Docket: 2002-222(GST)G

BETWEEN:

RICHTER & ASSOCIATES INC.
in its capacity as trustee to the bankrupt estate of
CASTOR HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 11, 2004, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Glenn A. Cranker Frank Mathieu
Counsel for the Respondent:	Benoît Denis

JUDGMENT

The appeals against eight assessments made under the *Excise Tax Act* and covering the period from October 1, 1994, to March 31, 2001, are allowed, with costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Estate is entitled to input tax credits of $2,354,362, in accordance with the attached reasons for judgment.

Signed at Drummondville, Québec, this 13th day of February 2005.

"Pierre Archambault"

Archambault, J.

Citation: 2005TCC92
Date: 20050213
Docket: 2002-222(GST)G

BETWEEN:

RICHTER & ASSOCIATES INC.
in its capacity as trustee to the bankrupt estate of
CASTOR HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Archambault, J.

[1] Richter & Associates Inc., in its capacity as trustee (**Trustee**) of the estate of Castor Holdings Ltd. (**Estate**)[1], is appealing against eight assessments under the *Excise Tax Act* (**Act**) covering the period from October 1, 1994, to March 31, 2001 (**relevant period**). The Minister of National Revenue (**Minister**) disallowed pursuant to sections 123, 141.1, 169 and 265 of the Act the input tax credits (**ITCs**) totalling $2,474,361.92 for the relevant period. The minister states that the ITCs were claimed in respect of properties and services which were not acquired in the course of commercial activities. They were instead acquired (or deemed to have been acquired) in the course of making exempt supplies (i.e. supplies of financial services).

Facts

[2] At the outset of the hearing, both parties filed a written Admission of Facts, which I shall reproduce here:

---

[1] When I refer to Castor in its bankrupt state, I will use the expression "Estate". When I refer to Castor as it was prior to its bankruptcy, I will use "Castor".

1. On March 26, 1992, Richter & Associates Inc. ("Richter") was named, in accordance with the Bankruptcy and Insolvency Act, interim receiver of Castor Holdings Ltd. ("Castor").

2. Prior to its bankruptcy, Castor engaged primarily in activities consisting of lending funds to real estate enterprises, and it was, therefore, a deemed financial institution under subsection 149(1) of the [Act].

3. Prior to its bankruptcy, Castor almost exclusively made supplies of financial services, i.e. "exempt supplies" within the meaning of subsection 123(1) of the [Act].

4. Castor was registered under section 240 of the [Act].

5. On July 9, 1992, Richter was named trustee to the bankrupt estate of Castor.

6. At the time of the bankruptcy, Castor's audited financial statements, prepared by Coopers & Lybrand, reflected that Castor had assets in excess of $1.8 billion.

7. Richter in its capacity as Trustee (the "Trustee") proceeded to the liquidation of the assets of the bankrupt Castor. The liquidation was substantially completed by 1994, and the Trustee had realized an amount of less than $25 million from all sources.

8. Various Canadian banks, foreign banks and Canadian corporations (the "Creditors") had loaned substantial amounts to Castor while relying on the financial statements audited by Coopers & Lybrand.

9. When it was determined that Castor had only insignificant assets and that a number of irregularities were evident, the Creditors initiated approximately 40 separate actions in the Québec Superior Court alleging that Castor's financial statements had been negligently audited by Coopers & Lybrand and seeking damages in excess of $1 billion.

10. The Trustee also initiated an action against Coopers & Lybrand alleging that it had failed to fulfill its contractual duties as auditor and seeking damages of $40 million.

11. In 1993 the Trustee and certain of the Creditors (the "Participating Creditors"), which had filed claims against Coopers & Lybrand in excess of approximately $800 million, entered into a Participation Agreement (the "Participation Agreement") in which it was agreed that the Trustee, having first hand knowledge of Castor's assets and records, would make available to

the Participating Creditors such expertise and information[2] that may be relevant to their proceedings against Coopers & Lybrand (sometimes referred to herein as the "Litigation Support Business").

12. To fund the Litigation Support Business, each Participating Creditor agreed to make periodic loans[3] to the Trustee which were obligatory and calculated

---

[2] Actually, the participation agreement (**Participation Agreement**) provides as follow:

> Certain creditors have expressed their intention to institute proceedings on grounds generally similar to those of the Trustee. In this connection, they have requested that the Trustee make available to them such expertise and information that may be relevant to their own proceedings. In order to assist in the administration of the Estate, the Inspectors have authorized the Trustee to make available information and expertise in its possession pertaining to those proceedings and the Trustee agrees with the signatory hereto to make same available to it on the following terms and conditions:
>
> [...]

A Participation Agreement dated September 28, 1993, was filed as Exhibit A-2, Tab 34, to illustrate a typical agreement entered into between the Trustee, on behalf of the Estate, and some of the Estate's creditors (**Participating Creditors**). In this particular agreement, Chrysler Canada Ltd. states that it is acting on its own behalf and for its Master Trust Funds, pension and retirement plans.

According to Mr. Philip Manel, C.A., a partner in the Trustee, who was in charge of the administration of the Estate and the only witness who testified at the hearing, the Estate held a proprietary interest in the information and this explains in part why it was the Estate that carried on the litigation support business (**Litigation Support Business**). This information included Castor's books and records located in different countries of the world. It took approximately five years to gather the information, going back 12 years, and thousands of hours of analysis were required. According to Mr. Manel, this work was clearly beyond the normal functions of a trustee administering the estate of a bankrupt.

[3] Actually, the Participation Agreement stipulates as follows:

> The Participating Creditor shall be required to loan to the Trustee the proportion of the reasonable Ongoing Fees as applicable and as may be billed to the Participating Creditor from time to time. The Trustee shall provide invoices which set out, in reasonable detail, the services rendered and disbursements incurred, as well as the relationship of same to proceedings instituted against Coopers & Lybrand.
>
> [Emphasis added.]

by reference to the percentage which each Participating Creditor's claim was in relation to the total claims of all participating creditors.[4]

13. The Participation Agreement provided that the loans advanced to the Trustee would not bear interest and were repayable by the Trustee at its sole discretion.[5]

14. On February 10, 1993 the Trustee received authorization from Castor's bankruptcy inspectors to enter into the Participation Agreement and funding mechanism.

15. During the period covered by this appeal, i.e. from October 1, 1994 to March 31, 2001, the Trustee paid GST in the amount of $2,474,361.92[6] on the property and services acquired to liquidate the bankrupt estate and to conduct the Litigation Support Business.[7]

---

4 Since the Estate is not a creditor of itself and therefore not a Participating Creditor, the result of this formula is that the Participating Creditors (and not the Estate) are financing all the "reasonable fees … to be incurred after March 1, 1993" (**Ongoing Fees**), including legal and accounting fees … relating to such expertise and information that may be relevant to their own proceedings" (page 1 of the Participation Agreement). According to Mr. Manel, the reason the Participating Creditors decided to use the loan mechanism was to allow them to get their money from the Estate with preference over the other creditors of the Estate.

