CITATION: GENERAL MOTORS OF CANADA LTD. *v.* CANADA, 2009 FCA 114, [2010] 2 F.C.R. 344 A-136-08

Her Majesty the Queen (*Appellant*)

v.

General Motors of Canada Limited (*Respondent*)

INDEXED AS: GENERAL MOTORS OF CANADA LTD. V. CANADA (F.C.A.)

Federal Court of Appeal, Desjardins, Nadon and Blais JJ.A.—Toronto, December 8, 2008; Ottawa, April 16, 2009.

Customs and Excise — Excise Tax Act — Appeal from Tax Court of Canada decision finding respondent eligible for input tax credits (ITCs) under Excise Tax Act, s. 169(1) in respect of GST paid to investment managers — Respondent administrator of employee pension plans, retaining investment managers — Agreements providing respondent liable for investment services, GST — Canada Revenue Agency rejecting respondent's ITC claim on basis services not acquired in course of commercial activities — Three conditions set out at Act, s. 169(1) for claiming ITC met — Respondent acquiring investment management services, not acting as trustee — Respondent liable for payment of those services — Pension plans integral component of respondent's commercial activities — Appeal dismissed.

This was an appeal from a Tax Court of Canada decision finding that the respondent was eligible for input tax credits (ITCs) under subsection 169(1) of the *Excise Tax Act* in respect of GST paid to investment managers.

The respondent, a manufacturer and seller of vehicles, is the administrator of its employees' pension plans. The pension plans are funded through trusts for which a trustee is appointed. The respondent manages the investment funds by retaining investment managers. Investment management agreements between the respondent and the investment managers provide that the respondent is liable to pay for the investment management services and the GST on those services. At the material times, the investment managers invoiced the respondent directly and also collected the GST from the respondent. In an advance GST ruling, the Canada Revenue Agency rejected the respondent's ITC claim because it did not acquire investment management services for consumption, use or supply in the course of its commercial activities. However, the Tax Court of Canada found that the respondent was eligible to claim ITCs because it met the three conditions of subsection 169(1) of the Act in that (1) the respondent acquired the investment management services, (2) the GST was payable or paid by the respondent on the investment management services, and (3) the investment management services were acquired for consumption or use in the course of the respondent's commercial activities.

Held, the appeal should be dismissed.

The Tax Court of Canada did not err in finding that the respondent met all three conditions of subsection 169(1) of the Act.

Regarding the first condition, the acts of acquiring the services were not deemed by section 267.1 of the Act to be acts of the trustee. The Tax Court of Canada found that section 267.1 was not applicable, that no evidence was produced to suggest that the respondent took title to the assets under the deed of trust, and that for the purposes of section 267.1, the respondent's roles and duties, distinct from those of the trustee, were that of an administrator of the pension plans. It concluded that the fiduciary duties exercised by the respondent did not mean that it was a trustee, and that consequently, it was the respondent that acquired the investment management services. This conclusion was based on the evidence and as such, was not a reviewable error.

Regarding the second condition, the Tax Court of Canada did not err in concluding that the respondent was the person liable for the payment of the investment management services, even though it resupplied those services to the pension plan trusts and was reimbursed by the trusts. In addition, the agreements with the investment managers established the respondent's liability for payment. It is the person who satisfies the

requirement at subsection 169(1) of the Act and who carries the contractual liability to pay that is entitled to claim ITCs.

Regarding the third condition, the fact that the respondent was the key contributor to the trust funds and remained liable to pay the investment management fees even if they were ultimately borne by the trustees had to be taken into account. Also, the factual situation in the case at bar was different from that in *Canada v. 398722 Alberta Ltd.*, wherein it was held that ITCs were not available when fulfilling an obligation to meet another business objective. The pension plans, which the respondent is obligated to maintain, were not simply another business objective. Without the collective agreement, they would not exist. Finally, the Tax Court of Canada did not apply an "economic substance over form" analysis contrary to the principles set out by the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*. Pension plans are not necessarily separate and distinct from other businesses and, in the case at bar, they were an integral component of the respondent's commercial activities.

