions to the ordinary ITC claim regime provided for in section 169 of the Act. More specifically, the relevant parts of this provision are paragraphs 175.1(a), (b) and (c) of the Act, which read as follows:

> 175.1 – Warrantee reimbursement - Where
>
> > (a) the beneficiary of a warranty (other than an insurance policy) in respect of the quality, fitness or performance of tangible property acquires or imports property or a service or brings it into a participating province and tax is payable by the beneficiary in respect of the acquisition, importation or bringing in, and
> >
> > (b) a registrant pays to the beneficiary, under the terms of the warranty, an amount as a reimbursement in respect of the property or service and therewith provides written indication that a portion of the amount is on account of tax,
>
> the following rules apply:
>
> > (c) the registrant may claim an input tax credit, for the reporting period of the registrant in which the reimbursement is paid, equal to the amount (referred to in this section as the "tax reimbursed") determined by the formula
> >
> > A × B / C
> >
> > where
> >
> > A is the tax payable by the beneficiary,
> >
> > B is the amount of the reimbursement, and
> >
> > C is the cost to the beneficiary of the property or service, . . .

[23] The registrant who wishes to benefit from this exception is required to provide the beneficiary with a warranty rather than an insurance policy, which is specifically excluded from the exception by the phrase "other than an insurance policy".

[24] For this analysis, it must be determined whether the protection plan supplied by the appellant to its clients constituted a warranty or an insurance policy for the purposes of the Act.

[25] The case law relating to section 175.1 of the Act is non-existent. The concepts of insurance policy and warranty will have to be analyzed closely.

[26] In *Silicon Graphics*,[3] it was recognized by the Federal Court of Appeal ("FCA") that the explanatory notes issued by the Department of Finance constitute an interpretation tool that can help the courts clarify Parliament's intent regarding a particular provision of the statute:

> [50] Of course, Technical Notes are not binding on the courts, but they are entitled to consideration. See *Canada v. Ast Estate*, 1997 CanLII 6330 (FCA), [1997] 3 F.C. 86 (C.A.), at paragraph 27:
>
> > Administrative interpretations such as technical notes are not binding on the courts, but they are entitled to weight, and may constitute an important factor in the interpretation of statutes. Technical Notes are widely accepted by the courts as aids to statutory interpretation. The interpretive weight of technical notes is particularly great where, at the time an amendment was before it, the legislature was aware of a particular administrative interpretation of the amendment, and nonetheless enacted it.

[27] The explanatory notes issued regarding section 175.1 of the Act are relevant in this case because in describing what is meant by the word "warranty", the Minister of Finance points to a repair service as an example:

> New section 175.1 ensures that a warrantor can claim input tax credits in respect of the tax portion of reimbursements it has made to the warranty holder, who is referred to as the "beneficiary" in the legislation, <u>for property or services such as repairs</u> provided under the terms of a warranty and supplied by a third party. This could occur where charges for repairs and tax are initially paid by the warranty holder instead of the warrantor due to an emergency or due to the distance from the warrantor's own authorized repair facility.
>
> [Emphasis added.]

[28] In its submissions, the respondent argued that the use of the word "repairs" shows that section 175.1 of the Act must be interpreted as referring to the repair work carried out in the case of repairs covered by the manufacturer's warranty.

[29] The explanatory notes do not explicitly provide the definition or scope of the word "repairs".

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[3] *Silicon Graphics Ltd. v. R.*, 2002 FCA 260, para 50.

[30] The appellant, on the other hand, argues that the word "repairs" is a clear indication of the types of property and services that fall under section 175.1 of the Act. According to the appellant, Parliament did not intend to provide a restrictive example.

[31] As such, counsel for the respondent submits that the contract must be characterized as an insurance policy, while the appellant is of the view that it constitutes a warranty.