5 Actually, the Participation Agreement provides as follows:

> 1.(b) All loans made to the Trustee hereunder shall not bear interest and shall be without recourse against the Trustee and shall be repayable only at such time as the Trustee determines, in its sole discretion acting reasonably, that it has sufficient funds for all existing and future administrative requirements of the Estate after reimbursement of all loans made by all Participating Creditors. (Exhibit A-2, Tab 34, p. 2)
>
> [Emphasis added.]

6 This represents 7% of $35,348,029.

7 For the period from July 9, 1992, to March 1, 2001, the disbursements of the Estate (whether for the liquidation of the Estate or the conduct of the Litigation Support Business) amounted to $44,643,991, the three largest items being $20,916,055 for legal fees, $10,244,375 for the Trustee's fees and $3,272,773 for accounting experts. It should be remembered that the hearing of the test case before the Superior Court only started late in the summer of 1998. A large portion of these disbursements was funded by the Participating Creditors ($26,194,545). See Exhibit A-2, Tab 31.

16. The Trustee claimed input tax credits ("ITCs") in Castor's periodic GST returns, which the Trustee filed in its capacity as agent for the bankrupt, the whole in conformity with section 265 of the [Act].

17. Appellant acknowledges that GST in the amount of approximately $120,000[8] paid on property and services acquired for use in the liquidation of Castor's exempt financial assets is ineligible for ITCs and, therefore, reduces its claims to such extent, i.e. that the amount in dispute is approximately $2,354,000.00.

18. The Trustee's claims for ITCs for the period covered by this appeal were disallowed in eight (8) separate notices of assessment, all of which were duly appealed by way of notices of objection.

19. In its letter, dated October 19, 2001, the Ministère du Revenu du Québec (the "Minister"), as agent for the Minister of National Revenue, confirmed the earlier notices of assessment which disallowed the Trustee's claims for ITCs.

20. Generally, the Minister refused the Trustee's claims for ITCs on the grounds that the activities of the Appellant constituted exempt supplies (financial services) and are not in the course of commercial activities in accordance with sections 123, 141.1, 169 and 265 of the [Act].

[Emphasis added.]

[3] Many additional facts set out by the Estate in its Notice of Appeal were either denied by counsel for the respondent or counsel stated that he had no knowledge thereof. Most of these I reproduce here:

3. Castor also made some taxable supplies, and it was registered under section 240 of the [Act].[9]

---

8 Mr. Manel explained how the $120,000 ITC was calculated. He stated that the claim made against Coopers & Lybrand (**C&L**) by the Estate represents roughly 2.90% of all the claims filed against that firm. Given the variation in the number of Participating Creditors and the fluctuation in the amount of their claim, the actual percentage varied during the period from 1994 to 1999. The average percentage of the claim by Castor represents 3.86%. However, it should be recalled that all the Ongoing Fees relating to the Litigation Support Business are financed by the Participating Creditors. The amount of $120,000 represents 4.85% of the $2,474,362 ITC amount claimed by the Estate. There is no claim by the respondent that this amount is both unfair and unreasonable.

9 See Exhibit A-2, Tab 43, page 5, for an example of a taxable supply made by the Estate.

14. The Trustee periodically sent requests for loans to the Participating Creditors requesting payment of their pro rata share of fees and expenses required to fund the common litigation.[10]

17. It was unanimously resolved by the inspectors that if the damages ultimately recovered by the Trustee in its action against Coopers & Lybrand exceeded the total of the fees and expenses required to fund the common litigation, the loans advanced by the Participating Creditors would be fully reimbursed.

18. Otherwise, if the Trustee would recover less than the total of such fees and expenses, the Trustee intended to partially reimburse the loans with the net funds available. Upon obtaining approval of the inspectors, the Participating Creditors would be invoiced their pro rata share of the remaining expenses, plus GST as applicable, with the loan proceeds previously received by the Trustee being applied against such invoices.

19. In a June 12, 1995 decision, the Québec Court of Appeal recognized the legitimacy of the Participation Agreement.[11]

---

[10] See Exhibit A-2, Tab 44.

[11] The Quebec Court of Appeal was not specifically asked to recognize the legitimacy of the Participation Agreement. Rather, it dealt with an appeal from a decision of the Superior Court judge respecting an alleged conflict of interest of the law firms Stikeman Elliott and Goldstein Flanz & Fishman raised as an issue by C&L as one of the creditors of the Estate. In concluding that there was no such conflict of interest and that there was a convergence of common interests, the Court of Appeal, in its reasons written by Justice Gendreau, said at page 16 (No. 500-09-002102-937, June 12, 1995):

> Les créanciers, en l'espèce, estiment que le remboursement de leurs réclamations dépend largement du résultat des recours engagés contre Coopers. Ils ont donc créé un fonds pour aider le syndic à couvrir les frais de ses procédures contre l'appelante et en échange, obtenir informations, expertises et assistance à l'avocat choisi par chacun d'eux (participating creditor). Stikeman et Goldstein sont les avocats du syndic et de certains créanciers dans leur action en responsabilité contre Coopers . . . (Exhibit A-2, Tab 39)

Here is how Justice Gendreau concluded his reasons:

> Il serait, pour le moins, étonnant que la coalition formée d'intérêts identiques, mise sur pied pour mieux attaquer Coopers, soit démantelée à la demande de celui-ci, au motif d'un conflit d'intérêts.

20. Of all the actions initiated against Coopers & Lybrand, the Honourable Mr. Justice Paul Carrière of the Quebec Superior Court selected as the test case the action initiated by another Creditor, Peter N. Widdrington, and not the action which the Trustee had initiated against Coopers & Lybrand.[12]

21. The Court decided that in the event of a finding of negligence against Coopers & Lybrand in this test case, the body of evidence relating thereto would be used in the other actions, thereby limiting the trials in the other actions to questions regarding quantification of damages and causation.[13]

22. The other cases against Coopers & Lybrand, including the Trustee's action, have been held in abeyance pending a decision in the test case.[14]

23. The trial in the test case against Coopers & Lybrand commenced in September 1998 and continues to the date of filing of this Notice of Appeal.[15]

24. The Trustee engaged the lawyers, accountants, forensic experts and staff (the "Professionals") acting in the test case, and paid GST on their fees and disbursements.

25. The Trustee engaged these Professionals as the "recipient" of the supply of their services, not as agent or mandatary of the Participating Creditors.

In my opinion, the Quebec Court of Appeal has thus, at least indirectly, recognized the legitimacy of the Participation Agreement.

12 This selection was made on February 20, 1998 (see Exhibit A-2, Tab 40). Mr. Peter N. Widdrington's court record number is S.C.M. 500-05-001686-946.

13 See Exhibit A-2, Tabs 44 and 45.

14 See Exhibit A-2, Tab 40.

15 More than 500 days of hearing have already been taken up by the test case and several more years of hearing will likely be required to complete it. The amount of litigation expenses incurred by the Estate in connection with the action against C&L represents many millions of dollars.