STATUTES AND REGULATIONS CITED

Excise Tax Act, R.S.C., 1985, c. E-15, ss. 123(1) "business" (as enacted by S.C. 1990, c. 45, s. 12), "commercial activity" (as enacted *idem*; 1993, c. 27, s. 10; 1997, c. 10, s. 1), "exempt supply" (as enacted by S.C. 1990, c. 45, s. 12), "financial service" (as enacted *idem*; 1993, c. 27, s. 10; 1997, c. 10, s. 1; 2000, c. 30, s. 18; 2006, c. 4, s. 136), "recipient" (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10), 169 (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 35; 1997, c. 10, ss. 19, 161; 2000, c. 30, s. 28), 191(3) (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 56), 267.1 "trust" (as enacted by S.C. 1997, c. 10, s. 73), "trustee" (as enacted *idem*), 296(2.1) (as enacted *idem*, s. 78; 2006, c. 4, s. 151).

Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 337 (as am. *idem*, ss. 18, 36).

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 1 "administrator".

CASES CITED

DISTINGUISHED:

Canada v. 398722 Alberta Ltd., [2000] G.S.T.C. 32, 2000 G.T.C. 4091, 257 N.R. 71 (F.C.A.).

CONSIDERED:

Shell Canada Ltd. v. Canada, [1999] 3 S.C.R. 622, (1999) 178 D.L.R. (4th) 26, [1999] C.T.C. 313, 99 DTC 5669.

REFERRED TO:

Canadian Medical Protective Assn. v. Canada, 2008 TCC 33, [2008] G.S.T.C. 88, 2008 G.T.C. 461; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] W.W.R. 1; *Blanchard v. Canada* (1995), 9 C.C.P.B. 117, [1995] C.T.C. 262, 95 DTC 5479 (F.C.A.); *Minister of National Revenue v. Yonge-Eglinton Building Limited*, [1974] 1 F.C. 637, [1974] C.T.C. 209, [1974] DTC 6180 (C.A.).

APPEAL from a decision of the Tax Court of Canada (2008 TCC 117, 67 C.C.P.B. 290, [2008] G.S.T.C. 41, 2008 G.T.C. 256) finding that the respondent was eligible for input tax credits under subsection 169(1) of the *Excise Tax Act*, R.S.C., 1985, c. E-15. Appeal dismissed.

APPEARANCES

Bonnie F. Moon for appellant.

Alnasir Meghji and *Sean C. Aylward* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Osler, Hoskin & Harcourt LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

[1] DESJARDINS J.A.: This appeal of a decision of Campbell J. (the Tax Court Judge), *General Motors of Canada Ltd. v. Canada*, 2008 TCC 117, 67 C.C.P.B. 290, was heard consecutively to appeal A-243-08, *Canadian Medical Protective Assn. v. Canada*, 2008 TCC 33, [2008] G.S.T.C. 88, rendered by Bowman C.J.

[2] At issue is whether General Motors of Canada Ltd. (GMCL) was, during the relevant period, eligible for input tax credits (ITCs) under subsection 169(1) [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 35; 1997, c. 10, s. 161] of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the Act) in respect of GST [Goods and Services Tax] paid to investment managers.

[3] If GMCL is not entitled to claim ITCs, the question becomes whether GMCL is entitled to a rebate of GST paid in error pursuant to subsection 296(2.1) [as enacted by S.C. 1997, c. 10, s. 78; 2006, c. 4, s. 151] of the Act, on the basis that the investment services would not be subject to GST at all, since they would be an "exempt supply" [as enacted by S.C. 1990, c. 45, s. 12] of a "financial service" [as enacted *idem*; 1993, c. 27, s. 10; 1997, c. 10, s. 1; 2000, c. 30, s. 18; 2006, c. 4, s. 136] as defined in subsection 123(1) of the Act.

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

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

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

THE FACTS

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

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

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

[10] As administrator of these plans, GMCL's responsibilities include the calculation and payment of pension entitlements and the disclosure of information to the members of the respective plans.

GMCL also submits filings and accurate reports, it invests the assets, it ensures that all required contributions are made and that the fees and expenses are reasonable.

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

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

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

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

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

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

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

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

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

a. payment directly by GMCL to the investment manager, with reimbursement directed to GMCL from the Plan Trust; or

b. payment directly by the relevant Plan Trust to the investment manager upon the direction of GMCL.