Definition of "insurance policy" and "insurer"

[32] The words "insurance policy", which can be found in section 175.1 of the Act, are defined in subsection 123(1) of the Act, and the relevant part of the provision reads as follows:

> ***insurance policy*** means
>
> (a) a policy or contract of insurance (other than a warranty in respect of quality, fitness or performance of tangible property, where the warranty is supplied to a person who acquires the property otherwise than for resale) that is issued by an insurer, including
>
> (i) a policy of reinsurance issued by an insurer,
>
> (ii) an annuity contract issued by an insurer, or a contract issued by an insurer that would be an annuity contract except that the payments under the contract
>
> (A) are payable on a periodic basis at intervals that are longer or shorter than one year, or
>
> (B) vary in amount depending on the value of a specified group of assets or on changes in interest rates, and
>
> (iii) a contract issued by an insurer all or part of the insurer's reserves for which vary in amount depending on the value of a specified group of assets,
>
> . . . (*police d'assurance*)

[33] One of the appellant's fundamental arguments rests on the excerpt of subsection 123(1) of the Act that reads as follows:

> ***insurer*** means a person who is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada an insurance business or under the

> laws of another jurisdiction to carry on in that other jurisdiction an insurance business. (*assureur*)

[34] Based on this, the appellant submits that this cannot be an insurance policy but must instead be a warranty because the appellant is not an insurer within the meaning of the Act, a fact that has been admitted.

[35] However, must one find that the product is not an insurance policy on the sole basis of the fact that the appellant did not hold, at the relevant time, the necessary licence to act in that capacity?

[36] Is it also possible to conclude that no insurance is possible in the absence of an insurer legally authorized by the proper authorities?

[37] In order to answer in the affirmative, one must accept that there can be no insurance without the presence of a certified, qualified, recognized insurer with all of the necessary licences.

[38] Article 2389 of the *Civil Code of Québec* (the "C.C.Q.") defines the contract of insurance as follows:

> 2389. A contract of insurance is a contract whereby the insurer undertakes, for a premium or assessment, to make a payment to the client or a third person if a risk covered by the insurance occurs.
>
> Insurance is divided into marine insurance and non-marine insurance.
>
> [Emphasis added.]

[39] A contract of insurance therefore extends beyond the status of the insurer; in other words, a contract of insurance is a legal instrument that generates consequences and that can exist without having the person who receives the premium be a duly qualified and accredited insurer. The nature and effects of a contract cannot be determined exclusively by the title, role or function of one or the other of the parties to a contract.

[40] While the Act does define the word "insurer", it does not define insurance. Arguing that the product cannot be insurance because it has not been sold or offered by a licensed and accredited insurer within the meaning of the applicable statutes and regulations results in a reduction and limitation of the meaning and scope of the word insurance.

[41] Physicians perform medical acts in their professional practices. However, a medical act can be performed by a non-physician. A medical act performed by a non-physician still generates all of the civil, penal and even criminal effects and consequences.

[42] Claiming that an act is not a medical fact solely on the basis that it was not performed by a physician recognized by the College of Physicians is an aberration.

[43] Regardless of the activity performed by the physical or legal person, it is not a permit, a licence or an accreditation that defines the nature of the work performed, but rather the actual, concrete actions taken.

[44] Any economic activity may be subjected to a permit, licence or accreditation, in the absence of which penalties may apply. This does not, however, have the effect of modifying, changing or altering the nature of the service performed, the nature of the contract or the liability and obligations of the parties.

[45] In this respect, the comments of Justice Dalphond are highly relevant.[4]

> [TRANSLATION]
>
> [60] In his treatise entitled *Les contrats d'assurances (terrestres)*, Volume 1, Les Éditions SEM inc., 1989, pp. 129 et seq., he had previously written:
>
> > [TRANSLATION]
> >
> > The definition of a contract of insurance is provided in article 2468 C.C.: "A contract of insurance is that whereby the insurer undertakes, for a premium or assessment, to make a payment to a policyholder or a third person if an event that is the object of a risk occurs."
> >
> > That definition is very general and tells us that, to be qualified as such, a contract of insurance must have three essential elements: a risk, a premium paid by the insured and a payment provided by the insurer in the event that a risk occurs. Other contracts may be similar to it. It is worth considering those common features, in order to be able to correctly qualify those other contracts. The applicable law depends on that qualification.
> >
> > . . .