26. Richter issued their periodic invoices to the estate of the bankrupt and charged GST.[16]

27. The Trustee incurred numerous other expenses in connection with the Litigation Support Business, including costs for leasing premises in the court, photocopies, expert witnesses, transcripts, staff, and travel, and paid GST on most of these expenses, as applicable.[17]

28. The fees and expenses incurred by the Trustee to fund the common litigation were paid for using the proceeds from the loans advanced by the Participating Creditors.[18].

29. All property and services acquired by the Trustee in connection with the common litigation were acquired in its capacity as agent of the bankrupt, as provided by paragraph 265(1)(a) of the [Act], and not as agent for the Participating Creditors.

[Emphasis added]

[4] With the exception of those facts described in paragraphs 17 and 18, the above facts have been established to my satisfaction, either as a result of the testimony of Mr. Manel or by means of documentary evidence filed at the hearing.

---

16 The Trustee's fees charged to the Estate were first approved by the Estate's bankruptcy inspectors. Furthermore, an annual statement is presented to the Quebec Superior Court for its approval. Similarly, each invoice from the lawyers is first approved by the Trustee and the inspectors, and subsequently by the Quebec Superior Court.

17 In Exhibit A-4, there is a summary of all the litigation support activities performed by the Trustee. They include gathering records and "inventorization" (including travel to Ireland, Cyprus, Curacao and Switzerland), scanning and document management (including the scanning of some 500 boxes of documents consisting of 6,000 file folders), analysis of loan loss provisions, a five-year accounting analysis of investment in mortgages and secured debentures, of advances and of capitalization of interest, a 12-year review of minute books, a review of the auditors' working papers, liaison with Participating Creditors and with attorneys and experts, the listing of thousands of documents pursuant to Rule 15, assistance to lawyers with respect to examinations for discovery which lasted approximately 200 days, with respect to rogatory examinations and during trial. Mr. Manel insisted that this work is not typical for a trustee in bankruptcy. In his views, it amounted to a separate business.

18 This statement is certainly true with respect to the Ongoing Fees (which represent fees incurred since March 1, 1993) incurred during the relevant period (which started on October 1, 1994). See note 4 above.

With respect to the facts stated in paragraphs 17 and 18, more analysis is required before concluding that they have been established. I note that in the Participation Agreement, there is no statement that, upon obtaining the approval of the inspectors, the "Participating Creditors would be invoiced their pro rata share of the remaining expenses, plus GST as applicable, with the loan proceeds previously received by the Trustee being applied against such invoices". As mentioned above,[19] the loans are to be reimbursed at the discretion of the Trustee. However, Mr. Manel confirmed the Trustee's intention to invoice the different Participating Creditors for the non-reimbursed portion of the loans used to finance the litigation, although not all Participating Creditors were aware yet of the mechanics of this arrangement. But, the largest single creditor of the Estate, at least is aware. In a letter dated May 4, 2004,[20] that is, just prior to the hearing herein, Daimler Chrysler Canada Inc. indicated that it had not claimed any ITCs with respect to the loans made to the Estate.[21] However, when a final invoice is issued, Daimler Chrysler Canada Inc. intends to claim ITCs for the GST charged thereon.[22]

---

19 See note 5 above.

20 Exhibit A-2, Tab 42.

21 Mr. Manel explained that no GST was charged on the loans made by the Participating Creditors because he did not know what portion of the loans would constitute a consideration for the litigation services. It should be remembered that the Participating Creditors are hoping to be reimbursed a portion of their litigation costs from the 40 million dollar action brought by the Estate against C&L.

22 Furthermore, in my view, this intention of the Trustee to invoice the non-reimbursed portion of the loans would be in accordance with the legal requirement of the Act. Indeed, the non-reimbursed loans would then constitute a consideration for the service that the Participating Creditors received from the Estate. Although the parties themselves did not refer to it, I believe that the rule in subsection 168(9) of the Act could be applicable. That subsection reads as follows:

> 168(9) For the purposes of this section, a deposit (other than a deposit in respect of a covering or container in respect of which section 137 applies), whether refundable or not, given in respect of a supply shall not be considered as consideration paid for the supply unless and until the supplier applies the deposit as consideration for the supply.
>
> [Emphasis added.]

In my view, a good argument could be made that the loans here can be considered to be in the nature of deposits : see the comment on the meaning of deposit by David Sherman in his note concerning subsection 168(9) in GST Partner (Thomson Canada Ltd.), the decision in *Kenneth B.S. Robertson Ltd.* v. *M.N.R.*, [1944] Ex. C.R. 170,

[5] According to Mr. Manel, the disbursements made and expenses incurred by the Estate during the relevant period related primarily to the Litigation Support Business. "The liquidation [of the Estate] was substantially completed by 1994 . . ."[23] Given how few assets were recovered by the Estate, its main hope for obtaining any additional assets after 1994 lies in the damages it could receive from C&L. As to the Participating Creditors, given that the disbursements of the Estate already substantially exceed the value of the assets that it has realized,[24] their main hope for obtaining compensation for the loss of their investment in Castor is similarly their own direct claim for damages against C&L.

[6] When asked what the Estate's profit from carrying on its Litigation Support Business would be, Mr. Manel replied that he would describe the Participation Agreements not as a source of profit for the Estate but as a benefit. He stated that this arrangement allowed the Estate to finance its own claim against C&L. If the Estate wins, the money will be used to pay first the costs for the general administration of the Estate, and the excess, if any, will then be used to reimburse the loans to the Participating Creditors, and if any assets are then still available, they will be paid as a dividend to the Estate's creditors.[25]

[7] Until the test case is decided and until the Estate has a chance to establish its own entitlement to damages from C&L, we do not know who will ultimately bear the cost of the litigation and to what extent. However, one thing is clear: there is no way that the Estate could have pursued its claim in damages against C&L without the loans made by the Participating Creditors. Given the astronomical amount of

---

[1944] C.T.C. 75, 2 DTC 655 (per Thorson P.) and the U.K. decision mentioned therein. Therefore the loans cannot be applied "as consideration for the supply" until it is determined what portion, if any, of the loans will be reimbursed. The ultimate amount of the fees payable by the Participating Creditors cannot be determined until Mr. Widdrington's test case handled by the Estate has been decided, until the Estate's own claim is recognized by the Quebec Superior Court and until damages are paid to the Estate.

23 Paragraph 7 of the written Admissions of Facts in paragraph 2 above.

24 See note 7 above and note 26 below.

25 Given that not all creditors of the Estate participated in the financing of the action taken against C&L, it seems reasonable that the Participating Creditors be reimbursed ahead of the Estate's other creditors.

litigation costs involved,[26], it is most likely that any additional assets that the Estate may acquire will not be sufficient to pay these costs through the reimbursement of the Participating Creditors' loans and, therefore, the Participating Creditors will have to bear directly at least a portion, if not a substantial portion, of these costs.

[8] In conclusion, the Participation Agreement constituted a funding mechanism to provide the Estate with sufficient funds to prosecute the actions against C&L, not only for its own benefit but also for the benefit of the Participating Creditors.

Position of the Minister

[9] The minister's position is concisely described as follows in paragraphs 79 and 80 of the Respondent's Reply to the Notice of Appeal:

> 79. Since Appellant, prior to its bankruptcy, made exempt supplies, that is made supplies otherwise than in the course of commercial activities, any act performed by the trustee in the administration of the estate of Appellant is deemed to have been performed, as the case may be, by the trustee as agent of the Appellant, such as initiating an action against Coopers & Lybrand;
>
> 80. Furthermore, pursuant to paragraph 141.1(3)(b) of the [Act], the action initiated against Coopers & Lybrand by the trustee, constitutes an act, other than making a supply, in connection with the termination of an activity that is not a commercial activity and the trustee, as agent of Appellant, shall be deemed to have done that thing otherwise than in the course of commercial activities.
>
> [Emphasis added.]

[10] Further enlightenment can be found in the memorandum on objection prepared by the Ministère du Revenu du Québec, which is responsible for administering the Act in Quebec. The appeals officer who processed the objection cited the following opinion expressed by the Direction des lois sur les taxes, le recouvrement et l'administration:

> … Selon les faits soumis, nous sommes d'avis que les biens acquis par le syndic dans le cadre de l'exercice du recours ne le sont que pour la réalisation des actifs du failli, donc dans le cadre de la

[26] As of April 2004, the disbursements of the Estate amounted to approximately $62 million and the Participating creditors' loans totalled $46 millions.

> cessation de l'activité non commerciale de Castor, et qu'en conséquence, ils sont réputés avoir été acquis en dehors du cadre d'une activité commerciale (alinéa 141.1(3)b) de la Loi). Ainsi, aucun crédit de taxe sur les intrants ne peut être réclamé par Richter, en sa qualité de syndic de Castor, à l'égard des biens et des services acquis dans le cadre de l'exercice du recours contre Coopers et Lybrand.
>
> De plus, selon notre analyse, nous sommes d'avis qu'en l'espèce, le « support de litige » offert par Richter ne peut être considéré comme étant une nouvelle activité du failli.
>
> [Emphasis added.]

[11] Furthermore, the appeals officer also added her own opinion as follows:

> . . . En aucun cas, le syndic ne peut, aux fins de la LTA, commencer une nouvelle activité au nom du failli.
>
> Le fait que l'article 32 LFI[27] n'exige pas que le syndic poursuive les activités du failli n'a pas d'incidence sur les effets des dispositions de la LTA. Nous ne contestons pas la légalité du geste posé par le syndic puisque nos conclusions ne portent que sur les conséquences (ou la qualification) de ce geste en matière de taxes à la consommation....
>
> [Emphasis added.]

[12] Further on, on page 3 of her report, the appeals officer states:

> Le syndic soutient que le failli aurait, par son entremise, débuté une nouvelle entreprise soit celle de la fourniture de services de « support aux litiges » aux créanciers du failli.
>
> Nous sommes d'avis que tel n'est pas le cas. Le syndic a pris action ès qualité pour récupérer un actif dans la faillite dans le cadre de sa gestion des actifs du failli. Il est partie à l'action. Ainsi, le fait que les autres créanciers lui prêtent des sommes d'argent ne signifie pas qu'il y a exploitation d'une entreprise. Ces fonds servent à financer l'action en justice qu'il a intentée.
>
> Le fait que le syndic mette à la disposition des autres créanciers les opinions comptables et légales qu'il a acquises ne constitue pas une

[27] *Loi sur la faillite et l'insolvabilité* (*Bankruptcy and Insolvency Act*) (**BIA**).

> fourniture en ce qu'il n'y a pas de livraison de biens ni de prestations de services. . . .
>
> [Emphasis added.]

[13] To distinguish the case of the Estate herein from that of the appellant in *Borrowers' Action Society v. The Queen*, [1996] G.S.T.C. 61, the appeals officer asserts the following:

> . . . le syndic ne fait pas la promotion de poursuites en responsabilité professionnelle, ni n'intente de telles poursuites au nom d'autres personnes. Le syndic ne tente que de récupérer des sommes qui pourraient être dues au failli.
>
> [Emphasis added.]

[14] Finally, the appeals officer draws the following conclusion at pages 3 and 4 of her report:

> . . . Cependant, nous ne croyons pas qu'il y a activité commerciale et contrepartie; les autres créanciers (que le syndic doit représenter) ne sont pas les acquéreurs d'une fourniture et ne versent pas une contrepartie mais ils avancent des fonds au syndic dans leur propre intérêt. De plus, le présent cas concerne uniquement la demande de l'opposant (non celle du syndic) et les activités de celui-ci étaient exonérées.
>
> De plus, si une telle activité avait été exercée par l'opposant (ce que nous nions), celle-ci aurait été réputée être l'activité d'une personne distincte du failli et aurait été une activité non visée par la faillite. . . .
>
> [Emphasis added.]

The Estate's Position

[15] Counsel for the Estate stated, in his remarks, that the bankruptcy of Castor constitutes a unique case, being probably the largest bankruptcy in Canada. In his view, the Estate started carrying on a new business when it decided to provide litigation support to the Participating Creditors. The supplies provided by the Estate constituted taxable supplies because they were so provided in the course of a

commercial activity. His reasons in support of the appeals are outlined in his Notice of Appeal at paragraphs 50 to 77, which I reproduce here:

> D. REASONS IN SUPPORT OF APPEAL
>
> **(i) Introduction**
>
> 50. In entering into the agreements with the Participating Creditors, it was explicitly agreed that the Trustee would supply litigation support services to the Participating Creditors. At such time, the Trustee commenced a new "commercial activity" which was distinctly different from the exempt financial activity carried on by Castor prior to its bankruptcy. The Trustee was, therefore, entitled to claim input tax credits on property and services it acquired for consumption, use or supply in the course of this new commercial activity.
>
> **(ii) The Trustee was Engaged in a "Commercial Activity"**
>
> 51. The supply of litigation support services to the Participating Creditors constitutes a "commercial activity" either as a "business" carried on by the Appellant or an "adventure or concern in the nature of trade". Both of these activities are defined as a "commercial activity" in subsection 123(1) of the [Act].
>
> 52. The definition of "business" in subsection 123(1) is clearly broad enough to comprehend the supply of litigation support services to the Participating Creditors. "Business" is defined to include "a profession, calling, trade, manufacture or undertaking of any kind whatsoever, whether the undertaking is engaged [in] for profit".
>
> 53. The conclusion that Appellant's Litigation Support Business constitutes a "business" and a "commercial activity" is supported by the decision of the Tax Court of Canada in *Borrowers' Action Society v. The Queen*, [1996] G.S.T.C. 61. In this case, the court had to decide whether the appellant made a "taxable supply" to each person who paid a fee, characterised as a "donation", to participate in a class action suit instituted against a credit card company. If the class action suit was successful, each person who advanced funds was entitled to receive a portion of the award.
>
> 54. The Court had little difficulty in determining that the litigation support services provided by Borrowers' Action constituted a "business" and a "commercial activity" on the grounds the taxpayer was engaged in the business of promoting, instituting and prosecuting a legal action against credit card companies financed by

monies received from individuals who wished to participate in the litigation.

55. Similar to the facts in the *Borrowers' Action* case, the Trustee agreed to supervise the test case against Coopers & Lybrand and make available expertise and information to the Participating Creditors as may be relevant to their proceedings. The Trustee's Litigation Support Business was financed by loans made by the Participating Creditors, and the Trustee was authorized by the inspectors to charge the Participating Creditors for its fees and expenses.

56. Accordingly, the activities of the Trustee clearly constitute a "business" and a "commercial activity", not an exempt financial activity as determined by the Minister.

(iii) The Trustee's Inputs Were for Use in a Commercial Activity

57. Considering that the Appellant's Litigation Support Business constitutes a "commercial activity" and not an exempt supply of a financial service, the Trustee was entitled to claim input tax credits with respect to property and services acquired for consumption, use or supply in the course of this new commercial activity.

58. In Appellant's submission, the Minister incorrectly concluded that the property and services acquired by the Trustee were for use in the realisation of the assets of the bankrupt and were, therefore, deemed under paragraph 141.1(3)(b) of the [Act] to have been acquired otherwise than in the course of commercial activities.

59. To the contrary, the property and services were acquired for use in the Trustee's new commercial activity of supplying litigation support services to the Participating Creditors – an activity which was totally unrelated to the exempt financial activities previously carried on by Castor.

60. The Minister also incorrectly determined that the funds loaned by the Participating Creditors were used to finance the Trustee's litigation against Coopers & Lybrand. The Trustee's action against Coopers & Lybrand was held in abeyance pending a decision in the test case, and all funds loaned by the Participating Creditors were used to fund the Trustee's Litigation Support Business in connection with the prosecution of the test case against Coopers & Lybrand.

61. With respect to the timing of its claims for input tax credits, the Trustee was not required to collect GST from the Participating Creditors until its action against Coopers & Lybrand was ultimately decided. It was nevertheless entitled to claim input tax credits on an ongoing basis. Paragraph 169(1)(c) of the [Act] provides that a person is entitled to claim an input tax credit to the extent that a person has acquired property or services for consumption, use or supply in the course of commercial activities. As well, subsection 228(3) of the [Act] provides that a person may claim a net tax refund in a reporting period where its claims for input tax refunds exceed the GST collectible during a reporting period.

62. In Appellant's submission, the Minister's refusal to allow the Trustee's claims for input tax credits conflicts with the underlying policy of the [Act] that businesses engaged in commercial activities should be refunded the GST paid on their inputs even before they make taxable supplies.

63. Further, the Minister's denial of 100% of the input tax credits is particularly onerous since the supply of litigation support services to the foreign banks qualifies for zero-rating under section 23 of Part V of Schedule VI to the [Act]. As well, any GST collected from the Participating Creditors which are Canadian corporations engaged in commercial activities will be refundable to them through the input tax credit mechanism. Only the Canadian financial institutions, which account for approximately 20%[28] of the claims of the Participating Creditors, will have to pay GST on the Trustee's fees and expenses and be ineligible for input tax credits.

(iv) The Minister Misinterpreted Section 265 of the [Act]

64. The Minister refused the claims for input tax credits on the grounds that the Trustee engaged in an exempt financial activity and not commercial activities. Accordingly, the Minister concluded that the property and services acquired by the Trustee were deemed by paragraph 141.1(3)(b) of the [Act] to have been acquired otherwise than in a commercial activity.

65. In Appellant's submission, the Minister's conclusion rests primarily on an erroneous interpretation of section 265 of the Act that the Trustee in no case could commence a new business in the name of the bankrupt. In its reasons, the Minister expressed the view that the Trustee's principal activity as agent of the bankrupt was to continue

---

[28] This statement may be true but the evidence is insufficient to allow me to find this as a fact.

> the exempt business of the bankrupt exercised at the time of the bankruptcy. In no case could the Trustee, for purposes of the [Act], commence a new activity in the name of the bankrupt.

66. Preliminarily, Appellant notes that although Castor was a deemed financial institution, it carried on *both taxable* and *exempt* activities and was a GST registrant. In such circumstances, the Canada Customs and Revenue Agency has recognized repeatedly that a financial institution can claim input tax credits to the extent that property and services are consumed or used in its commercial activity.

67. Contrary to the conclusion of the Minister, section 265 does not imply that the Trustee is restricted to the bankrupt's business, as carried on prior to the bankruptcy.

68. Paragraph 265(1)(a) provides that a trustee in bankruptcy is deemed to be an agent of the bankrupt and that the activities of the trustee in the administration of the estate or in the carrying on of any business of the bankrupt are deemed to have been made as agent of the bankrupt.

69. The Trustee was authorized by the bankruptcy inspectors and the Québec courts to carry on the new commercial activity of supplying litigation support services to the Participating Creditors and to request loans from them to fund the activity. Accordingly, as provided by paragraph 265(1)(a), the Trustee was carrying on these new activities as agent of the bankrupt in the administration of the estate.

70. Moreover, the interpretation of the Minister that the Trustee is restricted to the business of the bankrupt, as carried on prior to the bankruptcy, conflicts with section 32 of the *Bankruptcy and Insolvency Act* which provides that a Trustee is not required to carry on the business of the bankrupt.

71. As well, the Trustee was authorized under section 30 of the *Bankruptcy and Insolvency Act* to supervise the litigation against Coopers & Lybrand, to hire solicitors for such purpose and to borrow funds from the Participating Creditors to fund the litigation.

72. The Minister also misconstrued section 265 when it stated that if the Appellant engaged in a new commercial activity, this activity would be deemed to be the activity of a different person, distinct from the

bankrupt, and claims for the input tax credits would have to be made under another registration number.

73. This interpretation ignores the express wording of paragraph 265(1)(e) which states that "the registration [of the bankrupt] continues in relation to the activities of the person to which the bankruptcy relates as though the Trustee in bankruptcy were the registrant in respect of those activities".

74. In the present circumstances, the inspectors authorized the Trustee to carry on the Litigation Support Business, and these activities clearly related to the bankruptcy of Castor. Therefore, the Trustee was not required under paragraph 265(1)(f) of the [Act] to obtain a new registration number or claim input tax credits under another GST number.

75. The Minister also stated in its reasons that if a new commercial activity of supplying litigation support services was commenced, it was carried on by Richter in its own name and not by Richter in its capacity as Trustee of the bankrupt.

76. This interpretation is contrary to paragraph 256(1)(*a*) of the [Act] which provides that except for supplying its services to the bankrupt, "in every other respect, the trustee in bankruptcy is deemed to be agent of the bankrupt and any supply made or received and any act performed by the trustee in the administration of the estate ... is deemed to have been made, received or performed, as the case may be, by the trustee as agent of the bankrupt".

E. CONCLUSION

77. For all these reasons, Appellant submits that it was engaged in a new commercial activity when it supplied litigation support services to the Participating Creditors; that it was entitled to claim input tax credits with respect to these activities; and that section 265 of the Act did not preclude the Trustee from carrying on such activities and claiming input tax credits under the GST registration number of Castor.

[Emphasis added.]

Analysis

[16] The issue raised by these appeals is a thorny one. The difficulty results to a great extent from the unusual circumstances giving rise to them. We have here an arrangement put in place by a trustee in bankruptcy which involves a major endeavour, that is, the provision of litigation support services to some of the creditors of the Estate for the pursuit of their own actions in damages against Castor's auditor. The difficulty also arises because of the particularities of the Participation Agreement. The main source (if not the only one) of funding for the prosecution of the test case against C&L is provided by these creditors in the form of loans. Actually, all the Ongoing Fees have been financed by the Participating Creditors. However, we do not know who will ultimately bear the costs of this very expensive litigation. It is highly likely that a great portion of the advances by the Participating Creditors will not be reimbursed and that the non-reimbursed portion will then constitute a consideration for the services provided by the Estate to these creditors. However, we do not know to what extent this will be the case. It is also possible that a disproportionate share of the costs in question could be borne by the Estate should it be successful in obtaining an award of damages in its own claim against C&L.

[17] To resolve the issue in hand, it is necessary to begin by looking at the relevant provisions of the Act. First, pursuant to subsection 225(1) thereof, a registrant is entitled to claim ITCs. Subsection 169(1) provides the general rule for their computation:

> 169(1) **General rule for credits**. Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> A x B
>
> where
>
> A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

[. . .]

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

[. . .]

[Emphasis added.]

[18] The ITCs can be claimed only to the extent that the property or service was used or consumed or supplied in the course of a commercial activity. Therefore, it is important to look at the definition of "commercial activity" in subsection 123(1) of the Act:

« *activité commerciale* » Constituent des activités commerciales exercées par une personne :	"*commercial activity*" of a person means
a) l'exploitation d'une entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;	(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
b) les projets à risque et les affaires de caractère commercial (à l'exception de quelque projet ou affaire qu'entreprend, sans attente raisonnable de profit, un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où le projet ou l'affaire comporte la réalisation par la personne de	(*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

fournitures exonérées;

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

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

[Emphasis added.]

[19] The word "business" is also defined in the same subsection:

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

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

[Emphasis added.]

[20] The word "profession" is not defined in the Act, but the following definition is provided by the U.K. Court of Appeal in *Commissioners of Inland Revenue v. Maxse*, [1919] 1 K.B. 647 (C.A.), as cited in the *Canadian Goods and Services Tax Reporter* (published by CCH Limited), at paragraph 3115:

> . . . an occupation requiring either purely intellectual skill, or [. . .] manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities.

[21] The word "undertaking" has been defined in *James Voorhees Drumheller v. M.N.R.*, 59 DTC 1177, 1180 (Exch. Ct.), as embracing ". . . trades, manufactures, professions, or callings, and any other conceivable kinds of enterprise as well."

[22] In the *Drumheller* case, a taxpayer had been brought into a joint scheme which is described as follows on page 1181:

> . . . What they put into the project was almost entirely personal effort. Indeed, the appellant's contribution was nothing but his personal efforts, and his rights in the assets (which consisted principally of the franchise) gained in carrying out the venture represented his return for what those efforts, carried out as they were in conjunction with further efforts by Mr. Brook, had produced. . . . each was to do what he was qualified to do and . . ., in arranging for and attending the testing of the well, the appellant was doing much the same sort of thing as he customarily did in carrying out his profession as an engineer. The arranging for testing of the well, the testing of it, and the supervision of the testing were all part of the procedure which it was necessary or desirable to carry out to attain the first objective of the project; that is, to acquire the franchise, which in itself was a thing of value. . . . the project, so far as it was their personal project, was substantially that of putting forth the efforts necessary to obtain the franchise and promote the company. They had no scheme for operating or even for acquiring a gas distributing system for themselves. Their personal venture would be completed when the company to be incorporated came into the picture and purchased what assets had in the meantime been acquired. . . .
>
> [Emphasis added.]

[23] In the opinion of Justice Thurlow, these activities constituted an undertaking and the $10,000 received in lieu of what had been promised initially, that is, a 25% interest in a gas company to be formed and of which he was to have been appointed manager, constituted income from an undertaking, rather than capital.

[24] For the purposes of determining whether a business has been "carried on", reference may be made to *Palmer v. The Queen*, 73 DTC 5248 (F.C.T.D.), a decision in which Justice Cattanach stated (at page 5249) that "it is a question of fact whether a series of acts amounts to carrying on a trade or business. Principal considerations in determining such an issue of fact are (1) the nature and the frequency of the act, and (2) the intention of the person concerned."

[25] The same issue was dealt with as well by the Privy Council in *American Leaf Blending Co Sdn Bhds v. Director-General of Inland Revenue*, [1978] 3 All ER 1185, also cited in paragraph 3115 of the *Canadian Goods and Services Tax Reporter*:

> The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.

[26] Certain activities may be deemed to be carried on either in the course of commercial activities or otherwise than in the course of commercial activities. One example is where one is involved in the termination of an activity. The relevant provision is subsection 141.1(3) of the Act, which provides as follows:

141.1(3) Pour l'application de la présente partie :	141.1(3) For the purposes of this Part,
a) dans la mesure où elle accomplit un acte, sauf la réalisation d'une fourniture, à l'occasion de l'acquisition, de l'établissement, de l'aliénation ou de la cessation d'une de ses activités commerciales, une personne est réputée avoir accompli l'acte dans le cadre de ses activités commerciales;	(*a*) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of a commercial activity of the person, the person shall be deemed to have done that thing in the course of commercial activities of the person; and
b) dans la mesure où elle accomplit un acte, sauf la réalisation d'une fourniture, à l'occasion de l'acquisition, de l'établissement, de l'aliénation ou de la cessation d'une de ses activités non commerciales, une personne est réputée avoir accompli l'acte en dehors du cadre d'une activité commerciale.	(*b*) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of an activity of the person that is not a commercial activity, the person shall be deemed to have done that thing otherwise than in the course of commercial activities.

[Emphasis added.]

[27] As we saw above, ITCs are only available to the extent that the property or service is being consumed, used or supplied in the course of a commercial activity and not in the course of making exempt supplies. There is no dispute here that most of the services provided by Castor before its bankruptcy — i.e., the lending of funds to real estate enterprises — constituted exempt supplies as defined in

Schedule V of the Act.[29] However, even financial institutions can make taxable supplies in respect of which there is a requirement to collect GST.[30] There is no dispute either that the provision of litigation support services does not constitute an exempt supply. Therefore, if the Litigation Support Business constitutes a commercial activity of the Estate, the Estate would be entitled to claim ITCs to the extent that the properties and the services were acquired in the course of that commercial activity.

[28] When a registrant such as a financial institution provides both taxable and exempt supplies, the Act does not prescribe any specific allocation methods for the purpose of determining the qualifying ITCs to which a registrant is entitled. Instead, pursuant to subsection 141.01(5), registrants may use any method to allocate the use of their inputs between the provision of taxable supplies and other activities, provided the method chosen is fair and reasonable in the circumstances and is used consistently throughout the fiscal year. Subsection 141.01(5) provides as follows:

141.01(5) Seules des méthodes justes et raisonnables et suivies tout au long d'un exercice peuvent être employées par une personne au cours de l'exercice pour déterminer la mesure dans laquelle :	141.01(5) The methods used by a person in a fiscal year to determine
a) la personne acquiert, importe ou transfère dans une province participante des biens ou des services afin d'effectuer une fourniture taxable pour une contrepartie ou à d'autres fins;	(*a*) the extent to which properties or services are acquired, imported or brought into a participating province by the person for the purpose of making taxable supplies for consideration or for other purposes, and
b) des biens ou des services sont consommés ou utilisés en vue de la réalisation d'une fourniture taxable pour une contrepartie ou à d'autres fins.	(*b*) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,
	shall be fair and reasonable and shall be used consistently by the person throughout the year.

29 See paragraphs 2 and 3 of the written Admissions of Fact, in paragraph 2 of these reasons.

30 For an illustration, see GST Memoranda (New Series) 17.2, dated April 2000.

[Emphasis added.]

[29] Subsection 141.01(3) should also be cited here:

141.01(3) La consommation ou l'utilisation d'un bien ou d'un service par une personne dans le cadre de son initiative est réputée, pour l'application de la présente partie, se faire :	141.01(3) Where a person consumes or uses property or a service in the course of an endeavour [31] of the person, that consumption or use shall, for the purposes of this Part, be deemed to be
a) dans le cadre des activités commerciales de la personne, dans la mesure où elle a pour objet la réalisation, pour une contrepartie, d'une fourniture taxable dans le cadre de l'initiative;	(*a*) in the course of commercial activities of the person, to the extent that the consumption or use is for the purpose of making taxable supplies for consideration in the course of that endeavour; and
b) hors du cadre des activités commerciales de la personne, dans la mesure où elle a pour objet :	(*b*) otherwise than in the course of commercial activities of the person, to the extent that the consumption or use is
(i) la réalisation, dans le cadre de l'initiative, d'une fourniture autre qu'une fourniture taxable effectuée pour une contrepartie,	(i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or
(ii) une autre fin que la réalisation d'une fourniture dans le cadre de l'initiative.	(ii) for a purpose other than the making of supplies in the course of that endeavour.

[30] Let us now apply these statutory provisions to the facts of this case. Although the Respondent's counsel stated there were no issues with respect to the facts, I believe that at least the inference to be drawn from those facts does give rise to a dispute between the parties. Essentially, the respondent's position as expressed by the appeals officer and set out in paragraphs 10 to 14 above, is that the Estate was only involved in collecting money owed to it.[32] This description by

---

31 The word "endeavour" for the purposes of section 141.01 includes a business of a person (subsection 141.01(1) of the Act).

32 "[L]es biens acquis par le syndic dans le cadre de l'exercice du recours ne le sont que pour la réalisation des actifs du failli, donc dans le cadre de la cessation de l'activité non

the appeals officer does not correspond with my understanding of what took place here.

[31] In my view, it is clear that the Estate was acquiring the services and properties related to the litigation support activity not only for its own benefit but also for the benefit of each Participating Creditor. This is clear when one considers that the Estate entered into Participation Agreement with the Participating Creditors and was made even clearer when the Quebec Superior Court justice who is the coordinating judge with respect to over 40 actions brought against C&L decided on February 20, 1998, to hold the Estate's case in abeyance and to proceed with Mr. Widdrington's test case. When the Estate, through the professionals that it has hired, provides litigation support services for the test case against C&L, it is providing those services not only to Mr. Widdrington but also to each Participating Creditor who benefits from the test case. Although the Estate is not financing the Ongoing Fees, it also is benefiting from the test case. Pursuant to the Participation Agreement and as a result of having hired these professionals and acquired properties in the course of the Litigation Support Business, the Estate will bear some of the costs should it be successful in collecting any damages from C&L.

[32] The services required to prosecute its own claim and the claims of the Participating Creditors against C&L constitute an enormous undertaking which has taken many years of effort and will likely require several more years. It has cost numerous millions of dollars and will require millions more. The initial stage required thousands of hours of research in, and analysis of, Castor's books and records and C&L's working papers. In the next phase, the examinations for discovery prior to the hearing took up at least 200 days. The third phase, which started with the commencement of the court hearing in the test case in September 1998, has necessitated, as of May 2004, over 500 days of testimony. Many more years of hearing are anticipated just to complete the first stage of the claims against C&L, that is, for the Superior Court to determine whether C&L was negligent in preparing Castor's financial statements. Then, if negligence is established, the next stage will require that each Participating Creditor and the Estate furnish its own proof of damages. I have no doubt in concluding that the activities carried on by the Estate in providing the litigation support services to the Participating Creditors constitute, if not a profession as defined in the *Maxse* case (cited above), at least an undertaking as this term is used in the definition of a "business". Given the nature of these activities and the continuous involvement required from the Estate in order

---

commerciale de Castor" (see paragraph 10 above). "Le syndic ne tente que de récupérer des sommes qui pourraient être dues au failli" (see paragraph 13 above).

to provide the services during the relevant period and that will be required from it in future years, this undertaking amounts to a business being carried on by the Estate.

[33] The respondent's counsel and agents have adopted here a very narrow interpretation of what constitutes a business. They claim that the Estate, through the Trustee, was not allowed under the BIA to carry on such a business under the BIA. First, I believe that the Trustee, acting as agent for the Estate, was legally entitled to carry on the undertaking in question. Indeed, the Trustee was authorized to do so by the inspectors and obtained a legal opinion stating that it was appropriate pursuant to paragraph 30(1)(*e*) of the BIA[33] for it to enter into the Participation Agreement and to carry on the Litigation Support Business. As mentioned in note 11 above, the Quebec Court of Appeal has also recognized, at least indirectly, the legitimacy of the Participation Agreement.

[34] In any event, I would add that the Act is not to be applied to transactions that ought to have taken place, nor is it to be applied only to transactions that could be legally carried out. In my view, the Act ought to be applied to what has actually taken place. If the Estate's litigation support services provided to the Participating

---

[33] That provision reads as follows:

> 30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> [. . .]
>
> (*e*) employ a solicitor or other agent to take any proceedings or do any business that may be sanctioned by the inspectors;
>
> 30(1) Avec la permission des inspecteurs, le syndic peut :
>
> [. . .]
>
> *e)* employer un avocat ou autre mandataire pour engager des procédures ou pour entreprendre toute affaire que les inspecteurs peuvent approuver;
>
> [Emphasis added.]

It is interesting to note that in the French version the equivalent of the word "business" used in paragraph 30(1)(*e*) is "*affaire*", the same word as that used in the French version of the Act for "undertaking" in the definition of "business".

Creditors constitute a business being carried on by the Estate, then the activities should be treated as such under the Act.

[35] Contrary to the position taken by the appeals officer as set out in paragraph 14 above, I believe that the Participating Creditors were not simply lending money to the Estate, but were actually entering into an agreement under which the Estate was to provide them with services for a contingent fee. The contingency here has to do with whether the Estate will be able to acquire sufficient assets through its own claim against C&L to pay for all the services and properties related to the litigation support activity mainly, if not almost exclusively, from any such assets. So the Participation Agreement cannot be treated as a simple loan agreement.

[36] First of all, the Participation Agreement stipulates that the Estate is to provide its expertise and information to the Participating Creditors. This can be better described as the supply of litigation support services to the Participating Creditors. To that end, the Estate retained lawyers, accountants and other professionals. The Trustee itself supplied litigation support services to the Estate and was paid fees for them. The Estate's mandate was to provide the litigation support necessary for the preparation of the claims against C&L and for the prosecution of the common test case — once it was selected by the Quebec Superior Court — for the benefit of the Participating Creditors. The Estate was and is required under the Participation Agreement to "provide [to the Participating Creditors, with its loan requests] invoices which set out, in reasonable detail, the services rendered and disbursements incurred" (see note 3 above).

[37] Furthermore, no interest is payable with respect to the loans. These loans are repayable only at such time as the Trustee determines in its own discretion that the Estate has sufficient funds for all existing and future administrative requirements of the Estate. Today, it is fairly obvious that the Participating Creditors will not, in all likelihood, have their loans fully refunded and that they will bear at least a portion of the Ongoing Fees. Given how few assets were available to the Estate, I would suggest in addition that this likelihood was also foreseeable at the time it entered into the Participation Agreements.

[38] So the true nature of the arrangement entered into here is the provision to the Participating Creditors of litigation support services for a contingent fee that will become payable to the extent that the Estate does not itself have sufficient funds to

pay for those services.[34] The largest single Participating Creditor expects to receive an invoice once the Estate's claim is dealt with.

[39] I agree with the respondent's counsel that the Trustee was involved in terminating the activities of the Estate, since it was hired to liquidate all the Estate's assets. Given that Castor's main activities involved making exempt supplies, the activities of the Trustee would be deemed not to be carried on in the course of commercial activities. Therefore, the costs of the litigation support services that the Estate enjoyed in prosecuting its own claim against C&L would not qualify for ITCs. Here the services and properties acquired by the Estate in the course of the prosecution of the actions against C&L (or the prosecution of Mr. Widdrington's test case alone as of February 1998) were so acquired for the dual purpose of advancing its own claim against C&L and providing litigation support services to the Participating Creditors. I would therefore conclude that to the extent that those services and properties were acquired for the purpose of benefiting the Estate, the portion thereof acquired for the benefit of the Estate would be considered not to have been acquired in the course of commercial activities. That portion of the costs does not qualify for ITCs. Indeed, the Estate has acknowledged in its Notice of Appeal that it is not entitled to a portion of the ITCs that it had previously claimed. However, the portion of the services and properties in question that was acquired for the purpose of prosecuting the claims of the Participating Creditors would be considered to have been acquired in the course of commercial activities. The Estate's supply of its litigation support services to the Participating Creditors would thus constitute a "taxable supply". The allocation by the Estate of the use of its inputs between its taxable supplies and its other activities (exempt supplies) appears to me to be a fair and reasonable one and it complies with subsection 141.01(5) of the Act. The fairness and reasonableness of that allocation was not contested by counsel for the respondent.

[40] Before concluding, I should mention that I do not agree with the position of the Minister's appeals officer that, should the Litigation Support Business of the Estate be considered to be a commercial activity, it would have to be treated as an activity of a separate person. The appeal's officer relied on paragraph 265(1)(*f*) of the Act, which provides as follows:

---

[34] For an example of a characterization of the true nature of such an arrangement, see *Borrowers' Action Society* (*supra*), a case in which my colleague Justice Bell accepted the respondent's argument that a taxable supply had been made for a consideration, although the Appellant's documentation described the money paid by the people acquiring a right to participate in a contingent award as a "donation".

> 265(1) For the purposes of this Part, where on a particular day a person becomes a bankrupt,
>
> [. . .]
>
> (*f*) where, on or after the particular day the person begins to engage in particular activities to which the bankruptcy does not relate, the particular activities shall be deemed to be separate from the activities of the person to which the bankruptcy relates as though the particular activities were activities of a separate person, and the person may
>
> (i) apply for, and be granted, registration under Subdivision d of Division V, and
>
> (ii) establish fiscal periods and establish and make elections respecting reporting periods,
>
> in relation to the particular activities as though they were the only activities of the person;
>
> [Emphasis added.]

[41] In order for this provision to apply, it is necessary to conclude that the Litigation Support Business is an activity to which the bankruptcy does not relate. In his argument, the respondent's counsel did not deal with this issue and I do not know how it can be said here that the Litigation Support Business constitutes an activity to which the bankruptcy does not relate. It is clear that the services and properties related to litigation support services and properties acquired by the Estate in order to carry on the Litigation Support Business are also benefiting the Estate in the pursuit of its own legal action against C&L. The damages it could receive would most likely constitute its last remaining asset for the Trustee to liquidate before terminating its work. The Litigation Support Business allows the Estate to pursue the endeavour that is its legal action. *Prima facie*, these activities of the Estate appear to me as activities to which the bankruptcy relates and I do not believe that paragraph 265(1)(*f*) applies here. In any event, in my view, the argument based on that paragraph is nothing more than a red herring, given that the purpose of the rule set out therein is to determine how GST tax returns should be filed, for which fiscal period and under which registration number. Regardless of whether the Estate should have filed its GST return as the Estate or as a separate person, the respondent's liability to pay the ITCs to the Estate would not change.

[42] To summarize, the services and properties related to litigation support were acquired by the Estate both for its own benefit in the liquidation of all of its assets and for the purpose of providing litigation support services to the Participating Creditors. The provision of those services constituted the carrying on of commercial activities. Therefore, to the extent that they relate to these commercial activities, the Estate is entitled to the ITCs. Given that the allocation made by the Estate is fair and reasonable, an amount of $120,000 should be deducted from the total ITCs of $2,474,361.92 claimed by the Estate. The balance of these ITCs, that is, $2,354,362, relates to properties and services acquired in the course of a commercial activity.

[43] For all these reasons, the Estate's appeals are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Estate is entitled to ITCs of $2,354,362, the whole with costs.

Signed at Drummondville, Québec, this 13th day of February 2005.

"Pierre Archambault"

Archambault, J.

CITATION:	2005TCC92
COURT FILE NO.:	2002-222(GST)G
STYLE OF CAUSE:	Richter & Associates Inc. in its capacity as trustee to the bankrupt estate of Castor Holdings Ltd. and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	May 11, 2004
REASONS FOR JUDGMENT BY:	The Hon. Justice Pierre Archambault
DATE OF JUDGMENT:	February 13, 2005

APPEARANCES:

Counsel for the Appellant:	Glenn A. Cranker and Frank Mathieu
Counsel for the Respondent:	Benoît Denis

COUNSEL OF RECORD:

For the Appellant:

Name:	Glenn A. Cranker
Firm:	Stikeman Elliott Montréal, Quebec

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada