Dockets: 2017-3925(GST)G
2017-3931(GST)G

BETWEEN:

PRESIDENT'S CHOICE BANK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard virtually on January 31 and February 1, 2, 9 and 14, 2022
at Ottawa, Ontario

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Chia-yi Chua Anu Koshal Pierre-Gabriel Grégoire
Counsel for the Respondent:	Justine Malone Lindsay Tohn

JUDGMENT

The appeals from the reassessments made under the *Excise Tax Act*, notices of which are dated March 26, 2014 and June 23, 2015, are allowed in part only and on agreed terms, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

The parties will have until September 19, 2022 to agree on costs, failing which they are directed to file their written submissions on costs no later than September 19, 2022. Such submissions should not exceed 10 pages.

Signed at Magog, Québec, this 19th day of July 2022.

"Robert J. Hogan"

Hogan J.

Citation: 2022 TCC 84
Date: 20220719
Dockets: 2017-3925(GST)G
2017-3931(GST)G

BETWEEN:

PRESIDENT'S CHOICE BANK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. INTRODUCTION

[1] President's Choice Bank ("**PC Bank**") appeals reassessments made by the Minister of National Revenue (the "**Minister**") pursuant to the *Excise Tax Act* (the "**Act**").[1] There are two appeals.

[2] The first appeal concerns the Notice of Reassessment dated March 26, 2014, which reassessed PC Bank's net tax for the annual reporting period commencing December 31, 2008 and ending December 30, 2009 (the "**2009 Appeal**").[2] The second appeal concerns the Notice of Reassessment dated June 23, 2015, which reassessed PC Bank's net tax for the annual reporting periods ending December 30, 2010, December 30, 2011 and December 30, 2012 (the "**2010—2012 Appeal**").[3] There are three main issues addressed in the 2009 Appeal and the 2010—2012 Appeal (collectively, the "**PC Bank Appeals**").

---

[1] Unless otherwise stated, all statutory references are to the *Excise Tax Act*, RSC 1985, c E-15.
[2] Exhibit A1: Partial Agreed Statement of Facts and Revised and Restated Description of the Issues Under Appeal (signed by the Appellant on February 6, 2022 and by the Respondent on February 7, 2022), at para 32 [Exhibit A1 (PASF)]. See also Exhibit A3 (Pleadings Brief) at Tab 3, para 2 [Exhibit A3 (Pleadings Brief)].
[3] Exhibit A1 (PASF), *supra* note 2 at para 38. Exhibit A3 (Pleadings Brief), *supra* note 2 at Tab 1 at para 2.

[3] The first issue is whether PC Bank's supply to the Canadian Imperial Bank of Commerce ("**CIBC**") is an exempt "financial service" or a taxable supply (the "**PCF Supply Issue**").[4] The PCF Supply Issue is common to the PC Bank Appeals. This issue is also raised in the appeal of *Canadian Imperial Bank of Commerce v Her Majesty the Queen* (the "**CIBC Appeal**"), which I released concurrently with this Judgment. The parties to the PC Bank Appeals and the CIBC Appeal agreed that the evidence in the CIBC Appeal be treated as evidence in relation to the PCF Supply Issue in the PC Bank Appeals.[5] Therefore, the PC Bank Appeals in respect of that issue are dismissed in accordance with the CIBC Appeal, which I have attached as Appendix I.

[4] The second issue in the PC Bank Appeals is whether PC Bank is entitled to claim notional input tax credits ("**NITCs**") pursuant to subsection 181(5) for payments it made to Loblaws Inc. ("**Loblaws**") when clients redeemed loyalty points at Loblaws stores (the "**NITC Issue**").[6] The parties agree that the NITC Issue turns on whether or not PC Bank pays the redemption amounts to Loblaws in the course of a "commercial activity" as defined in subsection 123(1).

[5] The third issue in the PC Bank Appeals is whether the services provided by Total Systems Services Inc. ("**TSYS**")[7] and First Data Resources Inc. ("**FDR**")[8] to PC Bank for use in PC Bank's credit card business are exempt supplies (the "**FDR/TSYS Issue**").

[6] The material facts are set out below, followed by the analysis of the NITC Issue and the FDR/TSYS Issue.

II. **MATERIAL FACTS**

[7] The parties filed a partial agreed statement of facts ("**PASF**").[9] I have reproduced the relevant parts below for ease of reference:

---

[4] Exhibit A1 (PASF), *supra* note 2 at para 41. Exhibit A3 (Pleadings Brief), *supra* note 2 at Tab 1 para 40(a), Tab 3 at para 40(a).
[5] Exhibit A1 (PASF), *supra* note 2 at paras 42-45.
[6] Exhibit A1 (PASF), *supra* note 2 at paras 51-52.
[7] Exhibit A1 (PASF), *supra* note 2 at paras 49-50.
[8] Exhibit A1 (PASF), *supra* note 2 at paras 47-48.
[9] Exhibit A1 (PASF), *supra* note 2.

President's Choice Bank ("PC Bank")

1. PC Bank is a Schedule I bank pursuant to the *Bank Act*, S.C. 1991, c. 46 that is, and was at all material times, resident in Canada and registered under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "**Act**") for purposes of the goods and services tax ("**GST**") and the harmonized sales tax ("**HST**").

2. PC Bank is, and was at all material times, a listed financial institution for purposes of the Act. Effective December 31, 2009, PC Bank was a selected listed financial institution for purposes of the Act.

3. PC Bank is a wholly-owned subsidiary of Loblaw Financial Holdings Inc. and an indirect wholly-owned subsidiary of Loblaws Inc. ("**Loblaws**"). Loblaws is a wholly-owned subsidiary of Loblaw Companies Limited ("**LCL**").

PC Bank MasterCards

4. MasterCard International Incorporated operates the MasterCard Worldwide Network, which processes payment transactions made under its payment brands, including MasterCard credit cards. A typical MasterCard transaction is described in Appendix "A" to this Partial Agreed Statement of Facts.

5. Since 2011, PC Bank has been a licensee of MasterCard and an issuer of President's Choice branded MasterCard credit cards ("**PC MasterCards**" or in the singular a "**PC MasterCard**") to its customers (the "**Cardholders**").

6. Cardholders may use their PC MasterCards to make purchases at merchants that accept MasterCard-branded credit cards and to obtain cash advances.

The Points Program

7. Prior to March 1, 2008, PC Bank owned and operated a loyalty points program (the "**Points Program**") which provided for the rewards of loyalty points ("**PC Points**").

8. Effective March 1, 2008, PC Bank transferred the Points Program to President's Choice Services Inc. (formerly President's Choice Financial Inc.) ("**PCSI**"), an indirect subsidiary of Loblaws. To effect the transfer, PC Bank and PCSI entered into a Transfer Agreement, General Conveyance agreement, and Assignment Agreement each dated March 1, 2008. The Transfer Agreement was amended on July 31, 2008.

9. PC Bank and PCSI entered into a Loyalty Services Agreement (the "**Services Agreement**") made effective March 1, 2008 and a Licence Agreement ("**Licence Agreement**") dated July 31, 2008.

10. PC Bank, PCSI, and Loblaws entered into a Loyalty Expense Agreement (the "**Expense Agreement**") made effective March 1, 2008.

11. The Licence Agreement, Services Agreement, and Expense Agreement were the subject of a rectification order granted by the Ontario Superior Court of Justice on August 16, 2016 (the "**Rectification Order**").

12. Pursuant to the Rectification Order, the Licence Agreement, Services Agreement, and Expense Agreement were rectified *nunc pro tunc* in the form attached to the Order.

Cardholders as members of the Points Program

13. All Cardholders are automatically members of the Points Program. PC Bank issues PC Points to Cardholders whenever they use their PC MasterCard (points issued by PC Bank referred to herein as "**PCB Points**").

14. All members of the Points Program are subject to the terms and conditions of the Points Program.

15. At all material times, for purchases made on the PC MasterCard, Cardholders automatically earned:

a. 20 PCB Points for every $1 spent using their PC MasterCard at a Loblaw-banner store where President's Choice products are sold; and

b. 10 PCB Points for every $1 spent using their PC MasterCard anywhere else.

Issuance and Redemption of PC Points

16. Pursuant to the Licence Agreement (as rectified), amongst other things:

a. PCSI granted, for the duration of the term as set out therein, a non-exclusive, royalty-free license to PC Bank the right to issue PC Points to members of the PC Points loyalty program (as defined therein) who are PC Bank's customers subject to the terms and conditions of the Licence Agreement and the Loyalty Terms and Conditions; and

b. PC Bank acknowledged that, by virtue of being a Licensee, it will be liable for the redemption for all PCB Points.

17. PC Points were redeemable at certain supermarkets within Canada owned or controlled by Loblaws or a subsidiary, or that were operated by Loblaws franchises under a trademark owned or controlled by Loblaws, and any other locations as may

be agreed to by Loblaws or PCSI, as applicable, or against any reward that may be offered as part of the Loyalty Program from time to time.

18. Pursuant to the Expense Agreement (as rectified), amongst other things:

a. for every $1.00 of purchases made by Cardholders using their PC MasterCard at Loblaw Stores where PC Bank issues PCB Points to the Cardholder, Loblaws will pay $0.0075 to PC Bank;

b. for every $1.00 of notional value of PCB Points accumulated by a Cardholder using a PC MasterCard and redeemed by such Cardholder, Loblaws will pay $0.35 to PC Bank; and

c. for every $1.00 of notional value of PCB Points accumulated by a Cardholder using a PC MasterCard and redeemed by such Cardholder, PC Bank will reimburse/pay Loblaw Inc. $1.00 (the "**Redemption Payment**").

First Data Resources LLC ("FDR")

19. At all material times, FDR was a corporation not resident in Canada and not registered under Part IX of the Act for GST/HST purposes.

20. PC Bank and FDR entered into a Service Agreement dated January 31, 2001 (the "**FDR Agreement**"), pursuant to which FDR made a single compound supply to PC Bank (the "**FDR Supply**").

21. The FDR Agreement was amended on January 1, 2002 (the "**First FDR Amendment**") and March 1, 2003 (the "**Second FDR Amendment**").

22. Pursuant to the FDR Agreement and FDR Amendments, PC Bank paid FDR for the FDR Supply. FDR invoiced PC Bank for the FDR Supply. A sample invoice from FDR is available.

23. FDR did not collect GST/HST in respect of the FDR Supply pursuant to the FDR Agreement. In its annual reporting period ending December 30, 2009, PC Bank did not self-assess GST/HST on the consideration paid to FDR pursuant to Division IV of the Act.

Total Systems Services, Inc. ("TSYS")

24. TSYS is a global payment solutions provider that provides services to financial and nonfinancial institutions.

25. At all material times, TSYS was a corporation not resident in Canada and not registered under Part IX of the Act for GST/HST purposes.

26. PC Bank and TSYS entered into a Processing Services Agreement dated December 10, 2009 (the "**TSYS Agreement**").

27. Pursuant to the TSYS Agreement, TSYS provided a single compound supply to PC Bank (the "**TSYS Supply**"). PC Bank paid TSYS for the TSYS Supply. A sample invoice from TSYS is available.

28. PC Bank self-assessed and remitted GST/HST in respect of the TSYS Supply totaling $267,866, $703,411, and $934,234 in its annual reporting periods ending December 30, 2010, December 30, 2011, and December 30, 2012, respectively. PC Bank claimed and was allowed input tax credits of $4,840, $14,730, and $19,574 in its annual reporting periods ending December 30, 2010, December 30, 2011, and December 30, 2012, respectively.

Financial Statements

29. KPMG LLP prepared an Auditors' Report to the Shareholder in respect of PC Bank as at December 31, 2009 and 2008, dated January 28, 2010, as at December 31, 2010 and 2009, dated February 22, 2011, and as at December 31, 2011 dated April 3, 2012 (the "**Financial Statements**").

The December 31, 2008 to December 14, 2009 Period

30. PC Bank charged, collected, and remitted GST/HST on the CIBC Payments, as defined below, *inter alia*, by way of an invoice dated August 27, 2007 in respect of the 2003 to 2006 periods.

Assessments Under Appeal

2009 Period

31. On February 19, 2010, PC Bank filed a GST return for the annual reporting period ending December 30, 2009 (the "**2009 Period**"), which, amongst other things:

> a. did not claim any operational input tax credits ("**ITCs**") pursuant to subsection 169(1) of the Act;
>
> b. did not claim any notional ITCs pursuant to subsection 181(5) of the Act;
>
> c. did not include any self-assessed GST/HST collectible on the consideration paid for the FDR Services pursuant to Division IV of the Act; and

d. did not include any self-assessed GST/HST collectible on the consideration paid for supplies from MCII, a non-resident, pursuant to Division IV of the Act.

32. By way of a Notice of (Re)Assessment dated March 26, 2014 (the "**2009 Reassessment**"), the Minister of National Revenue (the "**Minister**") reassessed PC Bank's net tax, including an increase to tax payable under Division IV of the Act, for the annual reporting period commencing December 31, 2008 and ending December 30, 2009 (the "**2009 Period**"). The 2009 Reassessment, amongst other things:

a. assessed PC Bank for tax payable under Division IV of the Act pursuant to paragraph 296(1)(b) of the Act on the consideration paid for the FDR Services;

b. assessed PC Bank for tax payable under Division IV of the Act pursuant to paragraph 296(1)(b) of the Act on the consideration paid for the MasterCard Services; and

c. increased PC Bank's GST/HST collectible on the consideration paid for supplies made by PC Bank to the CIBC (the "**CIBC Payments**").

33. PC Bank filed a Notice of Objection dated June 23, 2014 to a portion of the 2009 Reassessment. The Notice of Objection raised, amongst other things, whether:

a. the CIBC Payments were in respect of taxable or exempt supplies;

b. the Minister properly assessed Division IV tax on the consideration paid for the services provided by MCII (the "**MCII Service**");

c. the Minister properly assessed Division IV tax on the consideration paid for the FDR Supply; and

d. PC Bank is entitled to additional ITCs pursuant to subsection 296(2) of the Act.

34. Subsequent to the commencement of the audit, PC Bank claimed operational ITCs totaling $88,674.09 and notional ITCs totaling $1,583,615.65.

35. PC Bank filed an appeal to the Tax Court of Canada in respect of the 2009 Reassessment on October 4, 2017, being court file no. 2017-3925(GST)G (the "**2009 Appeal**").

2010—2012 Periods

36. On June 24, 2013, PC Bank filed its Selected Listed Financial Institution GST/HST returns for the annual reporting periods ending December 30, 2010 (the "**2010 Period**"), December 30, 2011 (the "**2011 Period**"), and December 30, 2012 (the "**2012 Period**") (and collectively, the "**2010—2012 Periods**"). The returns for the 2010-2012 Periods, amongst other things:

a. reported GST/HST collectible on a portion of the CIBC Payments;

b. claimed ITCs regarding the CIBC Payments;

c. did not claim any notional ITCs pursuant to subsection 181(5) of the Act;

d. self-assessed GST/HST pursuant to Division IV of the Act in the amounts of $267,866, $703,411, and $934,234, respectively, in respect of the TSYS Supply; and

e. did not include any self-assessed GST/HST collectible on the consideration paid for supplies from MCII, a non-resident, pursuant to Division IV of the Act (the above defined MCII Service).

37. On June 30, 2014, PC Bank filed amended returns for the 2010-2012 Periods reporting notional ITCs of $2,496,144, $3,220,667, and $3,503,561, respectively.

38. By way of Notices of (Re)Assessment dated June 23, 2015 (the "**2010—2012 Reassessments**"), the Minister reassessed PC Bank's net tax, including an increase to tax payable under Division IV of the Act, for the 2010—2012 Periods. The 2010—2012 Reassessments, amongst other things:

a. increased PC Bank's GST/HST collectible on the CIBC Payments;

b. allowed notional ITCs of $45,101, $67,445, and $73,405, respectively; and

c. assessed PC Bank for tax payable under Division IV of the Act pursuant to paragraph 296(1)(b) of the Act on the consideration paid for the MCII Service.

39. PC Bank filed Notices of Objection dated September 18, 2015 to a portion of the 2010-2012 Reassessments. The Notices of Objection raised, amongst other things, whether:

a. the CIBC Payments were in respect of taxable or exempt supplies;

> b. the Minister properly assessed Division IV tax on the consideration paid for the MCII Service;
>
> c. PC Bank is entitled to additional notional ITCs;
>
> d. PC Bank is entitled to a refund of tax self-assessed in respect of the TSYS Supply on the basis that it was assessed in error;
>
> e. PC Bank is entitled to a rebate for tax paid in error to PCSI in the 2011 Period only.
>
> 40. PC Bank filed an appeal to the Tax Court of Canada in respect of the 2010—2012 Reassessments on October 3, 2017, being court file no. 2017- 3931(GST)G (the "**2010—2012 Appeal**").

[8] The defined terms used hereinafter have the meaning assigned to them in the PASF unless otherwise provided.

III. **THE NITC ISSUE**

[9] The parties agree that the NITC Issue centres on whether the Redemption Payment was made by PC Bank "in the course of a commercial activity" pursuant to subsection 181(5). If PC Bank made the Redemption Payment in the course of an exempt "financial service", then the Redemption Payment could not have been made "in the course of a commercial activity" because the "commercial activity" definition specifically excludes exempt supplies. PC Bank is only entitled to claim an NITC pursuant to subsection 181(5) if the Redemption Payment was made in the course of a "commercial activity" of PC Bank.

A. **Position of the Parties: The NITC Issue**

[10] PC Bank's position is that it made the Redemption Payments in the course of its operation of the Loyalty Program, which it states is a commercial activity.[10] According to PC Bank, the three payments set out in the Expense Agreement (as rectified) are all related to its operation of the Loyalty Program.[11] Therefore, PC Bank paid the Redemption Payment in the course of a commercial activity and is entitled to claim NITCs under subsection 181(5).[12] For PC Bank, there is no basis to conclude that the Redemption Payment was made in the course of a different activity

---

[10] Written Submissions of the Appellant re NITC Issue at paras 2-4.
[11] Written Submissions of the Appellant re NITC Issue at paras 3-4.
[12] Written Submissions of the Appellant re NITC Issue at paras 2-7; 83; January 31, 2022 Transcript, p 12, lines 1-10.

(i.e. the PC Bank MasterCard business).[13] PC Bank acknowledges that the PC Bank MasterCard activities on their own are exempt in nature.[14]

[11] The Respondent's position is that PC Bank issued PCB Points to Cardholders to entice them to acquire and then use their PC MasterCards.[15] PC Bank was required to reimburse Loblaws by means of the Redemption Payment when PC Bank customers redeemed the PCB Points in the Loblaws-affiliated stores.[16] According to the Respondent, in this context, the Redemption Payments were made by PC Bank to Loblaws in the course of making exempt supplies of a "financial service" to Cardholders.[17] Since a financial services business is excluded from the definition of a "commercial activity" in subsection 123(1), PC Bank is not entitled to claim NITCs for the redemption price paid in relation to the PCB Points under subsection 181(5).[18]

B. **Legislation**

[12] Subsection 165(1) provides that GST is payable by recipients of taxable supplies:

> **165 (1) Imposition of goods and services tax**—Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

[13] Section 181 sets out special rules for the treatment of coupons redeemed on purchases. The relevant parts of section 181 read as follows:

> **181 (1) Definitions –** The definitions in this subsection apply in this section.
>
> "**coupon**" includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).
>
> "**tax fraction**" of a coupon value or of the discount or exchange value of a coupon means

[13] Written Submissions of the Appellant re NITC Issue at paras 2-4.
[14] Written Submissions of the Appellant re NITC Issue at paras 2-4; January 31, 2022 Transcript, p 11, lines 26-28; and p 12, line 1.
[15] Written Submissions of the Respondent re NITC Issue at paras 1- 2.
[16] Written Submissions of the Respondent re NITC Issue at para 2.
[17] Written Submissions of the Respondent re NITC Issue at para 2; January 31, 2022 Transcript, p 17, lines 1-4.
[18] Written Submissions of the Respondent re NITC Issue at para 2.

(a) where the coupon is accepted in full or partial consideration for a supply made in a participating province, the fraction

A/B

where

A is the total of the rate set out in subsection 165(1) and the tax rate for that participating province, and

B is the total of 100% and the percentage determined for A; and

(b) in any other case, the fraction

C/D

where

C is the rate set out in subsection 165(1), and

D is the total of 100% and the percentage determined for C.

(2) Acceptance of reimbursable coupon – For the purposes of this Part, other than subsection 223(1), where at any time a registrant accepts, in full or partial consideration for a taxable supply of property or a service (other than a zero-rated supply), a coupon that entitles the recipient of the supply to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this subsection referred to as the "coupon value") and the registrant can reasonably expect to be paid an amount for the redemption of the coupon by another person, the following rules apply:

(a) the tax collectible by the registrant in respect of the supply shall be deemed to be the tax that would be collectible if the coupon were not accepted;

(b) the registrant shall be deemed to have collected, at that time, a portion of the tax collectible equal to the tax fraction of the coupon value; and

(c) the tax payable by the recipient in respect of the supply shall be deemed to be the amount determined by the formula

A–B

where

A is the tax collectible by the registrant in respect of the supply, and B is the tax fraction of the coupon value.

…

> **(5) Redemption of coupon –** For the purposes of this Part, where, in full or partial consideration for a taxable supply of property or a service, a supplier who is a registrant accepts a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon, the following rules apply:
>
> (a) the amount shall be deemed not to be consideration for a supply;
>
> (b) the payment and receipt of the amount shall be deemed not to be a financial service; and
>
> (c) if the supply is not a zero-rated supply and the coupon entitled the recipient to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this paragraph referred to as the "coupon value"), the particular person, if a registrant (other than a registrant who is a prescribed registrant for the purposes of subsection 188(5)) at that time, may claim an input tax credit for the reporting period of the particular person that includes that time equal to the tax fraction of the coupon value, unless all or part of that coupon value is an amount of an adjustment, refund or credit to which subsection 232(3) applies.

[14] Subsection 181(2) applies to "coupons" that entitle the recipient of the supply to a reduction of the price of the property or service for a fixed dollar amount ("**Fixed Value Coupon**"). Under subsection 181(2), a Fixed Value Coupon redeemed by a customer in a store is treated like cash. This means that the GST/HST is not reduced on the purchase price.

[15] For subsection 181(2) to apply, certain conditions must be met. First, there must be a "registrant". A "registrant" is defined in subsection 123(1) as a person who is GST-registered (e.g. a retailer). Second, the registrant must accept the "coupon". A "coupon", which is defined in subsection 181(1), includes "a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit … ." Third, this "coupon" must be accepted in full or partial consideration for a taxable supply of "property" or "a service". Fourth, the supply cannot be a "zero-rated supply". A "zero-rated supply" is defined in subsection 123(1) as a supply included in Schedule VI. Fifth, there must be a "recipient" of the supply. A "recipient" of a supply of property or a service is defined in subsection 123(1) to mean a person. Generally, a "recipient" of a supply means a person contractually obligated to pay for the supply, such as a customer. Sixth, the "coupon" is a Fixed Value Coupon. Lastly, the "registrant" can reasonably expect to be paid an amount for the redemption of the Fixed Value Coupon by another person.

[16] If the conditions in subsection 181(2) are met, the deeming rules under that provision apply. Paragraph 181(2)(a) provides that the tax applies as if the coupon was not accepted. This means that GST/HST is added to the purchase price before the amount of the Fixed Value Coupon is deducted. Paragraph 181(2)(b) provides that the registrant is deemed to have collected a portion of the tax equal to the tax fraction of the value of the Fixed Value Coupon. Paragraph 181(2)(c) provides that the tax payable by the recipient (e.g. customer) in respect of the supply is deemed to be (1) the amount of the tax collectible by the registrant (e.g. retailer) in respect of the supply less (2) the "tax fraction" of the coupon value. Subsection 181(1) defines a "tax fraction".

[17] To illustrate the operation of subsection 181(2), the Respondent provided the following useful example:

> 38. Consider, for example, a customer who uses a reimbursable coupon for $1.00 off of a $10 bottle of shampoo, before HST of 15%, at a retailer:
>
> | | |
> |---|---|
> | Price of the shampoo | $10.00 |
> | HST at 15% | $1.50 |
> | Subtotal | $11.50 |
> | Less coupon | (1.00) |
> | Customer pays | $10.50 |
>
> 39. In this example, the registrant (retailer) is deemed to have collected HST of $1.50 pursuant to subsection 181(2). It must report and remit $1.50 of HST.
>
> 40. Pursuant to paragraph 181(2)(c), however, the recipient (customer) cannot claim an ITC of $1.50. The recipient's tax payable is deemed to be the tax collectible by the registrant (in this case, $1.50) less the tax fraction of the coupon value (in this case, $1.00/1.15 = $0.13). Therefore, the recipient may claim an ITC, if the purchase satisfies subsection 169(1) of the Act, in the amount of $1.37.[19]

[18] Subsection 181(5) entitles a particular person to an NITC for the tax fraction equal to the coupon value if certain conditions are met. First, a registrant (e.g. a retailer) must accept as full or partial consideration for a taxable supply of property or a service a "coupon" from a recipient (e.g. a customer). This coupon may either be exchanged for property or a service or entitles the recipient to a reduction of the price of the property or service. Second, a particular person (e.g. a manufacturer) pays an amount to the supplier (e.g. a retailer) for the redemption of the "coupon". Third, this redemption payment is made in the course of a "commercial activity" of a particular person (e.g. the manufacturer). A "commercial activity" is defined in

[19] Written Submissions of the Respondent re NITC Issue at paras 38-40.

subsection 123(1). Unlike subsection 181(2), subsection 181(5) may apply to "zero-rated supplies".

[19] If the conditions in subsection 181(5) are met, the deeming rules under that provision apply. Paragraph 181(5)(a) provides that the redemption payment is deemed not to be consideration for a supply. Paragraph 181(5)(b) provides that the payment and receipt of the redemption payment shall be deemed not to be a financial service. Paragraph 181(5)(c) provides that the particular person (e.g. a manufacturer), who is a registrant, may claim an NITC equal to the tax fraction of the value of the Fixed Value Coupon.[20] This paragraph only applies if the supply is not zero-rated and the coupon entitled the recipient (e.g. a customer) to a reduction of the price of the property or service equal to the value of the Fixed Value Coupon.

[20] As noted, one of the conditions that must be met for subsection 181(5) to apply is that the redemption payment made by the particular person to the supplier must be made "in the course of a commercial activity" of that particular person. The term of "commercial activity" is defined under subsection 123(1) as follows:

> **123(1) Definitions**
>
> **…**
>
> **"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.
>
> …
>
> "**exempt supply**" means a supply included in Schedule V.
>
> [Emphasis added.]

[21] An "exempt supply" is defined in Part VII of Schedule V to include:

> 1. A supply of a financial service . . . .

[20] The registrant cannot be a prescribed registrant for the purposes of subsection 188(5).

[22] A "financial service" is defined in subsection 123(1). Thus, the making of an "exempt supply" of a "financial service" does not constitute a "commercial activity" and does not fall within the definition of a "taxable supply" for which NITCs would be available.

C. **Review of the Case Law**

[23] To understand NITCs, one must begin with subsection 169(1). Generally, input tax credits under subsection 169(1) are available for GST paid in relation to the acquisition of property or services by a person to the extent that such property or services are acquired for consumption or use in the course of commercial activities of that person. In *City of Calgary v Canada*,[21] the Supreme Court of Canada described the basic structure of the GST regime as follows:

> [16] … The GST is designed to be a tax on consumption, and as such, the *ETA* contemplates three classes of goods and services: (1) taxable supplies; (2) exempt supplies; and (3) zero-rated supplies. Taxable supplies currently attract a goods and services tax of 5% (7% at the relevant time) each time they are sold. To the extent that the purchaser of a taxable supply uses that good or service in the production of other taxable supplies, that is, in the course of commercial activities, the purchaser is entitled to an ITC and can recover the tax it has paid from the government. This is to prevent the cascading of GST, and to allow the obligation to pay GST to flow through to the ultimate consumer. The other two classes of goods and services, exempt supplies and zero-rated supplies, do not attract GST from the ultimate consumer. Vendors of exempt supplies, while paying the GST on their purchases, are not entitled to ITCs. In consequence, GST is paid to the federal government at the penultimate stage in the production chain rather than by the ultimate consumer.