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4 *Association pour la protection des automobilistes inc. v. Toyota Canada inc.*, 2008 QCCA 761 (*Toyota*).

2.

Contracts of insurance and warranties

The warranties referred to here are those attached to commercial goods: the warranty on your car, your television, etc.

Warranty contracts possess the three essential elements of a contract of insurance:

there is a risk of damage;

there is a premium, usually built into the price of the good: certain automobile dealerships will reduce the sale price if the buyer waives the warranty;

there is a performance: the performance consists in the repair of the good or its exchange for another good.

In Quebec, there is scanty case law on this subject. We are aware of two cases.[5]

. . .

We believe that the distinction drawn by the courts leads to the following conclusion: certain assumptions of risk that are accessory to a contract of provision of goods or services may be contracts of insurance; when a good is guaranteed against any risk whatsoever, we are dealing with insurance; when a good is guaranteed against risks flowing from manufacturing defects, we are dealing with a warranty.

Let us apply this principle. If you purchase a tire that is guaranteed against all types of road hazards, you have a contract of insurance. If, however, the tire is guaranteed only against risks flowing from a manufacturing defect, you have a warranty. It is normal to expect a good or service to satisfy the standards associated with its purpose.

Obviously, even in the case of a simple warranty, to the extent that the risk is assumed by a third party, who is a stranger to the provision of the good or service, the operation is very likely to be qualified as insurance. . . .

[Emphasis added.]

[61] There is therefore an important distinction: a warranty is associated with a defect in the good sold, and the warrantor has an economic interest in the

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5 *Wood v. Grose,* (1896) 5 B.R. 116 (C.S.); *Bédard v. Gervais*, (1933) 55 B.R. 195 (C.A.).

> purchase of the good by a consumer, as is the case for the manufacturer, the distributor and the merchant. What is more, these persons have a legal obligation to warrant that the good is free of latent defects. On the other hand, insurance is provided by a party that is not bound to warrant the quality of the good because of its role in the marketing of the good, and whose principal activity is risk speculation.

[46] The Act defines the word "insurer", and the CCQ defines the words "contract of insurance". Logically and classically, it is normal to argue that contracts of insurance are sold or offered by insurers. The CCQ does not establish or require any conditions for qualifying someone as an "insurer". Thus, in civil law, it is entirely possible to be in the presence of a contract of insurance while in the absence of a qualified or accredited insurer. The nature and object of the contract are in no way affected.

[47] This approach is entirely consistent with the fundamental principles of tax law, according to which the intention of the parties may be considered but is rarely determinative, especially if it cannot be reconciled with the relevant facts underlying the dispute.

[48] In this case, the coverage in the event of a partial or total loss is essentially partial because the primary insurer covers the depreciated value; only the difference between the depreciated value and the replacement value is covered by the appellant.

[49] In its Notice of Appeal,[6] the appellant described the mode of compensation that applied when a client made a claim under the warranty:

> [TRANSLATION]
>
> In no case did the warranty enable the client to claim an amount of money. The warranty only entitled the client to a replacement vehicle.

[50] The appellant therefore stated that the warranty it offered did not constitute an insurance policy, on the basis that it did not entitle clients making a claim to monetary compensation.[7]

[51] This argument cannot be accepted; it is possible to imagine a number of situations in which the payment would have to be made in the form of monetary

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6 Notice of Appeal, para 14.

7 Appellant's written submissions, para. 75.

compensation; for example, one need only imagine the discontinuance of the covered model, the closure of the dealership, a loss suffered in the United States, the withdrawal of the model, the bankruptcy of the manufacturer, etc.

[52] Respecting the obligations and/or restrictions requires that all of the conditions still be present at the time of the claim, otherwise the settlement must be reached on a consensual basis, with a significant possibility that the settlement be in the form of a payment and/or indemnity.

[53] The appellant also argued that the creation of a protection plan did not involve a sophisticated risk analysis for each client. That argument is less cogent when one considers that a primary insurer was necessarily involved in each file.

[54] Indeed, it is exceptional to see an insurance contract entered into with one client exclusively. Insurance is based on actuarial studies and statistics, and the premiums are determined on the basis of classes and categories rather than with regard to a single insured individual.

[55] In order to avail oneself of the language of section 175.1 of the Act, one must necessarily be dealing with a warranty with respect to quality, fitness or performance.

[56] To qualify, the protection plan created and offered by the appellant had to meet the requirement of covering one of the three following elements:

(1) quality;

(2) fitness; and

(3) performance.

[57] Quality, fitness and performance are characteristics related to the vehicle's use and purpose. When one of those does not meet the expectations of the consumer-owner, it is generally a temporary, one-time situation of limited duration.

[58] A distinction must be drawn between a total loss of use and a definitive total loss. I believe that there is a clear distinction between a total loss of use arising from a failure or defect and a total loss arising from an accident and/or theft.

[59] A loss of use arising from a failure, a defect or abusive use is generally temporary, while a total loss arises from an accident and is generally total, permanent and definitive.

[60] When the appellant submits that nobody is claiming the GST and Quebec Sales Tax ("QST") on the part of the value indemnified by the primary insurer, is it not arguable that it would be unfair for the secondary payer to be able to claim the ITC while the primary insurer is unable to do so?

[61] I believe it will be worthwhile to make incidental comments on the injustice and fairness aspects of this case, the appellant having made multiple references to these issues.

[62] The appellant has argued before this Court that the refusal of its claim would produce an unfair result for the following reasons, which it set out in its Notice of Appeal:[8]

> [TRANSLATION]
>
> 85. The ultimate consumers (the clients) bore the GST applicable to the taxable supplies provided by the appellant in the course of its commercial activities.
>
> 86. It is therefore entirely legal and legitimate for the applicant to be entitled to the ITC in issue like any other issuers of warranties, whether they be manufacturers, retailers or external issuers. Section 175.1 was added to the Act to ensure this result, which is also based on section 169.
>
> 87. The respondent's refusal to allow the ITC in issue results in double taxation.
>
> 88. This result is even more unfair and contrary to the Act when one takes into account the fact that the total amount of GST paid by the client in respect of the warranties is well above the total amount of ITC claimed by the appellant for the replacement vehicles. Indeed, only a fraction of the warranties gave rise to a replacement vehicle.

[63] Moreover, at trial, the appellant submitted that the disallowance of the ITCs produced an unfair result because [TRANSLATION] "it is reflected in the insurance premiums, and as we also heard this morning, it makes one less competitive".[9]

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8 Notice of Appeal, paras 84 to 88.

[64] The Supreme Court of Canada did state in *Daishowa*[10] that where two interpretations of a provision are possible, the Court must favour the fairer one:

> [43] . . . Although not dispositive, as Mainville J.A. recognized in his dissent, an interpretation of the Act that promotes symmetry and fairness through a harmonious taxation scheme is to be preferred over an interpretation which promotes neither value.

[65] That said, one must take into account that the Tax Court of Canada (the "TCC") must follow the law, which means that it does not have the power to adjudicate a dispute on the basis of fairness.

[66] In *Mills*,[11] Justice Masse summarized the case law on this principle as follows:

> [21] However, the Tax Court of Canada is not a court of equity. The Tax Court of Canada does not have the legal authority to set aside or vary a tax assessment for reasons based essentially on equity. In other words, the role of a judge of this Court is to decide whether or not an assessment is well founded, not to make or change the law: see *Smith v. M.N.R.*, 1989, 89 D.T.C. 299; *Lamash Estate v. M.N.R.*, 1990, 91 D.T.C. 9; *Sunil Lighting Products v. M.N.R.*, [1993] T.C.J. No. 666; *Tignish Auto Parts Inc. v. M.N.R.*, [1993] T.C.J. No. 446; *Impact Shipping v. Canada*, [1995] T.C.J. No. 409; *Lassonde v. Canada*, 2005 FCA 323; and *Dubois v. the Queen*, 2008 D.T.C. 3205.
>
> [Emphasis added.]

[67] That principle was also confirmed in *Chaya*,[12] where the FCA decided that it was not possible for the courts to waive the application of the law on the grounds of fairness:

> [4] The applicant says that the law is unfair and he asks the Court to make an exception for him. However the Court does not have that power. The Court must take the statute as it finds it. It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

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9 Transcript, *supra*, note 4, p. 183 (lines 17-19).

10 *Daishowa-Marubeni International Ltd. v. R.*, 2013 CSC 29, [2013] 4 CTC 97, para 43.

11 *Mills v. R.*, 2014 D.T.C. 1138 (TCC). This decision was upheld by the FCA in *Mills v. R.*, 2015 D.T.C. 5127 (FCA).

12 *Chaya v. R.*, 2004 FCA 327, para 4.

[68] The principle that the TCC cannot adjudicate a dispute primarily on grounds of fairness was also addressed on several other occasions, including by the FCA in *MacKay*[13] and by the TCC in *Darbaj*,[14] *Springer*[15] and *Solanko*.[16]

[69] Thus, it is not open to the TCC to override the application of a principle arising from the interpretation of a provision merely because the outcome appears unfair or inequitable. The TCC's role is to apply the law, not to create [TRANSLATION] "new" law on the basis of fairness.

[70] This principle was cited with approval by Justice Paris in *Alfonsi*:[17]

> The Appellant maintains that her appeal should be allowed on the grounds of fairness. Unfortunately, this Court has no equitable jurisdiction, and where the wording and provisions of the GST legislation are clear, the Court must apply those provisions. . . .

[71] Justice Hogan also noted in *Maass-Howard*[18] that the TCC had no power to render a decision that would "vacate an assessment if it was made in conformity with the law".

[72] This concludes the discussion on the fairness argument.

[73] As for the warranty, it is not defined in the Act. The *Dictionnaire Larousse* defines *"garantie"* [warranty] as follows:

> [TRANSLATION]
>
> **Warranty:**
>
> A guarantee of the performance, the respect of the terms of a contract.
>
> Obligation of a person to guarantee another person's enjoyment of a thing or right, or to protect that person against any damage or to compensate that person in the event of such damage; responsibility of one of the parties to a contract.

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13 *MacKay v. R.*, 2015 FCA 94, 2015 D.T.C. 5051, paras 2-3.
14 *Darbaj v. R.*, 2014 TCC 103, para 9.
15 *Springer v. R.*, 2013 TCC 332, para 8.
16 *Solanko v. R.*, 2014 TCC 100, para 5.
17 *Alfonsi v. R.*, 2009 TCC 202.
18 *Maass-Howard v. R.*, 2012 TCC 307, para 14.

[74] In *Toyota*,[19] the Court of Appeal of Québec, at paragraph 28, wrote as follows:

> [TRANSLATION]
>
> [28] The status of insurer is recognized after various requirements are satisfied, including the requirements of the *Insurance Act* and the regulations enacted thereunder. It has been established that the respondent did not have this status. This in itself is not determinative of the nature of the contract, which could be insurance issued by a person who is not authorized to act as an insurer.
>
> [Emphasis added.]

[75] The respondent wrote the following in her Reply to the Notice of Appeal:

> [TRANSLATION]
>
> (g) The warranty provided by the appellant covers the risk arising from the theft or total loss of the vehicles rather than the risk arising from a defect or malfunction following normal use of the vehicles;
>
> (h) The appellant is not a manufacturer, distributor or merchant of the vehicles and is therefore not legally required to guarantee their quality;
>
> (i) The warranty provided by the appellant is not a warranty "in respect of the quality, fitness or performance" of the vehicles;

[76] That was the Reply to the paragraph in the Notice of Appeal that reads as follows:

> [TRANSLATION]
>
> In no case did the warranty enable the client to claim an amount of money. The warranty only entitled the client to a replacement vehicle.

[77] The argument was repeated insofar as the appellant submitted that the contract could not be an insurance policy because the consumer is not entitled to an indemnity but essentially to a replacement vehicle.

[78] The consumer consented to the contractual provision that sets out how things would be done; however, that provision was included to satisfy the interests of the dealer that sold the protection plan to the consumer, ensuring that the dealer would

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[19] *Toyota*, para 28.

profit from the new vehicle and the service continuity, which was another dimension to the dealer's benefit.

[79] That is a subordinate clause that, on its own, does not alter the fundamental nature of the contract. Moreover, as already mentioned, it is easy to imagine a great number of situations where a settlement should result in an indemnity.

[80] The essential and genuine object of the contract is the value of the replacement, the cost that the appellant has to pay and the existence of conditions that entitle it to the replacement value, including primary insurance and total loss due to theft and/or accident.

[81] Moreover, the condition is essentially advantageous to the dealer that benefits from the sale of protection plans that enable it to earn a significant commission on the premium and the potential other sale of a replacement vehicle to the same consumer. For the appellant, the sale of the plans and everything that goes with them is part of its business activities.

[82] The consumers' obligation to deal with the dealer that sold them the protection plan is something completely secondary because their ultimate objective is to obtain an equivalent vehicle in case of a theft or a total loss. In this regard, consumers can argue that they are entitled to an indemnity if it is impossible for them to comply with their undertaking because of something beyond their control, such as the closure of the garage, discontinuance of the brand, disappearance of the manufacturer, etc.

[83] The goal of the protection plan is to enable the person who acquired it to obtain a new vehicle without suffering the loss due to depreciation increasing year after year that the person would have had to assume because the primary insurer's liability is limited to the depreciated value.

[84] Moreover, it is common knowledge that conventional insurers [defined as primary insurers] offer this type of protection with no obligation to purchase the replacement vehicle from the same dealer.

[85] The argument that the contract is a warranty only because of the consumers' obligation to deal with the dealer that sold them the protection plan to replace the eligible vehicle (total loss or theft) is not very convincing.

[86] This is a not a determinative factor for qualifying the nature of the contract.

[87] With respect to the risk assessment for each client, I do not accept that argument because the appellant knew or ought to have known the degree of risk determined in part by the primary insurer; on the other hand, the appellant could revisit its prices at any time on the basis of its files and its budgetary forecasts.

[88] Subsection 175(1) of the Act provides that the warranty must relate to quality, fitness or performance.

[89] The appellant submits that the total loss from an accident or theft is a situation that can and should be included in quality, fitness or performance.

[90] At first glance, the quality, fitness or performance of a vehicle has nothing to do with theft or total loss. They are essentially situations related to the purpose and use of the vehicle.

[91] For all these reasons, the appellant does not meet the conditions of subsection 175(1) of the Act to benefit from the exception.

[92] With respect to the claim for ITCs under section 169 of the Act, that section sets out the conditions that a registrant must satisfy to be entitled to claim an ITC. The relevant portions of that provision are reproduced below:

> General rule for credits
>
> 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:
>
> $$A \times B$$
>
> where
>
> 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 is . . .
>
> . . .

> (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.]

[93] As the appellant noted it, the conditions required for a taxpayer to be eligible to claim an ITC were summarized as follows by Justice Campbell in *General Motors*:[20]

> [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.
>
> [Emphasis added.]

[94] First, the evidence is clear that the appellant did indeed pay amounts to the dealers through various protection plans sold to their clients. Among other things, the payments related to

- reimbursement of deductible;
- vehicle rental;
- cost of original parts; and
- part of the replacement cost of a vehicle.

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[20] *General Motors of Canada Limited v. The Queen*, 2008 TCC 117, upheld by FCA in 2009 FCA 114.

[95] However, the situation is far from being that clear with respect to the other conditions; indeed, can it be argued that the appellant received and benefited from the supply?

[96] Indeed, the concept of supply is broad; it means the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.

[97] In this case, there is no doubt that the vehicle acquired through partial reimbursement [the other part being assumed by the primary insurer] does not profit or benefit the appellant because only the consumer benefits from the acquisition of the property replaced.

[98] In this regard, the decision in *General Motors*[21] is very helpful; in particular, the following excerpt is relevant in determining whether the appellant had "provided property":

> [TRANSLATION]
>
> [80] In the case of courtesy cars, there are also two supplies that are involved in the implementation of the Program. First, there is the dealer that supplies a courtesy car to a GMC client. Then, there is the supply that occurs between the dealer and GMC. This is also the second supply that is at issue and that the Court must qualify.
>
> [81] To qualify these supplies of property between the dealers and GMC, again there must be a provision of property that meets the definitions of supply and property [See definition of supply in section 1 AQST [*Act Respecting the Québec Sales Tax*]).]
>
> [82] Although these definitions are broad, there can be no question here of provision of property between the dealers and GMC in any way, including by sale or otherwise as defined in the AQST. Specifically, there cannot be provision of road vehicles between the dealers and GMC in the context of a taxable supply between them that is the subject of this dispute.
>
> [83] Moreover, GMC is never in possession of nor does it acquire the road vehicles that are the subject of supply to its clients.

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21 *General Motors of Canada Ltd.* c. *Agence du revenu du Québec*, 2015 QCCQ 386, paras 82, 83 and 86 to 89.

> [88] The fact that the dealers, either themselves or through car rental companies, have provided replacement vehicles to GMC's clients for its benefit, does not mean that the supplies between the dealers and GMC are themselves supplies of road vehicles.
>
> [89] GMC could have acquired road vehicles to subsequently provide them again to its clients. In that case, GMC's acquisition of road vehicles would constitute a supply of property that, under certain conditions, could be subject to the restriction in section 206.1 AQST. However, that is not the situation here. GMC did not acquire the road vehicles under the supply made by the dealers as part of the Program. Accordingly, there can be no question here that section 206.1 AQST applies.
>
> [Emphasis added.]

[99] This so obvious that the appellant did not emphasize this aspect and instead accepted the aspect of provision of services prior to payment of the partial cost of the replacement vehicle.

[100] Imagine the case where after the total loss of his or her vehicle, a consumer claims and obtains the indemnity payable by the primary insurer. The consumer acquires a new vehicle. Certain problems arise with the protection plan acquired from the appellant.

[101] Will a car dealer who is owed a balance of the sale price look to the person who acquired the vehicle or to the appellant? The answer is self-evident. Indeed, only the person who acquired the vehicle is responsible for the balance of the sale price. The consumer would possibly have an action in warranty against the appellant.

[102] The consumer pays an amount to the dealer, who is the appellant's agent, for the desired protection plan; the goal is to obtain a new vehicle in the event of a total loss of the property the consumer acquired.

[103] The replacement of the property protected by such a protection plan includes the GST and QST, which the plan is completely responsible for. The taxes in question are essential components of the value of the property that must be replaced, as are the various options the vehicle that must be replaced had.

[104] The appellant, through contractual clauses, chose to pay the dealer directly when claims are made rather than paying an indemnity to the consumer, which would enable the consumer to shop for the new vehicle anywhere. The payer of the

premium has moreover accepted that condition, which does not release him or her from their obligation to pay the GST and the QST.

[105] If the appellant pays the taxes in accordance with the contractual obligations that it must assume in the place and stead of its client, it is not for the state to indemnify the appellant through input tax credits to reduce its financial liability with respect to its insured.

[106] The ultimate transaction that consists in replacing the total loss or stolen vehicle is subject to the payment of taxes owed by the consumer, who alone could claim ITCs. Since the consumer is not a registrant, this right cannot be assigned or transferred to the appellant, which paid the cost of the replacement vehicle in place of the consumer.

[107] Where a person, in consideration of a sum of money, decides to formally make undertakings that are likely to occur in the event of a total or partial loss of property, that person cannot claim to have suffered harm after the fact if the expected assumptions have changed. That is the very essence of a contract whose consideration is the assumption of any risk.

[108] In this case, the purchaser of the taxable supply is not the appellant but the consumer, who benefits from the reimbursement contract for the entire price that he obtained from the appellant through a premium.

[109] Who received the supply? The consumer. The supply was not received for use or consumption in the course of the appellant's commercial activities. The beneficiary of the supply received was the consumer and payer of the premium.

[110] The argument that the dealer must do a great deal of work and invest a great deal of time to prepare and subsequently submit the claim to the appellant is very unconvincing. The witness stated that the work was long, difficult and tedious.

[111] The work required to submit a claim is normal, usual and routine. Furthermore, the dealer that assumes this obligation is completely indemnified by the profit made on a new car.

[112] In addition, did the dealer itself not establish its percentage of commission when the protection plan was sold? In other words, the consideration for the time spent on preparing the claim, as important as it is, is more than offset by the sale of a new vehicle.

[113] Any person holding a protection plan in any field must provide notification, and prepare and submit a request for payment in the event that the risk anticipated by the plan occurs. For the procedures, forms, time, energy, stress, worries, they are strictly entitled to nothing other than what is set out in the contract.

[114] In this case, the dealer did in fact receive consideration for its services; indeed, the dealer itself determined the amount of the commission it deemed appropriate for its services both for the sale of the contract and the potential obligation to submit a claim, which in addition occurs in a marginal percentage of contracts sold. Moreover, the dealer makes a profit on the sale of the vehicle and again retains the consumer-client's loyalty.

[115] The work part consisting in preparing a claim in the event of the total loss of a vehicle covered is not a transaction between the dealer and the appellant subject to the GST and the QST. That is essentially work done for and on behalf of the victim of the loss who is liable for the taxes associated with the property that has to be replaced.

[116] The appellant submits that when it has to make payments in the event of a consumer's claim on the basis of or under the protection plan, it benefits from numerous services provided by the dealer, which prepares and submits the claim in accordance with its requirements.

[117] On the one hand, I believe that the services in question are greatly exaggerated because at that point the primary insurer has already acted; this means that part of the work has already been done.

[118] On the other hand, it is surprising that the contract between the appellant and the dealer does not provide for any compensation, fee or commission for the dealer's work if the work in question is so labour-intensive, while the same agreement provides that the dealer is entitled to a commission that it determined itself when the protection plan is sold to the consumer.

[119] The dealer's services and work are not free. Indeed, the dealer is guaranteed to sell a new vehicle thereby ensuring that the dealer makes a profit on the vehicle. Other than that profit, since a guaranteed sale is involved, the dealer can realistically hope to sell a new, slightly different protection plan but again with a commission, without mentioning all the other possibilities in terms of added services and options.

[120] In conclusion, arguing that the payment made by the appellant as the result of a claim is a transaction between it and the dealer and a taxable economic activity is without merit.

[121] In accordance with the doctrine of the FCA, only the person for whose benefit a supply is made can claim and obtain the related ITC.

[122] Imagine a consumer who has a protection plan that the parties disagree on. The consumer has such a protection plan, is driving in a remote area in the southern United States and is involved in an accident that results in the total loss of the consumer's car. The consumer is wealthy and wants to continue his or her trip as soon as possible. The consumer decides to replace that vehicle after advising the primary insurer, taking photographs, etc. The consumer buys a replacement vehicle and reports his or her claim against the appellant when they return.

[123] Should the appellant make up the difference between the indemnity received from the primary insurer and the value of the loss? This is a simple example but as relevant as the example where the dealership no longer exists, particularly for Suzuki vehicles, which were discussed at the hearing.

[124] Before concluding, I am of the opinion that, if I were to accept the appellant's arguments and submissions, that would enable any registrant for the purposes of the GST and QST to claim ITCs after the receipt of property by a non-registrant (consumer) through an agreement between the registrant, the non-registrant and the supply seller. The GST and/or the QST are taxes that ultimately are non-refundable if the property was received by a non-registrant.

Conclusion

[125] For all these reasons, the appeal is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 16th day of January 2017.

"Alain Tardif"

Tardif J.

Translation certified true
On this 18th day of April 2017.

François Brunet, Revisor

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