Docket: 2004-3594(GST)G

BETWEEN:

GENERAL MOTORS OF CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 27 and 28, 2006 and January 23, 2007 at Toronto, Ontario,

Before: The Honourable Justice Diane Campbell

Appearances:

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

Signed at Ottawa, Canada, this 22nd day of February 2008.

"Diane Campbell"

Campbell J.

Citation: 2008TCC117
Date: 20080222
Docket: 2004-3594(GST)G

BETWEEN:

GENERAL MOTORS OF CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] 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 Trustee 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 DTC 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 DTC 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

[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).

> 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.

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

[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 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 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 DTC 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 DTC 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 DTC 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 merits 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 DTC 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 DTC 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 DTC 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 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 99¢ 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 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 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 appeal 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.

Signed at Ottawa, Canada, this 22nd day of February 2008.

"Diane Campbell"

Campbell J.

CITATION:	2008TCC
COURT FILE NO.:	2004-3594(GST)G
STYLE OF CAUSE:	General Motors of Canada Limited and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	November 27 and 28, 2006 January 23, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	February 22, 2008

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