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

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

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

DECISION OF THE CANADA REVENUE AGENCY

[22] GMCL obtained an advance GST ruling (the ruling) from the Canada Revenue Agency (CRA) concerning its entitlement to claim an input tax credit in respect of the investment management services. In the ruling, the CRA acknowledged that GMCL was the only person "liable to pay" the investment manager and was, therefore, the "recipient" [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10] of the services as that term is defined in subsection 123(1) of the Act. In addition, the CRA also acknowledged in the ruling that GMCL was the person who "acquired" the investment management services. The sole reason given by the CRA in rejecting GMCL's input tax credit claim was that GMCL did not acquire investment management services for consumption, use or supply in the course of its commercial activities. The ruling read in relevant part as follows (A.B., Vol. 5, Tab 6(D), pages 1162–1163):

RULING GIVEN

…

Based on the facts above, we rule that:

…

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

EXPLANATION

…

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

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

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

THE RELEVANT LEGISLATION

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

169. (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

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

(*a*) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(*b*) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

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

[25] "Commercial activity" [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10; 1997, c. 10, s. 1] is defined in subsection 123(1) of the Act as:

123. (1) …

"commercial activity" of a person means

(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

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

[26] The term "business" [as enacted by S.C. 1990, c. 45, s. 12] is also defined in subsection 123(1) of the Act:

123. (1) …

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

[27] Section 267.1 [as enacted by S.C. 1997, c. 10, s. 73] of the Act reads thus:

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

"trust" includes the estate of a deceased individual.

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

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

(3) A trustee of a trust is jointly and severally liable with the trust and each of the other trustees, if any, for the payment or remittance of all amounts that become payable or remittable by the trust under this Part before or during the period during which the trustee acts as trustee of the trust except that

(*a*) the trustee is liable for the payment or remittance of amounts that became payable or remittable before the period only to the extent of the property and money of the trust under the control of the trustee; and

(*b*) the payment or remittance by the trust or the trustee of an amount in respect of the liability discharges the joint liability to the extent of that amount.

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

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

(*a*) anything done by the person in the person's capacity as trustee of the trust is deemed to have been done by the trust and not by the person; and

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

THE STANDARD OF REVIEW

[28] The appellant claims that the standard of review to be applied is correctness since the issues at stake are questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8 ff.). The respondent claims that the question as to whether the services were acquired by GMCL for use in its commercial activity has a substantial factual component to it. Consequently, the standard to be applied is whether the Tax Court Judge has made a palpable and overriding error (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 26 ff.).

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

DECISION OF THE TAX COURT JUDGE

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

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

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

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

[31] She found that GMCL met the three conditions.

[32] The appellant submits she erred in doing so.

ANALYSIS

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

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

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

[35] The respondent claims that the application of section 267.1 of the Act was not specifically indicated as a statutory provision relied on by the Crown in its reply to the appellant's notice of appeal before the Tax Court (A.B., Vol. 1, Tab 6(A)(2), at page 69) and that it is only before us, in her notice of appeal, that the Crown raised specifically the fact that the Tax Court Judge erred in law in the interpretation of sections 169 [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 35; 1997, c. 10, ss. 19, 161; 2000, c. 30, s. 28] and 267.1 of the Act (A.B., Vol. 1, Tab 1).

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

[37] Before us, the Crown's proceedings, in conformity with rule 337 [as am. by SOR/2004-283, ss. 18, 36], of the *Federal Courts Rules*, SOR/98-106 [r. 1 (as am. *idem*, s. 2)], indicate that the Crown relies on section 267.1 of the Act. Since the matter was not raised before the Tax Court, where the defect originated and where it should have been dealt with, I need not indulge further on this procedural dispute.

[38] The Tax Court Judge found (at paragraph 42 of her reasons) that section 267.1 of the Act had no application. She wrote that there was no evidence produced during the hearing that would suggest that GMCL took title, legal or otherwise, to the assets under the deed of trust. She found that the trust agreements expressly established Royal Trust as the trustee. GMCL's role in relation to the trusts was of an administrator, as defined and contemplated under the OPBA. It did not include, nor was it

intended to include, the role of trustee in relation to the trusts. For the purposes of section 267.1 of the Act, the role of GMCL was that of an administrator to these plans. The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. She noted that while GMCL may have exercised some fiduciary duties as the plan's administrator, this did not mean that GMCL was a trustee to the trust. She concluded that it was GMCL which contracted for and acquired the services of the investment managers. She said:

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

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

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

[40] With regard to the second condition, namely, whether GST was payable or was paid by GMCL, the Tax Court Judge proceeded with an analysis of the mode of payment provided in the various agreements. She concluded, at paragraph 57 of her reasons, that although GMCL resupplied 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 investment managers.