[24] There is limited case law on subsection 181(5). *President's Choice Bank v R* (the "**2009 Decision**")[22] is the main case that addresses subsection 181(5) and whether or not in the context of that provision, an input was made "in the course of a commercial activity". In that case, one of the issues before this Court was whether PC Bank was entitled to NITCs pursuant to subsections 181(2) and 181(5) in respect of reimbursements made by PC Bank to Loblaw on the redemption of PC Points during the 2001 and 2002 taxation periods.[23] In addressing that issue, Lamarre J., as she then was, determined that in the context of subsection 181(5), "[i]t is at the time

[21] *City of Calgary v Canada*, 2012 SCC 20.
[22] *President's Choice Bank v R*, 2009 TCC 170.
[23] 2009 Decision, *supra* note 22 at para 12.

of redemption of the coupon that we have to determine whether that coupon has a fixed dollar value."[24]

[25] Although Lamarre J found that the coupons had a fixed dollar value at the time of redemption, she held that PC Bank was not entitled to NITCs on PC Points awarded on President's Choice Financial products and subsequently redeemed.[25] This conclusion was based on the finding that the supply of the PC Points in accordance with the agreement in effect at that time, was part of the exempt supplies—financial services—offered by PC Bank through CIBC. These supplies were not subject to GST.[26] Because financial services are exempt supplies, PC Bank did not make them in the course of a commercial activity.[27] However, Lamarre J. stated that for PC Points awarded on taxable supplies, PC Bank would be entitled to NITCs when it pays for the redemption of those points.[28]

[26] In *Nestlé Canada Inc. v R*,[29] the Tax Court made some observations in respect of subsections 181(2) and (5). The main issue in that case was whether instant rebate coupons ("**IRCs**") issued by the taxpayer, Nestlé Canada Inc. ("**Nestlé**"), fit within the requirements for a coupon set out in section 181 or whether the IRCs should be characterized as promotional allowances.[30] If the IRCs qualified as coupons pursuant to subsection 181, "Nestlé would be entitled to its ITCs for any excess GST/HST paid by the consumer when that consumer purchased a Nestlé product at Costco [Wholesale Canada Ltd.]."[31] In addressing whether the IRCs qualified as coupons, Lamarre J. made the following observations on the operation of subsections 181(2) and (5):

> [38] Under subsection 181(2), Costco is required to collect GST/HST on the pre-discount price of the Nestlé products.
>
> [39] Subsection 181(2) thus requires the customer to overpay GST/HST on the Nestlé products and then deems the customer to have paid only the GST/HST attributable to the post-discount price. The reason for implementing this practice was explained by counsel for the Respondent in his oral submissions, in which he referred the Court to the policy underlying the treatment of discount coupons. The object of the practice was to simplify the treatment of coupons for small grocers,

---

[24] 2009 Decision, *supra* note 22 at para 74.
[25] 2009 Decision, *supra* note 22 at para 77.
[26] 2009 Decision, *supra* note 22 at para 77.
[27] 2009 Decision, *supra* note 22 at para 77.
[28] 2009 Decision, *supra* note 22 at para 78.
[29] *Nestlé Canada Inc. v R*, 2017 TCC 33 [*Nestlé Canada*].
[30] *Nestlé Canada*, *supra* note 29 at para 20.
[31] *Nestlé Canada*, *supra* note 29 at para 20.

> who, in the 1990s, did not have easy access to cash registers that, for the purpose of the application of the GST/HST, could distinguish between coupons for taxable supplies and coupons for non-taxable (or zero-rated) supplies.
>
> [40] This excess GST/HST does not go to the government however. Instead, subsection 181(5) allows the provider of the coupon, here Nestlé, to obtain an input tax credit for the excess GST/HST paid by the Costco customer.
>
> [41] The benefit represented by this additional input tax credit, received at the customer's expense, is why Nestlé is claiming that its transactions fit within the section 181 coupon regime, instead of the section 232.1 promotional allowance regime.

[27] No further analysis was provided in respect of subsection 181(2) or (5) because Lamarre J. concluded that the IRCs were not coupons pursuant to section 181.[32]

[28] Neither the 2009 Decision nor *Nestlé Canada* provides significant guidance for the NITC Issue in this appeal. In the context of other provisions of the Act, including subsection 169(1), the courts have considered on a number of occasions whether an input was made "in the course of" a "commercial activity". The meaning of these phrases as described by the courts is outlined below.

(i) The phrase "in the course of" has a wide meaning.

[29] The phrase "in the course of" has a wide meaning.[33] Courts have concluded that an ITC is available if an item directly or indirectly contributes to the production of articles or the provision of services that are taxable. For example, in *Midland Hutterian Brethren v R*,[34] at issue was whether the applicant could claim an ITC in respect of the cost of certain cloth purchased to make work clothing for use by its members in its commercial activity—farming operations.[35] The Federal Court of Appeal found that the cloth contributed to the applicant's commercial activities and bottom line.[36] In arriving at this conclusion, the Federal Court of Appeal noted:

> [23] … This Court has already interpreted these words to mean that, when a registrant incurs a GST expense in connection with its commercial activities, it is

---

[32] *Nestlé Canada*, *supra* note 29 at paras 32, 46.
[33] *General Motors of Canada Ltd. v R*, 2009 FCA 114 at para 44 [*General Motors*]. See also *ONEnergy Inc. v R*, 2018 FCA 54 at paras 23-24.
[34] *Midland Hutterian Brethren v R*, 2000 CarswellNat 2969, 2000 CarswellNat 4833, [2000] GSTC 109 (FCA) [*Midland Hutterian Brethren*].
[35] *Midland Hutterian Brethren*, *supra* note 34 at paras 1-2.
[36] *Midland Hutterian Brethren*, *supra* note 34 at para 26.

entitled to an ITC. As Stone J.A. explained in *Metropolitan Toronto Hockey League* decision:

> The scheme of the Act allows a business to claim refund or credit of any tax paid on the purchase or services connected to its sale of taxable supplies. In this way the tax is ultimately paid only by the final non commercial purchaser of a taxable supply [emphasis added].

[24] When the phrase "connected to" was used by Justice Stone to explain the words in the statute, the meaning it conveyed was that the supplies must contribute to the production of articles or the provision of services that are taxable. It would not be enough to qualify as being connected to the business activity if something, like a cigarette, were merely consumed while engaged in the business activity, for that would not contribute to the commercial activity that will ultimately produce taxable supplies.

[25] There is no language in subsection 169(1) that requires the use in question to be exclusively commercial or that distinguishes between property acquired and used directly and property acquired and altered before its use in commercial activities. Once an item is found to be acquired and used in connection with the commercial activities of a GST registrant and that item directly or indirectly contributes to the production of articles or the provision of services that are taxable, then an ITC is available using the formula in that subsection. Any possible abuse is to be combatted by requiring evidence of intended use and an adjustment in the percentage of ITC allowed by the Minister.

[Emphasis added.]

[30] Courts have found that there must be a "sufficient nexus or connection" between the input and the commercial activity. For example, in *General Motors of Canada Ltd. v R*,[37] the Federal Court of Appeal upheld this Court's conclusion that there was a "sufficient nexus or connection" between services provided by investment managers and the commercial activities of General Motors of Canada Ltd. ("**GMCL**"). In that decision, the Federal Court of Appeal noted that:

> [44] The Tax Court Judge gave to the words "in the course of", found in paragraph 169(1)*(c)*, a wide meaning given by this Court in *The Queen v. Blanchard,* 95 D.T.C. 5479 (F.C.A.) and in *M.N.R. v. Yonge Eglington Building Ltd.*, 74 D.T.C. 6180, at page 6184, where the words "in connection with", or "incidental to", or "arising from" were suggested. She held that GMCL's responsibilities to properly manage the Pension Plan assets were derived not only through the agreements but also through its duties as administrator under the OPBA and its duties to provide

[37] *General Motors*, *supra* note 33.

pension benefits to its employees (her para. 65). She noted that pension benefits, like salaries, are part of the compensation package which is an integral component to the commercial activities of the corporation. She fully explains these considerations at paragraphs 66-67. At paragraph 67 she stated:

> … 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 in original.]

[31] At issue in *General Motors*, was whether GMCL was eligible for ITCs under subsection 169(1) of the Act in respect of GST paid to investment managers.[38] GMCL retained these investment managers in order to manage the investment funds held in the pension plans established by GMCL. Although it was GMCL that manufactured, assembled and sold vehicles, the services provided by the investment managers were found to be sufficiently connected to the commercial activities of GMCL.

[38] *General Motors*, *supra* note 33 at para 2.

(ii) The definition of "commercial activity" requires that a part of the business that consists of making exempt supplies be notionally severed.

[32] Courts have concluded that where there are multiple businesses or business objectives, any part of the business that consists of making exempt supplies must be notionally severed.[39] For example, in *398722 Alberta Ltd. v R*, the Federal Court of Appeal addressed whether the taxpayer was required to "pay GST on the fair market value of an apartment building acquired solely to obtain approval for a new hotel development … ."[40] The Federal Court of Appeal found that the company was not entitled to ITCs and stated that:

> [22] Any business may consist of a number of components, each of which is integral to the business as a whole. The definition of "commercial activity" recognizes that possibility but requires, for GST purposes, that any part of the business that consists of making exempt supplies be notionally severed. The statutory definition dictates that the business of the respondent is not a "commercial activity" in so far as it consists of the rental of the units of the four-plex. On that basis I agree with the Crown that the respondent is not entitled to an input tax credit to offset the GST payable on the self-supply of the four-plex.
>
> [Emphasis added.]

[33] The Federal Court of Appeal denied the taxpayer's claim for ITCs in *398722 Alberta Ltd.* on the basis that the taxpayer was "fulfilling an obligation to meet another business objective".[41]

[34] In *London Life Insurance Co. v R*,[42] the Federal Court of Appeal held that the taxpayer, whose business consisted of making exempt supplies, made a separate taxable supply to its landlord when it provided the landlord with leasehold improvements in return for leasehold improvement allowances. The Federal Court of Appeal noted that this conclusion was "consistent with the fact that under the leases, the improvements became the property of the landlords immediately upon installation."[43] Thus, the taxpayer's business of supplying improved leasehold

---

[39] *398722 Alberta Ltd. v. R*, 2000 CarswellNat 837, 2000 CarswellNat 4798, [2000] GSTC 32 at para 22 [*398722 Alberta Ltd.*].
[40] *398722 Alberta Ltd.*, *supra* note 39 at para 1.
[41] *General Motors*, *supra* note 33 at para 53.
[42] *London Life Insurance Co. v R*, [2000] FCJ No 2121 [*London Life*].
[43] *London Life*, *supra* note 42 at para 21.

premises to its landlord was separate from its normal business, which was the provision of exempt supplies.

(iii) The words of a written contract should be considered in light of the factual matrix of the contract.

[35] In *Creston Moly Corp. v Sattva Capital Corp.*,[44] the Supreme Court of Canada reviewed the principles of contractual interpretation within the context of appeals from commercial arbitration decisions. The Supreme Court of Canada stated that:

> [50] … [c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

[36] The Supreme Court of Canada also turned its attention to the role and the nature of the surrounding circumstances in contractual interpretation and the nature of the evidence considered:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffman, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or

[44] *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53.

> reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> …
>
> [59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at pp. 341-342, *per* Sopinka J.).
>
> [60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> [61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 2002 CanLII 45017 (ON CA), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.
>
> [Emphasis added.]

[37] There is a limitation on the weight given to the surrounding circumstances in the interpretation of a contract. As stated by the Supreme Court of Canada, the parol evidence rule precludes the admission of evidence outside the words of the written contract that would contradict or subtract from a contract that has been wholly reduced to writing.

D. **Review of the Key Agreements**

(1) Historical Overview of the Loyalty Program

[38] Before 2008, PC Bank owned and operated the Points Program.[45] PC Bank issued PC Points when PC Bank customers used payment vehicles such as the PC MasterCard and other President's Choice Financial products ("**PCF Products**") offered through CIBC.[46] CIBC paid PC Bank when such points were redeemed by its customers for rewards in Loblaws stores.[47]

[39] As the operator of the program, PC Bank paid $0.65 to Loblaws for every $1.00 of notional value of PC Points redeemed at a Loblaws store.[48] If the amount was paid in respect of a PC Point issued by CIBC to its customers, CIBC paid PC Bank $1.00 for each PC Point redeemed by a CIBC client.[49] Loblaws also paid $0.0075 to PC Bank for every $1.00 of sales where PC Points were awarded to a Points Program member for purchases at Loblaws stores.[50]

[40] On March 1, 2008, PC Bank sold its interest in the Points Program to PCSI.[51] PCSI acquired all of the assets required to allow it to become the owner, administrator and operator of the Points Program (the "**Loyalty Program**").[52] Therefore, PC Bank was not operating the Loyalty Program during the tax periods at issue.

[41] Having divested itself of the Points Program, PC Bank entered into three agreements for the purpose of allowing it to issue points to the Cardholders. These agreements are the Loyalty Services Agreement, the Loyalty Expense Agreement and the Licence Agreement. These agreements were subject to various amendments, in some cases to correct alleged errors, as evidenced by an order of the Ontario Superior Court of Justice granting rectification thereof.[53] The three agreements are discussed below.

---

[45] Exhibit A1 (PASF), *supra* note 2 at para 7. See also Exhibit A2: Transfer Agreement (dated March 1, 2008), Joint Book of Documents [JBOD] vol 1, Tab 4 at p 83.
[46] Exhibit R1: Loyalty Expense Agreement (dated January 1, 2002) [Exhibit R1] at arts 2(a)-(b). Written Submissions of the Respondent re NITC Issue at paras 14-15.
[47] Exhibit R2: Loyalty Services Agreement (dated November 1, 1997) [Exhibit R2]. Written Submissions of the Respondent re NITC Issue at paras 14-15.
[48] Exhibit R1, *supra* note 46 at arts 2(a)-(b). Written Submissions of the Respondent re NITC Issue at paras 14-15.
[49] Exhibit R2, *supra* note 47. Written Submissions of the Respondent re NITC Issue at paras 14-15.
[50] Exhibit R1, *supra* note 46 at arts 2(a)-(b). Written Submissions of the Respondent re NITC Issue at paras 14-15.
[51] Exhibit A1 (PASF), *supra* note 2 at para 8.
[52] Exhibit A2: Transfer Agreement (dated March 1, 2008), JBOD, vol 1, Tab 4 at pp 84-86 at art 1.
[53] See Exhibit A2: Amendment No. 1 to Loyalty Services Agreement, JBOD, vol 1, Tab 10 at pp 136-137; Amendment No. 1 to Transfer Agreement, JBOD, vol 1, Tab 11 at pp 138-139; Amendment No. 1 to Loyalty Expense Agreement, JBOD, vol 1, Tab 12 at pp 140-143; Amendment No. 2 to Loyalty Services Agreement, JBOD,

(a) The Licence Agreement

[42] Effective March 1, 2008, PC Bank obtained a non-exclusive royalty-free licence from PCSI granting it the right to issue PCB Points to Cardholders, subject to the terms and conditions of the Licence Agreement and of the Loyalty Program owned, administered and operated by PCSI.[54] The Licence Agreement was rectified (the "**Rectified Licence Agreement**"). This rectification included the intentional deletion of the fee structure article of that agreement.[55]

[43] The Rectified Licence Agreement expressly states that PC Bank desires to continue to participate in the Loyalty Program and acquire the right to issue PCB Points to its customers.[56] As per article 2.1:

> Licensor [PCSI] hereby grants, for the duration of the Term, a non-exclusive, royalty-free license to Licensee [PC Bank] the right to issue PCB Loyalty Points to Members who are Licensee's [PC Bank's] customers subject to the terms and conditions of this Agreement and the Loyalty Terms and Conditions.[57]

[44] Under the Rectified Licence Agreement, PC Bank acknowledges that PCSI is the exclusive owner of the Loyalty Program, which includes the right to issue PCB Points.[58] It is PCSI that has the "full authority" to "control the character, nature, features and redemption value of the [PCB Points] … ."[59] In the Rectified Licence Agreement, PC Bank also acknowledges its liability for the redemption of all PCB Points.[60]

(b) The Rectified Loyalty Services Agreement

[45] The rectified Loyalty Services Agreement (the "**Rectified Services Agreement**") sets out PCSI's obligation to offer the Loyalty Program to PC Bank.[61] Article 2(a.1) provides that:

---

vol 1, Tab 13 at pp 144-145; Amendment No. 1 to Licence Agreement, JBOD, vol 1, Tab 14 at pp 146-147. See also Order of the Ontario Superior Court of Justice, JBOD, vol 1, Tab 15 at pp 148-183.

[54] Exhibit A2: Licence Agreement (dated July 31, 2008), JBOD, vol 1, Tab 9 at pp 129-135.

[55] Exhibit A2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at 152 at art 3.

[56] Exhibit 2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at p 150 at recitals.

[57] Exhibit A2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at p 152 at art 2.1.

[58] Exhibit A2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at p 152 at art 2.2.

[59] Exhibit A2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at p 152 at art 2.7.

[60] Exhibit A2: Licence Agreement (rectified), JBOD, vol 1, Tab 15 at p 152 at art 2.3.

[61] Exhibit A2: Loyalty Services Agreement (rectified), JBOD, vol 1, Tab 15 at p 159 at art 2(a).

> Right to issue PCB Loyalty Points. Pursuant to the Licence Agreement, PC Bank has been granted non-exclusive, royalty-free licence to issue PCB Loyalty Points.

[46] The Rectified Services Agreement also stipulates that each PC Bank customer is automatically eligible to be a member of the Loyalty Program.[62] That agreement also provides, per article 2(f), that:

> …Members may redeem Loyalty Points at any Participating Location...as may be agreed to by Loblaw or PCSI, as applicable. Subject to the Loyalty Terms and Conditions, Loyalty Points may be redeemed against the purchase of any Eligible Product at the rate of $1.00 retail per 1,000 Loyalty Points or such other rate as may be agreed to by Loblaw or PCSI, as applicable, and or against any reward that may be offered as part of the Loyalty Program from time to time, including, without limitation, rewards made available on the pcpoints.ca, at the rates disclosed with such offers.

[47] Article 3(a) sets out the awarding of PCB Points by PC Bank as follows:

> PC Bank is required to have certain of its products, services or PCF Payment Vehicles participate in the Loyalty Program. PC Bank may also award Loyalty Points as part of its marketing and customer acquisition and satisfaction strategy for any of its products or services.

[48] Article 5 sets out PCSI's administrative responsibilities under the Rectified Services Agreement. Additionally, the administrative costs are the sole responsibility of PCSI.[63]

(c) The Rectified Loyalty Expense Agreement

[49] The rectified Loyalty Expense Agreement (the "**Rectified Expense Agreement**") is an agreement made between PC Bank, PCSI and Loblaws. This agreement sets out the payments for Loblaws' participation in the Loyalty Program.[64] These payments include payments on the award of PCB Points and payments in relation to the redemption of PCB Points.

[50] The payments related to the award of PCB Points are set out in article 2(a) and can be summarized as follows:

---

[62] Exhibit A2: Loyalty Services Agreement (rectified), JBOD, vol 1, Tab 15 at p 163 at art 2(b).
[63] Exhibit A2: Loyalty Services Agreement (rectified), JBOD, vol 1, Tab 15 at p 165 at art 6(a).
[64] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at pp 178-179 at art 2.

i. Loblaw will pay PC Bank 0.75 cents for every $1.00 of sales where PCB Loyalty Points are awarded to members of the Loyalty Program for purchases made by such members in the Loblaw stores.[65]

ii. Loblaw will pay 0.375 cents to PCSI for every $1.00 of sales where PCB Points are awarded to a member of the Loyalty Program for purchases made by such member in Loblaw stores using a Payment Vehicle (other than a PCB Payment Vehicle).[66]

[51] The payments related to the redemption of PCB Points are set out in article 2(b) and can be summarized as follows:

i. Loblaw will pay $0.35 to PC Bank for every $1.00 of notional value of PCB Loyalty Points accumulated by a member using a PCB Payment Vehicle and redeemed by such member.[67]

ii. PC Bank will reimburse/pay Loblaw $1.00 for every $1.00 of notional value of PCB Loyalty Points accumulated by a member using a PCB Payment Vehicle and redeemed by such member.[68]

iii. Loblaw will pay $0.35 to PCSI for every $1.00 of notional value of Loyalty Points accumulated by a member using a Payment Vehicle (other than a PCB Payment Vehicle) and redeemed by such member.[69]

iv. PCSI will reimburse/pay Loblaw $1.00 for every $1.00 of notional value of Loyalty Points accumulated by a member using a Payment Vehicle (other than a PCB Payment Vehicle) and redeemed by such member.[70]

(d) ***Summary of the Agreements***

[52] There are numerous points that stand out from my review of the above agreements.

---

[65] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at p 179 at art 2(a)(i).
[66] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at pp 179-180 at art 2(a)(ii).
[67] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at p 180 at art 2(b)(i).
[68] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at p 180 at art 2(b)(ii).
[69] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at p 180 at art 2(b)(iii).
[70] Exhibit A2: Loyalty Expense Agreement (rectified), JBOD, vol 1, Tab 15 at p 180 at art 2(b)(iv).

[53] First, PC Bank obtained the right to issue PCB Points to Cardholders to entice them to use their PC MasterCards frequently in order to accumulate PCB Points that could be used to acquire discounted or free goods from Loblaws.

[54] Second, PC Bank did so because the issuance of PCB Points was perceived as an attractive benefit for its Cardholders. In turn, this allowed PC Bank to grow its credit card business quickly.

[55] Third, PC Bank agreed to pay the redemption price for the cash value of the points because this was an obligation that it incurred as consideration for the issuance of the PCB Points.

[56] Fourth, the issuance of the PCB Points created a future liability to pay the redemption price for goods when the PCB Points were redeemed by Cardholders for rewards.

[57] All of the above establishes a direct link between the substantial income earned by PC Bank from its PC MasterCard business and the Redemption Payment made for the redemption of the PCB Points issued by PC Bank.

E. **Testimonial Evidence: The NITC Issue**

[58] In respect of the NITC Issue, PC Bank called three witnesses: Ms. Sarah Ruth Davis, Mr. Ian Hanning and Mr. David Valenta.

[59] Ms. Davis is now retired.[71] Prior to her retirement she held various positions related to LCL including Senior Vice President and Controller of the "enterprise",[72] Executive Vice President of Finance,[73] Chief Financial Officer of LCL,[74] and former President of LCL.[75] She also served on the board of directors of PC Financial.[76] Ms. Davis was the Chief Financial Officer of LCL during the relevant period.[77]

---

[71] January 31, 2022 Transcript, p 25, line 24.
[72] January 31, 2022 Transcript, p 28, lines 16-25.
[73] January 31, 2022 Transcript, p 28, lines 26-28.
[74] January 31, 2022 Transcript, p 29, lines 1-3.
[75] January 31, 2022 Transcript, p 29, lines 14-16.
[76] January 31, 2022 Transcript, p 29, lines 20-22.
[77] Written Submissions of the Appellant re NITC Issue, para 18 (The relevant part reads: "Sarah Davis, the former President of LCL, was Chief Financial Officer of LCL during the relevant period. She was also a director of PC Bank at the time.").

[60] Mr. Hanning joined President's Choice Financial as the Chief Financial Officer in 2019.[78] This is subsequent to the tax periods at issue in the PC Bank Appeals.[79] The record shows that Mr. Hanning had no personal involvement in the matters discussed here in the relevant years. Either way, in my opinion, there was nothing of note in Mr. Hanning's testimony that requires comments from me.

[61] Mr. Valenta was called as an adverse witness by the Appellant.[80] At the time of the trial, Mr. Valenta was employed by the Canada Revenue Agency ("**CRA**") as a large case file manager.[81] Prior to this, Mr. Valenta was a large file auditor with the CRA.[82] Mr. Valenta was the auditor responsible for the PC Bank file.[83] His testimony was short. He did not have anything relevant to say that was germane to the issue.

F. **Analysis of the NITC Issue**

[62] The NITC Issue requires that I determine whether PC Bank made the Redemption Payment in the course of a commercial activity of PC Bank pursuant to subsection 181(5).[84] Subsection 181(5) should be interpreted following the modern approach to statutory interpretation, which requires considering the text, context and purpose of that provision.[85]

[63] The text of subsection 181(5) entitles a "particular person" (e.g. PC Bank) to claim NITCs for the tax fraction equal to the coupon value if certain conditions are met. First, a registrant (Loblaw) must accept as full or partial consideration for a taxable supply of property or a service a "coupon" (PCB Points) from a recipient (Cardholder). This coupon (PCB Points) may either be exchanged for property or a service (goods from Loblaws) or entitle the recipient (Cardholder) to a reduction on the price of the property or service. Second, a particular person (PC Bank) pays an amount to the supplier (Loblaw) for the redemption of the "coupon" (PCB Points). Third, this redemption payment is made in the course of a "commercial activity" of a particular person (PC Bank). A "commercial activity" is defined in subsection

[78] February 1, 2022 Transcript, p 103, lines 5-6; and p 104, lines 13-14.
[79] February 1, 2022 Transcript, p 106, lines 24-28; and p 107, lines 1-6.
[80] February 2, 2022 Transcript, p 213, lines 11-13.
[81] February 2, 2022 Transcript, p. 213, lines 18-19; 23-25.
[82] February 2, 2022 Transcript, p 213, lines 26-28.
[83] February 2, 2022 Transcript, p 214, lines 1-3.
[84] Exhibit A1 (PASF), *supra* note 2 at paras 51-52.
[85] *Canada Trustco Mortgage Co v R*, 2005 SCC 54 at para 10.

123(1). A business that consists of the making of exempt supplies of a "financial service" is carved out of the "commercial activity" definition.

[64] The purpose of subsection 181(5) is to allow an issuer of a coupon to receive the tax fraction of the coupon value where it makes a redemption payment to the supplier, so long as the issuer does so in the course of a commercial activity. The parties agree that in this case, the only aspect of subsection 181(5) that is not met is whether PC Bank makes the Redemption Payment in the course of a commercial activity.

[65] As discussed below, I endorse the Respondent's theory, which is that PC Bank became liable to make the Redemption Payments to Loblaws in the course of its MasterCard business. PC Bank issued the PCB Points to Cardholders to reward them for making purchases using their PC MasterCard.[86]

(i) The NITC Issue must be answered from the perspective of PC Bank.

[66] The question in dispute must be answered from the perspective of PC Bank, a distinct legal entity subject to the GST consequence with respect to its inputs, redemption expenses and supplies. This is clear from the part of subsection 181(5) that provides that "a particular person [PC Bank] at any time pays, in the course of a commercial activity of the particular person [PC Bank]". The evidence must be examined to determine the reason or cause for the Redemption Payment. Stated differently, is the Redemption Payment linked to the making of exempt or taxable supplies by PC Bank?

(ii) The Redemption Payments are made in the course of PC Bank's provision of an exempt supply of a financial service—the PC MasterCard business—to Cardholders.

[67] In my opinion, the Redemption Payments were made in the course of PC Bank's MasterCard activity, which involves the provision of exempt supplies of financial services to Cardholders. PC Bank issued the PCB Points to generate revenue from its PC MasterCard portfolio. PC Bank earned significant revenue from interchange fees that pales in comparison to the minimal revenue it received from Loblaws. PC Bank is a highly regarded legal entity licensed to carry on certain

[86] Written Submission of the Respondent re NITC Issue at paras 70, 74.

banking operations for profit. It is inconceivable to me that PC Bank made the Redemption Payments to lose money.