[41] What she said, at paragraphs 34 and 57, is the following:

> 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.
>
> …
>
> It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still

the person liable for payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment of the fees is irrelevant because the bottom line, as reiterated by Woods J. in *Y.S.I.'S Yacht Sales*, is that the person who satisfies the requirement at subsection 169(1), and who carries the contractual liability to pay, will be the person entitled to claim ITCs. [Emphasis in original.]

[42] I find no reviewable error in her second finding.

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

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

[44] The Tax Court Judge gave to the words "in the course of", found in paragraph 169(1)(*c*), a wide meaning given by this Court in *Blanchard v. Canada* (1995), 9 C.C.P.B. 117 (F.C.A.) and in *Minister of National Revenue v. Yonge-Eglinton Building Limited*, [1974] 1 F.C. 637 (C.A.), at page 644, where the words "in connection with", or "incidental to", or "arising from" were suggested. She held that GMCL's responsibilities to properly manage the pension plan assets were derived not only through the agreements but also through its duties as administrator under the OPBA and its duties to provide pension benefits to its employees (her paragraph 65). She noted that pension benefits, like salaries, are part of the compensation package which is an integral component to the commercial activities of the corporation. She fully explains these considerations at paragraphs 66–67. At paragraph 67 she stated:

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

[45] The appellant makes three points:

(a) the first relates to the fact that pension plan trusts are a third person involved in the process;

(b) the second relates to the notion of indirect nexus; and

(c) the third relates to the concept of economic substance over form.

(a) the trust as a third person

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

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

[48] The appellant's first point is untenable.

(b) indirect nexus

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

[50] In support to her position, the appellant relies on the decision of this Court in *Canada v. 398722 Alberta Ltd.*, [2000] G.S.T.C. 32 (F.C.A.), where she says "this Court has held that it is the direct use of a supply that governs the entitlement to input tax credits".

[51] The *398722 Alberta Ltd.* case dealt with a "four-plex" apartment building for residential housing built as a condition precedent for obtaining a permit to build a hotel. The corporation, 398722 Alberta Ltd., argued that the operation of the residential housing was an integral part of its hotel business and thus was a "commercial activity" within the statutory definition of subsection 123(1) of the Act and that the corporation's GST liability under the self-supply rule of subsection 191(3) [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 56] should be offset, in the same amount, by an input tax credit under subsection 169(1) of the Act.

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

123. (1) …

"commercial activity" of a person means

(*a*) a business carried on by the person … except to the extent to which the business involves the making of exempt supplies by the person.

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

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

Any business may consist of a number of components, each of which is integral to the business as a whole. The definition of "commercial activity" recognizes that possibility but requires, for GST purposes, that any part of the business that consists of making exempt supplies be notionally severed. The statutory definition dictates that the business of the respondent is not a "commercial activity" in so far as it consists of the rental of the units of the four-plex. On that basis I agree with the Crown that the respondent is not entitled to an input tax credit to offset the GST payable on the self-supply of the four-plex.

The respondent is in exactly the same position as anyone who acquires an apartment building and rents out the apartments. It should not and does not matter whether the acquisition is motivated by the prospect of receiving rent or, as in the respondent's case, is the fulfilment of a legal obligation that must be met in order to accomplish another business objective.

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

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

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

(c) economic substance over form

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

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

[60] The following principles were set out in *Shell Canada Ltd. v. Canada*, above, at paragraphs 39 and 40:

This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: *Bronfman Trust*, *supra*, at pp. 52-53, *per* Dickson C.J.; *Tennant*, *supra*, at para. 26, *per* Iacobucci J. But there are at least two *caveats* to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases.

Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21, *per* Bastarache J.

Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: *Continental Bank*, *supra*, at para. 51, *per* Bastarache J.; *Tennant*, *supra*, at para. 16, *per* Iacobucci J.; *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27 and 330, *per* Iacobucci J.; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 11, *per* Major J; *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at para. 15, *per* Cory J. [Emphasis added.]

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

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

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

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

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

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

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

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

CONCLUSION

[69] I would dismiss this appeal with costs.

NADON J.A.: I agree.

BLAIS J.A.: I agree.