[68] PC Bank states that per the rectified agreements and *viva voce* evidence, PC Bank made the Redemption Payment in the course of a commercial activity.[87] This activity was, "namely, its operation of the Loyalty Program with Loblaws."[88] However, the agreements are clear: PCSI, not PC Bank, owned and operated the Loyalty Program during the tax periods at issue.

[69] PC Bank has the right to issue PCB Points to its Cardholders pursuant to several agreements: the Rectified Licence Agreement, the Rectified Services Agreement, and the Rectified Expense Agreement (collectively, the "**Rectified Agreements**"). The Rectified Agreements allow PC Bank to offer PCB Points to Cardholders through PCSI's Loyalty Program.

[70] PC Bank's core business is banking, the provision of financial services. The Loblaw Companies Limited 2011 Annual Information Form (the "**2011 Loblaw Report**") states that:

> [PC Bank] makes available to consumers financial services under the *President's Choice Financial* brand, including the President's Choice Financial MasterCard® … which are provided by the direct banking division of a major Canadian chartered bank and the *PC* points Loyalty Program. ...PC Bank offers the *President's Choice Financial* MasterCard® throughout Canada.[89]

[71] Although the 2011 Loblaw Report predates the Rectified Agreements, these agreements do not change the fact that PC Bank's general business is the provision of financial services to its customers.

(iii) PC Bank has not established the nature of the alleged commercial activity.

[72] PC Bank has not identified the commercial activity for which it claims entitlement to NITCs. One of the principal arguments put forth by the Appellant is based on the fee structure as outlined in the Rectified Expense Agreement.[90] In

---

[87] Written Submissions of the Appellant re NITC Issue at para 83.
[88] Written Submissions of the Appellant re NITC Issue at para 83.
[89] Exhibit A2: Loblaw Companies Limited Annual Information Form (2011), JBOD, vol 1, Tab 19 at p 250. January 31, 2022 Transcript p 55, lines 20-28; p 56, lines 1-28; and p 57, lines 1-2 (confirmation by Ms. Davis that that is an accurate description of PC Bank's business).
[90] Written Submissions of the Appellant re NITC Issue at paras 96-102.

summary, in its written and oral submissions, PC Bank alleges that the $0.35 payment that Loblaws is required to make to PC Bank when $1.00 worth of PCB Points are redeemed is intertwined with the Redemption Payment.[91] According to PC Bank:

> In the present case, there is no dispute that PC Bank's operation of the Loyalty Program is a commercial activity. The Respondent acknowledges as much in confirming that the 0.75 cent payment from Loblaws to PC Bank when points are issued, and the $0.35 payment from Loblaws to PC Bank when points are redeemed, are consideration for taxable supplies – namely, the "provision of services to Loblaws Inc., in connection with the PC Loyalty program."[92]

[Emphasis added.]

[73] PC Bank's business consists of earning money from a profitable credit card business.[93] Even from the consolidated reporting perspective (i.e. LCL), the reporting on the financial services segment (i.e. PC Bank) looks at how profitable the PC Bank credit card business was.[94] It earns substantially all of its net income from that activity. It is my view that PC Bank obtained the right to issue PCB Points to Cardholders for the purpose of enticing them to acquire the PC MasterCard in the first place and thereafter for the purpose of encouraging Cardholders to use their PC MasterCards. The 2011 Loblaw Report made the following comment about financial services:

> The Canadian bank card market is highly regulated and competitive. In the past year, the market has consolidated with two significant issuers selling their portfolios to major Canadian banks. As the market competition increases, customers expectations are being redefined, which include good value, exceptional service and programs that reward them for their loyalty. PC Bank as the issuer of *President's Choice Financial* MasterCard® competes in this market. The unique value proposition of free groceries enables *President's Choice Financial* MasterCard® to compete with the dominant players in the market.[95]

[74] It is common knowledge that the Canadian banks use loyalty programs to grow their credit card businesses. PC Bank issued PCB Points and paid the Redemption Payment for PCB Points redeemed by Cardholders in order to have a

---

[91] Written Submissions of the Appellant re NITC Issue at paras 5, 102.
[92] Written Submissions of the Appellant re NITC Issue at para 89.
[93] January 31, 2022 Transcript, p 63, lines 27-28 to p 64, line 2.
[94] January 31, 2022 Transcript, p 63, lines 27-28 to p 64, line 2. Exhibit A2: 2011 Annual Report-Financial - Review, Loblaw Companies Limited, JBOD, vol 1, Tab 20 at p 289.
[95] Exhibit A2: Loblaw Companies Limited Annual Information Form (2011), JBOD, vol 1, Tab 19 at p 254. January 31, 2022 Transcript, p 57, lines 23-28 to p 58, line 12 (confirmation by Ms. Davis).

competitive credit card offering. When Cardholders use their credit card, PC Bank earns, *inter alia*, significant interchange fees and interest on unpaid balances.[96] In Ms. Davis's testimony, she acknowledged that the financial benefit to PC Bank is the interchange fees when the PC MasterCard is used. Ms. Davis confirmed that this is because the PC MasterCard is a no-fee credit card and that if cardholders are not using their PC MasterCard, "there's no money to be made".[97]

[75] In this context, why does PC Bank pay the redemption price for the PCB Points redeemed in Loblaws stores? It does so because the issuance of the PCB Points creates a future liability that becomes due and payable when a Cardholder chooses to redeem PCB Points for purchases at participating locations owned or controlled by Loblaws. There is a direct link between the PCB Points that are issued in conjunction with an exempt financial service supplied by PC Bank to Cardholders and an expense that is paid when the PCB Points are redeemed by Cardholders.

[76] PC Bank's business practice in issuing PCB Points and paying for their redemption costs mirrors that of CIBC when CIBC issues loyalty points to its clients and pays the redemption costs of the loyalty points. Why does CIBC obtain the right to issue points? It does so to entice the clients to acquire PCF Products from it. Once CIBC issues the loyalty points, it incurs a future liability to pay for the redemption cost. I fail to see any material difference between these two situations. In both cases, when points are redeemed for rewards, Loblaws enjoys a benefit. There are more customers shopping in its stores buying goods. Loblaws receives payment for the goods that it sells. The fact that Loblaws benefits when points issued by CIBC and PC Bank are redeemed does not explain why PC Bank and CIBC issue the points in the first place. PC Bank issues the points and pays their redemption price for the same reason CIBC does, namely, to earn income from the supply of financial services.

[77] I have difficulty reconciling the Appellant's argument with normal commercial and business practices. It is unimaginable for me that the Appellant would accept to pay $1.00 to earn $0.35. Why would the Appellant issue points to lose money? My analysis conforms to the approach adopted by Lamarre J. in the 2009 Decision. In that case, Lamarre J. looked at the supply made by PC Bank when it issued the loyalty points. She did so because the issuance of the points created a future liability to pay the redemption price of the points when a Loyalty Program member chose to redeem them.[98] She found that PC Bank was not entitled to NITCs

[96] January 31, 2022 Transcript, p 60, lines 2-20 (confirmation by Ms. Davis).
[97] January 31, 2022 Transcript, p 60, lines 2-20 (cross-examination of Ms. Davis).
[98] 2009 Decision, *supra* note 22 at paras 74-76.

on loyalty points awarded on President's Choice Financial products and subsequently redeemed.[99] This conclusion was based on the finding that the supply of the points in accordance with the agreement in effect at that time was part of the exempt supplies—financial services—offered by PC Bank through CIBC. These supplies were not subject to GST.[100] Because financial services are exempt supplies, PC Bank did not make them in the course of a commercial activity.[101]

(iv) NITCs cannot be claimed from a consolidated entity perspective.

[78] The Appellant essentially frames the NITC Issue from the perspective of LCL—the enterprise or consolidated perspective.[102] Ms. Davis testified at length from this vantage point. For example, Ms. Davis emphasized that the main purpose of the Loyalty Program was to "drive more retail traffic" to Loblaws.[103]

[79] Ms. Davis emphasized that the PC Bank's MasterCard revenue paled in comparison to the revenue generated from the retail business.[104] For example, Ms. Davis pointed out that in 2011, PC Bank earned approximately $250 million in interest from credit card loans and approximately $191 million in interchange income while LCL's retail operations generated in the range of $31 to $32 billion of revenue in the same period.[105] For Ms. Davis, the proportion of revenue from PC Bank was a "very small portion" from a consolidated financials perspective.[106]

[80] LCL is a public holding corporation that reports its results on a consolidated basis.[107] How income or revenue is generated at the legal entity level does not matter in the grand scheme of affairs, provided that the entity level results can be consolidated with that of a parent. That is why executives of a public holding corporation make decisions from this perspective.

[81] What happens at the legal entity level matters for a host of reasons. First, PC Bank is a highly regulated entity. As a bank, it is required to report to the competent banking authorities on a legal entity basis to protect its creditors and ensure

---

[99] 2009 Decision, *supra* note 22 at para 77.
[100] 2009 Decision, *supra* note 22 at para 77.
[101] 2009 Decision, *supra* note 22 at para 77.
[102] See for example February 9, 2022 Transcript, p 254, lines 14-21.
[103] January 31, 2022 Transcript, p 31, lines 20-24; p 33, lines 9-12; p 34, lines 6-8; p 39, lines 1-4; p 45, lines 22-28; p 46, lines 1-18; p 49, lines 1-7; and p 50, lines 9-13.
[104] January 31, 2022 Transcript, p 43, lines 24-28 to p 44, line 1; p 44, lines 24-28 to p 45, line 7.
[105] January 31, 2022 Transcript, p 43, lines 9-28 to p 44, line1. See also Exhibit A2: President's Choice Bank Consolidated Statement of Comprehensive Income, JBOD, vol 1, Tab 3 at p 47.
[106] January 31, 2022 Transcript, p 43, lines 24-28 to p 44, line 1.
[107] January 31, 2022 Transcript, p 45, lines 9-194.

compliance with strict banking rules. Second, and more importantly, for the purpose of the present case, income tax and excise tax are levied on a legal entity basis. The reason for this is tied to the fact that Canada is a federation and the tax base is shared between the federal and provincial governments. For GST purposes, the legal entity, PC Bank, is required to report the GST that it collects and claims ITCs on its input, when allowed, on a legal entity basis.

[82] As noted earlier, the focus of subsection 181(5) is squarely on PC Bank. What caused PC Bank to make the Redemption Payment? After considering the testimonial evidence, my opinion remains the same. PC Bank issued the PCB Points to attract clients to subscribe for and, more importantly, thereafter use their PC MasterCards. This was done to grow PC Bank's MasterCard operations. PC Bank made the Redemption Payment for the redeemed PCB Points as consideration for having issued the PCB Points in the first place.

[83] For a loyalty program to be successful, it must be attractive to all of the participants thereunder, otherwise it will likely fail. I will use the Loyalty Program to illustrate this point. There are three participants in the Loyalty Program. The members of the program are of vital importance. The program must be designed to entice a desired behaviour. If the rewards under the program were unattractive, potential customers would opt to acquire and use a credit card that offers rewards perceived to be more attractive. There are a great deal of attractive loyalty programs that PC Bank, PCSI and Loblaws undoubtedly had to take into account in designing the Loyalty Program at issue here. While LCL ensured that PCB Points could be redeemed at Loblaws stores, the program, in the eyes of the Loyalty Program members, was nonetheless perceived to be attractive.[108] This is obvious based on the popularity of the PC Bank MasterCard.

[84] Ms. Davis, in her testimony, acknowledged that the PC MasterCard had to be attractive to be competitive with credit cards offered with loyalty program benefits from other institutions.[109] In this context, the Loyalty Program benefits had to be attractive to allow PC Bank to grow its business.[110] The Loyalty Program also had to take into account Loblaws's intent. Loblaw benefited from the fact that Cardholders were incentivized to shop at Loblaws.[111] Loblaws was also fully reimbursed the value of the rewards paid out to Cardholders.

---

[108] January 31, 2022 Transcript, p 39, lines 9-28.
[109] January 31, 2022 Transcript, p 57, lines 23-28 to p 58, line 12.
[110] January 31, 2022 Transcript, p 57, lines 23-28 to p 58, line 12.
[111] January 31, 2022 Transcript, p 50, lines 9-13; p 39, lines 9-28.

[85] The Loyalty Program was win-win-win for all participants. This is why it was successful. The Appellant agreed to issue PCB Points and pay the Redemption Payment of the PCB Points for the same reason that CIBC did when it issued points to entice its clients to acquire PCF Products. Like CIBC, PC Bank issued PCB Points and paid the redemption price of the points in the course of its credit card business consisting of the sale of exempt financial services. In that context, PC Bank is not entitled to claim NITCs.

[86] For all of these reasons, PC Bank's appeal with respect to the NITC Issue is dismissed.

IV. **THE FDR/TSYS ISSUE**

[87] This section addresses whether the services provided by FDR/TSYS to PC Bank are exempt financial services. The parties agree that the services provided by FDR/TSYS, respectively, are a single compound supply.[112] However, the parties differ on their characterization of these services under the Act.

[88] PC Bank did not self-assess GST/HST on the consideration paid to FDR in respect of the FDR Supply.[113] However, PC Bank self-assessed and remitted GST/HST in respect of the TSYS Supply.[114] After the 2010-2012 Reassessments were issued, PC Bank claimed that it paid the tax in respect of the TSYS Supply in error.[115]

A. **Position of the Parties: The FDR/TSYS Issue**

[89] PC Bank's position is that the services provided by FDR/TSYS are exempt financial services.[116] According to PC Bank, the "essential character of the supply" provided by the FDR/TSYS is complex credit card processing and portfolio management services for PC Bank's credit card business.[117] The FDR/TSYS services are integral to the operation of PC Bank's credit card business.[118] PC Bank

[112] Exhibit A1 (PASF), *supra* note 2 at paras 20, 27.
[113] Exhibit A1 (PASF), *supra* note 2 at para 23.
[114] Exhibit A1 (PASF), *supra* note 2 at paras 28, 36.
[115] Exhibit A1 (PASF), *supra* note 2 at para 39(d).
[116] Written Submissions of the Appellant re FDR/TSYS Issue at paras 7, 138; January 31, 2022 Transcript, p 13, lines 20-27.
[117] Written Submissions of the Appellant re FDR/TSYS Issue at para 143.
[118] Written Submissions of the Appellant re FDR/TSYS Issue at paras 7, 123, 137, 155, 161, 164.

submits that the FDR/TSYS supplies are included by paragraphs (d), (i) and (l) of the "financial service" definition in subsection 123(1).

[90] PC Bank states that paragraph (d) applies because the supply made by FDR/TSYS was, *inter alia*, the processing of credit card transactions.[119] PC Bank also relies on paragraph (i), which covers any services provided under an agreement relating to payments for which a credit card voucher has been issued, provided once again that such a service is not described in an Exclusionary Paragraph.[120] PC Bank also indicates that paragraph (l) applies because, in general terms, that paragraph applies to supplies that consist of "the arranging for" the lending or payment of money subject to the application of the Exclusions.[121]

[91] The Respondent submits that the FDR/TSYS services are taxable supplies.[122] According to the Respondent, FDR/TSYS assist PC Bank in the administration of its credit card business by providing PC Bank with electronic systems that assisted PC Bank in the management of the data collected and used in the course of its business.[123] Therefore, the predominant element of these services does not fit within paragraphs (a), (d), (i) or (l) of the "financial service" definition in subsection 123(1).[124] In the alternative, in the event that I conclude otherwise, the Respondent states that exclusionary paragraphs (r.3), (r.4), (r.5) and/or (t) of the "financial service" definition in subsection 123(1) apply such that FDR/TSYS supplies are taxable supplies subject to GST/HST.[125]

B. **Legislation**

[92] The relevant paragraphs of the "financial service" definition in subsection 123(1) of the Act are set out below:

> "**financial service**" means

---

[119] Written Submissions of the Appellant re FDR/TSYS Issue at paras 131-132.
[120] Written Submissions of the Appellant re FDR/TSYS Issue at para 127-128.
[121] Written Submissions of the Appellant re FDR/TSYS Issue at paras 133-136.
[122] Written Submissions of the Respondent re FDR/TSYS Issue at para 2; January 31, 2022 Transcript, p 20, lines 13-20.
[123] Written Submissions of the Respondent re FDR/TSYS Issue at paras 1-4; January 31, 2022 Transcript, p 19, lines 18-28 to p. 20, line 10.
[124] Written Submissions of the Respondent re FDR/TSYS Issue at para 2.
[125] Written Submissions of the Respondent re FDR/TSYS Issue at para 3; January 31, 2022 Transcript, p 19, lines 26-28 to p 20, line 1.

(a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,

…

(d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,

…

(i) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued,

…

(l) the agreeing to provide, or the arranging for, a service that is

(i) referred to in any of paragraphs (a) to (i), and

(ii) not referred to in any of paragraphs (n) to (t) …

(r.3) a service (other than a prescribed service) of managing credit that is in respect of credit cards, charge cards, credit accounts, charge accounts, loan accounts or accounts in respect of any advance and is provided to a person granting, or potentially granting, credit in respect of those cards or accounts, including a service provided to the person of

(i) checking, evaluating or authorizing credit,

(ii) making decisions on behalf of the person in relation to a grant, or an application for a grant, of credit,

(iii) creating or maintaining records for the person in relation to a grant, or an application for a grant, of credit or in relation to the cards or accounts, or

(iv) monitoring another person's payment record or dealing with payments made, or to be made, by the other person,

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

(i) a service of collecting, collating or providing information, or

> (ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,
>
> (r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l),
>
> …
>
> (t) a prescribed service.

[Emphasis added.]

[93] Paragraph (t) of the "financial service" definition excludes a "prescribed service".

[94] A prescribed service is described in section 4 of the *Financial Services and Financial Institutions (GST/HST) Regulations* (SOR/91-26) (the "**Regulations**") as follows:

> 4 (1) In this section,
>
> **"instrument"** means money, an account, a credit card voucher, a charge card voucher or a financial instrument;
>
> **"person at risk"**, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.
>
> (2) Subject to subsection (3), the following services, other than a service described in section 3, are prescribed for the purposes of paragraph (t) of the definition "financial service" in subsection 123(1) of the Act:
>
> (a) the transfer, collection or processing of information, and
>
> (b) any administrative service, including an administrative service in relation to the payment or receipt of dividends, interest, principal, claims, benefits or other amounts, other than solely the making of the payment or the taking of the receipt.

> (3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition "financial service" in subsection 123(1) of the Act where the service is supplied with respect to an instrument by
>
> (a) a person at risk, …

[95] As noted in the attached CIBC reasons for judgment, the definition of a financial service is complex.

[96] Subsection 123(1) of the Act defines a "financial service". This definition consists of a list of services that may come within that term. These paragraphs are paragraphs (a) to (m) (the "**Inclusions**" or the "**Inclusionary Paragraphs**"). The "financial service" definition also lists services that are excluded from that definition. These paragraphs are paragraphs (n) to (t) (the "**Exclusions**" or "**Exclusionary Paragraphs**").

[97] At this juncture, I observe that the Exclusionary Paragraphs overlap to some degree. For example, paragraph (t), excludes a "prescribed service" from the definition of a "financial service". However, paragraph (t) is broad enough to also cover a service the predominant elements of which falls within paragraph (r.3). Paragraph (r.3) excludes from the "financial service" definition certain activities related to managing credit that are administrative in nature.

[98] For efficiency purposes, I will assume that the predominant elements of the supply here fall initially within one of the three Inclusionary Paragraphs—paragraphs (d), (i) or (l)—relied on by PC Bank. It is undisputed that, if a supply that falls within the scope of an Inclusionary Paragraph also falls within the scope of an Exclusionary Paragraph, then that supply will be excluded from the "financial service" definition. If I determine that none of the Exclusionary Paragraphs relied on by the Respondent apply, then I will return to this matter and specifically address whether the FDR/TSYS supply falls within the Inclusionary Paragraphs relied on by PC Bank.

C. **Review of the Case Law**

[99] There are numerous cases that address whether or not a single compound supply falls within the "financial service" definition in subsection 123(1). The legal test applied to make that determination is generally a two-step test. First, the predominant elements of the supply are identified based on an interpretation of the contracts between the parties. Second, whether or not the predominant elements fall

within the statutory definition of "financial service" is determined based on the words of the Act.

[100] In *Global Cash Access (Canada) Inc. v R,*[126] the Federal Court of Appeal addressed whether the single supply at issue in that case met the "financial service" definition. To do so, the Court set out a two-step test:

> [26] To determine whether that single supply falls within the statutory definition of "financial service", the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of "financial service"?

[101] At issue in *Global Cash* was whether the commissions paid by the corporate taxpayer ("**Global**") to two corporations that operated casinos (the "**Casinos**") were consideration for a "financial service" supplied by the Casinos.[127] Global argued that the commissions were exempt from GST because they were paid as consideration for a "financial service"[128].

[102] Global's business included providing casino patrons access to cash through dedicated computer terminals owned and installed by Global in the Casinos. Global gained access to the Casinos through contracts, the preamble of the which stated that Global would become a supplier of Funds Access Services within the Casinos, and that the Casinos would receive a commission for each completed transaction.[129] The contracts also provided for a transaction volume incentive.[130] The Federal Court of Appeal held that Global paid the Casinos a commission for all of the steps that it took to complete the transactions, which constituted a single supply of a service. The supply fell within paragraph (g) of the "financial service" definition and did not fall within any of the Exclusionary Paragraphs.[131]

[103] In *Great-West Life Assurance Co. v R,*[132] the Federal Court of Appeal expanded on the two-step test set out in *Global Cash*. The Court noted that the

---

[126] 2013 FCA 269 [*Global Cash*].
[127] *Global Cash*, *supra* note 126 at para 2.
[128] *Global Cash*, *supra* note 126 at para 2.
[129] *Global Cash*, *supra* note 126 at para 8.
[130] *Global Cash*, *supra* note 126 at para 9.
[131] *Global Cash*, *supra* note 126 at para 35.
[132] 2016 FCA 316 [*Great-West*].

difficult part of the two-step test is the second part.[133] This is because of the following:

> [48] … It requires a determination as to whether the supply is included in the definition of "financial service." As part of this exercise, it is necessary to determine the predominant elements of the supply if it is a single compound supply. It is only the predominant elements that are taken into account in applying the inclusions and exclusions in the "financial service" definition.

[104] The Court also confirmed that the test for determining the predominant elements of the supply requires identifying the "parts of the service that resulted in the payment of the benefits".[134] At issue in *Great-West* was whether fees paid by the corporate taxpayer—Great-West Life Assurance Company ("**Great-West**")—to Emergis Inc. and Telus Health Solutions (collectively "**Emergis**") were fees paid for a "financial service". The fees were paid in connection with group health benefits offered by Great-West to employers. The services provided by Emergis related to "receiving and adjudicating benefits claims from employees, and arranging for the benefits to be received on a real-time basis."[135] These services were generally delivered electronically through a program that enabled the claims to be adjudicated quickly.[136] Emergis also entered into agreements with pharmacies, which allowed prescriptions to be filled with the understanding that payments would follow.[137]

[105] The Federal Court of Appeal explained that there is a two-step process to determine whether a supply is a "financial service": "The first question is simply to determine what services were provided for the consideration received. At this stage, the services should include all services and not just the predominant elements."[138] For step two, "it is necessary to determine the predominant elements of the supply if it is a single compound supply. It is only the predominant elements that are taken into account in applying the Inclusions and Exclusions in the 'financial service' definition."[139] The Federal Court of Appeal found that the Tax Court judge's reasons suggested that the judge correctly "determined that the predominant elements of the supply were the parts of the service that resulted in the payment of the benefits."[140]

---

[133] *Great-West*, *supra* note 132 at para 48.
[134] *Great-West*, *supra* note 132 at para 50.
[135] *Great-West*, *supra* note 132 at para 9.
[136] *Great-West*, *supra* note 132 at para 9.
[137] *Great-West*, *supra* note 132 at para 10.
[138] *Great-West*, *supra* note 132 at para 47.
[139] *Great-West*, *supra* note 132 at para 48.
[140] *Great-West*, *supra* note 132 at paras 50-51.

Accordingly, Emergis provided a taxable supply of an "administrative service" to Great-West.

[106] More recently in *Canadian Imperial Bank of Commerce v Canada*,[141] the Federal Court of Appeal addressed CIBC's application for a rebate under section 261 of the Act for GST paid on the supply made by Aeroplan to CIBC. There was no dispute between the parties that Aeroplan made a single supply to CIBC. At issue was "what in particular was supplied as the single supply." Because CIBC was the person liable to pay consideration under the agreements with Aeroplan, the characterization of the supply was made from the perspective of CIBC.[142] The Court noted that, just like in *Global Cash*, the "agreement under which the consideration for the supply was paid by CIBC should play a dominant role in determining what was acquired for the amounts that were paid."[143]

[107] In *Canadian Imperial Bank of Commerce v The Queen*,[144] at issue was whether CIBC paid GST in error on fees charged to it by Visa because Visa made an exempt supply of a "financial service". The Tax Court judge held that Visa made a taxable supply of an "administrative service" and that Visa was not "a person at risk".[145] The Federal Court of Appeal reversed the Tax Court judge on the basis that he "committed a reversible error by making contradictory and irreconcilable findings concerning the nature and impact of the Visa supply."[146] The Federal Court of Appeal held that Visa made an exempt supply of a financial service and did not need to consider the alternative "person at risk" argument.

D. **Review of the Key Agreements**

(i) Service Agreement (the "FDR Agreement")

[108] FDR provided services to PC Bank beginning after January 31, 2001 until December 10, 2009.[147] The FDR Agreement sets out the services that were made available by FDR to PC Bank. These services are found in a lengthy and detailed list in Exhibit A of the FDR Agreement.[148] As stipulated in that agreement, the types of

---

[141] 2021 FCA 96 [*CIBC (Aeroplan)*].
[142] *CIBC (Aeroplan)*, *supra* note 141 at paras 33 and 34.
[143] *CIBC (Aeroplan)*, *supra* note 141 at paras 57-58.
[144] 2021 FCA 10 [*CIBC (Visa)*].
[145] As those terms are defined in section 4 of the Regulations.
[146] *CIBC (Visa)*, *supra* note 144 at para 4.
[147] Written Submissions of the Appellant re. FDR/TSYS Issue at para. 48. Exhibit 1 (PASF), *supra* note 2 at paras 20-23.
[148] Exhibit A2: FDR Agreement, Exhibit A, JBOD, vol 2, Tab 21 at p 404-413 at art 2.

services offered by FDR are grouped into two main categories: "General Services" and "Ancillary Services".

[109] Section II of Exhibit A of the FDR Agreement sets out the General Services performed by FDR as follows:[149]

> II. General Services
>
> A. FDR will provide Customer with an on-line terminal facility (not the terminals themselves), on-line access to Transaction Card processing software, adequate computer time and other mechanical Transaction Card services as more specifically described in the [user manuals].
>
> B. Reports will be made available to Customer at Customer's request from time to time in accordance with FDR's Information Delivery Platform (IDP). FDR will shut off specific reports within five (5) business days of receiving such a request to do so from Customer and will not bill Customer for reports generated after such date.
>
> C. Specific Services are defined in Sections IV, V and VI [of Exhibit A].

[110] Section III of Exhibit A of the FDR Agreement sets out in great detail the Ancillary Services provided by FDR. These Ancillary Services include:[150]

a) fraud management and detection services in conjunction with its proprietary software;

b) services (human statistical analysis or reports) and products (software integrated into the FDR system) for use in connection with the Appellant's risk management of its accounts;

c) the Evolve application and licence, which Ms. Daksa Mody ("**Ms. Mody**") explained to be a FDR system interface;[151]

d) the InfoSight software, which Ms. Mody also described as another FDR system interface;[152] and

---

[149]Exhibit A2: FDR Agreement, Exhibits A, JBOD, vol 2, Tab 21 at p 441 at s II.
[150] Exhibit A2: FDR Agreement, Exhibit A: JBOD, vol 2, Tab 21 at pp 441-455.
[151] February 1, 2022 Transcript, p. 203, lines 8-21. Exhibit A2: FDR Agreement, Exhibit A, Schedule A-1, JBOD, vol 2, Tab 21 at p 479.
[152] February 1, 2022 Transcript, p. 203, line 22 to p 204, line 3.

e) FDR ROW/ROWnet Services, which will be provided by FDR or through the Appellant's permitted access to licensed software and related documentation.[153]

[111] Section IV of Exhibit A of the FDR Agreement sets out processing fee definitions and prices.[154] For example, under the definition "Auto PIN Change", each time a PC MasterCard holder uses the automated telephone system to change his or her PIN, FDR would bill PC Bank $0.79.[155]

[112] Section V of Exhibit A of the FDR Agreement sets out credit-related processing services as well as their definitions and prices per item.[156]

[113] Section VI of Exhibit A of the FDR Agreement sets out the processing services provided by FDR and related definitions and prices per item. For example, a two-cent fee is charged each time a PIN-based transaction is processed by FDR.[157]

[114] PC Bank replaced FDR with TSYS to provide a similar service that was previously offered by FDR.[158] Ms. Mody testified that there was no material difference between the services provided by TSYS and FDR.[159] This is apparent from a review of the recitals to the TSYS Agreement, which are discussed below.

(ii) Processing Services Agreement (the "TSYS Agreement")

[115] TSYS provided services to PC Bank beginning after December 10, 2009, pursuant to the TSYS Agreement.[160] The recitals to the TSYS Agreement state as follows:

> RECITALS:
>
> A. PC Bank is currently engaged in the business of advancing credit to credit card holders, financing and managing the related accounts and receivables, and related financial services and may be engaged in other financial services in the future;

---

[153] Exhibit A2: FDR Agreement, JBOD, vol 2, Tab 21 at pp 453-455.
[154] Exhibit A2: "FDR Agreement, Exhibit A", JBOD, vol 2, Tab 21 at pp 455-474.
[155] Exhibit A2: "FDR Agreement, Exhibit A", Tab 21, JBD vol. 2 at pp. 456.
[156] Exhibit A2: FDR Agreement, JBOD, vol 2, Tab 21 at pp 475-476.
[157] Exhibit A2: FDR Agreement, JBOD, vol 2, Tab 21 at p 476.
[158] Written Submissions of the Appellant re. FDR/TSYS Issue at para 48.
[159] February 1, 2022 Transcript, p 187, lines 21-26.
[160] Written Submissions of the Appellant re FDR/TSYS Issue at para 48; Exhibit 1 (PASF), *supra* note 2 at paras 26-28.

> B. TSYS is engaged in the business of providing a broad range of innovative issuing and acquiring payment technologies, including credit card processing and account maintenance services;
>
> C. PC Bank has selected TSYS, and TSYS has agreed to provide for the processing of credit card and other payment transactions of Cardholders and related account maintenance services, on an integrated basis, in accordance with the terms and conditions of this Agreement.[161]

[Emphasis added.]

[116] The underlined words capture the essence of the TSYS supply. In short, TSYS is a supplier of "issuing and acquiring payment technologies". It agreed to provide PC Bank "the processing of credit card and other payment transactions… and related account maintenance services, on an integrated basis … ."[162]

[117] Article 4 and Schedule 4.1 govern the core services provided under the TSYS Agreement. The services supplied by TSYS include "all processing and account maintenance services".[163]

[118] The TSYS Agreement defines the "core processing services" as a variety of services that are performed by the TSYS system, including:

> a) The acceptance and processing of credit card authorization requests;
>
> b) Processing of new client applications through the TSYS system based on terms and conditions set out by PC Bank;
>
> c) Processing the information relating to cardholder account transactions; and
>
> d) Storage of data on the TSYS system.[164]

[119] Schedule 4.1 of the TSYS Agreement sets out the processing services provided by TSYS to PC Bank. They are divided as follows: core processing services, optional processing services, miscellaneous services, and ancillary services.

---

[161] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 26 at p 798-879.
[162] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 26 at p 798.
[163] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 26 at p 811.
[164] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 951-979.

[120] The core processing services supplied by TSYS to PC Bank include authorizing transactions in accordance with "the authorization control options selected by PC Bank within the TSYS System";[165] assessing and evaluating "new account application[s] according to the options selected by PC Bank";[166] receiving, processing and posting PC Bank customers' transaction activity;[167] maintaining customer data and providing PC Bank access to that data;[168] and, as directed by PC Bank, generating, distributing and transmitting TSYS standard reports.[169]

[121] The optional processing services supplied by TSYS to PC Bank include a portfolio management service, which "provides an automated behaviour score based on each Cardholder's activity, Cardholder Account performance and associated risk";[170] fraud protection services;[171] a management system, which "integrates applications, automates and streamlines business processes, and provides real-time management operations … ";[172] and training and testing services.[173]

[122] The miscellaneous services supplied by TSYS to PC Bank are "incidental" to the core and optional processing services, and they "include customized programming, consulting services, and custom Developments to the TSYS system".[174]

[123] Finally, the ancillary services supplied by TSYS to PC Bank include a data protection program;[175] a dedicated TSYS relationship manager;[176] and the maintaining and administering of relevant telecommunications systems.[177]

E. **Testimonial Evidence**

[124] In respect of the FDR/TSYS Issue, the Appellant called Ms. Mody as a witness. Ms. Mody is Vice President Customer Support COE, PC Bank (part of LCL).[178] She joined PC Bank in 2005, first as a Director of Operations Strategy and

---

[165] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p 951 at art 1(a).
[166] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27at p 952 at art 1(b).
[167] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p. 953 at art 1(c).
[168] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p 962 at art 1(j).
[169] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p 967 at art 1(k).
[170] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p 968 at art 1.1(a).
[171] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 969-971.
[172] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 972-973.
[173] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 977-979.
[174] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 979-981.
[175] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 982-984.
[176] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at pp 984-985.
[177] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 27 at p 985.
[178] February 1, 2022 Transcript, p 146, lines 8-9.

Vendor Management.[179] Between 2006 and 2014, Ms. Mody held the roles of Vice President of Operations and Vice President of Solutions Delivery.[180] She held the latter roles during the relevant periods.

[125] The Respondent did not call any witnesses.

F. **Analysis of the FDR/TSYS Issue**

[126] The parties agree that the FDR/TSYS supply consists of a single compound supply.[181] I share the parties' view on this point.

[127] The parties also agree on the framework that applies for the purpose of determining whether a supply is an exempt supply of a "financial service" or a taxable supply.[182] The first step consists in determining "what services were provided for the consideration received".[183] The second step consists in establishing the "predominant elements" of the supply. In determining whether a single compound supply is a financial service or not, only the predominant elements of the supply must be considered.[184]

(i) Step 1: Elements of the supply

[128] I will begin my analysis of the elements of the FDR/TSYS supply with an overview of the process under which PC Bank makes credit card loans to its customers.

[129] A typical credit card loan made by PC Bank involves numerous parties. These include a Cardholder using his or her PC MasterCard to pay for goods or services with a merchant; the merchant presented with the PC MasterCard for payment of goods and services; an acquirer acting as an intermediary between MasterCard and

---

[179] February 1, 2022 Transcript, p 147, lines 1-11.
[180] February 1, 2022 Transcript, p 147, lines 12-26. Written Submissions of the Appellant re FDR/TSYS Issue at para 51.
[181] Exhibit A1 (PASF), *supra* note 2 at paras 20, 27.
[182] Written Submissions of the Appellant re FDR/TSYS Issue at paras 114-117; Written Submissions of the Respondent re FDR/TSYS Issue at paras 63-65.
[183] *Global Cash*, *supra* note 126 at para 26; *Great-West*, *supra* note 132 at para 47; *CIBC (Visa)*, *supra* note 144 at para 32.
[184] *Global Cash*, *supra* note 126 at para 26; *Great* –West, *supra* note 132 at para 48; *CIBC (Visa)*, *supra* note 144 at para 32.

the merchant; and a processor (either FDR or TSYS depending on the relevant period).[185]

[130] The case law provides that the interpretation of the relevant agreements is key to establishing the elements of the supply.[186] Under the FDR Agreement, the general services provided by FDR to PC Bank include:[187]

> an on-line terminal facility (not the terminal themselves), on-line access to Transaction Card processing software, adequate computer time and other mechanical Transaction Card services…

[131] Under the TSYS Agreement, the recitals set out the general services offered by TSYS to PC Bank. In short, TSYS is a supplier of "issuing and acquiring payment technologies". It agreed to provide PC Bank "the processing of credit card and other payment transactions … and related account maintenance services, on an integrated basis … "[188]

[132] FDR/TSYS used automated systems to check and authorize credit in respect of the particular transaction based on the protocol and the terms and conditions set by PC Bank.[189] An authorization of a credit card loan typically takes place in "milliseconds".[190]

[133] Ms. Mody stated that the authorization process is automated because it must be frictionless for Cardholders. If there are delays, a Cardholder may seek to use a different means of payment.[191]

[134] To avoid fraud, the automated system is able to identify unusual transactions. For example, if a card is used for payment on the same day in Canada and in a foreign country, this may indicate that the card has been stolen.[192] Similarly, the automated process can identify large purchases that are made quickly on the card and that do not correspond to a Cardholder's normal spending pattern. In both cases, the authorization process may be slowed down to allow for further verification; the

---

[185] February 1, 2022 Transcript, p 148, line 22 to p 150, line 7.
[186] *Global Cash*, *supra* note 126 at paras 25-30; *CIBC Aeroplan*, *supra* note 141 at paras 57-61.
[187] Exhibit A2: FDR Agreement, Exhibit A, JBOD, vol 2, Tab 21 at p 441.
[188] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 26 at p 798.
[189] February 1, 2022 Transcript, p 151, lines 2-9.
[190] February 1, 2022 Transcript, p 149, line 21.
[191] February 1, 2022 Transcript, p 171, lines 15-28.
[192] February 1, 2022 Transcript, p 155, line 23 to p. 156, line 26.

Cardholder may be called by someone from FDR/TSYS to verify the flagged transactions.[193]

[135] In all cases, FDR/TSYS, through the use of the automated systems and follow-up security and authorization procedures, are applying security protocols established by PC Bank.[194] In short, they provide the service as agent for PC Bank using the automated security protocol approved by PC Bank.[195] The automated systems also verify other critical information, such as whether the request for a credit card loan is within the Cardholder's credit card limit.[196]

[136] Like the billing scheme of the FDR Agreement, the TSYS Agreement's billing scheme was on a per-item basis. As Ms. Mody explained, "… each component of a decision that TSYS makes for us generally has a separate billing element associated with it."[197] Ms. Mody went on to explain that PC Bank was not charged one fee for TSYS services, but each item processed by TSYS was billed separately to PC Bank.[198]

[137] Ms. Mody described TSYS as "this neural network that takes information, transactions, customer behaviour, et cetera, and processes that information, working with PC Bank strategies. And they … help us manage our portfolio both from a risk perspective and a growth perspective."[199] By this I understood that the TSYS system processed the request for authorization in real time to enable the Cardholder to purchase goods and services by means of a credit card loan and performed related administrative and credit management services within the parameters set by PC Bank. Undoubtedly, PC Bank could not conduct its business without the benefit of an automated credit card authorization and processing system.

(ii) Step 2: The predominant elements of the supply

[138] I believe that the predominant element of the FDR/TSYS supply is the automated services provided by the FDR/TSYS system for and on behalf of PC

[193] February 1, 2022 Transcript, p 156, line 27 to p. 157, line 13.
[194] February 1, 2022 Transcript, p 154, lines 12-19.
[195] February 1, 2022 Transcript, p 159, lines 15-25.
[196] February 1, 2022 Transcript, p 169, line 19 to p 170, line 3.
[197] February 1, 2022 Transcript, p 181, lines 1-12.
[198] February 1, 2022 Transcript, p 181, lines 13-15.
[199] February 1, 2022 Transcript, p 151, lines 17-26.

Bank. This is the Respondent's alternative argument. In my opinion, the predominant element of this supply is described in Exclusionary Paragraph (r.3).[200]

[139] The June 10 Technical Notes describe the scope of application of paragraph (r.3) as follows:

> New para. (r.3) is added to the definition to clarify that the definition "financial service" does not include a service of managing credit in respect of credit or charge cards, or in respect of credit accounts, charge accounts, loans accounts or accounts in respect of any advance, where the service is provided to a person granting, or prospectively granting, credit in respect of those cards or accounts. A service of managing credit includes a service provided to the person of:
>
> • checking, evaluating or authorizing credit;
>
> • making decisions on behalf of the person relating to a grant, or an application for a grant, of credit;
>
> • creating or maintaining records for the person relating to a grant, or an application for a grant, of credit or in relation to the cards or accounts; or
>
> • monitoring another person's payment record, or dealing with payments made, or to be made, by the other person.[201]
>
> [Emphasis added.]

[140] The June 10 Technical Notes mirror, to a large extent, the final text of Exclusionary Paragraph (r.3).

[141] The language of paragraph (r.3) indicates that "managing credit" is broader in scope than what may be commonly understood by that expression. In a narrow sense, credit management refers to the process of granting credit to borrowers based on agreed-upon terms and conditions, recovering payment and ensuring that borrowers abide by the terms and conditions of their loans. The Appellant bases its argument on this narrow definition of "managing credit".[202]

[142] The services described in paragraph (r.3) are defined to include checking or authorizing credit; making decisions on behalf of the person in relation to a grant, or application for a grant, of credit; creating or maintaining records in connection with

---

[200] Written Submissions of the Respondent re. FDR/TSYS Issue at paras 133-135.
[201] Written Submissions of the Respondent re FDR/TSYS Issue at para 60.
[202] Written Submissions of the Appellant re FDR/TSYS Issue at paras 143-144.

the foregoing (in the instant case, the records are stored in digital format); and monitoring another person's payment record. Thus, the term "managing credit" for the purpose of paragraph (r.3) is broad.

[143] The Appellant argues that the FDR/TSYS supply falls outside of paragraph (r.3) on the basis that the "essential character of the supply provided by FDR and TSYS … is complex credit card processing and portfolio management", not "credit management".[203] In short, according to the Appellant, PC Bank could not conduct its business without the services offered by FDR/TSYS. Ms. Mody testified that without TSYS, PC Bank's credit card business could not operate.[204] While that is true, whether a service is essential or not or integral or not to a money-lending business is not a characteristic that precludes the application of paragraph (r.3).

[144] As noted above, the purpose of paragraph (r.3) is to exclude credit management services, described in a broad sense, from the "financial service" definition. Proper credit management is the lifeblood of all money-lending businesses. Poor credit management can lead to large loan losses and potential business failure.

[145] The main service offered by FDR/TSYS was the automated management and authorization of credit in real time, on behalf of PC Bank, based on the parameters and protocols established by PC Bank. These protocols included measures designed to detect credit fraud and to ensure that the terms and conditions under which PC Bank wishes to grant a credit card loan to a Cardholder are satisfied. All of this is done to avoid loan losses for PC Bank.

[146] The Appellant, in its written and oral submissions, relies a great deal on *CIBC (Visa)*. In my opinion, the Appellant overlooks the fact that the Federal Court of Appeal was dealing principally with Exclusionary Paragraph (t), which excludes so-called "administrative services". In addition, there are significant differences between the characteristics of services supplied by Visa in that decision and the FDR/TSYS supply in the instant case.

[147] In *CIBC (Visa)*, at issue was whether CIBC paid GST in error on fees charged to it by Visa because Visa made an exempt supply of a "financial service". The Tax Court judge held that Visa made a taxable supply of an "administrative service" and that Visa was not "a person at risk".[205] As I explained earlier, the Federal Court of

[203] Written Submissions of the Appellant re. FDR/TSYS Issue at paras 121-123, 137 and 143.
[204] February 1, 2022 Transcript, p 151, lines 10-15.
[205] As those terms are defined in section 4 of the Regulations.

Appeal reversed the decision of the Tax Court judge on the basis that he "committed a reversible error by making contradictory and irreconcilable findings concerning the nature and impact of the Visa supply."[206] As explained by the Federal Court of Appeal:

> [56] … On one hand, he found (at paragraphs 92 and 95 of his reasons) that Visa's services "form an essential part of the ability for CIBC to offer credit card based services to their clients," and that they "[give] CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them." He added that "[i]f CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa."
>
> [57] On the other hand, in concluding (at paragraph 116) that the services provided by Visa were, like those considered in *GWL TCC*, "quintessentially administrative in nature," the Tax Court judge stated that "[a]t its most basic level […], the benefit that Visa offered CIBC was cost saving and logistical simplification."

[148] In deciding that the Visa credit card service was not analogous to the service provided by Emergis in *Great-West*, the Federal Court of Appeal reasoned as follows:

> [63] In the face of this evidence and the evidence concerning the operation of the Visa payment system, I would find, consistent with the Tax Court judge's findings at paragraphs 92 and 95 of his reasons, that Visa's services "form an essential part of the ability for CIBC to offer credit card based services to their clients," that they "[give] CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them," and that "[i]f CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa." To this I would add that Visa's services relieve CIBC and other issuers of the need to investigate and analyze the risk profile and solvency of the merchants that accept credit cards in payment for goods and services. To describe the benefit that CIBC obtained from Visa's services as merely "cost saving and logistical simplification," and on that basis to describe the services as "quintessentially administrative," does not, in my view, adequately recognize the reality of the benefit that CIBC derived.
>
> [64] Nor can it properly be said, in my view, that the Visa payment network differs from that provided by Emergis in *GWL TCC* only in scale and not in substance. In *GWL TCC*, the Tax Court was able to find that the supply by Emergis did not alter

[206] *CIBC (Visa)*, *supra* note 144 at para 4.

> the substance of what was being done. As the evidence cited above makes clear, that is not the case here.
>
> [65] These findings mean that all that is left as the basis for the Tax Court judge's conclusion on "administrative service" is his finding that, like the system operated by Emergis, the Visa network operated "with minimal decision making involved." But in my view, this factor is not capable on its own of supporting the conclusion that the Visa supply was an "administrative service," particularly when Visa sets all of the rules of the payment network and maintains decision-making authority in the application of those rules.[207]

[Emphasis added.]

[149] The Federal Court of Appeal held that Visa made an exempt supply of a financial service and did not need to consider the alternative "person at risk" argument.

[150] The Appellant claims that paragraph (r.3) is inapplicable because this Court held in *CIBC Visa* that the services provided by Visa did not include "the responsibility for authorizing the credit".[208] Credit card loan approvals were the responsibility of CIBC, the issuer of the card.

[151] Although not expressly stated, the Appellant appears to suggest that the same observation applies here because PC Bank, and not FDR or TSYS, is the one that establishes the terms and conditions and the circumstances under which credit card loans are made to Cardholders.

[152] I see nothing in the text of paragraph (r.3) that suggests that a service that consists of processing authorization requests via an automated system as agent for the issuer of a credit card is excluded under paragraph (r.3). In fact, the text and purpose of the provision suggest otherwise.

[153] Undoubtedly Parliament was aware of the fact that responsibility for credit management is an essential function for a moneylender. This authority is not the type that would be delegated to a third party as a principal unless the third party assumed the credit risk. To do so would create a misalignment between the lender, who assumes a risk by making the loan, and the third party, who does not bear such a risk in these circumstances. Therefore, in order for paragraph (r.3) to have meaning, I believe that the scope of paragraph (r.3) covers all services related to credit

---

[207] *CIBC (Visa), supra* note 144 at paras 63-65.
[208] Written Submissions of the Appellant re FDR/TSYS Issue at para 142.

management, including those undertaken by a third party on behalf of the issuer of a credit card.

[154] In my opinion, Parliament used exclusionary language in paragraph (r.3) because the Inclusionary Paragraphs, particularly paragraph (l), were interpreted expansively prior to the 2010 amendments.

[155] Outsourcing to third parties by financial service providers often takes place to achieve greater efficiency and cost savings. If the predominant elements of the outsourced service are described in an Exclusionary Paragraph, the consequence is that the supply is a taxable supply and the financial service provider that consumes the input in the making of exempt supplies of financial services must, at least initially, bear the GST as an expense. I surmise that PC Bank considered that the cost and efficiency savings attributable to the outsourcing of services to FDR and then to TSYS was of greater value than the GST that PC Bank self-assessed on the TSYS supply.

[156] Ms. Mody suggested that the substance or essence of the FDR/TSYS supply could best be described as the brains of PC Bank's credit management function.[209] I disagree. Unlike Visa, FDR/TSYS did not set the rules of the payment network and maintain decision-making authority in respect thereof; PC Bank did so by setting the parameters and protocols under which credit card transactions would be authorized by FDR and TSYS on its behalf. Nonetheless, it remains that the authorization of credit card loans by FDR/TSYS on behalf of PC Bank falls within the description of credit management services specifically included by Parliament under Exclusionary Paragraph (r.3). Data processing and record keeping services are also described in that paragraph.

[157] As a final observation on Ms. Mody's testimony, I note that her statements regarding the importance of the FDR/TSYS services are inconsistent with the services as described in the key agreements. PC Bank set the terms and conditions under which it would allow credit card loans to be approved on its behalf. In these circumstances, I am inclined to place greater weight on my interpretation of the key agreements rather than on Ms. Mody's somewhat embellished testimony.

[158] The FDR/TSYS services are significantly different than the attributes of the Visa services as noted by the Federal Court of Appeal in *CIBC (Visa)*. *CIBC (Visa)* differs from the present appeals because Visa was not acting as agent for CIBC when

[209] February 1, 2022 Transcript, p 151, lines 17-26.

it provided its services to CIBC. CIBC did not have the right to direct or control how Visa would provide services to it. In the present appeals, the evidence shows that the opposite is true. PC Bank sets the terms and conditions pursuant to which FDR/TSYS authorizes credit card loans on PC Bank's behalf. Stated differently, Visa operated the Visa payment system based on the rules that it established; issuers of Visa credit cards were obligated to follow these rules.[210] This is not the case for the services prescribed by FDR/TSYS.

[159] *CIBC (Visa)* also differs from the present appeals because, although the Federal Court of Appeal did not have to decide whether Visa was a "person at risk" given that the service Visa supplied was not an "administrative service", the evidence showed that Visa incurred significant payment obligations on its own behalf. As the Federal Court of Appeal explained, Visa was exposed to a variety of significant risks, including settlement risk, sovereign risk, foreign exchange risk, and merchant risk.[211] While CIBC bore fraud risk responsibility, Visa regularly analyzed and responded to fraudulent transactions and CIBC was required "to follow Visa-specified anti-fraud requirements and controls."[212]

[160] In comparison to Visa, FDR/TSYS bore very little risk. The Appellant argued that TSYS "is liable for the full value of the contract—$80 million—in the event that any of the data that it processes, stores, and analyses is leaked."[213] This is a standard indemnity that one would expect to be included in contracts where confidential information may be disclosed. It is worth noting that the indemnity that TSYS provided to PC Bank is included in a section of the TSYS Agreement that sets out the limits to TSYS's liability.[214] The indemnity for breach of confidential information is limited to the value of the contracts or $80 million even though the loss suffered by PC Bank may very well be significantly greater.

[161] While the above factors are irrelevant to the determination as to whether Exclusionary Paragraph (r.3) applies to the FDR/TSYS services, I am inclined to believe that the FDR/TSYS services are also excluded from the definition of a "financial service" by virtue of paragraph (t). Needless to say, this is relevant only if I am wrong regarding the application of paragraph (r.3).

---

[210] *CIBC (Visa)*, *supra*, note 144 at para 14.
[211] *CIBC (Visa)*, *supra*, note 144 at paras 19 and 23.
[212] *CIBC (Visa)*, *supra*, note 144 at para 25.
[213] Written Submissions of the Appellant re FDR/TSYS Issue at para 174.
[214] Exhibit A2: TSYS Agreement, JBOD, vol 3, Tab 26 at p 854.

[162] For all of these reasons, PC Bank's appeals as they relate to the FDR/TSYS Issues are dismissed.

V. SUMMARY

[163] In summary, PC Bank's appeals are allowed in part only. The reassessments are returned to the Minister for reconsideration and reassessment to allow solely the followings adjustments:

- PC Bank is entitled to a reduction of the GST/HST assessed by the Minister, the whole in accordance with the Consent to the Order attached hereto as Appendix III.

- PC Bank is entitled to additional operational ITCs of $88,674 in the 2009 Period pursuant to subsection 169(1) of the Act in accordance with the parties' agreement as set out in paragraph 53 of the PASF.

- PC Bank is entitled to a rebate for tax paid in error in the 2011 Period under subsection 296(2.1) of the Act in the amount of $556,1363.01, in accordance with the parties' agreement as set out in paragraph 54 of the PASF.

Signed at Magog, Québec, this 19th day of July 2022.

"Robert J. Hogan"

Hogan J.

Appendix I

Tax Court of Canada | Cour canadienne de l'impôt

Docket: 2019-3197(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard virtually on common evidence with the appeals of
President's Choice Bank (2017-3925(GST)G and 2017-3931(GST)G)
on January 24, 25, 26, and 27, 2022 and February 11, 2022
at Ottawa, Canada

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Al Meghji Alexander Cobb Al-Nawaz Nanji
Counsel for the Respondent:	Justine Malone Lindsay Tohn

JUDGMENT

The appeal from the assessments made under the *Excise Tax Act*, notices of which are dated January 30, 2017, November 22, 2016, January 23, 2017, and January 27, 2017, is dismissed with costs in favour of the Respondent in accordance with the attached reasons for judgment.

The parties will have until September 19, 2022 to agree on costs, failing which they are directed to file their written submissions on costs no later than September 19, 2022. Such submissions should not exceed 10 pages.

Page: 2

Signed at Magog, Québec, this 19th day of July 2022.

"Robert J. Hogan"

Hogan J.

Tax Court of Canada | Cour canadienne de l'impôt

Citation: 2022 TCC 83
Date: 20220719
Docket: 2019-3197(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. INTRODUCTION

[1] Canadian Imperial Bank of Commerce ("**CIBC**" or the "**Appellant**") and Loblaw Companies Limited ("**LCL**") entered into two agreements, the Financial Services Agreement (the "**FSA**") and the Loyalty Services Agreement (the "**LSA**"). The FSA and the LSA (collectively, the "**PCF Agreements**") were assigned by LCL to its indirectly wholly-owned subsidiary President's Choice Bank ("**PC Bank**"). Initially, PC Bank did not charge CIBC Goods and Services Tax ("**GST**") on the consideration that it received for the supply it made under the PCF Agreements. PC Bank believed that the supply was exempt from GST on the basis that it was the supply of a financial service under subsection 123(1) of Part IX of the *Excise Tax Act* (the "**ETA**").[1]

[2] PC Bank was subsequently reassessed GST by the Minister of National Revenue (the "**Minister**") for failure to collect and remit GST on the basis that the supply was taxable in nature. While PC Bank appealed the Minister's reassessments to this Court, it began to collect and remit GST on behalf of CIBC. Following PC Bank's success in *President's Choice Bank v The Queen* [2] (the

[1] *Excise Tax Act*, RSC 1985, c E-15.
[2] 2009 TCC 170.

"**2009 Decision**"), the definition of "financial service" in subsection 123(1) of the ETA was amended to add, among other things, paragraphs (r.4) and (r.5). These paragraphs were enacted in 2010 with retroactive effect to December 17, 1990 and expanded the types of supplies that are excluded from the "financial service" definition in subsection 123(1).

[3] CIBC filed six rebate claims for GST paid in error on the basis that the supply it received from PC Bank remained a supply of an exempt financial service notwithstanding the expansion of the exclusions in the "financial service" definition. CIBC's rebate claims were denied by the Minister. In addition, the Minister assessed PC Bank in respect of certain periods on the basis that PC Bank failed to collect and remit some of the GST on the consideration that it received from CIBC.[3] PC Bank appealed the Minister's reassessments.

[4] PC Bank has two separate appeals regarding the Minister's reassessments (the "**PC Bank Appeals**"). CIBC's appeal and the PC Bank Appeals were heard together, in part, because the appeals raise a common issue: the characterization of a supply made by PC Bank to CIBC (the "**PCF Supply Issue**"). The parties have agreed that I can dispose of CIBC's and PC Bank's appeals as they pertain to the PCF Supply Issue based on the present reasons for judgment.

[5] While I have dismissed the Appellant's earlier motion to have the matter determined based on the outcome of the 2009 Decision ("**Reasons for Order**")[4], the Appellant insists that I must give weight to the earlier factual findings in the 2009 Decision because the retroactive amendments to the "financial service" definition which added significant exclusions do not change the essence or substance of the supply made by PC Bank to CIBC (the "**PC Bank Supply**").

[6] A careful read of the 2009 Decision reveals that my former colleague, Lamarre J., was tasked with examining the evidence presented at that trial through an entirely different legal prism. In short, I am of the opinion that the factual findings made by Lamarre J. were influenced by the old version of the definition of a "financial service", which was narrowed by virtue of the addition of new exclusions. At best, we are left to speculate about what factual findings Lamarre J. would have made had she been tasked, like me, with determining whether either

---

[3] PC Bank also appealed other issues in respect of which it was reassessed (the "**Other Issues**"). The PC Bank Appeals as they pertain to the Other Issues, were heard and disposed of separately.

[4] *Canadian Imperial Bank of Commerce v R*, 2022 TCC 26; my reasons are attached as Appendix "I" for ease of reference.

paragraph (r.4) or paragraph (r.5) of the "financial service" definition applies to exclude the PC Bank Supply as an exempt supply.

[7] For the reasons that follow, I am of the opinion that the essence of the single compound supply made by PC Bank to CIBC in the relevant periods falls within the exclusion provided for under paragraph 123(1)(r.5) of the "financial service" definition in the ETA.

II. MATERIAL FACTS

A. Partial Agreed Statement of Facts

[8] The parties filed a partial agreed statement of facts ("PASF").[5] I have reproduced it in its entirety below for ease of reference:

> **PARTIES**
>
> 1. Canadian Imperial Bank of Commerce (**CIBC**) is a Canadian chartered bank with its head office in Toronto, Ontario.
>
> 2. Loblaw Companies Limited (**LCL**) is a diversified retailer of groceries and other merchandise operating across Canada.
>
> 3. President's Choice Bank (**PC Bank**) is a subsidiary of LCL and is a Canadian chartered bank.
>
> **AGREEMENTS**
>
> **Financial Services Agreement**
>
> 4. LCL decided to provide financial products to its customers. LCL requested that CIBC provide financial products to its customers.
>
> 5. On November 1, 1997, CIBC and LCL entered into a Financial Services Agreement (**FSA**).
>
> 6. The parties to the FSA established, inter alia, a steering committee (**Steering Committee**) that met to discuss and make certain decisions about the financial products (**PCF Products**).

---

[5] Exhibit R8: Partial Agreed Statement of Facts (dated January 17, 2022) [Exhibit R8 (PASF)].

7. Other than as set out in the FSA and its amending agreements, CIBC would be the exclusive provider of financial services under the name "President's Choice Financial" and other trademarks identified in the FSA. These financial services included: (i) mutual funds sales, (ii) credit products, (iii) securities brokerage, (iv) financial planning, (v) debit cards, (vi) check cards, (vii) bill payment services, (viii) person to person payment services, (ix) ABM services, (x) insurance products relating only to credit products and home warranties, and (xi) credit cards.

8. Until April 1, 2005, CIBC was obliged to pay to LCL (and then PC Bank), fees calculated by reference to each new account, or other financial products opened, as well as a fee calculated by reference to the average funds and assets under management by CIBC under the PCF program (**FSA Fees**).

9. Effective April 1, 2005, the FSA Fees were replaced with a revenue share payment, calculated in accordance with the terms of an amending agreement dated April 1, 2005.

Loyalty Services Agreement

10. Contemporaneously with the execution of the FSA, CIBC and LCL also entered into a Loyalty Services Agreement (**LSA**), which, in part, provided for a loyalty program to be offered to PCF customers (**Loyalty Program**).

11. The Loyalty Program provided for the award of "Loyalty Points" (**PC Points**). The PC Points were issued to the customers as a reward for making eligible LCL purchases and eligible PCF purchases and as part of any other offer made available through the Loyalty Program.

12. The redemption of the PC Points was available at any participating LCL location as well as any other location as agreed to by the parties. The PC Points could be redeemed, subject to certain terms and conditions, against the purchase of any eligible products.

13. CIBC initially administered the Loyalty Program until 2001, after which LCL (subsequently PC Bank or an affiliate) became the administrator of the Loyalty Program. CIBC was obligated to pay LCL (then PC Bank or an affiliate), on a monthly basis, consideration in respect of the PC Points awards and administration costs.

14. On April 17, 2006, CIBC and PC Bank agreed that the administration costs payable by CIBC would be a flat amount of $20,000 per month effective January 2006.

Trademark Agreements

15. On November 1, 1997, CIBC and Loblaws Inc., a subsidiary of LCL, entered into two trademark license agreements.

Assignment to PC Bank

16. On October 1, 2000, LCL assigned its rights and obligations under both the LSA and the FSA to the President's Choice Financial Trust Company, the predecessor to PC Bank. The LSA provided [that] either party could assign the rights and obligations to an affiliate.

Amendments of Agreements and Letter Agreements

17. The FSA and LSA were amended by the following agreements:

(a) a letter agreement dated January 17, 2001;

(b) a letter agreement dated March 14, 2003;

(c) a letter agreement dated May 25, 2004;

(d) a letter agreement dated October 27, 2004;

(e) a letter agreement dated October 27, 2004;

(f) an amending agreement dated April 1, 2005;

(g) a letter agreement dated March 8, 2006;

(h) an agreement dated April 17, 2006;

(i) an amending agreement dated March 2, 2010;

(j) amended and restated letter agreement dated May 1, 2011;

(k) an amended and restated letter agreement dated November 1, 2012;

(l) an amending agreement dated January 7, 2013;

(m) an amending agreement dated August 30, 2013; and

(n) an amending agreement dated October 8, 2014.

PCF FINANCIAL OFFERINGS

18. Customers obtained PCF Products mainly through kiosks/pavilions at certain LCL stores.

19. A pamphlet entitled "Legal Stuff" was provided to PCF customers of personal banking financial products.

REVENUE SHARE PAYMENTS

20. Monthly calculations computing the revenue share payments were prepared.

21. Summaries of the calculations of the 2009, 2010, 2011 and 2012 revenue share payments show the breakdown payable to PC Bank for those periods.

CIBC'S REBATE CLAIMS

First Rebate Claim

22. The Minister of National Revenue (**Minister**) assessed PC Bank for GST for the period January 2003 to September 2007 in the amount of $10,195,817, which PC Bank invoiced to CIBC.

23. For the period October 2007 to November 2008, PC Bank invoiced CIBC for GST in the amount of $2,108,754.

24. CIBC filed a rebate claim for GST paid in error dated January 16, 2009 (**First Rebate Claim**) in the amount of $12,304,571.

25. The parties agree that the correct amount of the First Rebate Claim is $12,302,079 and that CIBC paid the amount of $12,302,079. The correct amount removes an error of $2,492.

Second Rebate Claim

26. For the period December 2008 to March 2009, PC Bank invoiced CIBC for GST in the amount of $490,001.

27. CIBC filed a rebate claim for GST paid in error dated May 11, 2010 (**Second Rebate Claim**) in the amount of $490,001.

28. The parties agree that the correct amount of the Second Rebate Claim is $490,001 and that CIBC paid the amount of $490,001.

Third Rebate Claim

29. For the period July 2010 to July 2012, PC Bank invoiced CIBC for fees under the FSA, as amended, and an affiliate of PC Bank invoiced CIBC for fees under the LSA, as amended. The invoices included the federal portion of HST in the amount of $2,798,787.

30. CIBC filed a rebate claim for HST paid in error dated October 31, 2012 (**Third Rebate Claim**) in the amount of $17,018,959.

31. The parties agree that the correct amount of the Third Rebate Claim is $2,798,787 in respect of the federal portion of HST, subject to an adjustment for ITCs, and that CIBC paid the amount of $2,798,787. The correct amount of the federal portion of HST claimed in the Third Rebate Claim removes: (a) an amount of $192,479 relating to errors, (b) an amount of $8,785,355 that was already included in the First Rebate Claim, and (c) an amount of $764,278 that was self-assessed by CIBC; and (d) an amount of $4,478,060 of provincial value-added tax.

Fourth Rebate Claim

32. For the period August 2012 to May 2014, PC Bank invoiced CIBC for fees under the FSA, as amended, and an affiliate of PC Bank invoiced CIBC for fees under the LSA, as amended. The invoices included the federal portion of HST in the aggregate amount of $2,513,226.

33. CIBC filed a rebate claim for the federal portion of HST paid in error dated June 24, 2014 (**Fourth Rebate Claim**) in the amount of $2,518,146.

34. The parties agree that the correct amount of the Fourth Rebate Claim is $2,513,226 and that CIBC paid the amount of $2,513,226. The correct amount removes an error of $4,920.

Fifth Rebate Claim

35. For the period June 2014 to June 2015, PC Bank invoiced CIBC for fees under the FSA, as amended, and an affiliate of PC Bank invoiced CIBC for fees under the LSA, as amended. The invoices included the federal portion of HST in the aggregate amount of $1,600,795.

36. CIBC filed a rebate claim for the federal portion of HST paid in error dated September 4, 2015 (**Fifth Rebate Claim**) in the amount of $1,600,795.

37. The parties agree that the correct amount of the Fifth Rebate Claim is $1,600,795 and that CIBC paid the amount of $1,600,795.

Sixth Rebate Claim

38. For the period December 2008 to February 2016, PC Bank invoiced CIBC for fees under the FSA, as amended, and an affiliate of PC Bank invoiced CIBC for fees under the LSA, as amended. The invoices included the federal portion of HST in the aggregate amount of $2,657,990.

39. CIBC filed a rebate claim for the federal portion of HST paid in error dated May 16, 2016 (**Sixth Rebate Claim**) in the amount of $2,657,990.

40. The parties agree that the correct amount of the Sixth Rebate Claim is $2,657,990 and that CIBC paid the amount of $2,657,990.

Other Adjustments

41. The correct amount of the above rebate claims must be further reduced by the amount of any input tax credits that CIBC was allowed by the Minister in respect of GST claimed in the rebate claims.

42. The Minister takes the position that CIBC is entitled to the provincial portion of HST of $4,478,059.84 claimed in the Third Rebate Claim. The amount of the allowable provincial portion of HST must be adjusted to remove erroneously claimed amounts as well as the provincial portion of HST in respect of input tax credits allowed by the Minister and to otherwise account for the adjustments to CIBC's net tax made under subsection 225.2(2) in respect of the amounts to which the Rebate Claims relate.

Summary of Fees and Rebate Claims

43. The following is a summary of the fees invoiced to and paid by CIBC:

FEES PAID				
	Revenue Share	Points	Admin	Total
First Rebate Claim	139,343,482	50,158,645	2,056,971	191,559,098
Second Rebate Claim	7,234,153	2,485,878	80,000	9,800,031
Third Rebate Claim	49,028,265	6,447,484	500,000	55,975,749
Fourth Rebate Claim	46,850,118	2,974,395	440,000	50,264,513
Fifth Rebate Claim	28,512,253	3,343,651	160,000	32,015,904
Sixth Rebate Claim	43,458,075	9,241,740	460,000	53,159,815

44. The following is a summary of the GST/federal portion of HST invoiced to and paid by CIBC:

GST PAID				
	Revenue Share	Points	Admin	Total
First Rebate Claim	8,872,744	3,292,947	136,388	12,302,079
Second Rebate Claim	361,708	124,294	4,000	490,001
Third Rebate Claim	2,451,413	322,374	25,000	2,798,787
Fourth Rebate Claim	2,342,506	148,720	22,000	2,513,226
Fifth Rebate Claim	1,425,613	167,183	8,000	1,600,795
Sixth Rebate Claim	2,172,904	462,087	23,000	2,657,990

MINISTER'S DENIAL OF CIBC'S REBATE CLAIMS

45. The Minister denied each of the rebate claims by way of notices of assessment.

46. The Minister's reasons for the denials are set out in proposals letters dated August 25, 2016 and decision letters denying each rebate claim.

NOTICES OF OBJECTION

47. CIBC filed notices of objection on February 16, 2017 in respect of the denial of the First Rebate Claim, Second Rebate Claim, Third Rebate Claim, Fourth Rebate Claim, Fifth Rebate Claim and Sixth Rebate Claim.

OTHER MATTERS

48. The parties agree that the supply in issue in this appeal is a single compound supply.

[Emphasis added and footnotes omitted.]

[9] It should be noted that hereinafter, LCL and its affiliates are defined as the "**LCL Group**" and that all the defined terms have the meaning given to them in the PASF unless otherwise indicated.

[10] The parties submitted a joint book of documents[6] that includes, *inter alia*, PC Bank's Financial Statements, the relevant agreements between PC Bank and CIBC, President's Choice Financial documents, CIBC's rebate claims, the notices of assessment, letters from the Minister, and LCL documents.

---

[6] Exhibit A1: Joint Book of Documents [JBOD], vols 1-2.

[11] In addition, CIBC called two witnesses to testify: Mr. Rob Ward and Mr. Kevin Lengyell.

[12] The Respondent intended to call Ms. Sarah Davis, as the former president of Loblaw. However, the Respondent attempted to serve Ms. Davis and was unsuccessful. An adverse inference should not be drawn from this fact.[7]

III. THE PCF SUPPLY ISSUE

A. Position of the Parties

[13] The Appellant submits that the issue is whether the supply in issue made by PC Bank to CIBC pursuant to the FSA and the LSA was a taxable supply or an exempt financial service.[8] The Appellant argues that "CIBC was paying PC Bank for acting as an intermediary to bring the financial products to customers and PC Bank's major role in the process of providing financial services by CIBC to customers."[9] The Appellant relies on the 2009 Decision and Lamarre J.'s conclusion that "the substance of the PC Bank Supply was PC Bank's major role in selling attractive financial products to customers and by acting as an intermediary to bring financial products to customers" of the LCL Group.[10] The Appellant submits that the amendments to the PCF Agreements do not alter the substance of the PC Bank Supply, nor do the legislative amendments to the "financial service" definition under subsection 123(1).[11]

[14] The Respondent submits that the "bundle of rights and services supplied [by PC Bank] to CIBC does not fall within the statutory definition of "financial service."[12] While the Respondent has put forth alternative arguments, the Respondent acknowledged during oral arguments that the Respondent's main argument is that the PC Bank Supply is excluded under paragraph (r.5).[13] One of the Respondent's alternative argument is that the PC Bank Supply is excluded by virtue of paragraph (r.4).[14]

---

[7] January 27, 2022 Transcript, pp 465-466.
[8] Written Submissions of the Appellant at para 1.
[9] Written Submissions of the Appellant at paras 8, 14, 58.
[10] Written Submissions of the Appellant at para 14.
[11] Written Submissions of the Appellant at paras 17, 63, 71.
[12] Written Submissions of the Respondent at para 2.
[13] February 11, 2022 Transcript, p 515, lines 4 to p 518, line 25; Written Submissions of the Respondent at para 161.
[14] Written Submissions of the Respondent at para 166.

[15] I begin with an analysis of the exclusionary paragraphs relied on by the Respondent because if one of them applies, that would bring an end to this matter. This, in my opinion, is the most efficient way to deal with this matter. For now I will assume that the supply at issue is included in paragraph (1) of the definition of "financial service" under subsection 123(1) of the ETA. If I determine that none of the exclusionary paragraphs apply, I will return to this matter and decide whether the supply is captured by the inclusionary paragraphs relied on by the Appellant.

B. Legislation

[16] The language used in the definition of a "financial service" in subsection 123(1) before and after the 2010 amendments is key to understanding the purpose of the amendments. Before the amendments, the relevant parts of the definition of "financial service" read as follows:

> (a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,
>
> (b) the operation or maintenance of a savings, chequing, deposit, loan charge or other account,
>
> (d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,
>
> ...
>
> (f) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,
>
> ...
>
> (g) the making of any advance, the granting of any credit or the lending of money,
>
> ...
>
> (l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), ...
>
> but does not include
>
> ...

(t) a prescribed service.

[Emphasis added.]

[17] After the 2010 amendments, the relevant parts of the "financial service" definition read as follows:

> ...
>
> (a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,
>
> ...
>
> (d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,
>
> ...
>
> (i) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued,
>
> ...
>
> (l) the agreeing to provide, or the arranging for, a service that is
>
> (i) referred to in any of paragraphs (a) to (i), and
>
> (ii) not referred to in any of paragraphs (n) to (t) ...
>
> but does not include
>
> ...
>
> (r.3) a service (other than a prescribed service) of managing credit that is in respect of credit cards, charge cards, credit accounts, charge accounts, loan accounts or accounts in respect of any advance and is provided to a person granting, or potentially granting, credit in respect of those cards or accounts, including a service provided to the person of
>
> (i) checking, evaluating or authorizing credit,
>
> (ii) making decisions on behalf of the person in relation to a grant, or an application for a grant, of credit,

(iii) creating or maintaining records for the person in relation to a grant, or an application for a grant, of credit or in relation to the cards or accounts, or

(iv) monitoring another person's payment record or dealing with payments made, or to be made, by the other person,

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

...

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,

(r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of service referred to in any o paragraphs (a) to (i) and (l),

...

(t) a prescribed service; (*service financier*)

[Emphasis added.]

[18] The definition of "financial service" in subsection 123(1) lists activities that are included in that definition—paragraphs (a) to (m) (the "**Inclusionary Paragraphs**")—and activities that are excluded from that definition—paragraphs (n) to (t) (the "**Exclusionary Paragraphs**"). It is clear that the addition of the Exclusionary Paragraphs (r.4) and (r.5) intend to limit the scope of Inclusionary Paragraphs, such as paragraph (l).

[19] Prior to the 2010 amendments, the term "arranging for" as used in Inclusionary Paragraph (l) was construed expansively in a number of court decisions.[15] In some cases, a supplier to a financial services provider could be

[15] See *Canadian Medical Protective Association v R*, 2009 FCA 115 at paras 56, 63-64 (The Federal Court of Appeal found that the services performed by investment managers were to "cause to occur a transfer of ownership ... of a financial instrument" and fell within paragraphs 123(1)(d) and (l) of the Act. The Federal Court of Appeal noted: "The skill shown in the pick, i.e., the research necessary for the preparation of the buying or selling order, is the core of the investment managers' activity and the raison d'être of their being hired. The quality of the pick is the trademark of their profession.")

considered as arranging for a "financial service" without playing a direct intermediary role in the delivery of a financial service to a client of a financial institution.[16] For example, a supplier to a financial institution that performs a credit check or promotes the sale of a financial service or participates in its design might fall within the ambit of that language.[17]

[20] Parliament addressed the courts' expansive interpretation of Inclusionary Paragraph (l) of the "financial service" definition with legislative proposals intended to clarify that definition.[18] These proposals resulted in the additions of the new Exclusionary Paragraphs, including paragraphs (r.4) and (r.5). Those Exclusionary Paragraphs are relevant to the PCF Supply Issue and read as follows:

> (r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is
>
> ...
>
> (ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,
>
> (r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l).

[21] Exclusionary Paragraph (r.5) is broad. For example, it could exclude from the "financial service" definition "property ... that is delivered or made available to" CIBC "in conjunction with" CIBC selling PCF Products to new clients whom it recruited pursuant to the PCF Agreements (if we assume that such contractual rights are the predominant elements of the PC Bank Supply). The exclusion is also

---

[16] See *Skylink Voyages Inc v Canada*, 1999 CarswellNat 2983, 1999 CarswellNat 1256, [1999] GSTC 119 (Eng), [1999] GSTC 43 (Fr), [1999] TCJ No 159, 2000 GTC 732 (Eng), 99 GTC 3096 (Fr): The taxpayer operated a wholesale travel agency, essentially acting as an intermediary between airlines and retail travel agencies. The Court found that the collection services provided to the retail agencies by the taxpayer constituted financial services, which were exempt supplies.

[17] See *Les Promotions DND Inc v R*, 2006 TCC 63 at paras 12-13, 36-37: The Court found that the taxpayer was an intermediary between the financial institution and the purchaser in the supply of a financial service. The taxpayer's business was promoting credit cards in public spaces such as shopping centres, fairs and exhibition sites. The taxpayer's employees would revise the applications and send them to the credit card company.

[18] Department of Finance News Release 2009-115—*Government of Canada Responds to Recent Court Decisions on the GST and Financial Services* (December 14, 2009), Respondent's Book of Authorities, Tab 31 at p 262; Written Submissions of the Respondent at paras 53-61.

broad enough to cover a single compound supply consisting of a predominant element, which is the provision of property, and a secondary element, which consists of, for example, services excluded under paragraph (r.4). It is well established by the case law that in applying the Inclusionary Paragraphs and the Exclusionary Paragraphs, only the predominant elements of the supply are taken into account.[19]

[22] I explained to counsel for the Appellant during oral argument that I do not favour the approach that he urges me to follow.[20] He argued that I should determine first whether the PC Bank Supply is described in Inclusionary Paragraph (l) and then determine whether the PC Bank Supply can be excluded by virtue of being captured by Exclusionary Paragraphs (r.4) and (r.5).[21] I should do so first by determining the "substance of the supply" using the two-step approach discussed later.[22] Respectfully, this approach seems to me to be placing the proverbial cart before the proverbial horse. I believe that I should start by defining the ambits of Exclusionary Paragraphs (r.4) and (r.5), provisions that were not in force when the 2009 Decision was rendered. This is typically how a judge goes about disposing of an issue. First, one determines the scope of application of a relevant provision, and then one determines the facts that allow one to conclude whether or not a provision applies. In short, factual determinations should not be made in a vacuum; fact-finding should take place after the law has been properly interpreted. This places the proverbial cart properly behind the proverbial horse.

[23] The approach that I have chosen to follow is supported by the preamble to the exclusions in the "financial service" definition, which provides that a financial service "does not include" the supply of a service or property described in the Exclusionary Paragraphs.

[24] If an Exclusionary Paragraph applies, it becomes somewhat of a futile exercise for me to determine whether the supply would otherwise be described in an Inclusionary Paragraph. For the reasons that follow, it is unnecessary for me to answer the latter question because I believe that the predominant elements of the

---

[19] *Great-West Life Assurance Co v R*, 2016 FCA 316 at para 48 [*Great-West*]; *Global Cash Access (Canada) v R*, 2013 FCA 269 at paras 25-26, 37-38 [*Global Cash*]; *Canadian Imperial Bank of Commerce v. The Queen*, 2021 FCA 10 [*CIBC (Visa)*] at para 32.

[20] February 11, 2022 Transcript, p 473, line 24 to p 478, lines 2-23.

[21] Ibid, p 478, lines 4-17; Written Submissions of the Appellant at para 54.

[22] Ibid.

supply fall within Exclusionary Paragraph (r.5). Therefore, I will not address this issue despite the Appellant urging me to do so.

[25] At this point, I would like to acknowledge that I made a mistake in my reasons dismissing the Appellant's preliminary motion. I stated that subparagraph (l)(ii) of the "financial service" definition under subsection 123(1) narrowed the types of supplies that constitute "the arranging for" a financial service.[23] I was wrong. It is the preamble to the Exclusionary Paragraphs that narrows the scope of application of all of the Inclusionary Paragraphs listed before the preamble. This is clearly expressed by the words "but does not include". Stated differently, if the predominant elements of the PC Bank Supply are described in Exclusionary Paragraph (r.5), that supply is excluded despite the fact that it might otherwise fall within Inclusionary Paragraph (l) before consideration of paragraph (r.5). Nonetheless, the result of the preliminary motion remains the same.

[26] Before addressing the question of the predominant elements of the PC Bank Supply, I would like to make a few general observations on the scheme of the ETA.

[27] Under a value-added tax system, like the GST, a guiding principle is that the tax should be paid by the final consumer of a supply. To ensure that this occurs, GST is collected and remitted throughout the process by which value is added to the final supply of goods or services. At each stage, GST is collected and remitted by the registrant supplier. The purchaser of the goods or services is entitled to claim an input tax credit ("**ITC**") for the GST it paid provided that the purchaser used the goods or services in the course of a commercial activity. The GST is collected at each stage for a number of reasons. For example, the final goods or services may be exported; exported goods or services are exempted from the GST.

[28] There are only two major exceptions. The first exception concerns zero-rated supplies, which are food and other necessities. These goods are not subject to GST throughout the value-added phase and on the final sale because these goods are viewed as essential products. Zero-rated goods are excluded to counter the regressive effect of a value-added tax; lower-income individuals spend a larger portion of their income on food and other essentials than upper-income earners.

[29] The other exception is financial services. This exception exists because it is difficult to properly price all of the individual inputs that go into a financial service

---

[23] Reasons for Order, *supra* note 4 at paras 37-48.

and, therefore, apply tax on a value-added basis. As a result, the GST system treats the provider of a financial service as the consumer. This treatment has an impact on the behaviour of providers of financial services. If such a provider uses internal staff to provide services, those internal inputs are not subject to GST (payroll, etc.). This creates a dilemma for financial institutions. From a cost standpoint, financial service providers often outsource part of their operations to benefit from economies of scale and, as a result, to save on costs. For example, marketing services are typically outsourced by financial institutions to marketing agencies. Call centre services are also frequently outsourced. If these services are outsourced, GST is due on the consideration paid for the supply because these supplies are often not a "financial service" as defined in subsection 123(1). If the impact of GST was the driving factor in the decision to outsource or not, economies of scale would be difficult to achieve. In most cases, services will be outsourced if the services can be outsourced efficiently at a lower cost (taking into account the impact of GST on the supply) or if the supply qualifies, in its own right, as an exempt financial service.

[30] With this context in mind, the ideal situation for a financial service supplier would be for the input from a third-party supplier to be included under the "financial service" definition. If the supply qualifies as a financial service, there is no non-recoverable GST due on the consideration paid for the supply. As the Respondent explained, the new exclusions (discussed above) were introduced because Parliament felt that the GST tax base was being eroded by services that were being found to be financial services but that in Parliament's mind should have been taxable supplies in the first place.[24]

[31] During the Respondent's oral submissions, counsel's principal argument was that the predominant element of the supply made available by PC Bank to CIBC was the provision of what I refer to as a "bundle of rights" consisting of the right to solicit LCL's clients in LCL's stores, the right to use trademarks, the right to issue points under the Loyalty Program, and other rights acquired for the purpose of expanding CIBC's nascent fintech banking operations (collectively the "**Bundle of Rights**").[25] According to the Respondent, the secondary element of the compound supply consisted, *inter alia*, of marketing, product design, and

---

[24] Written Submissions of the Respondent at paras 53-61.
[25] February 11, 2022 Transcript, p 517, lines 5-16.

promotional services provided by a small number of LCL/PC Bank employees (the "**PC Bank employees**").[26]

[32] Counsel for the Appellant acknowledged that the arguments he put forward were substantially the same as those that he presented in the 2009 Decision that were favourably received at that time.[27] It is noteworthy that counsel spent little time addressing the scope of application of Exclusionary Paragraphs (r.4) and (r.5), which were not in force when the 2009 Decision was rendered.[28]

[33] Counsel for the Appellant argued that the relationship between LCL and then PC Bank and CIBC was more than a passive relationship of the provision of rights that allowed CIBC to sell financial products to LCL's customers. He emphasized that the relationship of the parties was like a joint venture or partnership.[29]

[34] Counsel for the Respondent astutely pointed out that a "joint venture" or "a partnership-type relationship" is not a supply.[30] These are labels used to define a legal relationship, but they cannot be applied here because the PCF Agreements expressly provide that the relationship between the parties was not a "joint venture" or "a partnership".[31]

[35] Counsel for the Appellant emphasized that the relationship between the parties was based on "collaboration and working together to fulfill the multiple daily tasks undertaken in the course of selling PCF Products to LCL's existing or future clients".[32] Once again, the Respondent's counsel noted that "collaboration, working together or as a joint venture" is not a description of a supply.[33] Rather, these terms define how the parties approach the exercise of their rights and the fulfillment of their obligations under the PCF Agreements, which govern commercial relationships. In other words, these terms are simply hallmarks of all

---

[26] Ibid, p 517, line 17 to p 518, line 25.
[27] Ibid, p 490, line 16 to p 494, line 15; p 505, line 28.
[28] Ibid, p 477, lines 2-11.
[29] Ibid, p 501, line 23 to p 502, line 6.
[30] Ibid, p 508, lines 4-7.
[31] Ibid, p 509, lines 28 to p 509, line 11. See also Financial Services Agreement (dated November 1, 1997), JBOD, vol 1, Tab 3 at p 84; Loyalty Services Agreement (dated November 1, 1997), JBOD vol 1, Tab 4 at p 116; Trademark License Agreement (Financial) (dated November 1, 1997), JBOD, vol 1, Tab 5 at p 136; Trademark License Agreement (Loyalty) (dated November 1, 1997), JBOD, vol 1, Tab 6 at p 153.
[32] February 11, 2022 Transcript p 503, lines 1-19.
[33] Ibid, p 522, line 27 to p 523, line 12.

types of successful commercial relationships and not a description of a supply of a "financial service".

C. 2009 Decision

[36] In his oral submissions, counsel for the Appellant urged me to apply the factual findings of the Court in the 2009 Decision because, according to counsel, the essence or nature of the supply has not changed and the factual findings of the Court in that decision are reasonable.[34]

[37] In my opinion, this argument misses an important point. In the 2009 Decision, the Court analyzed and established the factual matrix relevant to the disposition of the matter in reference to a broader definition of a financial service. The Court emphasized the following:

> ...I find that PC Bank was not a passive associate concerned only with promotion and doing no more than allowing access to its list of members.[35]
>
> [Emphasis added.]

[38] On the basis of the previous text, the dividing line appeared to be active versus passive behaviour. If there was active involvement, the courts were more likely than not to view the supply as the "arranging for" an eligible "financial service". In contrast, if the arrangement was passive and consisted of the rental of space for an ATM, for example, then the rent paid for the supply would likely be held to be an excluded "financial service".

[39] One prong of the Appellant's litigation strategy appears to me to be squarely aimed at convincing me to first examine and adopt the factual findings made by Lamarre J. in the 2009 Decision. I am reluctant to do so. First, I am not an appellate court judge who has access to the full record of the hearing. My role does not require me to determine whether or not Lamarre J. made a palpable and overriding error of fact in rendering her decision. Rather, I am a trial judge who has heard evidence directly on a supply that has been affected by retroactive amendments. As noted in my Reasons for Order, I am not bound to apply the factual findings of Lamarre J. because the doctrines of *res judicata* and/or abuse of process do not apply here. Accordingly, I believe that the best course of action is

---

[34] Ibid, p 492, line 19 to p 493, line 20; p 505, line 5 to p 506, line 3.
[35] 2009 Decision, *supra* note 2 at para 38.

to limit my analysis of the 2009 Decision to commenting on clarifications of relevant principles identified in the case law subsequent to the 2009 Decision.

[40] In determining the essence or nature of the supply, the parties agree that the law requires one to take into account the perspective of the recipient of the supply.[36] This principle was specifically acknowledged by the Federal Court of Appeal in *Canadian Imperial Bank of Commerce v Canada*.[37]

[41] The relevant question is: What did CIBC receive under the key agreements? I observe that this clarification was made by the Federal Court of Appeal after the Tax Court rendered the 2009 Decision. In re-reading the latter decision, it appears to me that the Court focused a great deal on why LCL entered into the key agreements. The case law subsequent to the 2009 Decision establishes that the determination of the predominant elements of the supply must be made while taking into account CIBC's perspective of the matter.[38]

[42] Counsel for the Appellant argues that the supply provided by PC Bank was broader than so-called rental arrangements.[39] In making this argument, I believe that counsel is mischaracterizing and/or ignoring the Respondent's position. The Respondent's position is that the predominant elements of the supply are captured by Exclusionary Paragraph (r.5) and that the secondary element of the supply constitutes services that are excluded under (r.4).[40] Services by definition require activity. The Respondent's position is more nuanced than that described by the Appellant.

[43] I will now proceed to examine the evidentiary record relevant to the determination of the predominant elements of the single compound supply at issue in the present case.

D. Determination of the Elements of the Supply

[44] The parties agree, in large part, on how one goes about determining the predominant elements of a single compound supply.

---

[36] Written Submissions of the Appellant at para 12; Written Submissions of the Respondent at para 64.
[37] *Canadian Imperial Bank of Commerce v Canada*, 2021 FCA 96 [*CIBC (Aeroplan)*] at para 30.
[38] See for example: *CIBC (Aeroplan), supra* note 37 at paras 22-24; *Great-West, supra* note 19 at para 47; *Global Cash, supra* note 19 at para 26.
[39] February 11, 2022 Transcript, p 499, line 3 to p 500, line 12.
[40] Ibid, p 517, lines 5 to 24.

[45] Briefly, in *Global Cash Access (Canada) Inc v R*, the Federal Court of Appeal mused as follows on how the definition of a financial service should be applied:

> [26] To determine whether that single supply falls within the statutory definition of "financial service", the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of "financial service"?[41]

[46] In *Great-West Life Assurance Co v R*, the Federal Court of Appeal noted that, following *Global Cash*, the first question is "simply to determine what services [are] provided for the consideration received."[42] This first step identifies services that are also not the predominant elements, while the second step of the analysis requires:

> [48] ... a determination as to whether the supply is included in the definition of "financial service." As part of this exercise, it is necessary to determine the predominant elements of the supply if it is a single compound supply. It is only the predominant elements that are taken into account in applying the inclusions and exclusions in the "financial service" definition.
>
> [Emphasis added.]

[47] Therefore, what is clear from the case law is that the identification of the predominant elements of a single compound supply is based on a two-step test. First, I am required to identify all of the components of the supplies that were received by CIBC for the consideration that it paid. At the second stage, I must then determine the predominant elements of the PC Bank Supply because it is a single compound supply.[43]

[48] For the purposes of the "financial service" definition in subsection 123(1), the agreements between the parties play a dominant role in determining what was supplied for the consideration paid. In *CIBC (Aeroplan)*, the Federal Court of Appeal stated that:

> [57] To suggest that the agreement between the parties under which the consideration for the supply is payable should not play a domina[nt] role in the

---

[41] *Global Cash*, *supra* note 19 at para 41.
[42] *Great-West*, *supra* note 19 at para 47.
[43] *Global Cash*, *supra* note 19 at para 26; *Great-West, supra* note 19 at paras 46-47.

> determination of the tax implications arising under the Act is not consistent with the Act. As noted, tax is imposed on a recipient of a taxable supply (section 165 of the Act) and the recipient is the person who is liable to pay the consideration for that supply under the applicable agreement (definition of "recipient" in section 123 of the Act). Therefore, it is logical that the agreement under which such consideration is payable will play a dominant role in determining the tax implications arising under the Act.
>
> [58] In particular, in determining what was supplied in *Global Cash*, the agreement under which the consideration was paid played a domina[nt] role. In *Global Cash*, the first question that was addressed was "[b]ased on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global?" Just as in *Global Cash*, the agreement under which the consideration for the supply was paid by CIBC should play a dominant role in determining what was acquired for the amounts that were paid.

E. *Viva Voce* Evidence

[49] The case law reveals that the interpretation of the contracts is key to establishing the predominant elements of a single compound supply. That said, I prefer to begin my analysis by examining the *viva voce* evidence of the Appellant's two witnesses, Mr. Ward and Mr. Lengyell.

Testimony of Mr. Ward

[50] The Appellant's first witness was Mr. Ward. He was employed by CIBC through the relevant period and participated in, among other things, the Steering Committee composed of both PC Bank and CIBC personnel.[44] Mr. Ward's salary was paid by CIBC as was the salary paid to employees assigned to work on this project by CIBC.[45] Similarly, PC Bank bore the costs of the four employees assigned to work on this activity.[46]

[51] Mr. Ward's testimony came off as being rehearsed. I do not fault him for this. I attribute this to his enthusiasm for the venture that he was involved with for many years. He was a key witness in the 2009 Decision. His testimony reveals that he was very informed of what would be helpful for CIBC's case. Undoubtedly he read the 2009 Decision and was familiar with the parts of his testimony that were

---

[44] January 25, 2022 Transcript, p 127, line 28 to p 130, line 21; p 142, lines 2-8.
[45] January 25, 2022 Transcript, p 156, lines 20-23.
[46] Ibid, p 143, lines 4-14.

relied upon by the Court in the earlier matter. Mr. Ward's testimony was peppered with the terms that described how closely PC Bank and CIBC worked together, and he frequently referred to "the team that brings you President's Choice Financial." For example, during examination-in-chief, counsel for the Appellant referred to section 2(d)(i) of the FSA, which essentially states that CIBC will, in its sole discretion, determine all attributes of PCF Products provided that CIBC first consults with Loblaw.[47] Counsel for the Appellant then asked Mr. Ward why, given what section 2(d)(i) states, the Steering Committee—and not CIBC on its own—had decided to get rid of the anniversary bonus that was paid to PC Bank customers who had held money in their savings accounts for at least a year.[48] Mr. Ward replied as follows:

> Because we were a partner with the same objectives. The, the — you're correct, the anniversary grid change — or removal, that's a pricing change. But that's not how we operated here. It was, it was the team, it was the team that brought you President's Choice Financial. We all had the same objective. And I can't think of a single incident where this ever would have been applied.[49]

[52] Mr. Ward testified on a number of important points that indicate what CIBC obtained as a supply under the key agreements.

[53] Mr. Ward testified that around the time PCF was established, the major Canadian banks were taking a "defensive stance" with respect to new players entering the Canadian banking market that were offering internet-based banking services.[50] These enterprises could afford to earn lower margins on their financial products because they operated without physical branches and other retail outlets. Everything would be done online.[51] In this context, the Canadian banks anticipated that pure electronic banking could erode their traditional higher-margin retail banking businesses.[52]

[54] Mr. Ward acknowledged that the Canadian banks employed the tools of electronic banking to supplement their traditional retail banking operations.[53] For example, ATMs were deployed to reduce real estate and personnel costs. In short,

---

[47] January 25, 2022 Transcript, p 177, lines 5-11.
[48] Ibid, p 174, lines 1-14; p 177, lines 12-13.
[49] Ibid, p 177, lines 14-21.
[50] Ibid, p 131, line 15 to p 132, line 3.
[51] Ibid, p 134, lines 12-18.
[52] Ibid.
[53] Ibid, p 131, line 23 to p 133, line 8.

Canadian banks use electronic platforms to facilitate banking, to make it more convenient, and to reduce the costs of their physical footprint.[54]

[55] With the above context in mind, CIBC was interested in launching a new electronic banking service that would be competitive with the nimble electronic banking institutions that were entering the Canadian market. CIBC was cognizant of the fact that fintech could be extremely disruptive to its traditional retail banking operations.[55]

[56] CIBC embarked on the venture with Loblaw (and later PC Bank), according to Mr. Ward, for both offensive and defensive purposes.[56] CIBC was interested in attracting the retail clients of its competitors that were using traditional higher-margin retail banking services. At the same time, CIBC took steps to avoid cannibalizing its own higher-margin retail banking operations. To protect its traditional operation, CIBC decided that the new operations must be presented as independent from CIBC. A different corporate name would be used eventually and the products would be marketed under trademarks not identified with CIBC. In short, steps were taken to distance the identification of this new business as an activity undertaken by CIBC.[57]

[57] According to Mr. Ward, because margins are much lower for pure electronic banking, new entrants in this market must quickly achieve economies of scale to become profitable. Acquiring new clients organically from scratch is an expensive way to grow such a business.[58]

[58] The evidence shows that CIBC's main motivation in entering into the PCF Agreements was to gain access to the LCL Group's large customer base in order to quickly ramp up its transaction volume.[59]

[59] LCL had other things that CIBC valued. The evidence shows that LCL and other entities in the corporate group owned various trademarks that enjoyed significant brand value and recognition. The evidence also shows that the LCL Group had spent a good deal of time and money building up these trademarks. If the new banking services were launched using a "PC" trademark, CIBC felt this

---

[54] Ibid, p 168, line 11 to p 169, line 2.
[55] Ibid, p 131, line 23 to p 133, line 8.
[56] Ibid, p 131, lines 23-28; p 133, lines 4-8.
[57] Ibid, p 245, lines 2-18.
[58] Ibid, p 138, line 22 to p 139, line 11.
[59] Ibid, p 132, lines 4-10; p 138, line 22 to p. 139, line 11.

would help recruit customers to its new banking operations.[60] In addition, the benefit of using the "PC" trademark was that it was distinct from that of the CIBC. A different trademark would mitigate the risk of CIBC clients switching to a lower-margin banking service.[61]

[60] Mr. Ward explained that CIBC deployed a hybrid fintech strategy. The agreements allowed CIBC personnel to quickly recruit Loblaw clients in store while attempting to attract clients through the internet and other electronic media. Needless to say, this was attractive as the expense of retail store space was borne by the LCL Group's retail grocery operations. Mr. Ward explained that the physical aspect of the hybrid model proved to be the most successful for customer recruitment for CIBC.[62] These customers, for the most part, were enrolled by CIBC personnel or CIBC third-party service providers using kiosks that were branded PC Financial and that were located in grocery stores or supermarkets owned or controlled directly or indirectly by the LCL Group.

[61] The evidence shows that the other arrangement of interest to CIBC was the Loyalty Program that was set up pursuant to the terms of the LSA. CIBC negotiated the right to issue points to the LCL Group's customers when they acquired PCF Products. These points could be redeemed for products sold by LCL in its stores. It is common knowledge that banks and other large retailers often use loyalty rewards to attract customers.

[62] In my opinion, Mr. Ward's evidence confirms that the predominant element of the single compound supply received by CIBC from PC Bank was the Bundle of Rights that enabled CIBC to sell financial products and services to the LCL Group's customers. As noted later, my interpretation of the key agreements bolsters this conclusion.

Testimony of Mr. Lengyell

[63] Mr. Lengyell was called to testify by the Appellant. He had also testified in the hearing of the 2009 Decision.[63] He was assigned by PC Bank to work on the arrangements with CIBC and played an active role in PC Financial. Mr. Lengyell joined LCL in 1996 as Vice President, Internal Audits. From 1999 to 2006,

---

[60]Ibid, p 138, line 22 to p 139, line 11.
[61] Ibid, p 134, lines 23-27.
[62] Ibid, p 269, line 19 to p 272, line 17.
[63] January 26, 2022 Transcript, p 307, lines 12-15.

Mr. Lengyell was Chief Financial Officer of what would become PC Bank in November 2000. Afterwards, Mr. Lengyell was in charge of PCF Product Management and later he was Senior Vice President, Banking and Insurance at PC Bank. In 2008, Mr. Lengyell became Senior Vice President, Securitization and Treasury at PC Bank. He left PC Bank in the summer of 2009.[64] He is an alumnus of LCL and PC Bank.

[64] Mr. Lengyell's testimony appeared to be less rehearsed than that of Mr. Ward.

[65] He acknowledged that the LCL Group was at all material times the premier grocery retailer in Canada.[65] The evidence shows that the LCL Group is and was at all material times the largest commercial retailer in Canada; 10 to 13 million customers per week shop at Loblaw stores. Grocery retailing is a competitive low-margin business. The LCL Group has a large, loyal base of customers who shop regularly in its stores.[66] Mr. Lengyell testified that LCL and CIBC decided to use the PCF brand because it had strong and favourable brand recognition.[67] They believed that the PCF trademark would help entice the LCL Group's existing and future customers to buy PCF Products from CIBC.[68]

[66] LCL was also interested in launching a loyalty program, which, by granting rewards, would entice customers to shop in its stores.[69] The creation of a loyalty program also was of interest to CIBC because points could be used to reward clients when they opened accounts or purchased other PCF Products from CIBC.[70]

[67] Mr. Lengyell testified that 10 to 15 PC Bank employees were dedicated to PC Financial and that together, they earned approximately $1.5 million per year.[71] I have no doubt that these were competent and hard-working employees, but I believe that the salaries that they earned (approximately $100,000 each) are representative of the value that they brought to the operation. The amount that these employees were paid pales in comparison to the over $300 million in total

---

[64] Ibid, p 303, line 13 to p 306, line 10.
[65] Ibid, p 398, line 27 to p 399, line 4.
[66] Ibid, p 398, line 27 to p 399, line 14.
[67] Ibid, p 398, line 27 to p 401, line 16.
[68] Ibid, p 400, line 16 to p 401, line 16.
[69] Ibid, p 382, line 22 to p 383, line 23.
[70] Ibid, p 315, lines 2-14.
[71] Ibid, p 306, lines 11-15; p 307, lines 1-8.

revenue that PC Bank earned during the relevant periods.[72] Therefore, in contrast to Mr. Ward's testimony, which I discussed earlier, I have a great deal of difficulty accepting that the daily activities of the "team that brought you PC Financial" constituted the predominant elements of the PC Bank Supply.

F. Analysis of the Key Agreements

Review of the FSA

Preamble/Recitals of the FSA

[68] On November 1, 1997, CIBC and LCL entered into the FSA. In my opinion, the recitals in the preamble of the FSA summarize the key elements of that agreement as follows:

- Loblaw "owns and operates or franchises to independent third parties a retail grocery and supermarket business through a network of retail locations in Canada".

- Loblaws Inc., "a subsidiary of Loblaw, is the sole owner of the trademark 'President's Choice™', 'PC™' and other related trademarks for specified wares and distributes and promotes a range of food and general merchandise products under such trademarks".

- Loblaw has "requested that CIBC provide or arrange to provide certain financial services under the name "President's Choice Financial™" and CIBC has agreed to do so in accordance with [the FSA]".

- Loblaw will "offer a loyalty program to President's Choice Financial customers who may be Loblaw Customers whereby such customers may earn Loyalty Points, under specified circumstances".

- CIBC "is the administrator of the Loyalty Program pursuant to the terms and conditions of the Loyalty Services Agreement".[73]

---

[72] Exhibit R8 (PASF), *supra* note 5 at para 43. I calculated the total revenue by adding up the figures in the "Revenue Share" column for the periods at issue.

[73] Exhibit A1: Financial Services Agreement (dated November 1, 1997), JBOD vol 1, Tab 3 at pp 44-45.

[69] In summary, the preamble to the FSA itemized what LCL and then PC Bank, by virtue of the assignment, was offering to CIBC:

i. Access to a large network of retail stores where customers could be recruited in store by CIBC;

ii. Use of a highly regarded brand to entice Loblaw's customers to acquire financial services and products from CIBC;

iii. Access to a loyalty program where points could be issued by CIBC to customers who acquire PCF Products; and

iv. Acknowledgement that CIBC would be the party that sold PCF Products.

[70] The Bundle of Rights allowed CIBC to tap into LCL's loyal and extensive customer base.

[71] This is what CIBC had to say about the commercial efficacy of the PC Bank Supply in its annual report for 2001:

> Within Canada, our model of establishing pavilions within the best retail grocery stores in the country is proving successful. Under our strategic alliance with Loblaw Companies Limited, we now have more than 200 pavilions operating under the President's Choice Financial brand across Canada. Our customer base grew 76% during the year and funds under management increased by 115%. A much higher than expected number of Loblaw customers have become President's Choice Financial customers. And, customer satisfaction ratings continue to be far above industry benchmarks, in excess of 75%.[74]

PCF Offer

[72] Article 2 of the FSA sets out the terms and conditions of the PCF Products and how they will be sold by CIBC.[75] I have summarized the relevant parts of article 2 as follows:

- Article 2(a) sets out the establishment of the Steering Committee by the parties and its general purposes. An equal number of senior

[74] Respondent's Book of Documents (Cross-examination of Rob Ward), Tab 4 at p 27.
[75] Exhibit A1: Financial Services Agreement (dated November 1, 1997), JBOD, vol 1, Tab 3 at pp. 49-60.

representatives from CIBC and Loblaw make up that committee. The Steering Committee's purpose is "determining launch times and geographic scope, marketing strategies and overall strategic direction of the PCF Offer." The Steering Committee's guiding principle is to "provide direct to the public through electronic means a full range of financial products and services under the President's Choice Financial trademark, with discount pricing but quality consistent with non-discounted financial products and services offered by CIBC."

- Article 2(b) sets out CIBC's right to offer any PCF Product. If CIBC no longer wishes to provide a PCF Product, the Steering Committee will seek to arrange for the provision of the PCF Product through a third-party supplier for delivery through the PCF delivery channels. If the parties do not agree on a third-party supplier, Loblaw may offer the product or service directly or through a third party. However, Loblaw cannot use the PCF trademark in relation to such a product, but it may use other trademarks such as the President's Choice trademark.

- Article 2(d) sets out information related to the PCF Products, including prices and rates.

- Subparagraph 2(d)(i) states that CIBC has sole discretion, after consulting with Loblaw, to determine all attributes of PCF Products that are provided by any member of the CIBC Group, including contractual terms, fees, services charges, prices and interest rates. Each PCF Product will be priced at the most beneficial (to customer).

- Subparagraph 2(d)(i)(a) specifies that the price must be equal to or better than the best retail price posted by a member of the CIBC Group for the same or substantially similar product or services offered on an average product portfolio basis.

- Subparagraph 2(d)(i)(b) sets out specific pricing for PCF Products constituting a deposit or credit products and mortgages on an average portfolio basis. These products must be at a minimum 45 basis points better than traditional national ... CIBC branch posted rates. CIBC may, in its discretion, attribute the 45 basis points to the product or service by reducing fees, changing interest rates or awarding Loyalty

Points, or any combination thereof. The 45 basis points do not include marketing funds CIBC may allocate to purchase Loyalty Points to award to PCF Customers upon purchase or use of PCF Products. If it would be reasonable for CIBC to consider, ceasing to offer a PCF Product based on a narrowing of interest rate spreads/decline in profitability, the Steering Committee must meet to consider a reduction in the 45 basis points.

- Subparagraphs 2(e)(i) to (ii) set out the requirements for the disclosure of the PCF Product supplier per the standards required by law.

    - CIBC's rights are not limited and it may produce, offer, deliver, promote or advertise any product or services it is entitled to under its own trademarks and delivery channels. CIBC agreed to pursue the launch of the PCF Visa card expeditiously.

- Subparagraph (2)(f)(i) sets out the PCF delivery channels, including:

    - PCF telephone banking, PCF- and CIBC-branded automated banking machines ("**ABMs**"), PCF internet site, PCF kiosk, and other channels as approved by the Steering Committee.

- Subparagraph 2(f)(ii) provides that CIBC must operate a PCF telephone banking facility seven days a week.

- Subparagraph 2(f)(iii) sets out CIBC's obligations in respect of the ABMs. Subject to the terms and conditions of the ABM Agreement, CIBC agrees to supply and install at least one full-function ABM in each corporate store participating in the pilot.

- Subparagraph 2(f)(iv) sets out CIBC's obligations in respect of PCF customers' Interac access. CIBC will not charge fees to PCF customers for transactions through CIBC- or PCF-branded ABMs or point-of-sale debit terminals. However, CIBC may charge its customary fees on transactions that are non-CIBC and non-PCF branded ABM or debit transactions.

- Subparagraph 2(f)(v) sets out CIBC's obligations to supply and maintain the PCF internet site. Loblaw must supply the domain name and permit CIBC to use it under licence.

- Subparagraph 2(f)(vi) sets out Loblaw's obligations in respect of the PCF kiosks including the design, installation and maintenance thereof. CIBC in turn provides at its own expenses the necessary hardware, software and communication links to allow the transactional capability for PCF customers.

- Subparagraph 2(f)(vii) sets out CIBC's in-store presence. Specifically, from time to time CIBC will place CIBC personnel on site in participating locations as determined by the Steering Committee. Loblaw staff may provide certain services at various locations including signature verification and emergency cash advances. Staff at participating locations will be instructed and trained by CIBC.

- Subparagraph 2(f)(viii) provides that CIBC waives its exclusivity rights to the extent required to allow the installation and operation of a PCF kiosk in a location where CIBC's rights of exclusivity with third parties would otherwise prevent this.

- Subparagraph 2(f)(x) states that each PCF customer is automatically eligible to be a member of the Loyalty Program.

- Subparagraph 2(f)(xi) states that CIBC may designate a subsidiary to handle PCF customer relations, including the collection, use and retention of information from PCF customers.

[73] LCL and PC Bank were granted a role in the design, marketing and promotion of PCF products, *inter alia*, in order to protect the value of its "PC" trademark and the goodwill of LCL Group's large customer base. In this regard, the Respondent points out that the FSA speaks to the following:[76]

> (d) design by Loblaw of the PCF kiosks, in consultation with CIBC, and at its own expense, install and maintain the physical structure of the PCF kiosks;[77]

---

[76] Written Submissions of the Respondent at para 76.
[77] Exhibit A1: Financial Services Agreement (dated November 1, 1997), JBOD vol 1, Tab 3 at p 59.

> (e) test the viability of the PCF Offer by launching a pilot program.[78] Its obligations under that pilot [are] to designate 9 corporate stores for the pilot and to have manufactured and installed one PCF kiosk in each of the 9 stores;[79]
>
> (f) pay the expenses of promoting the PCF Offer through its in-store signage, Loblaw flyers, Insider's Report and similar means;[80]
>
> (g) participate in a Joint Marketing Committee;[81]
>
> (h) provide marketing services;[82]
>
> (i) submit to CIBC all promotion and advertising material for the PCF Offer for prior review and approval in order to maintain the quality and integrity of the PCF Offer and indicate its approval or rejection of the other party's materials;[83] and
>
> (j) provide CIBC exclusivity for the placement of ABMs in corporate or franchised stores except to allow for the expiry of existing agreements and CIBC's right of first refusal.[84]

[74] In contrast with the Respondent's careful point-by-point analysis of the FSA, I note that the Appellant's counsel spent little time in his written and oral submissions identifying the elements of the supply made by PC Bank under the FSA. I believe that counsel side-stepped this key analysis because the key agreements are not at all helpful to his client's case. I surmise that this is why counsel focused most of his efforts on trying to persuade me that I should adopt the factual findings made by Lamarre J. in the 2009 Decision.

[75] As noted earlier, the Appellant's counsel spent most of his time arguing that the supply made by PC Bank to CIBC was much broader than the passive provision of the Bundle of Rights under the key agreements. The Respondent does not dispute this. In fact, the Respondent accepts that marketing and product design services were provided by PC Bank as a secondary supply to the predominant element of the supply which was the exercise of the Bundle of Rights that allowed CIBC to gain access to LCL's large customer base.[85] At this juncture, I observe that if I am wrong and the promotional and marketing services represent the predominant

---

[78] Ibid, pp 60-61.
[79] Ibid, p 61.
[80] Ibid, p 65.
[81] Ibid, pp 65-66.
[82] Ibid, p 66.
[83] Ibid.
[84] Ibid, pp 79-80.
[85] Written Submissions of the Respondent paras 6, 166-172.

elements of the PC Bank Supply, this supply would be a taxable supply by virtue of Exclusionary Paragraph (r.4).

Review of the LSA

[76] The LSA sets out rights and obligations that have become somewhat standard when third parties are granted the right to issue and pay for the redemption of points that are used by members to acquire rewards. This agreement appeared to be a win-win for both parties. In general, CIBC was given the right to issue points to entice customers to acquire PCF Products from it. Loblaw would benefit from greater customer loyalty from clients who would redeem the points for rewards in its stores.

Amending Agreements

[77] The parties entered into a series of amending agreements.

[78] The Letter Agreement, dated January 17, 2001 allowed Loblaw and PC Bank to expand the type of financial products and services that it could offer to its clients without the participation of CIBC.[86]

[79] The Amending Agreement, dated April 1, 2005, altered the fee structure. Both of the Appellant's witnesses provided insight as to why PC Bank and CIBC agreed in that agreement to alter the fee structure under the FSA.[87] Under the original FSA, LCL and PC Bank, following the assignment of the agreements were entitled to receive revenue that did not take into account CIBC's costs in generating the revenue. For example, under the original terms of the FSA, LCL, and then PC Bank, was entitled to receive a fixed amount for each account opened by a customer. Often these accounts could be inactive or generate little revenue, the same was true for other banking products. Because of this, CIBC was not properly incentivized to grow the business. To provide for better alignment of the parties' financial interests, the fee payable to PC Bank was modified. Under the new compensation arrangement 10.85% of net income would be paid, which would include all expenses normally attributable to that source.[88]

---

[86] Exhibit A1: Letter Agreement (dated January 17, 2011), JBOD, vol 1, Tab 8 at p 164-185.
[87] January 25, 2022 Transcript, p 194, line 14 to p 195, line 9; January 26, 2022 Transcript, p 342, line 25 to p 344, line 6.
[88] Exhibit A1: 2005 Amending Agreement , JBOD, vol 1, Tab 13 at p 202; January 26, 2022 Transcript, p 342, line 25 to p 344, line 1.

[80] Considering the oral evidence as a whole, I believe that this change was brought about because CIBC failed to properly estimate the value of the Bundle of Rights that allowed it to tap into the LCL Group's customer base. The value of intangible assets is often difficult to ascertain. That is why, when intangible assets are transferred or licensed, various compensation formulas are used to tie payments (i.e. purchase price of goodwill, royalty earned with respect to the granting of rights) to a percentage of future income generated from such assets. It appears that the new fee arrangement was implemented to address the shortcoming of the initial compensation method which, over time, had proven to over value the Bundle of Rights enjoyed by CIBC.

[81] The 2005 Amending Agreement created a better alignment with the true value of the Bundle of Rights that CIBC received.

[82] The Amending Agreement dated March 2, 2010 allowed PC Bank to issue guaranteed investment certificates ("**Broker GICs**") through a broker market.[89] I understand that PC Bank needed to find other channels to finance its expanding credit card financing business other than by securitizing credit card receivables.

[83] The other amending agreements are of far lesser importance and are of little relevance in determining the predominant elements of the supply. I summarize them briefly below:

a) **The Amending Agreement dated January 7, 2013**: Agreement between PC Bank and CIBC, pursuant to which, *inter alia*, CIBC agreed to promote and solicit certain PC Bank products to prospective clients at branded PC Bank kiosks and to provide other related support services; PC Bank agreed to pay CIBC tiered fees based on the number of completed credit card applications.[90]

b) **The Amending Agreement dated August 30, 2013**: Agreement between PC Bank and CIBC, which superseded the January 7, 2013 agreement and amends the FSA with respect to, *inter alia*, CIBC promoting and soliciting certain PCF Products and providing related support services; as well as PC Bank promoting and soliciting certain products at agreed-upon locations and providing related support services. It also sets out various fees payable by CIBC to PC Bank and

[89] Exhibit A1: 2010 Amending Agreement, JBOD, vol 1, Tab 16 at pp 246-253.
[90] Exhibit A1: Amending Agreement, JBOD, vol 1, Tab 19 at pp. 267-290.

vice versa, including revisions to the tiered fee structure based on completed credit card applications.[91]

c) **The Amending Agreement dated October 8, 2014**: Agreement between PC Bank and CIBC, which superseded the amendments made in 2013 (see exhibits J and K) and amends the FSA with respect to, *inter alia*, CIBC promoting and soliciting certain PCF Products at kiosks and via the call centre operated by CIBC, and CIBC providing related support services; as well as PC Bank promoting and soliciting certain PCF Products at agreed-upon locations and via a call centre operated by PC Bank, and PC Bank providing related support services. It also sets out various fees payable by CIBC to PC Bank and vice versa, including further revisions to the tiered fee structure based on completed credit card applications.[92]

The Determination of the Predominant Elements of the Supply

[84] As noted earlier, the case law instructs that I must determine the predominant elements of the supply if it is a single compound supply.

[85] In determining the predominant elements of a supply, the terms of an agreement may be examined by taking into account the relevant factual matrix and the commercial efficacy of the arrangements under which the supply is made.

[86] I now return full circle to the parts of Mr. Ward's testimony that the Appellant suggests or more often suppressed that the predominant element of the supply was the services of a team composed of CIBC and PC Bank personnel who worked together day to day to ensure that the arrangement was profitable for both parties.

[87] As noted earlier, the Respondent was quite successful in peeling away at Mr. Ward's, testimony which was embellished by repeated references to the close collaboration of "the team that brought you President's Choice Financial". As noted earlier, the team consisted of 10 to 15 employees of PC Bank assigned to give effect to the rights and obligations of the parties under the key agreements.[93]

---

[91] Exhibit A1: Amending Agreement, JBOD, vol 1, Tab 20 at pp 291-365.
[92] Exhibit A1: Amending Agreement, JBOD, vol 1, Tab 21 at pp 366-441.
[93] January 26, 2022 Transcript, p 358, line 24 to p 359, line 3.

[88] Mr. Ward emphasized that the "team" worked on a multitude of mundane tasks, such as dealing with the complaints of frustrated customers whose debit cards did not work properly.[94] On cross-examination, he admitted that the principal function of PC Bank was to assist with marketing initiatives to entice LCL's customers to purchase PCF Products from CIBC.[95] The team would identify, for example, in which stores new kiosks should be placed. They would prepare budgets and statements showing quarterly performance versus budget. It is no surprise that the PC Bank personnel were involved in market research, product design and marketing; the LCL Group valued its large customer base. Its "PC" trademarks had strong brand value. The LCL Group wanted to protect the value of both assets while allowing CIBC to benefit from the Bundle of Rights to sell PCF Products.

[89] The Appellant would have me believe that CIBC was paying for the services of the "team" made up of a small number of PC Bank employees who were assigned to work on the successful implementation of the FSA and the LSA and subsequent amending agreements. I have extreme difficulty believing this to be the case. I surmise that this small team of individuals would have been paid well in excess of approximately $1.5 million per year in total, if they were responsible for creating the value that counsel for the Appellant would like me to believe that they created. The services of the PC Bank employees would have been of no importance to CIBC if it were not for the Bundle of Rights described above.

[90] I agree with the Respondent that the participation of each of the parties' personnel on the Steering Committee and other committees established under the auspices of the key agreements was both an obligation and a right of PC Bank and CIBC. Both parties benefited from being members of these committees. The creation of the committees and the participation of a very limited number of PC Bank employees on the committees fall well short of being the predominant element of the PC Bank Supply. CIBC was not paying the consideration to PC Bank for the services of these individuals. Without the Bundle of Rights, these services would have been worthless to CIBC.

[91] I believe that the main contribution of the PC Bank employees was assisting in marketing research, promotional activities and, to a limited extent, product design, for the most part to ensure that LCL's goodwill was not negatively affected because of this initiative and overall to ensure that the arrangement was profitable

---

[94] January 25, 2022 Transcript, p 179, line 20 to p 180, line 13.
[95] Ibid, p 218, line 23 to p 231, line 7.

for both parties. This constitutes, at best, a secondary element of the PC Bank Supply.

[92] As noted by the Respondent, the above services are also excluded under the definition of "financial services" by reason of the application of Exclusionary Paragraph (r.4).

[93] Considering all of the above, I agree with the Respondent that CIBC was granted a Bundle of Rights that allowed it to solicit the LCL Group's existing and future clients for the purchase of PCF Products. The evidence shows that most of the PCF Products were purchased in Loblaw stores. These rights were extremely valuable to CIBC and allowed it to rapidly increase the volumes of sales of PCF Products. I agree with the Respondent that without these rights, CIBC would have no reason to enter into the FSA, the LSA and subsequent amending agreements and pay PC Bank the fees thereunder.

[94] For all of these reasons, I conclude that the predominant element of the PC Bank Supply was, at all material times, a taxable supply by virtue of the application of Exclusionary Paragraph (r.5). Therefore, both CIBC's appeal and the PC Bank Appeals as they relate to the "PCF Supply Issue" are dismissed.

Signed at Magog, Québec, this 19th day of July 2022.

"Robert J. Hogan"

Hogan J.

Appendix 1

Tax Court of Canada | Cour canadienne de l'impôt

Docket: 2019-3197(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard virtually on January 24, 2022 at Ottawa, Ontario

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Al Meghji Al-Nawaz Nanji Alexander Cobb
Counsel for the Respondent:	Justine Malone Lindsay Tohn

ORDER

The Appellant's motion is dismissed in accordance with the attached Reasons for Order. Costs shall be determined in the cause.

Signed at Ottawa, Canada, this 25th day of January 2022.

"Robert J. Hogan"

Hogan J.

Tax Court of Canada | Cour canadienne de l'impôt

Citation: 2022 TCC 26
Date: 20220125
Docket: 2019-3197(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hogan J.

I. INTRODUCTION

[1] Canadian Imperial Bank of Commerce ("CIBC" or the "Appellant") and Loblaw Companies Limited ("Loblaw") entered into two agreements, the Financial Services Agreement (the "FSA") and the Loyalty Services Agreement (the "LSA"). The FSA and the LSA (collectively, the "PCF Agreement") were assigned by Loblaw to its indirectly wholly-owned subsidiary President's Choice Bank ("PC Bank"). Initially, PC Bank did not charge CIBC GST on the consideration that it received for the supplies it made under the PCF Agreement. PC Bank believed that the supplies were exempt from GST on the basis that they were the supply of financial service under subsection 123(1) of Part IX of the *Excise Tax Act*[1] (the "ETA"). PC Bank was subsequently reassessed GST by the Minister of National Revenue (the "Minister") for failure to collect and remit GST on the basis that the supplies were taxable in nature. While PC Bank appealed the Minister's reassessments to this Court, it began to collect and remit GST on behalf of CIBC. Following PC Bank's success in *President's Choice Bank v The Queen*[2] (the "2009 Decision"), the definition of "financial service" in subsection 123(1) of the ETA was amended to add paragraphs (r.4) and (r.5). These new paragraphs

[1] *Excise Tax Act*, R.S.C. 1985, c E-15.
[2] 2009 TCC 170.

were enacted with retroactive effect to December 17, 1990 and expanded the types of supplies that are excluded from the "financial service" definition.

[2] CIBC applied for a refund of the GST that it paid on the basis that the supplies it received from PC Bank remained supplies of exempt financial services notwithstanding the expansion of the exclusions. CIBC's rebate claims were denied by the Minister. In addition, the Minister assessed PC Bank in respect of certain periods on the basis that PC Bank failed to collect and remit some of the GST on the consideration that it received from CIBC. PC Bank appealed the Minister's reassessments. PC Bank has two separate appeals regarding the Minister's reassessments (the "PC Bank Appeals"). CIBC's Appeal and the PC Bank Appeals will be heard together because the appeals raise a common issue: the characterization of a supply made by PC Bank to CIBC.

[3] CIBC brought this motion at the outset of the hearing asking me to:

a) allow its appeal on the basis that the substance of the supply was already determined in the 2009 Decision; or

b) issue an order precluding the Respondent from introducing evidence inconsistent with the 2009 Decision regarding the substance of the supply; and

c) award CIBC costs on this motion and the appeal.

II. PRELIMINARY MATTER

[4] During a litigation management conference, I agreed with the parties that the Appellant should bring its motion at the outset of this hearing which is scheduled for five days. I did so because if I rule in favour of the Appellant, this would dispense of the need for a hearing of evidence. On the other hand, if I dismiss the motion, the Appellant would know the case that it would have to address within the timeframe scheduled to hear this matter.

[5] Both parties provided me with excellent written submissions prior to the hearing. While I have just released written reasons on why I have decided to dismiss the Appellant's motion, I reserve the right to provide supplemental reasons

either orally or in writing at the same time as or before I issue my final Judgment on the common question. Such additional reasons, if any, shall be considered as forming part of these reasons as if incorporated herein.

III. POSITION OF THE PARTIES

A. Appellant's Position

[6] The Appellant framed the issue to be decided as follows:

> . . . whether the supply to CIBC under the PCF Agreement, which was determined in the 2009 Decision to be an exempt supply of a financial service of arranging for the granting of credit or banking facilities, lost that exempt status, and became a taxable supply, by virtue of paragraph (r.4) or (r.5) of the Financial Service Definition.

[7] The crux of the Appellant's argument is that I must apply the earlier factual findings holus-bolus to determine the outcome of the issue common to both appeals. In this regard, the Appellant argues that the doctrine of res judicata or the doctrine of abuse of process applies to preclude a re-litigation of the nature, essence or substance of the supplies as previously determined by the Court. Specifically, the Appellant argues that it would be abusive to allow the character of the supplies to be determined through a hearing of the appeal that would allow for a new factual matrix to be determined by me after hearing full evidence on the issue. The Appellant alleges that nothing material has changed that affects the nature of the Appellant's dealings with PC Bank. Therefore, the outcome of the appeal should be determined by reference to the factual findings made by this Court in the 2009 Decision. According to the Appellant, if this is done the appeal should be allowed.

B. Respondent's Position

[8] The Respondent views the issue in the appeal more broadly. In short, the Respondent argues that the factual and legal framework of the appeal is different from the factual and legal framework of the 2009 Decision. The Respondent observes that the GST at issue here is in respect of different taxation years. According to the Respondent, in order for this Court to determine whether the Appellant is entitled to claim a rebate of the GST that it has paid, this Court must

examine the PCF Agreement as amended by the parties subsequent to the tax periods addressed in the 2009 Decision (the "PCF Amended Agreement"). In addition, this Court must examine the circumstances surrounding the implementation of the PCF Amended Agreements and the mechanics of the business in the taxation periods at issue here. The motion record shows that PC Bank (and previously Loblaw) and CIBC have entered into six amending agreements subsequent to the taxation years addressed in the 2009 Decision. The Respondent submits that paragraphs (r.4) and (r.5) were added to the definition of "financial service" in subsection 123(1) of the ETA and are applicable for the supplies now under review. These provisions exclude from paragraph (l) of the definition of "financial service" in subsection 123(1) supplies that otherwise may have fallen within the scope of that provision prior to the legislative amendments. That issue was not adjudicated by this Court in the 2009 Decision.

IV. *RES JUDICATA* / ABUSE OF PROCESS

A. The Doctrine of *Res Judicata*

[9] *Res judicata* is a common law doctrine and fundamentally a rule of evidence. Consequently, if the requirements for *res judicata* are satisfied, the parties cannot proffer any evidence with respect to the issues that were decided in an earlier proceeding. In *C.U.P.E., Local 1394 v Extendicare Health Services Inc.*,[3] Justice Doherty of the Ontario Court of Appeal made the following observations about the doctrine of *res judicata*:

> . . . Looked at from the vantage point of the successful litigant in the earlier proceedings, the doctrine operates to admit into evidence at the second proceeding, the judicial determination of the relevant issue at the earlier proceeding. Not only is that earlier determination rendered admissible, it is also declared to be conclusive with respect to that issue. . .[4]

[10] That said, courts have suggested that *res judicata* is more substantial than a formal rule of evidence because it goes directly to the parties' ability to present

---

[3] 1993 CarswellOnt 887 (Ont. C.A.) [*C.U.P.E. Local 1394*].
[4] *Ibid* at para 60.

substantial arguments.[5] Accordingly, the court's application of the doctrine must be guided by the underlying policy principles that *res judicata* is concerned with.

[11] The doctrine of *res judicata* refers to a variety of legal concepts developed entirely by courts that have common principles.[6] In *The Doctrine of Res Judicata,* Bower and Handley define the two policy considerations that support the doctrine of *res judicata* as the following: ". . . the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause."[7]

[12] Although *res judicata* has undergone significant development, the doctrine is primarily concerned with the attempt of courts to achieve finality and predictability in litigation.[8]

[13] In Canada, the doctrine of *res judicata* takes two forms: cause of action estoppel and issue estoppel.[9] I will discuss each form later.

[14] The abuse of process doctrine relates to *res judicata*, in that both doctrines share the same concerns and underlying principles. However, the abuse of process doctrine is more flexible and courts have of a higher degree of discretion when applying it.

Cause of Action Estoppel

[15] Cause of action estoppel bars re-litigation of an action by either party against the other on grounds that were not raised when the matter was decided in an earlier proceeding.[10] This principle is well developed in common law.

---

[5] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Markham: LexisNexis Canada Inc., 2021), ch 1 at §4 (Lexis e-book) [Lange].
[6] *Emms v Canada (Deputy Minister of Indian Affairs and Northern Development)*, [1979] 2 SCR 1148 at p. 1160.
[7] Spender Bower & K. R. Handley, *Spencer Bower and Handley: Res Judicata*, 5th ed (London: LexisNexis, 2019) at para 1.10 [Handley].
[8] *Ibid* at para 1.11.
[9] Lange, *supra* note 5, ch 1 at §1.
[10] Handley, *supra* note 7 at para 7.03.

[16] Vice-Chancellor Wigram's statement in *Henderson v Henderson*[11] is generally cited as a foundational authority on cause of action estoppel:

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[12]
>
> [Emphasis added.]

[17] The Supreme Court of Canada's decision in *Doering v Grandview (Town)*[13] is the leading case on cause of action estoppel. In *Bjarnarson v Manitoba*,[14] the Manitoba Court of Queen's Bench summarized the criteria identified in *Doering* as follows:

> 1. There must be a final decision of a court of competent jurisdiction in the prior action;
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action *(mutuality)*;
>
> 3. The cause of action in the prior action must not be separate and distinct, and

---

[11] (1843) 3 Hare 100 at 319, 67 ER 313 [*Henderson*].
[12] *Ibid.*
[13] [1976] 2 SCR 621 [*Doering*].
[14] 38 DLR (4th) 32 (affirmed by the Manitoba Court of Appeal in *Bjarnarson v Manitoba*, 45 DLR (4th) 766) [*Bjarnarson*].

> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[15]

[18] In *McFadyen v The Queen*,[16] Chief Justice Rip (as he then was) made the following observations in regard to the application of the doctrine of cause of action estoppel in the context of tax litigation: "the appeal of the same assessment of tax liability for the same taxation years constitutes the same cause of action".[17]

[19] Accordingly, cause of action estoppel does not apply to an appeal of a tax assessment arising from two different taxation years even if the facts, parties and issues are substantially the same. For this reason, cause of action estoppel does not apply in the present case.

Issue Estoppel

[20] Issue estoppel bars re-litigation of an issue that was decided in a previous proceeding between the same parties ". . . notwithstanding that the cause of action is different".[18] The Supreme Court of Canada's decision *Danyluk v Ainsworth Technologies Inc.*[19] is the leading case on issue estoppel.

[21] In *Angle v Minister of National Revenue*,[20] the Supreme Court of Canada, distinguished issue estoppel from cause of action estoppel as follows:

> The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead* [sic] *v. Federal Commissioner of Taxation*, at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or

---

[15] *Ibid* at 3-4.
[16] 2008 TCC 441.
[17] *Ibid* at para 27 (emphasis added).
[18] David Jacyk, "Res Judicata and Issue Estoppel: The Reduction of Recycling and Reusing in Tax Cases" in *Tax Dispute Resolution, Compliance, and Administration Conference Report* (Canadian Tax Foundation, 2012) 3:1 at 3:6.
[19] 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*].
[20] [1975] 2 SCR 248 [*Angle*].

> issue of fact has already been decided (I may call it "issue-estoppel").[21]

[22] To apply issue estoppel, three requirements must be met.[22] The Supreme Court in *Angle* adopted the following three requirements per Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd.*,[23] who "defined the requirements of issue estoppel as":

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. . .[24]

[23] Typically, when a party pleads issue estoppel, the first requirement is the most difficult to satisfy. To satisfy the first requirement, it is not sufficient that the question was incidental in the previous proceeding.[25] As *Angle* instructs us, "[t]he question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at in the earlier proceedings."[26] [Emphasis added.]

[24] The second requirement, the finality of the decision, is usually satisfied when all reviews or appeals pertaining to a decision have been exhausted. In *Régie des rentes du Québec v Canada Bread Company Ltd.*,[27] the Supreme Court of Canada supported this definition of the finality of a decision, explaining that "only cases in which judgments have definitively determined the parties' rights and obligations are no longer pending [and are final]."[28] Therefore, in tax matters, a decision from the Tax Court is final at the expiration of the deadline to file an appeal to the Federal Court of Appeal and, if applicable, at the expiration of the deadline to file an appeal to the Supreme Court of Canada. A refusal from the Supreme Court to grant leave to appeal would characterize the Federal Court of Appeal's judgment as final.

---

[21] *Ibid* at 254.
[22] *Ibid.*
[23] *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No.2)*, [1967] 1 AC 853 at 935 [*Carl Zeiss*].
[24] *Angle*, *supra* note 20 at 254. See also: *Carl Zeiss*, *ibid* at 935.
[25] *Angle*, *supra* note 20 at 255.
[26] *Ibid* at 254 (per Lord Shaw in *Hoysted v Commissioner of Taxation*).
[27] 2013 SCC 46 [*Régie des rentes*].
[28] *Ibid* at para 32.

[25] The third requirement, mutuality of the parties, was confirmed as an essential part of the test in determining whether issue estoppel applies. In *Toronto (City) v Canadian Union of Public Employees, Local 79*,[29] the Supreme Court of Canada stated:

> [25] . . . In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.
>
> . . .
>
> [29] It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. . .[30]
>
> [Emphasis added.]

[26] The Supreme Court of Canada rejected counsel's plea to abolish the mutuality requirement.

[27] Following *Toronto (City)*, it is clear that failing to meet the mutuality requirement precludes the application of issue estoppel.

[28] Once the three requirements are satisfied, the court must ask whether issue estoppel ought to be applied.[31] The Supreme Court of Canada has ruled that courts possess a degree of discretion in applying issue estoppel, whereby they must "balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."[32] Although the court's discretion is limited in the context of a court proceeding, as an equitable doctrine, "exercise of a judicial discretion [is inevitable] to achieve fairness."[33]

---

[29] 2003 SCC 63 [*Toronto (City)*].
[30] *Ibid* at paras 25, 29, 32.
[31] *Danyluk, supra* note 19 at para 33.
[32] *Ibid.*
[33] *Ibid* at paras 62–63.

Essentially, the court's exercise of discretion either to apply or not to apply issue estoppel with respect to a given case, once all three formal requirements are satisfied, must be guided by the underlying policy concerns of *res judicata* and good sense.

Abuse of Process

[29] The leading case for the application of the abuse of process doctrine is *Toronto (City)*. The abuse of process doctrine is related to both cause of action estoppel and issue estoppel in that all three doctrines are concerned with similar policy principles. However, abuse of process is characterized by its flexibility in comparison to cause of action estoppel and issue estoppel, as it is unencumbered by specific requirements.[34] In this light, it has been observed that abuse of process is "meant to do justice and not be an instrument for injustice".[35]

[30] Lange summarizes the Supreme Court of Canada's analysis in *Toronto (City)* regarding the abuse of process doctrine as follows:

1. The doctrine is not encumbered by the specific requirements of *res judicata*.

2. The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.

3. Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.

4. The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.

5. The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.

---

[34] *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 40 [*Behn*].
[35] Lange, *supra* note 5, ch 4 at §2 (quoting from *Engels v Merit Insurance Brokers Inc.*, 84 OR (3d) 647, [2007] OJ No 807 (SCJ) at para 38).

6. The status of a party, as a plaintiff of defendant, in the relitigation proceeding is not a relevant factor.

7. The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.[36]

[31] Citing Justice McLachlin (as she then was) in *R v Scott*,[37] the Supreme Court of Canada states in *Toronto (City)* that "abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency."[38]

[32] In *Golden v The Queen*,[39] Justice Boyle distinguished the abuse of process doctrine from issue estoppel as follows:

> [28] The principal difference between issue estoppel and abuse of process to prevent relitigation is with respect to the question of mutuality of parties and privity. Abuse of process does not require that the preconditions of issue estoppel be met. Abuse of process can therefore be applied when the parties are not the same but it would nonetheless be inappropriate to allow litigation on the same question to proceed in order to preserve the courts' integrity.
>
> [29] Abuse of process is also a doctrine that should only be applied in the Court's discretion and requires a judicial balancing with a view to deciding a question of fairness. However, it differs somewhat from a consideration of the possible application of issue estoppel in that the consideration is focused on preserving the integrity of the adjudicative process more so than on the status, motive or rights of the parties.[40]
>
> [Emphasis added.]

---

[36] Lange, *supra* note 5, ch 4 at §2.
[37] *R v Scott*, [1990] 3 SCR at 979.
[38] *Toronto (City)*, *supra* note 29 at para 35.
[39] 2008 TCC 173 [*Golden*].
[40] *Ibid* at paras 28–30.

V. ANALYSIS

Application of the Preconditions

[33] I will first deal with the second and third requirements of the doctrine of issue estoppel because, generally speaking, they are preconditions that are the easiest to satisfy. The third requirement of issue estoppel, mutuality of the parties and their privies, in my opinion is satisfied. Although CIBC in the present appeal is not the same appellant as in the 2009 Decision, I am satisfied that CIBC is a privy of PC Bank. PC Bank was reassessed for failure to collect GST from the Appellant and remit it on its behalf. The finality condition is not disputed between the parties.

Are the Preconditions of Issue Estoppel or Abuse of Process Satisfied?

[34] The voluminous body of case law on the "same question" precondition illustrates that the devil is in the details regarding whether or not this requirement is satisfied. The exercise that I will now undertake requires me to examine the question of mixed fact and law adjudicated upon by this Court in the 2009 Decision and determine whether it is the same question of mixed fact and law set down before me.

[35] For the reasons that follow, I agree with the Respondent's submission that this is not the case.

[36] It is widely acknowledged by the tax bar that the assessments at issue in the present matter originate from legislative action undertaken by Parliament to overturn the precedent established by the 2009 Decision and other decisions of this Court viewed unfavourably by Parliament.[41]

[37] The language used in paragraph (l) of the definition of a "financial service" in subsection 123(1) of the ETA before and after the amendments is key to

---

[41] See Danny Cisterna, "Financial Services, GST/HST Issues–What A Year It Has Been!" *Report of Proceedings of Sixty-Second Tax Conference*, 2010 Conference Report (Toronto: Canadian Tax Foundation, 2011) 12.1–59 at 12.1–59; D'Arcy Schieman, "Advanced Commodity Tax Issues for the Financial Services Sector," *Report of Proceedings of Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), 27:1–18 [Schieman].

understanding the purpose of the amendments. Before the amendments the relevant part 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 (l)

[38] The term "arranging for" was construed expansively in a number of court decisions.[42] In some cases, a supplier to a financial services provider could be considered as arranging for a "financial service" without playing a direct intermediary role in the delivering of a financial service to a client of a financial institution.[43] For example, a supplier to a financial institution that performs a credit check or promotes the sale of a financial service or participates in its design might fall within the ambit of that language.[44] Parliament was unhappy with this expansive interpretation of the provision. This is apparent from the changes made to paragraph (l) of the definition of "financial services" and the additions of the new exclusions provided for, inter alia, in new paragraphs (r.4) and (r.5).

[39] The amendment to the concept of "arranging for a financial service" is provided for in the new text of paragraph (l), which now reads as follows:

> (l) the agreeing to provide, or the arranging for, a service that is
>
> (i) referred to in any of paragraphs (a) to (l) and
>
> (ii) not referred to in any of paragraphs (n) to (t).

---

[42] See *Canadian Medical Protective Assn v R*, 2009 FCA 115 at para 56, 63-64 (The Federal Court of Appeal found that the services performed by investment managers was to "cause to occur a transfer of ownership ... of a financial instrument" and fell within paragraph 123(1)(d) and (l) of the Act. The Federal Court of Appeal noted: "The skill shown in the pick, i.e., the research necessary for the preparation of the buying or selling order, is the core of the investment managers' activity and the raison d'être of their being hired. The quality of the pick is the trademark of their profession").

[43] See *Skylink Voyages Inc. v Canada* 1999 CarswellNat 2983, 1999 CarswellNat 1256, [1999] G.S.T.C. 119 (Eng.), [1999] G.S.T.C. 43 (Fr.), [1999] T.C.J. No. 159, 2000 G.T.C. 732 (Eng.), 99 G.T.C. 3096 (Fr.) (The taxpayer operated a wholesale travel agency, essentially acting as an intermediary between airlines and retail travel agencies (The Court found that the collection services provided to the retail agencies by the taxpayer constituted financial services, which were exempt supplies).

[44] See *Promotions DND Inc c R*, 2006 TCC 63 at paras 12-13, 36-37 (The Court found that the taxpayer was an intermediary between the financial institution and the purchaser in the supply of a financial service. The taxpayer's business was promoting credit cards in public spaces such as shopping centres, fairs and exhibition sites. The taxpayer's employees would revise the applications and send them to the credit card company).

[40] Before the amendments, particular services described in the exclusions provided for in paragraphs (n) through (t) were not excluded under paragraph (l) although surprisingly these exclusions applied to the other types of financial services included in the definition.

[41] The new exclusions to paragraph (l) which are relevant to the outcome of the common issue read as follows:

> (r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is
>
> > (i) a service of collecting, collating or providing information, or
> >
> > (ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,
>
> (r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l).

[42] In the 2009 Decision, this Court did not have to consider the scope of application of new paragraph (r.4) which excludes, inter alia, from the ambit of paragraph (l) services that are preparatory to the provision of or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l) of the "financial service" definition in subsection 123(1) of the ETA.

[43] Equally, this Court did not have to determine whether for the purpose of new paragraph (r.5) the supplies made by PC Bank in the period now under review constituted the supply of property that is delivered or made available to CIBC in conjunction with the rendering by CIBC of a service referred to in any of paragraphs 123(1)(a) to (i) and (l).

[44] It is clear from the Respondent's Reply to the Notice of Appeal that the Respondent's position is that the PC Bank supplies are excluded, by virtue of

paragraphs (r.4) and or (r.5), from the definition of "financial service" in subsection 123(1) of the ETA.[45]

[45] The Respondent states that these two exclusions have broad implications for the determination of this appeal. The Respondent says that paragraph (l) as previously applied by this Court in the 2009 Decision has been narrowed.

[46] In this context, according to the Respondent, new factual findings must be made to determine whether or not the exclusions apply. I agree with the Respondent's submissions in this regard.

[47] It is widely recognized that Parliament has the authority to adopt retroactive amendments to tax law to counter the effects of a court decision that Parliament wishes to nullify as a precedent.

[48] It is clear from the foregoing that Parliament intended to narrow the scope of application of paragraph (l) of the "financial service" definition in subsection 123(1). Once it is established that an amendment has been validly adopted, the court is then required to determine how a retroactive amendment affects the situation of parties that could have been advantaged by an earlier decision based on a more favourable version of the law.

[49] Therefore, I agree with the Respondent's submission that the legal norm that I am tasked to apply in the present appeal is different than that applied by this Court in 2009 Decision. The provisions relied on by the Court in the 2009 Decision appears to have been narrowed by virtue of these new exclusions. I fail to see how the doctrine of *res judicata* can apply when the provision of the law previously considered in an earlier decision no longer applies.

[50] I will now deal with the factual findings that I am called upon to make in the present appeal and compare my task in this regard to the task undertaken by the Court in 2009 Decision.

---

[45] See Respondent Reply to the Amended Notice of Appeal (dated November 22, 2019) at paras 19–21.

[51] In the present appeal, from a factual standpoint, I am tasked with determining the nature of the supply that PC Bank provided CIBC during the periods at issue for the fees that it earned.

[52] On this point, the Appellant says that the Respondent cannot re-litigate the substance, nature, or essence of the supplies at issue in the present appeal because the Respondent acknowledges that the amendments to the key agreements did not change the nature of the supplies for the purposes of paragraphs (l),(r.4) and (r.5) of the definition of "financial service" in subsection 123(1). The Appellant argues that the crux of the Respondent's argument is that the factual findings made by the Court in the 2009 Decision are simply wrong. In addition, the Appellant argues that the Respondent admitted on discovery that the nature of the supplies determined by this Court in the 2009 Decision is the same as the nature of the supplies made by PC Bank to CIBC in the present matter.

[53] In my opinion, the Appellant's formulation of the Respondent's position is not accurate.

[54] In discovery, contrary to the Appellant's allegation, the Respondent said the following:

> **242. BY MR. NANJI: Q**. In terms of the supply, are we in agreement that the supply is under the FSA and the LSA?
>
> **MS. MALONE**: There is a subsequent agreement in 2014, there is an additional supply – well, the supply is under the FSA, the LSA, and all amending agreements. It's not just under those two supplies [*sic*], there are many amending agreements that sometimes added to or removed from elements of the supply.[46]
>
> [Emphasis added.]

[55] The transcript for discovery shows that the Appellant took the position that the amending agreements are relevant to determining the nature of the supply. Its nominee states:

---

[46] Respondent's Written Submissions, *Res Judicata* and Abuse of Process (dated April 13, 2021), Tab 1 at para 16 [Respondent's Submissions].

> 203. Q. If you look at Tab 1 again, the FSA, page 11, at paragraph (d)(i) it says: "CIBC shall, in its sole discretion, after consultation with Loblaw determine all attributes of PCF Products which are provided by any member of the CIBC Group of Companies including contractual terms, fees, service charges, prices and interest rates." So that's what I conclude from the agreement, that it was ultimately CIBC's responsibility and ultimate decision. Are you saying that the agreement is incorrect?
>
> A. No, I'm saying that page 11, page 11 of – page 11 of a 51-page agreement that has – that you've read one sentence and that it is completely unfair and unreasonable to accept one sentence and to take and conclude that that in and of itself is the agreement between Loblaws and CIBC. That is an unfair characterization and, in fact, the Tax Court of Canada did not feel that way, that that's the only sentence that they should look at in order to make a determination on the tax status of the arranging for service provided by PC Bank and that there are multiple agreements on Tabs 2, 3, 4, 5, 6, 7, 8, 9 that one needs to consider for the commercial relationship between the two parties that has evolved over the period of time from – I go back – the first day of November 1997, all the way up until October 8, 2014.[47]
>
> [Emphasis and double emphasis added.]

[56] The motion record shows that the Respondent's position is that the amended FSA and the amended LSA are relevant to determining the nature of the supply in the present appeal. These amended agreements were not considered by this Court in the 2009 Decision.

[57] In reading the hearing transcript and the 2009 Decision, I was struck by the presentation of a considerable amount of parol evidence presented by PC Bank to establish the context surrounding the implementation of the PCF Agreement that was in effect for the periods addressed in the 2009 Decision. Much of the *viva voce* evidence dealt with how the key agreements were implemented in practice. The Respondent objected to this parol evidence on the basis that parol evidence should not be allowed to interpret agreements. PC Bank's counsel opposed the objection on the grounds that the witness from PC Bank was called to explain how

---

[47] Respondent's Motion Record, *Res Judicata* and Abuse of Process [Respondent's Motion Record], Tab A at 37–38.

the agreements were implemented from an operational and practical standpoint. This is what counsel for PC Bank said in opposition to the objection:

> "My friend has just told you that the contract was the basis of the assessment, which is not entirely correct, but we concede that the assessment was based partly on the reading of the contract. What is happening here is . . . that the parol evidence rule does not require this taxpayer not to speak to the surrounding circumstances and to explain the agreement, even though, I will note for the record, I am not asking him to interpret the contract."[48]

> "We are here to explain some of the mechanics of this business as it is described in the contract."[49]

[58] PC Bank's counsel's representations on this point are shared by D'Arcy Schieman in "Advanced Commodity Tax Issues for the Financial Services Sector" who quoted from the Canada Revenue's Agency's GST/HST Policy Statement P- 077R2 as follows:

> Moreover, when examining an agreement, it should not be viewed in isolation. Rather, it must be examined in the context of other factors such as the intent of the parties, the circumstances surrounding the transaction, and the supplier's usual business practices.[50]

[59] In the 2009 Decision, this Court sided with the PC Bank's counsel and overruled the objection.

[60] At paragraphs 27 to 29 of its written submissions, the Appellant alleges that the Respondent has failed to plead any new or additional facts in its Reply that are in any way inconsistent with the facts of the 2009 Decision. In my opinion, this allegation is inaccurate. For example, at paragraph 13(r) of its Reply, the Respondent alleges as part of the Minister's assumptions of fact that "PCB was to provide access (...) to its customer base and provide a channel of distribution through its stores' facilities to CIBC."

---

[48] Appellant's Motion Record, *Moving Party on Issue Estoppel/Abuse of Process Motion* [Appellant's Motion Record], Tab C at 111, Transcription of the Hearing from the 2009 Decision at 41, lines 10–22.
[49] Appellant's Motion Record, Tab C at 112, Transcription of the Hearing from the 2009 Decision at 42, lines 16–19.
[50] Schieman, *supra* note 41 at 27:5.

[61] In summary, the factual context in the present appeal is different than that considered by this Court in the 2009 Decision.

[62] Considering all of this, I am of the view that the question of mixed fact and law, which I am tasked to decide in the present matter is different than the question of mixed fact and law adjudicated upon by this Court in the 2009 Decision. On the basis of all of this, I am of the opinion that the so-called "same question" requirement is not satisfied. As a result, the doctrine of issue estoppel does not apply.

[63] The Appellant, in the alternative, contends that the doctrine of abuse of process applies to the present appeal. As indicated by Justice Boyle in *Golden*, the only difference between abuse of process and issue estoppel is the lack of the mutuality of parties requirement. For the reasons noted earlier, I believe that the so-called "same question" condition is not satisfied.

[64] I am not surprised by this result. I believe that the doctrines of issue estoppel and abuse of process will rarely find application with respect to transactions or arrangements carried out in different taxation years. This is particularly true when a provision of the law has been amended in an attempt to nullify the impact of a precedent which the government has taken issue with. Income and value-added taxes are imposed in respect of a tax period. The circumstances surrounding the parties' agreement often change when key agreements have been amended.

[65] As a final observation, in the event I am wrong on the above, I believe that it is in the public's interest that I exercise my residual discretion not to give effect to the doctrines relied on by the Appellant assuming that they otherwise apply. According to the Supreme Court of Canada in *Danyluk*, if a moving party establishes the preconditions to the operation of issue estoppel, the court "must still determine, whether as a matter of discretion, issue estoppel ought to be applied."[51] Based on the principles stated in *Danyluk*, the Court has discretion to refuse the application of issue estoppel, particularly where its application may give rise to an injustice, and "particularly in relation to allowing the parties to be heard."[52] The determination of whether or not the application of issue estoppel in the particular

---

[51] *Danyluk*, *supra* note 19 at para 33 (emphasis added).
[52] *Ibid.*

case would work an injustice, must take into account the entirety of the circumstances of the particular case.[53]

[66] In this case, there are competing public interest that must be weighed. On the one hand the finality of litigation is in the public interest. On the other hand it is in the public interest that the Court respect Parliament's authority to enact retroactive legislation. I do not believe it is in the public interest that I decide on an issue without hearing evidence that is relevant to the determination as to whether or not the exclusions apply. While some may view retroactive legislation as being manifestly unfair, it is not the court's role to limit Parliament's legislative authority to adopt retroactive legislation that is validly enacted.[54]

[67] In the instant case, at best, we are left to speculate on what Justice Lamarre would have decided if she had been tasked to consider the scope of application of the new provisions. The judgment that she has rendered now hangs by a thread because of the new financial services definition. This is hardly a case where the principle of finality requires me to give effect to the issue estoppel and/or abuse of process doctrines.

[68] Considering all of the above, this Court is not bound to apply the factual findings of this Court in the 2009 Decision, to determine the outcome of the underlying appeals.

---

[53] *Ibid.*

[54] The Appellant filed a supplemental book of authorities containing six cases that the Appellant is relying on in urging me not to exercise my residual discretion in this matter. For the record, I point out that none of these cases deal with the impact of a retroactive ??? enacted by Parliament in circumstances similar to those described above. The cases are: *Canada v. Costco Wholesale Canada Ltd.*, 2012 FCA 160; *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72; *Pharmascience Inc. v. Canada (Health)*, 2007 FCA 140; *Procter & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)*, [2003] F.C.J. No. 1805 (FCA); *Sanofi-Aventis Canada Inc. v. Pharmacience Inc.*, 2007 FC 1057; aff'd 2008 FCA 213; *Subramaniam v. Canada (Citizenship and Immigration)*, 2020 FCAC 202.

[69] Therefore, the Appellant's motion is dismissed with costs to be determined in the cause. Both parties are now free to present their evidence that is admissible with respect to the determination of the common issue.

Signed at Ottawa, Canada, this 25th day of January 2022.

"Robert J. Hogan"

Hogan J.

CITATION:	2022 TCC 26
COURT FILE NO.:	2019-3197(GST)G
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 24, 2022
REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
DATE OF ORDER:	January 25, 2022

APPEARANCES:

Counsel for the Appellant:	Al Meghji Al-Nawaz Nanji Alexander Cobb
Counsel for the Respondent:	Justine Malone Lindsay Tohn

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji
Firm:	Osler, Hoskin & Harcourt LLP 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50 Toronto, Ontario M5X 1B8
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

CITATION:	2022 TCC 83
COURT FILE NO.:	2019-3197(GST)G
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	January 24, 25, 26, and 27, 2022 and February 11, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	July 19, 2022

APPEARANCES:

Counsel for the Appellant:	Al Meghji Alexander Cobb Al-Nawaz Nanji
Counsel for the Respondent:	Justine Malone Lindsay Tohn

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji Al-Nawaz Nanji
Firm:	Osler, Hoskin & Harcourt LLP 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50

Appendix II

DESCRIPTION OF THE ISSUES UNDER APPEAL

The parties agree to identify the issues in the appeals as follows:

Supply to CIBC

41. Whether the CIBC Payments were consideration for a taxable supply made by PC Bank to CIBC (the "PCF Supply Issue") is an issue in both the 2009 Appeal and 2010-2012 Appeal.

42. The PCF Supply Issue is also raised in the appeal of *Canadian Imperial Bank of Commerce v. Her Majesty the Queen*, Tax Court of Canada court file no. 2019- 3197(GST)G (the "CIBC Appeal").

43. The parties to the CIBC Appeal and PC Bank's 2009 Appeal and 2010-2012 Appeal entered into an agreement made March 25, 2021 (the "Agreement").

44. Pursuant to the terms of the Agreement, if CIBC is successful on the PCF Supply Issue in the CIBC Appeal such that it is ultimately determined that the CIBC Payments were made in respect of the supply of an exempt financial service, then the PCF Supply Issue ought to be allowed in the 2009 Appeal and 2010-2012 Appeal, however:

a. PC Bank is not entitled to a complete reduction of net tax relating to the PCF Supply Issue, for the periods under appeal, as some amounts assessed and reassessed were collected from and paid by CIBC to PC Bank and remitted to the Receiver General of Canada;

b. PC Bank is however entitled to a reduction in net tax in the amounts of $610,563 for the reporting period ending December 30, 2009 and $836,070 for the reporting period ending December 30, 2010 as those amounts were collected from and paid by CIBC to PC Bank in subsequent reporting periods; and

c. PC Bank should not have been entitled to ITCs of $133,364, $80,936, and $77,055 in the 2010-2012 Periods, respectively.

45. Pursuant to the terms of the Agreement, if CIBC is not successful on the PCF Supply Issue in the CIBC Appeal such that it is ultimately determined that the CIBC

Payments were made in respect of a taxable supply, then the PCF Issue ought to be dismissed in the 2009 Appeal and 2010-2012 Appeal. The parties agree that PC Bank is entitled to additional ITCs of $68,717 in the 2009 Period pursuant to subsection 169(1) of the Act and a consequential adjustment pursuant to section 225.2 of the Act.

The MCII Service

46. The parties have agreed to resolve the issue of the MCII Service as set out in the terms of the Consent dated March 23, 2021 and filed with the Tax Court of Canada, which is the subject of the Order of Justice Hogan dated March 24, 2021.

The FDR Supply

47. If the FDR Supply is ultimately determined to be an exempt financial service in the 2009 Period and 2010 Period, then PC Bank's Division IV tax must be reduced by $415,771 in the 2009 Period, and $391,761 in the 2010 Period and PC Bank is no longer entitled to ITCs of $7,079 in the 2010 Period, and a corresponding adjustment to net tax will be made pursuant to subsection 225.2(2) of the Act for the 2010 Period.

48. If the FDR Supply is ultimately determined to be a taxable supply in the 2009 Period and 2010 Period, then the appeal in respect of this issue ought to be dismissed.

The TSYS Supply

49. If the TSYS Supply is ultimately determined to be an exempt financial service in the 2009 Period and 2010-2012 Periods, then the following adjustments apply, and a corresponding adjustment to net tax will be made pursuant to subsection 225.2(2) of the Act:

Reporting Period	Reduction to Division IV tax ($)	Reduction to ITCs ($)
2009 Period	299,723	n/a
2010 Period	267,865	4,840
2011 Period	703,411	14,730
2012 Period	934,234	19,574

50. If the TSYS Supply is ultimately determined to be a taxable supply in the 2009 Period and 2010-2012 Periods, then the appeals in respect of this issue must be dismissed.

Notional ITCs

51. If it is determined that PC Bank paid the Redemption Payments in the course of a commercial activity of PC Bank pursuant to subsection 181(5) of the Act, then:

a. PC Bank is entitled to notional ITCs of $1,583,615.65 in the 2009 Period; and

b. PC Bank is entitled to additional notional ITCs of $2,451,044, $3,153,222, and $3,430,155 in the 2010-2012 Periods, respectively.

52. If it is determined that PC Bank did not pay the Redemption Payments in the course of a commercial activity of PC Bank pursuant to subsection 181(5) of the Act, then the appeals in respect of this issue must be dismissed.

Operational ITCs

53. The parties agree that PC Bank is entitled to additional operational ITCs of $88,674 in the 2009 Period pursuant to subsection 169(1) of the Act.

Rebate for tax paid in error

54. The parties agree that PC Bank is entitled to a rebate for tax paid in error in the 2011 Period pursuant to subsection 296(2.1) of the Act, calculated as follows:

Federal Portion of HST:	$300,678.55
Provincial Portion of HST:	$481,085.69
Less ITCs claimed:	($52,626.80)
Less SAM portion:	($173,001.43)
Total rebate:	$556,136.01

55. No further consequential adjustments will be made in respect of the rebate.

Appendix III

Tax Court of Canada | Cour canadienne de l'impôt

2017-3925(GST)G

2017-3931(GST)G

TAX COURT OF CANADA

BETWEEN:

PRESIDENT'S CHOICE BANK

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

CONSENT

The Appellant and the Respondent hereby agree that the appeals with respect to the Appellant's 2009, 2010, 2011 and 2012 reporting periods should be decided in part in the Appellant's favour on the basis that the fees paid by the Appellant to MasterCard International Incorporated ("**MasterCard**") for the MasterCard service (the "**MasterCard Service**") were consideration for an exempt supply of a financial services, such that:

1. The Appellant was not required to self-assess tax under Division IV of the *Excise Tax Act* (Canada) (the "**ETA**") in respect of the MasterCard Service and the Appellant's tax liability under Division IV will be reduced by:

	Division IV tax reduction
2009 reporting period	$927,096
2010 reporting period	$1,039,320
2011 reporting period	$1,169,278
2012 reporting period	$1,247,211

2. The following operational input tax credits, which were previously allowed by the Minister of National Revenue (the "**Minister**") on the MasterCard Service, on the basis that the MasterCard Service was previously determined by the Minister as taxable shall be disallowed on the basis that the MasterCard Service is an exempt financial service as follows:

	ITC to be disallowed
2009 reporting period	N/A
2010 reporting period	$18,779
2011 reporting period	$24,486
2012 reporting period	$26,131

3. The net tax adjustments under subsection 225.2(2) of the ETA will be decreased accordingly in the following amounts.

	Net Tax Reduction
2009 reporting period	N/A
2010 reporting period	$680,028
2011 reporting period	$1,421,850
2012 reporting period	$1,505,546

4. All without costs in respect of the MasterCard issue.

5. The Appellant and the Respondent ask that the Court issue an Order acknowledging the terms of this Consent, which Consent is entered into between the parties on March 23, 2021.

6. The Appellant and the Respondent agree that the remaining issues under these appeals are not affected by this Consent and related Order.

7. The MasterCard issue shall be referred back to the Minister for reconsideration and reassessment at the same time as the other issues in the within appeals are disposed of by way of a judgment from this Court.

DATED at the City of Toronto, in the Province of Ontario, this 23rd day of March, 2021.

Counsel for the Appellant

DATED at the City of Ottawa, in the Province of Ontario, this 23rd of March, 2021.

ATTORNEY GENERAL OF CANADA
Tax Law Services Section
Justice Canada
99 Bank Street, 11th Floor
Ottawa ON K1A 0H8
Canada

Fax: 613-941-2293

Per: Justine Malone
Solicitor/Counsel for the Respondent
Telephone:613-670-6410
E-mail: Justine.Malone@justice.gc.ca

TO: The Registrar
Tax Court of Canada
200 Kent Street, 4th Floor
Ottawa, Ontario
K1A 0M1

AND TO: Wendy Brousseau
Chia-yi Chua
McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Box 48, Suite 5300
Toronto, ON
M5K 1E6

Counsel for the Appellant

Appendix IV

Tax Court of Canada | Cour canadienne de l'impôt

Docket: 2017-3925(GST)G
2017-3931(GST)G

BETWEEN:

PRESIDENT'S CHOICE BANK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Trial Management Conference held by telephone conference on March 24, 2021, at Ottawa, Ontario

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Wendy Brousseau Chia-yi Chua
Counsel for the Respondent:	Justine Malone Lindsay Tohn

ORDER

WHEREAS the parties have entered into the Partial Consent to Judgment (the "Partial Consent to Judgment") which is attached herewith as Schedule "A";

WHEREAS the Respondent agrees that the appeals with respect to the Appellant's 2009, 2010, 2011 and 2012 years should be decided, in part, in the Appellant's favour on the basis that fees paid by the Appellant to MasterCard Incorporated ("MasterCard") for the MasterCard service (the "MasterCard Service") were consideration for an exempt supply such that

Page: 2

the Appellant is entitled to the relief provided for in paragraphs 1 to 4 of the attached Partial Consent to Judgment; and,

WHEREAS the Appellant and the Respondent ask that the Court issue an Order acknowledging the terms of this Partial Consent to Judgment, which Consent is entered into between the parties on March 23, 2021;

IT IS HEREBY ACKNOWLEDGED that the parties entered into the attached Partial Consent to Judgment on March 23, 2021.

IT IS HEREBY ORDERED that the attached Partial Consent to Judgment be placed in the record of the Court as of the date of this Order, in order to allow the Partial Consent to Judgment to be taken into account at the same time the other issues in the within appeals are disposed of by way of a Judgment from this Court.

Signed at Ottawa, Canada, this 26th day of March 2021.

"Robert Hogan"

Hogan J.

Schedule "A"

2017-3925(GST)G

2017-3931(GST)G

TAX COURT OF CANADA

BETWEEN:

PRESIDENT'S CHOICE BANK

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

CONSENT

The Appellant and the Respondent hereby agree that the appeals with respect to the Appellant's 2009, 2010, 2011 and 2012 reporting periods should be decided in part in the Appellant's favour on the basis that the fees paid by the Appellant to MasterCard International Incorporated ("**MasterCard**") for the MasterCard service (the "**MasterCard Service**") were consideration for an exempt supply of a financial services, such that:

1. The Appellant was not required to self-assess tax under Division IV of the *Excise Tax Act* (Canada) (the "**ETA**") in respect of the MasterCard Service and the Appellant's tax liability under Division IV will be reduced by:

	Division IV tax reduction
2009 reporting period	$927,096
2010 reporting period	$1,039,320
2011 reporting period	$1,169,278
2012 reporting period	$1,247,211

2. The following operational input tax credits, which were previously allowed by the Minister of National Revenue (the "**Minister**") on the MasterCard Service, on the basis that the MasterCard Service was previously determined by the Minister as taxable shall be disallowed on the basis that the MasterCard Service is an exempt financial service as follows:

	ITC to be disallowed
2009 reporting period	N/A
2010 reporting period	$18,779
2011 reporting period	$24,486
2012 reporting period	$26,131

3. The net tax adjustments under subsection 225.2(2) of the ETA will be decreased accordingly in the following amounts.

	Net Tax Reduction
2009 reporting period	N/A
2010 reporting period	$680,028
2011 reporting period	$1,421,850
2012 reporting period	$1,505,546

4. All without costs in respect of the MasterCard issue.

5. The Appellant and the Respondent ask that the Court issue an Order acknowledging the terms of this Consent, which Consent is entered into between the parties on March 23, 2021.

6. The Appellant and the Respondent agree that the remaining issues under these appeals are not affected by this Consent and related Order.

7. The MasterCard issue shall be referred back to the Minister for reconsideration and reassessment at the same time as the other issues in the within appeals are disposed of by way of a judgment from this Court.

DATED at the City of Toronto, in the Province of Ontario, this 23rd day of March, 2021.

Counsel for the Appellant

DATED at the City of Ottawa, in the Province of Ontario, this 23rd of March, 2021.

ATTORNEY GENERAL OF CANADA
Tax Law Services Section
Justice Canada
99 Bank Street, 11th Floor
Ottawa ON K1A 0H8
Canada

Fax: 613-941-2293

Per: Justine Malone
Solicitor/Counsel for the Respondent
Telephone:613-670-6410
E-mail: Justine.Malone@justice.gc.ca

TO: The Registrar
Tax Court of Canada
200 Kent Street, 4th Floor
Ottawa, Ontario
K1A 0M1

AND TO: Wendy Brousseau
Chia-yi Chua
McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Box 48, Suite 5300
Toronto, ON
M5K 1E6

Counsel for the Appellant

CITATION:	2022 TCC 84
COURT FILE NOS.:	2017-3925(GST)G 2017-3931(GST)G
STYLE OF CAUSE:	PRESIDENT'S CHOICE BANK v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 31 and February 1, 2, 9 and 14, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	July 19, 2022

APPEARANCES:

Counsel for the Appellant:	Chia-yi Chua Anu Koshal Pierre-Gabriel Grégoire
Counsel for the Respondent:	Justine Malone Lindsay Tohn

COUNSEL OF RECORD:

For the Appellant:

Name:	Wendy Brousseau Chia-yi Chua
Firm:	McCarthy Tétrault LLP 66 Wellington Street West, Suite 5300 TD Bank Tower

	Box 48 Toronto, Ontario M5K 1E6
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada