Docket: 2012-3401(GST)G

BETWEEN:

CLUB INTRAWEST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 24, 25 and 26, 2014 at Vancouver, British Columbia and on January 27, 2015 at Ottawa, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Chia-yi Chua Wendy A. Brousseau John C. Yuan
Counsel for the Respondent:	Lynn M. Burch Shannon Currie

JUDGMENT

In accordance with the attached reasons for judgment:

The appeal from the assessments with regard to monthly reporting periods ending on October 31 for each year from 2002 to 2007, made under the *Excise Tax Act*, notices of which are dated August 19, 2010 for the October 2007 monthly reporting period and August 20, 2010 for the October monthly reporting period for each of the years 2002 to 2006, is dismissed.

The appeal from the assessment with regard to the monthly reporting period ending on October 31, 2008 is quashed.

The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award to the Respondent. If no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 9th day of June 2016.

"S. D'Arcy"

D'Arcy J.

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REASONS FOR JUDGMENT

D'Arcy J.

I. **Introduction**

[1] The Minister has assessed the Appellant in respect of its monthly reporting period ending on October 31 for each year from 2002 to 2007. The appellant also filed an appeal for its monthly reporting period ending on October 31, 2008. I quashed that appeal at the commencement of the hearing with the consent of the Appellant.

[2] As stated in the Amended Partial Agreed Statement of Facts and Issues (the **PASF**), the Appellant "was created to facilitate the administration and operation of resort accommodations in connection with a vacation accommodation ownership plan. . ." (the **Intrawest Program**).[1]

[3] The issues in this appeal arise from transactions between the following parties:

- The Appellant.

[1] PASF, paragraph 4.

- Intrawest Resort Ownership Corporation and its successor corporations, Intrawest Corporation and Intrawest ULC (individually and collectively referred to as the **Canadian Developer)**.

- Intrawest Resort Ownership U.S. Corporation and Resort Ventures L.P (jointly referred to as the **U.S. Developer**).

- Certain third parties situated in Canada who entered into an agreement with the Canadian Developer that allowed them to participate in the Intrawest Program (**Canadian Resort Point Purchasers)**.

- Certain third parties situated in the United States who entered into an agreement with the U.S. Developer that allowed them to participate in the Intrawest Program (the **American Resort Point Purchasers)**.

[4] The appeal relates to the following issues that arise in respect of the Appellant's participation in the Intrawest Program**:**

- Whether the Appellant acquired numerous goods and services as agent for the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer, and the U.S. Developer (collectively referred to as the **Members of the Appellant**).

- If the Appellant did not acquire the numerous goods and services as agent for the Members of the Appellant,

    - What was the nature of the supply made by the Appellant to the Members of the Appellant? Specifically, was it a supply of intangible personal property or of a service?

    - How do the *place-of-supply rules* contained in section 142 of Part IX of the *Excise Tax Act* (the ***GST Act***) apply to a supply of intangible personal property or a service that relates to both real property situated in Canada and real property situated outside of Canada?

- Whether the Minister followed the provisions of the *GST Act* when calculating the Appellant's net tax**.**

II. **Witnesses**

[5] The Appellant called two witnesses, Mr. Robert Keith Thompson and Ms. Sandra Ruff.

[6] Mr. Thompson is a retired lawyer. He informed the Court that, starting in 1993, he acted for Intrawest Corporation (the parent company of the Canadian Developer) and the Canadian Developer. Mr. Thompson informed the Court that his clients, Intrawest Corporation and the Canadian Developer, were waiving privilege with respect to discussions he had had with them relating to the establishment of the Appellant and the drafting of documents regarding the establishment of the Appellant.[2]

[7] Most of Mr. Thompson's testimony involved the identification of certain documents that he drafted on behalf of the Canadian Developer. The PASF discusses the majority of these documents.

[8] Mr. Thompson testified that he did not act for the Appellant. In addition, he was not involved in the transactions between the Canadian Developer and Canadian Resort Point Purchasers pursuant to which the Canadian Resort Point Purchasers purchased their interests in the Intrawest Program.[3]

[9] Ms. Ruff is an accountant who works for a division of the Canadian Developer. Specifically she is the Vice-President of Finance of the Intrawest Resort Club Group division of the Canadian Developer. The majority of her testimony related to the calculation of an annual fee that the Appellant bills to the Members of the Appellant (the **Annual Resort Fee**).

[10] I found both witnesses to be credible.

[11] The Respondent called three witnesses: Mr. Jaya Abraham, Ms. Brenda Ewing and Mr. Dennis Lum.

[12] Mr. Abraham and Ms. Ewing are Canadian Resort Point Purchasers. In 2008, subsequent to the assessed periods, Ms. Ewing was a sales representative for the Canadian Developer.

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[2] Transcript, page 56, testimony of Mr. Thompson.

[3] Transcript, page 111, testimony of Mr. Thompson.

[13] Mr. Lum is a large-business auditor and has worked for the CRA for 25 years.

[14] I found all of the Respondent's witnesses to be credible.

III. **Summary of Facts**

[15] The Appellant is a non-profit, non-stock corporation that was established on November 9, 1993 under the laws of the state of Delaware in the U.S.A. The Appellant is a GST registrant and its mailing and business address is 326-375 Water Street, Vancouver, British Columbia.[4]

[16] When assessing the Appellant, the Minister assumed that the Appellant was at all material times a resident of Canada. The Appellant did not provide any evidence to rebut this assumption.

[17] Paragraph 14 of the PASF notes that the following documents govern the Intrawest Program:

- Exhibit A-1, Table 1: The table contains an agreement entitled, FOURTEENTH AMENDED AND RESTATED Master Declaration for Club Intrawest entered into by the Appellant and the Canadian Developer (the **Master Declaration**).

- Exhibit A-1, Table 13: The table contains two documents: the Certificate of Incorporation for the Appellant with amendments (the **Incorporation Documents)** and the by-laws of the Appellant (the **By-laws**).

- "The agreements governing the trust arrangements described. . .in paragraph 19" of the PASF. Paragraph 19 states the following:

> When the developer [the Canadian Developer] transferred a vacation home in Canada to the Club [the Appellant], legal title to the vacation home was transferred to a trust company created under Canadian law, as trustee for the Club [the Appellant]. When the U.S. developer transferred a vacation home in the United States or Mexico to the Club [the Appellant], legal title to the

[4] PASF, paragraphs 1 to 3.

> vacation home was transferred to a trust company created under U.S. law, as trustee for the Club [the Appellant].

I will refer to the trust agreement involving the Canadian Developer and the Appellant as the **Canadian Bare Trust Agreement** and the agreement involving the U.S. Developer and the Appellant as the **U.S. Bare Trust Agreement**.

- Exhibit A-1, Table 6: "the guidelines setting out the rules applicable to members in connection with the Intrawest program." (the **Membership Guidelines**)

- Exhibit A-1, Table 8: The document entitled Purchase and Membership Agreement which agreement was entered into by the Canadian Developer and a Canadian Resort Point Purchaser (the **Canadian Purchase and Membership Agreement**)

- Exhibit A-3: A document entitled Membership Certificate

[18] As noted in paragraph 13 of the PASF, the parties are satisfied that the documents at Exhibits A-1 and A-2 are materially representative of these documents for the period between 2002 and 2007. I assume that the Membership Certificate, Exhibit A-3, is also materially representative of that document for the period between 2002 and 2007.

[19] The Canadian Developer established the Appellant and created the Intrawest Program in 1993. During the relevant period, the program involved vacation homes located in resorts in Canada (the **Canadian Vacation Homes)**, the United States and Mexico[5] (the **U.S./Mexico Vacation Homes**).

[20] It is my understanding that the Canadian Vacation Homes and the U.S./Mexico Vacation Homes (which I will refer to together as the **Vacation Homes**) are studio, one, two, and three bedroom condominium units in the various resorts.[6]

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[5] PASF, paragraph 9; Exhibit A-13.

[6] PASF, paragraph 6.

[21] The Canadian Developer either built or purchased the Canadian Vacation Homes.[7] It appears that the U.S. Developer either built or purchased the U.S./Mexico Vacation Homes.[8] As I will discuss, the Canadian Developer and the U.S. Developer transferred their respective interests in the Canadian Vacation Homes and the U.S./Mexico Vacation Homes to the Appellant.

[22] The Appellant retained the Canadian Developer to manage and operate the Canadian Vacation Homes and the U.S./Mexico Vacation Homes.[9]

Transfer of Vacation Homes to the Appellant

[23] Each of the Canadian Developer and the U.S. Developer transferred individual Vacation Homes to the Appellant. The Appellant paid for the Vacation Homes by transferring the occupancy rights to the Vacation Homes, in perpetuity, to the Canadian Developer and the U.S. Developer respectively.[10] I received very little detailed evidence with respect to these key transactions.

[24] The PASF notes the following:

> 7. When the developer(s) [the Canadian Developer] transfer a vacation home, either built or acquired, to the Club [the Appellant], it is transferred in exchange for the number of resort points required for the right to occupy and use the vacation home for an entire year.[11]
>
> . . .
>
> 12. The point values for the right to occupy and use the vacation home at a particular resort are determined before the developer(s) [the Canadian Developer] transfer the vacation home to the Club [the Appellant].

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[7] PASF, paragraph 7.

[8] PASF, paragraph 19.

[9] PASF, paragraph 63; Exhibit A-1, Table 10, section 3.1.

[10] Exhibit A-1, section 2.1(a).

[11] Paragraph 5 of the PASF notes that the Canadian Developer, i.e. Intrawest Resort Ownership Corporation and its successor corporations, will be referred to in the PASF as "the developer". The parties confirmed to the Court, in a letter dated February 15, 2016, that the word "developer(s)" as used in the PASF refers only to Intrawest Resort Ownership Corporation and its successor corporations.

[25] I have concluded from paragraphs 7 and 12 of the PASF, and after reading section 2.1(a) of Exhibit A-1, that the Canadian Developer transferred Vacation Homes to the Appellant in consideration of the occupancy rights, in perpetuity, to the Vacation Home. The occupancy rights are evidenced by a point system. According to paragraph 11 of the PASF, the Canadian Developer determines the actual number of points that represent the value of occupancy of a home for each day in a year (the **Resort Points)**.

[26] While paragraphs 7 and 12 of the PASF refer only to the Canadian Developer, I assume that the U.S. Developer received the same consideration when it transferred U.S./Mexico Vacation Homes to the Appellant.

[27] The Appellant did not provide the Court with any of the actual transfer agreements used by the Canadian Developer to transfer Canadian Vacation Homes to the Appellant (the **Canadian Vacation Home Transfer Agreement**), or used by the U.S. Developer to transfer U.S./Mexico Vacation Homes to the Appellant (the **American Vacation Home Transfer Agreement**). The Appellant's counsel argued that the Master Declaration effected the transfers. I do not agree. While the Master Declaration permits the transfers to take place, it is not an agreement that actually transfers the Vacation Homes to the Appellant. The Master Declaration does not contain basic clauses that are required in order to effect a transfer of a specific Vacation Home, such as a consideration clause, a date-of-transfer clause and a clause that specifies the interests that are being transferred. Mr. Thompson confirmed to the Court that the transfers were effected by documents that are not before the Court.[12]

[28] In addition, the Appellant did not call as a witness an employee, officer, or director of the Canadian Developer, the U.S. Developer or the Appellant who had knowledge of the terms of these agreements. In fact, the Appellant did not call any employees, officers or directors of the Appellant to testify before the Court.

[29] As a result, as I will discuss, it is not clear to the Court what beneficial interests in the Vacation Homes, or responsibilities with respect to the Vacation Homes, were retained by the Appellant under the two transfer agreements.

[30] As discussed previously, when the Canadian Developer transferred a Canadian Vacation Home to the Appellant, legal title was transferred to a trustee

[12] Transcript, pages 93 and 95, Testimony of Mr. Thompson.

pursuant to the Canadian Bare Trust Agreement. When the U.S. Developer transferred a U.S./Mexico Vacation Home to the Appellant, legal title was transferred to a trustee pursuant to the U.S. Bare Trust Agreement.

[31] The Appellant provided the Court with a copy of the Canadian Bare Trust Agreement between the Canadian Bare Trustee, the Canadian Developer and the Appellant. Section 2.1 of the trust indenture states the following:

> 2.1 Appointment: The Club [the Appellant] appoints the Trustee as its bare trustee to hold legal title to the Resort Accommodation in trust for and on behalf of the Club [the Appellant] in accordance with the terms of this Agreement. The Trustee accepts the appointment and declares that:
>
> (a) It will hold legal title to the Resort Accommodation in trust for the Club [the Appellant] in trust as bare Trustee for and on behalf of the Club [the Appellant]; and
>
> (b) It will hold no beneficial interest in the Resort Accommodation and that all the equitable and beneficial interest in the Resort Accommodation will be vested solely and exclusively in the Club [the Appellant] for the benefit of the Club [the Appellant] and its Members.[13]

[32] The Court was not provided with a copy of the U.S. Bare Trust Agreement. It appears, from the evidence before me, that the U.S. Bare Trustee held the legal title in the Vacation Homes in trust as bare trustee for and on behalf of the Appellant.[14]

The Canadian Developer's and U.S. Developer's involvement with the sale of the Intrawest Program

[33] The Canadian Developer markets and sells the Intrawest Program in Canada.[15] The U.S. Developer markets and sells the Intrawest Program in the United States.[16]

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[13] Exhibit A-1, Table 2.

[14] See, for example, Exhibit A-1, section 2.4.

[15] PASF, paragraph 5.

[34] The PASF provides the following description of the Canadian Developer's involvement in the program:

- The Canadian Developer assigns "a point value" (Resort Points) to the right to occupy one day in each [Vacation Home], with possible variations in assigned point value for the particular [Vacation Home], depending on which of five Intrawest program seasons – holiday season, peak season, activity season, relax season and opportunity season-the particular day falls within.[17]

- The Canadian Developer then sells, in Canada, Resort Points to Canadian Resort Point Purchasers.

[35] The PASF states that the Canadian Developer is a member of the Appellant.[18] It is not clear to the Court when or how the Canadian Developer acquired this membership.

[36] I did not receive any evidence with respect to the U.S. Developer's involvement in the assignment of point values to the U.S./Mexico Vacation Homes.

[37] The only reference in the PASF to the U.S. Developer's involvement in the Intrawest Program is the statement in paragraph 5 that the U.S. Developer markets and sells the Intrawest Program in the United States.

[38] The PASF does not state whether the U.S. Developer is a member of the Appellant. However, section 1.34 of the Master Declaration states that "'Member' means Resort Point Members and Advantage Members (collectively the Resort Point Purchasers), [19] together with the Declarant, with respect to the Declarant's Resort Points and the Declarant's Advantage Interests." Pursuant to sections 1.4 and 7.3 of the Master Declaration, Advantage Members are, generally speaking,

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[16] PASF, paragraph 5.

[17] PASF, paragraph 11.

[18] PASF, paragraph 8.

[19] Only for the purposes of the Master Declaration.

Resort Point Purchasers who have special occupancy rights.[20] Section 1.18 of the Master Declaration defines Declarant as including the Canadian Developer and its appointees. Section 1.6 of the Master Declaration states that 'Appointee' means Intrawest Resort Ownership U.S. Corporation, Resort Ventures, L.P [the U.S. Developer]. In summary, pursuant to the Master Declaration, the U.S. Developer is a member of the Appellant.

Sale of Resort Points

[39] The Canadian Developer and the Canadian Resort Point Purchasers entered into the Canadian Purchase and Membership Agreement. Section 2 of the agreement provides that the Canadian Resort Point Purchaser agrees to purchase, and the Canadian Developer agrees to sell, a specific number of Resort Points.[21] For the purposes of the Canadian Purchase and Membership Agreement, Resort Points are defined as "the currency of use at the Club [the Appellant] through which Resort Point Members reserve occupancy of Resort Accommodation in accordance with the Club Instruments."[22]

[40] The Canadian Purchase and Membership Agreement also provides that "on the purchase of the Resort Points, the Purchaser [the Canadian Resort Point Purchaser] shall be admitted as a Member of the Club [the Appellant] at no additional cost."

[41] The parties did not file with the Court the agreements that the U.S. Developer entered into with the American Resort Point Purchasers when the U.S. Developer sold Resort Points to the American Resort Point Purchasers. I assume that the American Resort Point Purchasers, when purchasing Resort Points from the U.S. Developer, acquired a membership in the Appellant.

[42] The Canadian Resort Point Purchasers and the American Resort Point Purchasers (referred to collectively as the **Resort Point Purchasers**), may occupy

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[20] The PASF does not distinguish between Resort Point Purchasers who are Resort Point Members and those who are Advantage Members. However, the two types of membership are described in the Master Declaration. The main distinction between these two types of membership is that Advantage Members are entitled to occupy a predetermined Vacation Home for the same period each year. See section 7.3(c)(a)(i) of the Master Declaration.

[21] Exhibit A-1, Table 8.

[22] Exhibit A-1, Table 8, section 1 and Table 1, sections 1.51 and 7.2.

the Vacation Homes "during a particular year by applying their resort points available to use that year towards a vacation home at a resort based on the assigned point values for each day and size of vacation home chosen".[23]

[43] The taxation of the sale of Resort Points is not before the Court. The issue before the Court is the taxation of the Annual Resort Fee paid by the Members of the Appellant.

[44] Paragraph 21 of the PASF states the following:

> 21. The principal rights that a member has in connection with the Intrawest program are the following:
>
> (a) the right to use resort points held by the member to reserve the use of the vacation homes in accordance with the Guidelines as established by the developer [the Canadian Developer];
>
> (b) the right to vote at annual general meetings of the Club [the Appellant], including the election of directors of the Club [the Appellant] and on any other Club matters that require member approval pursuant to the by-laws; and
>
> (c) in the event of wind-up and dissolution of the Club [the Appellant], the right to receive a distribution of the net proceeds from the liquidation of the assets of the Club [the Appellant] that is in proportion to the ratio of the member's resort points to all resort points.

The Annual Resort Fee

[45] Paragraph 22 of the PASF states: "Each member [the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers] is liable to pay an annual assessment to the Club [the Appellant] to meet 'Membership Costs' as defined in the master declaration."

[46] Section 1.37 of the Master Declaration states: "'Membership Costs' means and includes all costs incurred by the Club [the Appellant] for and on behalf of the Members [the Members of the Appellant] as provided in Section 10.3 hereof."[24]

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[23] PASF, paragraph 11(c).

[24] Exhibit A-1, Table 1.

[47] Section 10.2 of the Master Declaration states: "Each Member, including the Declarant [the Canadian Developer] **and** each Appointee [the U.S. Developer] and a Lender of Record acquiring a Membership as a result of enforcement of its security interest, shall be required to pay a Resort Fee for each Membership owned." Section 1.50 of the Master Declaration states: "'Resort Fees' means the annual assessment levied by the Board upon all Members [the Members of the Appellant] for their proportionate share of the annual Membership Costs."[25]

[48] As a result, the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer and the U.S. Developer satisfy the obligation to pay the annual Membership Costs when each pays the "Resort Fees" [i.e. the Annual Resort Fee].

[49] Paragraphs 25 to 38 of the PASF provide a general description of the calculation of the Annual Resort Fee. These paragraphs are attached hereto as Appendix A. The facts contained in these paragraphs may be summarized as follows:

- The Annual Resort Fee payable by a Member of the Appellant is a dollar amount per Resort Point for the particular calendar year multiplied by the number of Resort Points owned by the particular person.[26]

- The Appellant, through its board of directors, establishes the per-Resort-Point rate for a calendar year by dividing the budgeted costs for the particular year by the total amount of Resort Points issued by the Appellant. The per-Resort-Point rate is subject to the limitation in the Master Declaration with respect to the maximum rate per Resort Point that the Appellant is entitled to assess for a particular year.[27]

- Section 10.5 of the Master Declaration states that the Annual Resort Fee may not exceed a certain amount and provides rules for determining the maximum amount.[28]

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[25] Exhibit A-1, Table 1.

[26] PASF, paragraph 25.

[27] PASF, paragraph 26.

[28] PASF, paragraph 32.

- Paragraphs 36 and 37 of the PASF deal with Members of the Appellant who have not paid the Annual Resort Fee by its due date. Those paragraphs state the following:

> 36. All resort fees must be current in order for a member to make reservations using their resort points, to bank, borrow or transfer resort points, to use vacation homes, or maintain any other member rights or privileges.
>
> 37. Members who fail to pay their resort fees by the due date are in default. In the event of default, the Club [the Appellant] may exercise its right to forfeit the defaulting member's membership.

- Paragraph 38 of the PASF notes that the payment of the Annual Resort Fee does not entitle members to any additional rights or privileges.

[50] Ms. Ruff provided additional evidence with respect to the calculation and payment of the Annual Resort Fee.

[51] She testified that the budgeted costs are determined in September of each year being based upon the estimated costs for the next year. For example, the budgeted costs used to calculate the Annual Resort Fee for the 2003 calendar year were determined by the end of September 2002.[29]

[52] The Appellant uses the budgeted costs to determine a cost per outstanding Resort Point, that is, a cost for Resort Points held by the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers. For example, the Appellant determined in September 2002 that the cost per-Resort-Point for the 2003 calendar year was $5.25.[30]

[53] The Appellant then identified the "owners of record" of the Resort Points as at September 30 of a particular year. In October of each year, the Appellant billed each Resort Point Purchaser an amount for the Annual Resort Fee. For example, if a Resort Point Purchaser held 200 Resort Points as of September 30, 2002, then the

[29] Transcript, pages 210-211, testimony of Ms. Ruff.

[30] Exhibit A-13, page 2; Transcript, pages 208-209, Testimony of Ms. Ruff.

Appellant billed that Resort Point Purchaser $1,050 in October 2002 (200 x $5.25) as the Annual Resort Fee for 2003.[31]

[54] The Canadian Developer is not billed the total Annual Resort Fee in October of each year. Instead, the Appellant bills the Canadian Developer monthly for its portion of the Annual Resort Fee.[32] While I did not hear specific evidence with respect to whether the U.S. Developer is billed on an annual or a monthly basis, I have concluded, after reviewing Ms. Ruff's calculations, that it was billed on a monthly basis.

[55] She also testified that the Canadian Developer may pay all or a portion of the Annual Resort Fee on behalf of a Canadian Resort Point Purchaser as an incentive for that person to enter into the Canadian Purchase and Membership Agreement or as an incentive for a Resort Point Purchaser to purchase additional Resort Points; the Canadian Developer may also do so when a Canadian Resort Point Purchaser refers a person to the Canadian Developer and that person purchases Resort Points.[33]

[56] Ms. Ruff testified as well that if the actual expenses exceed the budgeted costs then the excess was added to the budgeted amount in the subsequent year. For example, if the actual expenses incurred in 2003 exceeded the budgeted amounts, then the excess would have been added to the budget for 2004. If the actual expenses are less than the budgeted amounts, then the subsequent year's budget is reduced by the amount of the excess.[34]

Other supplies of the Vacation Homes

[57] Paragraph 73 of the PASF states the following:

> From the time the Intrawest Program was established in 1993, the developer [the Canadian Developer] has operated various rental programs outside of the Intrawest Program under which the developer [the Canadian Developer] has generated revenues from renting out vacation homes (using occupancy rights associated with resort points owned by the developer [the Canadian Developer])

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[31] Transcript, pages 210-211, testimony of Ms. Ruff.

[32] Transcript, page 271, testimony of Ms. Ruff.

[33] Transcript, pages 267-268, testimony of Ms. Ruff.

[34] Transcript, pages 227-229, testimony of Ms. Ruff.

[58] One of these programs was referred to as the Passport Program. Paragraphs 74 and 76 of the PASF provide the following description of the program:

> 74. The Passport Membership Program (the "Passport Program") is a Vacation Home rental program that the developer [the Canadian Developer] created in 2006 to support the developer's sales and marketing of resort points.
>
> . . .
>
> 76. Under the Passport Program, a purchaser buys a number of points that can be redeemed with the developer [the Canadian Developer] (rather than the Club [the Appellant]) to occupy vacation homes during a 12-month period. . .

[59] The PASF states that persons who participated in the Passport Program did not pay any resort fees to either the Canadian Developer or the Appellant.[35]

[60] The Appellant's financial statements indicate that the Appellant earned revenue in respect of "getaway fees".[36] I did not hear any oral evidence with respect to these fees, nor are they discussed in the PASF. It appears that these fees are earned when Vacation Homes are rented to Resort Point Purchasers for cash as opposed to Resort Points. The Master Declaration and the Membership Guidelines provide that Vacation Homes that are not reserved by Resort Point Purchasers fourteen days prior to an occupancy date may be rented on a cash basis to Resort Point Purchasers.[37] It is not clear to the Court whether all, or only a portion, of the "getaway fees" are paid to the Appellant. As discussed in the next paragraph, revenue earned from the rental of Vacation Homes to the public may be paid to either the Canadian Developer or the Appellant.

[61] The Appellant's financial statements refer to "other revenue". I did not receive any evidence with respect to this revenue. I assume that the "other revenue" is, in part, the revenue realized from the rental of Vacation Homes to the general public pursuant to section 5.11 of the Master Declaration, which states, in part, the following:

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[35] PASF, paragraph 80.

[36] See, for example, Exhibit A-34.

[37] Exhibit A-1, Table 1, Master Declaration, sections 1.26 and 7.7; Exhibit A-1, Table 6, Membership Guidelines, paragraphs 3.1 to 3.6.

> If a Member [a Member of the Appellant] does not reserve occupancy at Resort Accommodation [a Vacation Home] fourteen (14) days prior to an occupancy date, then the Manager [the Canadian Developer[38]] may offer the Resort Accommodation [a Vacation Home] for rent to the general public and the rental proceeds received after deduction of the Manager's fee shall be paid at the direction of the Declarant [the Canadian Developer[39]] *either to the Club [the Appellant] or to the Declarant . . .*

[62] It is not clear to the Court what portion of these fees was paid to the Canadian Developer and what portion was paid to the Appellant.

[63] There is no evidence before me that the persons who rented Vacation Homes under either of these two programs paid the Annual Resort Fee.

IV. **First Issue: Whether the Appellant acquired numerous goods and services as agent for the Members of the Appellant**

[64] It is the Appellant's position that the Annual Resort Fee is not subject to GST since it is a reimbursement of expenses that the Appellant incurred as agent for each of the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers.

[65] It is the Respondent's position that the Annual Resort Fee is consideration for a taxable supply of intangible personal property. Specifically, the Annual Resort Fee is part of the ongoing consideration the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers must pay in order to maintain their membership in the Appellant.

The Law

Tax levied under Division II of the *GST Act*

[66] This appeal is concerned with the GST levied under subsections 165(1) and (2) of Division II of the *GST Act*. Those subsections read as follows:

> (1) 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

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[38] PASF, paragraph 63; Master Declaration, section 1.33.

[39] Master Declaration, section 1.18.

> calculated at the rate of 5% on the value of the consideration for the supply.
>
> (2) Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

[67] The 5% rate currently imposed under subsection 165(1) was 7% prior to July 2006 and 6% from July 2006 to the end of 2007.

[68] The effect of subsections (1) and (2) is to levy a single federal value-added tax at two rates: the 5% rate for supplies made in so-called non-participating provinces[40] and a 13%, 14% or 15% rate for supplies made in participating provinces.

[69] The answers to the following questions determine the amount, if any, of Division II tax payable under subsections 165(1) and (2):

- Did the supplier make a taxable supply?

- What was the amount of the consideration for the supply?

- Was the taxable supply made in Canada?[41]

- Was the taxable supply made in a participating province?[42]

[70] A taxable supply is defined as a supply made in the course of a commercial activity.[43] The *GST Act* defines a supply as the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.[44]

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[40] 7% prior to July 2006 and 6% from July 2006 to the end of 2007.

[41] As a result of the operation of section 144.1, tax is only levied under subsection 165(2), which deals with the "provincial" component of the federal tax, if the supply is made in Canada.

[42] Section 165

[43] Subsection 123(1), defines "commercial activity".

[44] Subsection 123(1), defines "supply".

[71] If I find that the Members of the Appellant paid the Annual Resort Fee to the Appellant as a reimbursement of expenses that the Appellant incurred as agent for the Canadian Developer, the U.S. Developer and the Resort Point Purchasers, then the Annual Resort Fee is not subject to GST. Where an agent is acting for a principal when acquiring property or a service from a third party supplier, the agent is not making a supply of the property or service to its principal, but is merely acting as a conduit.

Principal/Agent Relationship

[72] The agency argument raised by the Appellant is in respect of costs incurred in Canada, the United States and Mexico. The costs were incurred by the Appellant (a corporation incorporated in the United States), the Canadian Developer or the U.S. Developer. Further, the costs relate to Vacation Homes situated in Canada, the United States and Mexico. In such a situation, the Court must consider whether the agency law of the United States and Mexico applies to certain of the costs.

[73] It is possible that the law in the United States and/or Mexico relating to the creation of an agency relationship differs from the law in Canada.

[74] In *Fernandez v "Mercury Bell" (The)*[45] the Federal Court of Appeal held that:

> It is well known that in countries governed by the English law, a court is not entitled to inquire *proprio motu* as to the content of the foreign law on the basis of which an action brought before it should be disposed of. The court will not in principle take judicial notice of foreign law; it will not even consider foreign law as an ordinary fact (which it is not, in any event) about which it may require the parties to adduce satisfactory evidence. *If the parties, willfully or inadvertently, fail to bring expert evidence of the foreign law, the court will act as if the foreign law is the same as its own law, it will apply the lex fori*.[46] [Emphasis added.]

[75] In short, the consequence of a party failing to bring expert evidence to explain the operation of foreign law is that the concept of *lex fori* will apply. The Canadian court will act as if the foreign law is the same as its own law, unless the law is of a local or regulatory nature.

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[45] *Fernandez v "Mercury Bell"(The),* [1986] 3 FC 454, 66 NR 361 (FCA).

[46] *Ibid,* at page 460.

[76] The Appellant did not bring expert witnesses to explain to the Court the operation of the law of agency (or of any law) in the United States or Mexico. As a result, I will use Canadian law to make my decision on the agency issue and any other legal issue before the Court.

[77] The following definition of agency, by Gerald Fridman, has been quoted and applied in a number of decisions of Canadian courts:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.
>
> . . .
>
> Whether an agency relationship exists is a question of fact. If there is no evidence proving that one party intended another to act as his or her agent, there is no agency.[47]

[78] *Royal Securities Corp v Montreal Trust Co*[48] outlined the generally accepted three components of an agency relationship as follows:

> 1. The consent of both the principal and the agent;
>
> 2. Authority given to the agent by the principal allowing the former to affect the latter's legal position;
>
> 3. The principal's control of the agent's actions.

Authority of the Appellant to affect a Member of the Appellant's legal position

[79] Counsel for the Appellant stated at the commencement of her oral argument that "one of the key issues that needs to be addressed before we can get to characterization of the resort fees [the Annual Resort Fee] is the ownership of the

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[47] G.H.L. Fridman, *Canadian Agency Law*, 2nd ed (Markham, Ont: LexisNexis, 2012) at Paras. 3-4, 6-7.

[48] *Royal Securities Corp Ltd. v Montreal Trust Co*, [1966] OJ No 1078 (QL) at paragraph 55, [1967] 1 OR 137 at 155 (Ont HCJ), aff'd [1967] OJ No 997 (QL), [1967] 2 OR 200 (Ont CA) (*Royal Securities*).

vacation properties [the Vacation Homes]."[49] She argued that the beneficial interests in the Vacation Homes are held by the Appellant in trust for the benefit of the Members of the Appellant, namely, the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers. Further, she argued that the members hold an "un-deeded, undivided co-ownership" interest in each Vacation Home.[50]

[80] I agree with the Appellant's counsel that this is a key issue. One of the components of agency is the authority of the Appellant to affect the legal rights of the Members of the Appellant. If the Members of the Appellant are not obligated to pay the expenses required to maintain, repair, improve and operate the Vacation Homes (the **Vacation Home Operating Costs**), or to incur other expenses with regard to the Vacation Homes, then there are no legal rights that the Appellant can affect on behalf of the members in respect of such expenses. In such a situation, an agency relationship cannot, as a question of fact, exist.

[81] It is the Respondent's position that the Appellant does not hold the beneficial interest in trust for the members of the Appellant.

[82] When assessing the Appellant, the Minister made the following assumptions,

- Under the Intrawest Program, the Canadian Developer builds Vacation Homes situated in Canada and transfers beneficial ownership of those properties to the Appellant in exchange for the rights to occupy the resort accommodations beneficially owned by the Appellant.

- The Appellant beneficially owns resort accommodations in British Columbia, Ontario, Quebec, California, Florida, Hawaii and Mexico.

- The Appellant acquires beneficial ownership of the real properties acquired by the Canadian Developer and the U.S. Developer in exchange for Resort Points.

- The Resort Point Purchasers do not hold fee-simple title to their interest in the Vacation Homes, but only hold points.

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[49] Transcript, pages 375-376, argument.

[50] Transcript, pages 375-378.

[83] In my view, these assumptions mean that the Minister assumed, when assessing the Appellant, that the Appellant held the beneficial interest in the Vacation Homes, subject to the occupancy rights granted to the Canadian Developer and the U.S. Developer.

[84] The onus is on the Appellant to establish, on a *prima facie* basis, that someone transferred beneficial interests in the Vacation Homes, and particularly the risk with respect to the homes, to the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers.

[85] In *Velcro Canada Inc v The Queen*,[51] Associate Chief Justice Rossiter (as he then was), citing Associate Chief Justice Rip (as he then was) in *Prévost Car Inc. v The Queen*,[52] stated that there are four elements in considering the attribution of beneficial ownership: possession, use, risk and control. Associate Chief Rossiter stated the following: "In looking at the beneficial ownership issue one must apply the test as set out by Chief Justice Rip, and in doing so, one must look to the meaning of individual words, that is, 'possession', 'use', 'risk' and 'control'. These words have ordinary meanings."[53]

Transfer of Canadian Vacation Homes from the Canadian Developer to the Appellant

[86] The evidence before me is that the Canadian Developer was the first of the relevant persons to hold legal and beneficial ownership in any of the Canadian Vacation Homes. The Canadian Developer transferred its legal and beneficial ownership in each of the Canadian Vacation Homes to the Appellant.[54]

[87] Simultaneously with its acquisition of a Canadian Vacation Home, the Appellant transferred the legal title in the Canadian Vacation Home to the Canadian Bare Trustee. The Canadian Bare Trust Agreement clearly states that, at

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[51] 2012 TCC 57, at paragraph 29.

[52] 2008 TCC 231, affirmed in 2009 FCA 57.

[53] *Velcro Canada Inc v The Queen*, note 51 above, at paragraph 34.

[54] PASF, paragraph 7, Exhibit A-1, section 2.1(a); testimony of Ms. Ruff.

the time the Appellant acquired the Canadian Vacation Home, the Appellant held the beneficial ownership in the Canadian Vacation Home.[55]

[88] As consideration for the Canadian Vacation Home, the Appellant then transferred to the Canadian Developer the occupancy rights to the Canadian Vacation Home in perpetuity.[56]

[89] In summary, when the Appellant, the Canadian Developer and the Canadian Bare Trustee completed the transactions, the Canadian Bare Trustee held legal title in the Canadian Vacation Home in trust for the Appellant, and the Canadian Developer held the right to occupy the Canadian Vacation Home.

[90] One must apply the test set out by then Associate Chief Justice Rip to determine, who, at that point in time, held the beneficial ownership in the Vacation Homes.

[91] The first element I will consider is "use". *Black's Law Dictionary* defines the noun "use", in part, as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted. . ."[57] The *Canadian Oxford Dictionary* defines the verb "use" as meaning, among other things, "to employ or avail oneself of (something) regularly" [58]

[92] In my view, if the Canadian Developer held the right to occupy the Canadian Vacation Homes, then it held the right to employ the homes and thus the right to use them.

[93] The second element to consider is "possession". *Black's Law Dictionary* defines "possession" as:

> 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others . . .

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[55] Exhibit A-1, section 2.1.

[56] Exhibit A-1, section 2.1(a).

[57] *Black's Law Dictionary*, 10th ed, *sub verbo "use".*

[58] *Canadian Oxford Dictionary*, 2nd ed, *sub verbo "use".*

[94] Without a copy of the Canadian Vacation Home Transfer Agreement or *viva voce* evidence from a witness, it is not clear to me what power, if any, the Appellant retained over the Canadian Vacation Homes after it transferred the occupancy rights to the Canadian Developer. The Canadian Developer certainly held significant control over the Canadian Vacation Homes since it held the right to use the homes. However, under the Intrawest Program, particularly the Master Declaration, the Appellant also exercised significant control over the Vacation Homes. It is not clear to me whether the Appellant retained this control pursuant to the Canadian Vacation Home Transfer Agreement or whether it acquired the control after it transferred the use of the properties to the Canadian Developer.

[95] It is impossible for me to make a definitive finding with the little evidence before me; the Canadian Developer probably held possession rights in the Canadian Vacation Homes subject to any residual interest that the Appellant may have held in the homes.

[96] The third element to consider is "risk". This is the key element for the purposes of the Appellant's argument.

[97] In *Black's Law Dictionary* "risk" signifies "the chance of injury, damage, or loss. . . liability for injury, damage, or loss if it occurs". The *Canadian Oxford Dictionary* refers to "a chance or possibility of danger, loss, injury, or other adverse consequences".

[98] With respect to the Canadian Vacation Homes, risk refers to the risk of damage to the property through fire, misconduct of the users or normal wear and tear. It includes the liability to incur expenses in respect of the operation, repair and maintenance of the properties in order to ensure that they are suitable for occupancy under the Intrawest Program (i.e. the Vacation Home Operating Costs).

[99] While I have evidence that the Appellant transferred use and possession[59] to the Canadian Developer, there is no evidence before me that the Appellant transferred any risk with respect to the Canadian Vacation Homes to the Canadian Developer.

[100] If the Appellant did transfer some or all of the risk relating to the Canadian Vacation Homes to the Canadian Developer, then it would have done so pursuant

[59] Subject to any residual possession rights retained by the Appellant.

to the Canadian Vacation Home Transfer Agreement. The Appellant did not provide the Court with a copy of this agreement nor did it produce a witness from either the Appellant or the Canadian Developer who could have testified concerning the contents of the agreement, or provided *viva voce* evidence of a transfer of the risk.

[101] As a result, since I have no evidence that the Appellant transferred any portion of the risk, I am left with the conclusion that the Appellant retained the risk. This is consistent with the testimony of Ms. Ruff that the Appellant, not the Canadian Developer, pays the expenses for repairing, maintaining and operating the Canadian Vacation Homes.

[102] Further, I have drawn an adverse inference from the Appellant's failure to provide such a key document as the Canadian Vacation Home Transfer Agreement or to produce a witness from the Appellant or the Canadian Developer to speak to the terms of the transfer.

[103] The impact of not calling relevant witnesses was discussed by the Supreme Court of Canada in *Lévesque v Comeau et al*.[60] The Court held that a party's failure to call a witness meant that the "Court must presume that such evidence would adversely affect her case."[61] I have drawn such a conclusion in this appeal.

[104] The last element to consider is "control". *Black's Law Dictionary* defines the verb "control" as meaning "to exercise power or influence over". The *Canadian Oxford Dictionary* defines it as having the sense of "dominate or have command of."

[105] Since the Appellant did not provide the relevant agreements or relevant *viva voce* evidence, I simply do not know the extent to which the Appellant retained control over the Canadian Vacation Homes and the extent to which it transferred control to the Canadian Developer. However, the evidence before me is that the Appellant and the Canadian Developer shared control of the Canadian Vacation Homes.

[106] Clearly, the Canadian Developer, as the person entitled to occupy the Canadian Vacation Homes, exercised significant control over the Vacation Homes.

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[60] *Lévesque v Comeau et al*, [1970] SCR 1010, 5 NBR (2d) 15, 16 DLR (3d) 425.

[61] *Ibid.* at pages at 1012 - 1013 SCR.

However, it appears from the Master Declaration that the Appellant, when managing the Intrawest Program, also exercised some control over the homes.

[107] My conclusion that the two shared control is also supported by section 5.11 of the Master Declaration,[62] which provides that the Canadian Developer and the Appellant share the revenue realized when a Vacation Home is rented to the general public. That section states that the Canadian Developer determines how such revenue is shared by the two parties.

[108] To summarize, I have concluded that, once the transfer of a Vacation Home from the Canadian Developer to the Appellant was completed, both the Appellant and the Canadian Developer held beneficial interests in the Canadian Vacation Home. More importantly for the purposes of this appeal, the risk of damage to the property through fire, misconduct of the users or normal wear and tear rested with the Appellant. This included the liability to repair and maintain the Canadian Vacation Homes in order to ensure that they were suitable for occupancy under the Intrawest Program.

[109] Further, I was not provided with any evidence of a subsequent transaction that resulted in the Appellant transferring beneficial interests, including the risk with regard to repairing and maintaining the Canadian Vacation Homes, to the Canadian Developer or to the U.S. Developer.

Transfer of U.S./Mexico Vacation Homes to the Appellant

[110] I have, for the same reasons, concluded that, once the transfer of a U.S./Mexico Vacation Home from the U.S. Developer to the Appellant was completed, both the Appellant and the U.S. Developer held beneficial interests in the U.S./Mexico Vacation Home. The Appellant bore the risk relating to the repair and maintenance of the U.S./Mexico Vacation Homes.

[111] There is no evidence before me of any subsequent transfer by the Appellant to the U.S. Developer, or the Canadian Developer of beneficial interests in the U.S./Mexico Vacation Homes, including the risk relating to the repair and maintenance of the homes.

[62] Exhibit A-1, Table 1.

Did either the Canadian Developer or the U.S. Developer transfer beneficial interests in the Vacation Homes to the Resort Point Purchasers?

[112] Counsel for the Appellant argued that the "members" acquire their interest in the Vacation Homes by purchasing Resort Points from the "developer".[63] When referring to "members" she was referring, I assume, to the Canadian Resort Point Purchasers and the American Resort Point Purchasers. When referring to "developer", she was referring, I assume, to the Canadian Developer and the U.S. Developer.

[113] I will first deal with the sale of Resort Points by the Canadian Developer to the Canadian Resort Point Purchaser.

[114] Pursuant to sections 2 and 4 of the Canadian Purchase and Membership Agreement,[64] the Canadian Developer sold Resort Points and memberships in the Appellant to the Canadian Resort Point Purchasers.

[115] The sale by the Canadian Developer of Resort Points and memberships in the Appellant appears to me to be the granting of a contractual right to occupy the Vacation Homes pursuant to the rules set out in the Master Declaration and the Membership Guidelines. As noted in paragraph 21(a) of the PASF, the principal rights that a Member of the Appellant has in connection with the Intrawest Program are the following:

> (a) the right to use resort points held by the member to reserve the use of the vacation homes in accordance with the Guidelines [the Membership Guidelines] as established by the developer [the Canadian Developer].

[116] This is a contractual right. The fact that a Canadian Resort Point Purchaser has the contractual right to use Resort Points in such a way does not grant the Canadian Resort Point Purchaser a beneficial interest in a specific Vacation Home. Rather, it provides the Canadian Resort Point Purchaser with the right to occupy an individual unit in accordance with the rules established under the Intrawest Program.

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[63] Transcript, pages 376-377, argument of counsel for the Appellant.

[64] Exhibit A-1, Table 8.

[117] For example, section 10.15 of the Master Declaration states that if a Resort Point Purchaser is in default on any assessment levied upon him/her by the board of directors of the Appellant, then the Resort Point Purchaser is not entitled to occupy any of the Canadian or U.S./Mexico Vacation Homes until the default is corrected. In other words, the Resort Point Purchaser's (including a Canadian Resort Point Purchaser's) contractual right to occupy one of the Vacation Homes is suspended.

[118] Further, since the Canadian Developer was not at risk with regard to the Canadian Vacation Homes, it could not, in any scenario, transfer the obligation to repair and maintain the Canadian Vacation Homes to the Canadian Resort Point Purchasers.

[119] Also, there is no evidence before me that the Canadian Developer held any interests in the U.S./Mexico Vacation Homes. Specifically there is no evidence before me that either the Appellant or the U.S. Developer transferred any beneficial interests in the U.S./Mexico Vacation Homes to the Canadian Developer. As a result, the Canadian Developer could not have transferred beneficial interests in the U.S./Mexico Vacation Homes to the Canadian Resort Point Purchasers.

[120] There is no evidence before me of any transactions between the U.S. Developer and the Canadian Resort Point Purchasers.

[121] In summary, there is no evidence before me of any transaction that resulted in either the Canadian Developer or the U.S. Developer transferring beneficial ownership of the Canadian Vacation Homes or the U.S./Mexico Vacation Homes to the Canadian Resort Point Purchasers. Specifically, there is no evidence of either corporation transferring to the Canadian Resort Point Purchasers a beneficial interest that would result in the purchasers being responsible for the repair and maintenance of the Canadian Vacation Homes or the U.S./Mexico Vacation Homes.

[122] I will now consider the sale of Resort Points by the U.S. Developer.

[123] I have very little evidence with respect to transactions between the U.S. Developer, the Appellant and the American Resort Point Purchasers. The only evidence I have is the statements in the PASF that the American Resort Point Purchasers purchased Resort Points from the U.S. Developer. I was not provided

with a copy of the agreement pursuant to which the American Resort Point Purchasers purchased the points.

[124] In short, there is no evidence that would allow me to conclude, even on a *prima facie* basis, that an American Resort Point Purchaser acquired a beneficial interest in either a U.S./Mexico Vacation Home or a Canadian Vacation Home from either the U.S. Developer or the Canadian Developer.

Did the Appellant transfer beneficial interests in the Vacation Homes directly to the Resort Point Purchasers?

[125] There is no evidence before me of the supply of any property by the Appellant to the Canadian Resort Point Purchasers. In fact, the only transaction that I am aware of between the Appellant and the Canadian Resort Point Purchasers is the one resulting in the payment of the Annual Resort Fee.

[126] The Canadian Resort Point Purchasers did acquire memberships in the Appellant; however, they acquired these memberships from the Canadian Developer at the time they entered into the Canadian Purchase and Membership Agreement. I assume that the Canadian Developer acquired the memberships from the Appellant.

[127] Similarly, I received no evidence with respect to any transactions between the Appellant and the American Resort Point Purchasers.

[128] In summary, there is no evidence before me that either the Canadian Resort Point Purchasers or the American Resort Point Purchasers held a beneficial interest in the Vacation Homes.

Did the Appellant transfer beneficial interests in the Vacation Homes to a trust for the benefit of the Members?

[129] The Appellant's counsel also argued that the Appellant held beneficial interests in the Vacation Homes in trust for the Members of the Appellant.

[130] The Appellant did not provide the Court with written or oral evidence with respect to the terms of such a trust. Specifically, the Appellant did not provide the Court with a transfer agreement, or oral evidence of such an agreement, pursuant to which the Appellant transferred beneficial interests in either the Canadian Vacation Homes or the U.S./Mexico Vacation Homes to a trust under which the members

were beneficiaries. In addition, the Appellant did not provide the Court with a trust agreement or with oral evidence with respect to the terms of such a trust agreement.

[131] I have drawn an adverse inference from the failure of the Appellant to produce such evidence. The existence of the trust was a key part of its argument. It certainly realized the importance of providing a copy of a trust agreement with respect to a trust that it alleged existed, since it provided the Court with a copy of the Canadian Bare Trust Agreement. In my view, if documents that were key to the Appellant's argument, such as an agreement transferring its beneficial interest to a trust or a trust agreement in respect of such trust, did exist then the Appellant would have provided such documents to the Court. The fact that such documents were not provided seriously damaged the credibility of the Appellant's argument.

[132] The only evidence before me that such a trust existed is the testimony of Mr. Thompson and section 4.4 of the Master Declaration.

[133] Although Mr. Thompson referred to the existence of a trust, he did not take me to any trust agreements or provide any oral evidence with respect to the terms of such a trust.

[134] Section 4.4 of the Master Declaration states the following:

> . . . The Club will hold title to all Resort Accommodation registered in its name, and to all beneficial interests in the Trust [the Canadian and U.S. bare trusts] or other similar holding vehicle to which title to Resort Accommodation may be transferred, in trust, for the benefit of the Members and the value of each Member's beneficial interest in the Resort Accommodation shall be paid out and distributed to each Member of the Club in accordance with Article X of the Bylaws of the Club . . .[65]

[135] In my view, this clause does not create a trust. It merely evidences that the Appellant and the Canadian Developer (the parties to the Master Declaration) have agreed that the Appellant will create a trust to hold its beneficial interests in the Vacation Homes. There is no evidence before me that the Appellant created such a trust.

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[65] Exhibit A-1, Table 1, section 4.4.

[136] Further, the clause is ambiguous since it states that "the value of each Member's beneficial interest in the Resort Accommodation shall be paid out and distributed to each Member of the Club in accordance with Article X of the Bylaws of the Club." Article 10.2 of the By-laws states the following:

> On a winding-up and dissolution of the Club [the Appellant], the Board of Directors or the Trustee shall liquidate **all of the assets of the Club [the Appellant]** and convert them to cash and the balance, after making a provision for the payment of all debts, taxes, (if any), and expenses associated with the winding-up and dissolution shall be distributed to the Members of the Club . . .
>
> [Emphasis added.]

[137] This clause appears to state that the assets, including the Vacation Homes, are the assets of the Appellant and are only distributed to its members on a winding up and dissolution of the Appellant. There is no reference in the By-laws to the Appellant holding any of its assets in trust for its members. Further, sections 10.1 and 10.2 of the By-laws, which constitute all of Article X, contemplate a situation where the Appellant holds its assets for its own account, not in trust for its members.

[138] For the foregoing reasons, I have concluded that the Appellant, not a trust, held the beneficial interests in the Vacation Homes.

[139] Even if I were to find that the Appellant transferred its beneficial interests in the Vacation Homes to a trust, such a factual finding would not support the Appellant's argument that Members of the Appellant held beneficial interests in the Vacation Homes. A "person" is defined in subsection 123(1) of the *GST Act* to include a trust. Further, the effect of this definition and the provisions of sections 267.1 to 269 is that, if the Appellant did transfer its beneficial interests in the Vacation Homes to a trust for the benefit of its members, then the Trust, and not the trustee or the beneficiaries, held the beneficial interests.

Conclusion

[140] On the evidence before me, I have concluded that the Appellant held the beneficial interests in the Vacation Homes, subject to occupancy rights (and any incidental rights and interests) held by the Canadian Developer and the U.S. Developer. The beneficial interests held by the Appellant included the risk with respect to the Vacation Homes, including the obligation to incur the Vacation Home Operating Costs.

[141] There is no evidence before me of the Appellant transferring to the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers or the American Resort Point Purchasers, beneficial interests in the Vacation Homes that would result in any of them being responsible for the operation, repair and maintenance of the Vacation Homes or being liable to incur any expenses with respect to the Vacation Homes.

[142] As a result, since there were no legal rights that the Appellant could affect on behalf of its members (the Canadian Developer, the U.S. Developer, the Canadian Resort Point Purchasers and the American Resort Point Purchasers), an agency relationship did not exist between the Appellant and each of these persons in respect of such expenses.

Consent of both principal and agent

[143] Another component of an agency relationship is the consent of both the principal and the agent.

[144] In assessing the Appellant, the Minister assumed that "Members do not consent to the appellant acting as their agent". For the following reasons, I agree with the Minister's assumption.

[145] I was not provided with any agreement that, in my view, constitutes between the Appellant and the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer or the U.S. Developer, an agency agreement pursuant to which the Appellant agreed to act as agent for any of these parties with respect to the Vacation Home Operating Costs.

[146] I was provided with the Management Agreement between the Appellant and the Canadian Developer pursuant to which the Appellant, among other things, appointed the Canadian Developer as its agent for specific functions, such as employing persons to maintain and operate the Vacation Homes, including maids and front desk personnel. The agreement also states that the Canadian Developer will, as agent for the Appellant, oversee and supervise all employees of the Appellant.[66]

[66] Exhibit A-1, Table 10, sections 3.1(l), (m), (o), (p), (q) and (t). See also PASF, paragraphs 64 and 65.

[147] The agreement contains numerous clauses that one would expect in an agency agreement, such as a standard of care clause, an indemnification clause, a term clause and a discretionary authority clause.[67]

[148] I was not provided with a similar agreement whereby the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer or the U.S. Developer appointed the Appellant as their agent with respect to the Vacation Home Operating Costs. I have drawn a negative inference from the failure of the Appellant to provide the Court with such an agreement. The Appellant was certainly aware of the importance of any such agreement, since it provided the Court with the Management Agreement.

[149] I have a very difficult time accepting that the Members of the Appellant, particularly the Canadian Resort Point Purchasers and the American Resort Point Purchasers, would have appointed the Appellant as their agent without entering into an agreement with the Appellant that specified the actual expenses the Appellant could incur as their agent, the standard of care the Appellant was expected to meet and the terms of any indemnification.

[150] Paragraph 14 of the PASF states that the Intrawest Program is governed by the following documents: the Master Declaration, the Incorporation Documents, the By-laws, the Canadian Bare Trust Agreement, the U.S. Bare Trust Agreement, the Membership Guidelines, the Purchase and Membership Agreement and the Membership Certificate.

[151] There is no mention of the Appellant acting as agent for its members in any of these documents except for section 7 of the Canadian Purchase and Membership Agreement and sections 9.1 and 9.3 of the Master Declaration.

[152] The Appellant appears to be arguing that the Canadian Purchase and Membership Agreement and the Master Declaration constitute agency agreements. I do not agree.

[153] With respect to the Purchase and Membership Agreement, the only reference to agent is in section 7 entitled “Charges and Assessments”, which states that “[t]he Purchaser understands and agrees that the Club will incur Membership

[67] Exhibit A-1, Table 10, sections 3.1, 2.3, 2.4, 2.5 and 3.5.

expenses as the agent for all Members in accordance with their proportionate share of the Resort Points issued by the Club . . .”[68]

[154] Mr. Thompson testified that he drafted this clause on behalf of the Canadian Developer. He noted that the reference to the Appellant incurring the expenses as agent for its members did not exist when he first drafted the Canadian Purchase and Membership Agreement; it was added three years after the creation of the Intrawest Program.[69] The only evidence I received with respect to why the reference to agent was added was Mr. Thompson’s testimony that the Canadian Developer added the words three years after the creation of the Intrawest Program, on the advice of an accountant.

[155] The effect of the Canadian Developer adding such words three years after the start of the Intrawest Program is that some Canadian Resort Point Purchasers purchased Resort Points and memberships in the Appellant pursuant to an agreement that did not refer to the Appellant acting as their agent.

[156] Regardless, the Appellant is not a party to the Purchase and Membership Agreement. That agreement is between a Canadian Resort Point Purchaser and the Canadian Developer. I do not see how it could constitute an agency agreement between the Canadian Resort Point Purchaser and the Appellant if the Appellant is not a party to the agreement.

[157] While the agreement indicates that the Appellant will be appointed to act as the agent of the Canadian Resort Point Purchasers, I was not provided with an agency agreement that effects this intention.

[158] The second agreement is the Master Declaration. This appears to me to be an agreement between the Canadian Developer and the Appellant whereby they agree to establish and operate the Intrawest Program. In the agreement, the two parties agree on how they will operate the program.

[159] It is not an agency agreement.

[160] Sections 9.1 and 9.3, which contain the only references to agency, state the following:

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[68] Exhibit A-1, Table 8, section 7.

[69] Transcript, pages 159-160 and 152-154;.testimony of Mr. Thompson.

> 9.1 Administration of the Resort Accommodations. Subject to any Project Instruments and the Club Instruments, responsibility for the maintenance, repair, replacement, restoration, improvement, operation, and administration of the Resort Accommodations shall be vested in the Club. The Club shall act as the agent of all of the Members in collecting Assessments and in paying taxes, utility costs, and other Membership Costs. The Club, through its Board of Directors, Officers, the Manager, and other duly authorized agent(s) may exercise any and all rights and powers granted to it by law or by the Club Instruments, as amended or supplemented from time to time. Pursuant to the provisions of the Certificate of Incorporation, the exclusive power to promulgate and amend the Guidelines shall be vested in the Declarant as long as the Declarant is retained as Manager and the Board shall have no power with respect to such Guidelines except as to the enforcement thereof.
>
> . . .
>
> 9.3 Resort Accommodations and Equipment. Subject to any Project Instruments, exclusive control and responsibility over the maintenance, repair, modification, and alteration of all Resort Accommodations and the Equipment therein is vested in the Club, as agents for the Members. The Club shall at all times maintain the Resort Accommodations in good condition and repair. In the event of any disruption in service, the Club shall immediately make such repairs as may be necessary to restore such services. If the Declarant believes in good faith that the Club cannot or will not immediately make such repairs, the Declarant may, but shall not be obligated to, immediately arrange for and make such repairs in order to restore service, and the Club shall be liable to the Declarant for the cost of such repairs. The Club shall have complete discretion to determine the interior color scheme, decor and furnishings of all Resort Accommodations, as well as the timing, extent, and nature of all redecoration, repairs, and replacements thereof.
>
> No Member shall make any repairs, modifications, alterations, additions, redecoration, or replacements to any Resort Accommodation or to any Equipment therein, without the prior written approval of the Club. Each Member, during his or her reserved or scheduled Use Period(s), shall keep the interior of his or her Assigned Resort Accommodation, including, without limitation, the interior walls, windows, glass, ceilings, floors, fixtures, and appurtenances thereto, and all Equipment contained therein, in a clean, sanitary, and attractive condition, and shall be personally liable for any damage or destruction thereto caused by such Member, members of his or her family, his or her guests, tenants, invitees, or licensees as provided in Section 5.3 hereof.

[161] Mr. Thompson testified that the reference to agent in sections 9.1 and 9.3 was not contained in the original Master Declaration; rather, as with the Canadian

Purchase and Membership Agreement, the words were added three years after the Master Declaration was first executed, at the direction of an accountant.[70]

[162] This may help explain the inconsistencies in Article 9 of the Master Declaration. In my view, the article, when read as a whole, states that it is the Appellant that incurs, on its own account, the Vacation Home Operating Costs. For example, the first sentence in section 9.1 states that the responsibility for the maintenance, repair, replacement, restoration, improvement, operation and administration of the Vacation Homes is vested in the Appellant. Further, the first sentence of the second paragraph of section 9.3 states that no Member shall make or do any repairs, modifications, alterations, additions, redecoration or replacements to or in any Vacation Home without the prior written approval of the Appellant. These two clauses appear to me to state that it is the Appellant, not the Members, that is responsible for the operation and upkeep of the Vacation Homes.

[163] This is consistent with my previous factual finding that the beneficial interests in the Vacation Homes held by the Appellant included the risk with respect to the homes, including the expenses incurred in respect of their operation, repair and maintenance.

[164] Obviously, such a factual finding is inconsistent with the references in the second sentence of section 9.1 and the first sentence in section 9.3 to the Appellant incurring the Vacation Home Operating costs as agent for its members. It is not clear to me why the agency words were added three years later to an agreement that contemplates the Appellant incurring the expenses on its own account. I do not believe that this reflected the actual relationship between the Appellant and its members.

[165] The Purchase and Membership Agreement and the Master Declaration cannot constitute an agency agreement between the American Resort Point Purchasers and the Appellant or between the U.S. Developer and the Appellant, since the American Resort Point Purchasers and the U.S. Developer are not parties to either agreement. Further, I was not provided with any written agreements or *viva voce* evidence with respect to any agreements (including an agency agreement) entered into by either the American Resort Point Purchasers or the U.S. Developer in respect of the Intrawest Program.

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[70] Transcript, pages 152-156, testimony of Mr. Thompson.

[166] In my view, in a situation where the Court has not been provided with an agency agreement, the Court must look at the conduct of the parties to determine whether an agency relationship has come into existence.[71]

[167] The Appellant did not call any Canadian Resort Point Purchasers, American Resort Point Purchasers or employees, officers or directors of the Appellant to testify before the Court with respect to the purported agency relationship.[72] Counsel for the Respondent argued that I should draw an adverse inference from the failure of the Appellant to call such a witness. I agree.

[168] Such a witness would have provided the Court with definitive evidence with respect to whether a Canadian Resort Point Purchaser or an American Resort Point Purchaser consented to the Appellant acting as that purchaser's agent. A witness for the Appellant could have also addressed the purported agency relationship between the Appellant and the Canadian Developer and between the Appellant and the U.S. Developer.

[169] The Respondent did call two Canadian Resort Point Purchasers, Mr. Abraham and Ms. Ewing. Ms. Ewing did not address the agency issue.

[170] However, Mr. Abraham testified that he entered into the Canadian Purchase and Membership Agreement in 1998. He testified that the only documents he received when he purchased the Resort Points were the Canadian Purchase and Membership Agreement and a Membership Certificate. He did not receive a copy of the Master Declaration, the Canadian Bare Trust Agreement, the Management Agreement, the By-laws, the Incorporation Documents or any other documents.[73]

[171] More importantly, he testified that he did not know that the Appellant was holding itself out as his agent.[74] This is the only direct evidence I have relating to the consent issue.

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[71] Fridman, *op.cit.* at pages 5-6.

[72] Ms. Ruff is a Canadian Resort Point Purchaser, however, the Appellant called her to provide testimony with respect to the calculation of the Annual Resort Fee.

[73] Transcript, pages 302 – 304 and 308 -310, testimony of Mr. Abraham.

[74] Transcript, page 315, testimony of Mr. Abraham.

[172] In summary, the only direct evidence I have before me with respect to the conduct of the members supports the Minister's assumption that the Members of the Appellant did not consent to the Appellant acting as their agent.

[173] There is other evidence before me that supports a finding that the conduct of the parties does not support a finding of agency. This includes the following:

The items that comprise the Annual Resort Fee

[174] The Appellant calculated the Annual Resort Fee in part on the basis of expenses other than Vacation Home Operating Costs. In the first instance, it included internal costs of the Appellant, such as the cost of its annual general meeting, the cost of its auditor, income tax and legal costs of the Appellant. As a question of fact, these were costs of the Appellant, not its members (i.e. the Canadian Developer, the U.S. Developer and the Resort Point Purchasers). In other words, the Appellant incurred these costs on its own account, not as agent for its members.

[175] A portion of the Annual Resort Fee relates to a reserve fund maintained by the Appellant. This portion of the Annual Resort Fee represents a contingency fee for future unexpected costs. It does not represent an expense incurred by the Appellant as agent of its Members.

Wording in the By-laws and Master Declaration

[176] Section 7.2 of the By-laws provides that the Members of the Appellant shall pay the Assessments (the Annual Resort Fee) to the Appellant in accordance with the terms and provisions of the Master Declaration. There is no obligation in the By-laws for the members to personally incur the Vacation Home Operating Costs or any other expenses related to the Vacation Homes.

[177] In fact, section 4.18 of the By-laws states that the board of directors of the Appellant has the duty to maintain, repair, restore, improve and operate the Vacation Homes.

[178] Section 10.1 of the Master Declaration states the following:

> 10.1 Creation of Lien and Personal Obligation for Assessments. . . . each Member by acceptance of a Membership Certificate . . . is deemed to covenant and agree to

> pay to the Club an annual Resort Fee, Special Assessments for capital improvements or other extraordinary expenses or costs, and Personal Charges, all such Assessments to be established and collected as provided in this Article 10 and as hereinafter provided. . .

[179] This section obligates a member to pay the Annual Resort Fee. In my view, this is distinct from being personally liable for the Vacation Home Operating Costs.

[180] Further, pursuant to section 10.4 of the Master Declaration, while the amount of the Annual Resort Fee is based on estimated costs, the actual amount of the fee is at the sole discretion of the Appellant's board and may be adjusted, such adjustment being "based on the additional expenses incurred by the Club [the Appellant]."[75] Section 10.5 of the Master Declaration provides that the Annual Resort Fee may not exceed a specific amount.

[181] These clauses, in my view, are predicated on the assumption that the costs are incurred by the Appellant on its own account and not as agent for its members.

Ability of the Canadian Developer to avoid paying the Annual Resort Fee

[182] Ms. Ruff acknowledged that the Canadian Developer has the option of not paying the Annual Resort Fee if it elects to subsidize the financial operations of the Appellant. This is provided for in sections 10.7 and 1.8 of the Master Declaration. Section 10.7 states the following: "In lieu of the payment of an annual Resort Fee, the Declarant [the Canadian Developer] may elect to subsidize the financial operations of the Club in the event *all Assessments and every other revenue source (income)* received by the Club fails [sic] to equal or exceed the actual expenses incurred during the fiscal year. . ." Section 1.8 of the Master Declaration defines "Assessment" as including the Annual Resort Fees.[76]

[183] Section 10.7 does not contemplate a situation where the Appellant is incurring costs as the Canadian Developer's agent. Rather, it is based upon the assumption that the Appellant incurs costs on its own account. The Canadian Developer is agreeing to provide financial assistance if such costs exceed the Appellant's annual revenue.

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[75] Exhibit A-1, Table 1, page 22.

[76] Transcript, pages 276-277, testimony of Ms. Ruff, Exhibit A-1, Table 1.

Control

[184] The third factor to consider when determining the existence of an agency relationship is the principal's control of the agent's (Appellant's) action.

[185] The Appellant is a non-share corporation. In similar fashion to corporations that issue shares, the Appellant is controlled by its board of directors, who are elected by the Members of the Appellant. As a result, the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer and the U.S. Developer control the Appellant, since they collectively constitute all of the Members of the Appellant.

[186] Both of the parties, in their argument, focused on the ability of the Canadian Resort Point Purchasers and the American Resort Point Purchasers, as opposed to the Canadian Developer and the U.S. Developer, to elect the majority of the directors of the Appellant. The relevance of this argument is not clear to me. The question before the Court is whether the Appellant acted as agent for all of the Members of the Appellant, not just the Canadian Resort Point Purchasers and the American Resort Point Purchasers.

[187] Further, the question that must be asked is not whether the Members of the Appellant controlled the Appellant for corporate law purposes, but whether they exercised control over the Appellant pursuant to an agency agreement.

[188] My colleague Justice Hogan summarized the law on this point in *Fourney v The Queen*, 2011 TCC 520, as follows:

> [46] The Appellant in this case had full control over every action of the corporations. Indeed, the corporations could not act without her; even if the minority shareholders became active, the Appellant would remain the controlling party. The mere fact that she had such control, however, is not sufficient for a finding of an agent-principal relationship, otherwise many privately controlled corporations could be characterized as the agents of their majority shareholders. What, then, is the actual test to apply in determining whether an agency relationship existed?
>
> [47] In *Otineka Development Corporation Limited et al. v. The Queen*, the Tax Court of Canada emphasized the need for a high threshold of evidence for a finding that a corporation was actually acting as an agent:
>
> > . . .Where a corporation holds itself out to third parties as owning its property and business, keeps separate financial records, files its own

> corporate income tax returns and acts like any other corporation that is independent of its shareholders, it would require extremely cogent evidence to establish that all along it was really just an agent or trustee for its shareholders on the basis of an unwritten oral understanding or assumption on the part of some of the shareholders or directors.

[189] While Justice Hogan was dealing with a fact situation involving a corporation and a shareholder, I believe the law applies on the same basis to a non-share corporation and the members of that corporation. The members control the corporation through their ability to elect the board of directors of the corporation. However, such corporate control does not mean that the corporation acts as the members' agent.

[190] The Appellant held itself out as owning its own property; it maintained separate financial records, filed its own tax returns and acted like any other non-share corporation that is a separate entity from its members. As a result, I require extremely cogent evidence that the Members of the Appellant exercised control over the Appellant pursuant to an agency agreement.

[191] I do not have such evidence before me. As I have already noted, I was not provided with an agency agreement and the Appellant did not call any witnesses to testify on the control issue. Specifically, the Appellant did not call any employees, officers or directors of the Appellant and did not call any of the Members of the Appellant to address the agency issue.

Conclusion

[192] For the foregoing reasons, I have concluded that the Annual Resort Fee is an amount each of the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer and the U.S. Developer is required to pay, as a member of the Appellant, to fund the annual costs of the Appellant. The annual costs of the Appellant include the Vacation Home Operating Costs, the costs of operating the Intrawest Program and the corporate costs of the Appellant. The Appellant holds a portion of the Annual Resort Fee as a reserve fund for future unexpected expenditures of the Appellant.

[193] The Annual Resort Fee does not represent an amount paid by the Members of the Appellant to the Appellant as a reimbursement of costs the Appellant incurred as agent for the members.

[194] As a result, the Annual Resort Fee constitutes consideration paid for a supply. I must now determine whether that supply was subject to Division II tax.

V. **Second Issue: Was the supply made in Canada?**

[195] Under subsections 165(1) and (2), the supply will only be subject to GST if it is a taxable supply that was made in Canada.

[196] Both parties accept that, if the Appellant did make a supply, the supply was a taxable supply. However, they disagree on the application of the made-in-Canada rules contained in the *GST Act*.

[197] When assessing the Appellant, the Minister assumed that the Members of the Appellant paid the Annual Resort Fee as consideration for the supply of intangible personal property that related to both real property situated in Canada and real property situated outside of Canada.

[198] The Respondent is asking the Court to allocate the Annual Resort Fee between taxable supplies made in Canada and taxable supplies made outside of Canada, basing the allocation on the ratio of total resort points issued in respect of properties located in Canada to the total resort points issued in respect of all properties.

[199] The Appellant argues that, if the Court determines that the Appellant made a supply to its members, then the supply was a supply of a service in relation to real property, with the consideration for the supply being the Annual Resort Fee. Further, the Appellant argues that the Appellant made separate single supplies of services in respect of each Vacation Home.[77]

[200] The Appellant is asking the Court to allocate the Annual Resort Fee between taxable supplies made in Canada and taxable supplies made outside of Canada, basing the allocation on the ratio of membership costs associated with the operation of the Vacation Homes situated in Canada to the total costs for all Vacation Homes.

Legislative inconsistency in section 142

[77] Additional Written Submissions of the Appellant, filed January 30, 2015, paragraphs 2 and 32.

[201] The GST, like most value-added taxes, is a destination-based tax that is intended to tax consumption, in this case in Canada. The *GST Act* attempts to accomplish this objective by only taxing, under subsections 165(1) and (2), supplies that are deemed under the *GST Act* to be made in Canada and by zero-rating, under Part V of Schedule VI of the *GST Act* (the "Export Schedule"), certain cross-border supplies that are deemed to be made in Canada.

[202] Section 142 contains two sets of place-of-supply rules for intangible personal property.

[203] The first set of rules looks at where the intangible personal property may be used. The second set of rules looks at the location of related real property, tangible personal property or services.

[204] Subparagraph 142(1)(c)(i) deems a supply of intangible personal property to be made in Canada if the property may be used in whole or in part in Canada. Subparagraph 142(2)(c)(i) deems a supply of intangible personal property to be made outside Canada if the intangible personal property may not be used in Canada.

[205] Subparagraph 142(1)(c)(ii) deems a supply of intangible personal property to be made in Canada if the property *relates to real property situated in Canada*, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada.

[206] Subparagraph 142(2)(c)(ii) deems a supply of intangible personal property to be made outside Canada if the property *relates to real property situated outside Canada*, to tangible personal property ordinarily situated outside Canada or to a service to be performed wholly outside Canada.

[207] Section 142 contains three sets of place-of-supply rules for services. The first set of rules applies to a supply of a service in relation to real property. The second set of rules is contained in paragraphs 142(1)(f) and 142(2)(f) and applies to prescribed services. There are currently no prescribed services. The third set of rules applies to all other services.

[208] Paragraph 142(1)(d) provides that a supply of real property or a *service in relation to real property* will be deemed to be made in Canada if the real property is situated in Canada. Paragraph 142(2)(d) provides that a supply of real property

or a *service in relation to real property* will be deemed to be made outside Canada if the real property is located outside Canada.

[209] Paragraphs 142(1)(g) and 142(2)(g) apply to all services that are not in relation to real property. Paragraph 142(1)(g) deems a supply of such a service to be made in Canada if the service is performed in whole or in part in Canada. Paragraph 142(2)(g) deems a supply of such a service to be made outside Canada if the service is performed wholly outside Canada.

[210] The application of the made-in-Canada rules to supplies of intangible personal property and services that do not relate to real property is straightforward.[78] The supply of intangible personal property that does not relate to real property (or tangible personal property or a service) will be deemed to be made in Canada if the intangible personal property may be used in whole or in part in Canada. The supply of such intangible personal property will only be deemed to be supplied outside of Canada if the intangible personal property may not be used in Canada.

[211] Similarly, the supply of a service that does not relate to real property is deemed to be made in Canada if the service is performed in whole or in part in Canada. The service will only be deemed to be supplied outside of Canada if the service is performed wholly outside of Canada.

[212] The application of the place of supply rules is not as straightforward if the intangible personal property or service relates to real property.[79] The problem is that subsections 142(1) and (2) deem two mutually exclusive events to occur.

[213] For example, it is my understanding that the parties agree that the supply of the Resort Points (which is not before the Court) is a supply of intangible personal property that relates to real estate situated in Canada (the Canadian Vacation Homes) and to real estate situated outside of Canada (the U.S./Mexico Vacation Homes). I assume the parties reached this conclusion on the basis that the sole purpose of the Resort Points is to allow members to reserve specific Vacation Homes for specific periods.

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[78] Provided the intangible personal property also does not relate to tangible personal property or a service.

[79] The same issue arises if the intangible personal property relates to tangible personal property or a service.

[214] In such a situation, on a plain reading subparagraph 142(1)(c)(ii) deems the supply of the Resort Points to be made in Canada since the Resort Points relate to real property situated in Canada. However, on a plain reading of subparagraph 142(2)(c)(ii) the supply is deemed to be made outside of Canada since the Resort Points relate to real property situated outside of Canada. This is clearly an absurd result.

[215] A similar result occurs in respect of a single supply of a service that relates to both real property situated inside Canada and real property situated outside of Canada.

[216] In the situation before me, where the *GST Act* on a plain reading, creates an internal inconsistency, one must apply the principles of statutory interpretation to avoid a potentially absurd result.

[217] As has been stated by this Court on numerous occasions, the general rule for interpreting statutes is the textual, contextual and purposive approach, as confirmed by the Supreme Court of Canada in *Canada Trustco Mortgage Co v Canada*.[80]

[218] Further, it is a general rule of statutory interpretation that legislation is deemed to be well drafted and to express completely what the legislature wanted to say. As a result, when interpreting a particular section, the Court should not add words to the section. The Supreme Court of Canada explained this principle in *R v McIntosh*,[81] as follows:

> Second, the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 231, that:
>
> > Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say. . .

[80] 2005 SCC 54, [2005] 2 SCR 601, at paragraph 11.

[81] [1995] 1 SCR 686 at page 701.

> The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment.

[219] It is interesting to note that Professor Pierre-André Côté made the following comment in a subsequent edition of his book:

> The presumption against adding words must be treated with caution because legal communication, like all communication, contains both implicit (the overall context of the enactment) and explicit (the actual wording) elements. The presumption only concerns the explicit element of the legislature's message: it considers that the judge who adds terms to a provision legislates, and usurps the role of the legislature. However, if the judge makes additions in order to render the implicit explicit, he or she is not overreaching their authority. *The relevant question is not whether the judge can add words or not, but rather if the words added do anything more than express what is already implied by the statute*.[82]
>
> [Emphasis added.]

[220] In *Lévis (City) v Fraternité des policiers de Lévis Inc.*,[83] Justice Bastarache made the following comments on conflicts that arise in provisions enacted by the same legislature:

> 47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)
>
> . . . Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct

[82] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at pages 294-295.

[83] *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14, [2007] 1 SCR 591.

> conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).[84]

[221] In concurring reasons, Justices Deschamps and Fish preferred a narrower definition of conflict for provisions enacted by the same legislature:

> 89 . . . the rule should in our view be applied even more rigorously where the conflicting laws have been enacted by a single legislature. Since the legislature is presumed to know its own laws and to intend that they be applied consistently, the application of a rule favouring an interpretation that makes it possible to avoid conflicts is fully justified.
>
> 90 . . . It is therefore only where conflict is unavoidable that a court must apply the principles of interpretation that give precedence to one law over the other, in which case the conflicting provision will be tacitly repealed or found to be partially inapplicable.[85]

[222] Furthermore, an interpretation of a statute must be consistent with the presumption against tautology, which requires that, to the extent possible, a court should avoid adopting an interpretation that renders any portion of a statute meaningless or redundant.[86]

[223] In *Mathew v Canada*,[87] Chief Justice McLachlin and Justice Major underscored the importance of a contextual and purposive analysis when dealing with two provisions of the *Income Tax Act* that are in conflict with one another:

> 40 To resolve the dispute arising from the combined operation of s. 18(13) and s. 96 of the *Income Tax Act*, it is necessary to determine Parliament's intention in enacting these provisions by interpreting them purposively, in light of their context.[88]

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[84] *Ibid,* at paragraph 47.

[85] *Ibid,* at paragraphs 89-90.

[86] *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 at paragraph 45.

[87] *Mathew v Canada*, 2005 SCC 55, [2005] 2 SCR 643 (this case is often referred to as *Kaulius v Canada*).

[88] *Ibid,* at paragraph 40.

[224] Before addressing the legislative inconsistencies in section 142, I must first determine if the Members of the Appellant paid the Annual Resort Fee as consideration for the supply of a service or as consideration for the supply of intangible personal property.

Supply of a service or of intangible personal property?

[225] I have already concluded that the Annual Resort Fee is an amount each of the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer and the U.S. Developer is required to pay, as a Member of the Appellant, to fund the annual costs of the Appellant.

[226] The Respondent argues that the Members of the Appellant paid the Annual Resort Fee as additional consideration for the supply of their membership in the Appellant, which constitutes the supply of intangible personal property. Specifically, the Respondent argues that the Annual Resort Fee is part of the ongoing consideration Members of the Appellant pay in order to maintain their membership in the Appellant. As a result, in the Respondent's view, the Appellant made a supply of intangible personal property that relates to both real property situated in Canada and real property situated outside of Canada.

[227] The Respondent argues that the portion of the supply of such intangible personal property that relates to real property situated in Canada is subject to GST and the portion of the supply that relates to real property situated outside of Canada is not within the scope of the GST.[89] The Respondent argues that the Court should add the words "to the extent that" to the beginning of paragraph 142(1)(c)(ii) so that the paragraph would read, "(ii) *to the extent that* the property relates to real property situated in Canada."

[228] The Respondent's argument that tax may apply to only a portion of the consideration for a taxable supply appears to be based on an administrative concession made by the Canada Revenue Agency.[90]

[229] The Appellant argues, in the first instance, that the Members of the Appellant pay the Annual Resort Fee as consideration for a supply of a service in

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[89] Additional Submissions of the Respondent, paragraph 64.

[90] Respondent's Written Submissions, paragraph 4; Additional Submissions of the Respondent, paragraphs 58 to 67.

relation to both real property situated in Canada and real property situated outside of Canada. The Appellant's argument is summarized at paragraph 151 of the Written Submissions of the Appellant as follows:

> Consequently, if this Court concludes the Club is making a supply to the Members, the nature of the supply is the supply of the operation and maintenance of the Vacation Homes for Members – which is a service in relation to real property. Pursuant to paragraphs 142(1)(d) and (2)(d), only the services that relate to the Vacation Homes in Canada would be subject to GST.[91]

[230] The Appellant also makes what appears to be an alternative argument. It argues, at paragraphs 27 to 33 of its Additional Written Submissions, that it is making a separate single supply of a service in relation to each of the Vacation Homes.

[231] The *GST Act* contains definitions for the words "property" and "services". Property is defined to mean any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind whatever but does not include money.[92]

[232] Bruce Ziff in *Principles of Property Law* defines "property" as:

> From an intuitive perspective, the idea of property is perfectly straightforward: the term refers to those things one can own. . . . Property is sometimes referred to as a bundle of rights.[93]

[233] Furthermore, Ziff cites Professor Honoré, who identifies 11 elements composing the bundle of rights:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity.[94]

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[91] The same argument is made at paragraph 2 of the Additional Written Submissions of the Appellant.

[92] Subsection 123(1), definition of "property".

[93] Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at page 2.

[94] *Ibid*.

[234] "Intangible personal property" is not defined in the *GST Act*. It is generally accepted as meaning property that lacks a physical form (i.e. personal property other than tangible personal property).[95]

[235] The *GST Act* defines a service to mean *anything* other than property, money and certain services supplied to an employer by an employee, an officer and certain other persons.[96] The definition of a service is extremely broad. If something is not property, money or an "employee service", then it will be deemed to be a service.

[236] I agree with the Appellant that the Annual Resort Fee is paid as consideration for a service rendered by the Appellant to each of its members.

[237] The Appellant does not provide any rights in consideration of the Annual Resort Fee. In other words, it does not supply any property. What it supplies is the agreement to use the Annual Resort Fees to fund its operations. Specifically, it agrees to use the funds to pay the Vacation Home Operating Costs, to pay costs incurred to operate the Intrawest Program (including the reservation system and the member relation function), to pay its own internal expenses (such as head office salaries, legal fees, audit fees, cost of annual meetings, etc.) and to hold a portion of the funds in a reserve fund for future unexpected expenses (collectively referred to as the **Annual Services**).

[238] This is a supply of a service. It is the supply of something other than property.

[239] I do not accept the Respondent's argument that the Annual Resort Fee is part of the ongoing consideration the Members of the Appellant pay to maintain their membership in the Appellant.

[240] With respect to the Canadian Resort Point Purchasers, pursuant to the terms of the Canadian Purchase and Membership Agreement, a Canadian Resort Point Purchaser purchases both the Resort Points and the membership in the Appellant from the Canadian Developer. Specifically, section 4 of the agreement, states: "By signing this Agreement, the Purchaser [the Canadian Resort Point Purchaser] is

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[95] See, for example, *Black's Law Dictionary*, 10th ed.

[96] Subsection 123(1), definition of "service".

incurring a contractual obligation to purchase the Membership and Resort Points. . . ."[97]

[241] This is a different supply than the Appellant's supply of the Annual Services to the Canadian Resort Point Purchasers in consideration of the Annual Resort Fee. In the first instance, different persons are making the supplies. The Canadian Developer, not the Appellant, supplies the membership to the Canadian Resort Point Purchaser.

[242] Second, the supply of the memberships by the Canadian Developer to each Canadian Resort Point Purchaser is a supply of intangible personal property, namely the rights arising from a membership in the Appellant and the rights arising from the Resort Points.

[243] The membership in the Appellant provides the Canadian Resort Point Purchaser with various rights with respect to the Appellant, such as the right to participate in the Intrawest Program, vote at annual general meetings, elect directors and share in any proceeds realized on the winding-up of the Appellant. The Resort Points provide the Canadian Resort Point Purchaser with the right to reserve specific Vacation Homes pursuant to the terms of the Intrawest Program.

[244] The supply by the Appellant to the Canadian Resort Point Purchasers, in consideration of the Annual Resort Fee, does not involve a supply of any rights. The Canadian Resort Point Purchasers are merely agreeing, as members of the Appellant, to fund the costs of the Appellant. The members are not acquiring any additional membership rights; they acquired all of their rights as members when the Canadian Developer supplied the membership in the Appellant.

[245] I did not receive a copy of any agreement pursuant to which the American Resort Point Purchasers purchased either Resort Points or a membership in the Appellant. Paragraph 6 of the PASF states: "Under the Intrawest program, purchasers acquire resort points and thereby automatically become members of the Club [the Appellant] . . .". I assume that the reference to purchasers in this paragraph is to both the Canadian Resort Point Purchasers and the American Resort Point Purchasers. As a result, I have assumed that the American Resort Point Purchasers purchased the Resort Points and their memberships in the

[97] Exhibit A-1, Table 8.

Appellant from the U.S. Developer pursuant to an agreement very similar to the Canadian Purchase and Membership Agreement.

[246] Therefore, in similar fashion to the Canadian Resort Point Purchasers, the American Resort Point Purchasers paid the Annual Resort Fee as consideration for the supply of a service.

[247] The parties did not present the Court with any evidence with respect to the acquisition of memberships in the Appellant by either the Canadian Developer or the U.S. Developer. I have no idea how or when they acquired their memberships.

[248] There is no evidence before me that either the Canadian Developer or the U.S. Developer paid the Annual Resort Fee as consideration for a membership in the Appellant. As I have just discussed, the evidence before me is that the Members of the Appellant (including the Canadian Developer and the U.S. Developer) paid the Annual Resort Fee in consideration of the Appellant agreeing to use the fees to fund its operations.

[249] Counsel for the Respondent focused on the fact that the failure of a Member of the Appellant to pay the Annual Resort Fee may result in the Appellant placing a lien on the member's membership and then selling the membership under a power of sale.[98] This does not mean that the Annual Resort Fee is consideration for the supply of a membership in the Appellant. It simply means that if a Member of the Appellant fails to pay the fee, the Appellant may take collection actions, which can include seizing and selling the membership.

[250] The Respondent also raised the fact that, if a Canadian Resort Point Purchaser or an American Resort Point Purchaser does not pay the Annual Resort Fee, the member cannot use Resort Points to reserve a room in one of the Vacation Homes. Again, this is a collection action; it does not evidence the supply of rights. Further, this relates to the rights attached to the Resort Points not the rights attached to a membership in the Appellant.

[251] In summary, each of the Members of the Appellant paid the Annual Resort Fee as consideration for the supply by the Appellant of a service.

[98] See Exhibit A-1, Table 1, Master Declaration, section 10.1.

Did the Appellant make a single supply or multiple supplies in consideration of the Annual Resort Fee?

[252] Counsel for the Appellant argued that the Appellant made, in consideration of the Annual Resort Fee, separate single supplies of services in respect of each Vacation Home.

[253] The Respondent argues that the Appellant made a single supply comprising a number of constituent elements.

[254] As I noted in *Jema International Travel Clinic Inc. v The Queen*, 2011 TCC 462 (*Jema*), at paragraphs 28 and 29:[99]

> [28] The determination of this issue involves two steps. First, it must be determined whether a single supply or multiple supplies were made by the supplier; that is a question of fact. If it is determined that multiple supplies were made then the deeming provisions in section 138 and 139 of the *HST Legislation* must be considered.
>
> [29] The factual question of whether a supplier has made a single supply or multiple supplies has been considered by the Court and the Federal Court of Appeal on numerous occasions. Most of these decisions follow the principles summarized by Justice Rip (as he then was) in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (*O.A. Brown*).

[255] In *O.A. Brown*, Judge Rip (as he then was) summarized the law as follows:

> In deciding this issue, it is first necessary to decide what has been supplied as consideration for the payment made. It is then necessary to consider whether the overall supply comprises one or more than one supply. The test to be distilled from the English authorities is *whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply.* One must examine the true nature of the transaction to determine the tax consequences. The test was set out by the Value Added Tax Tribunal in the following fashion:
>
> > In our opinion, where the parties enter into a transaction involving a supply by one to another, the tax (if any) chargeable thereon falls to be determined by reference to the substance of the transaction, but the

[99] 2011 TCC 462.

> substance of the transaction is to be determined by reference to the real character of the arrangements into which the parties have entered.[100]

[256] My following statement at paragraph 32 of *Jema* emphasizes the importance of common sense when making the determination:

> [32] Justice Rip noted the importance of common sense when the determination is made. As my colleague Justice McArthur noted in *Gin Max Enterprises Inc. v. the Queen* at paragraph 18,
>
> > From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense. . .
> >
> > (Emphasis added)

[257] As noted in paragraph 22 of the PASF, the Members of the Appellant pay the Annual Resort Fee to fund *membership costs*. M*embership costs* are defined in section 1.37 of the Master Declaration. As can be seen from Exhibit A-13, they include all of the Annual Services.

[258] As I noted previously, the Annual Services comprise four separate groups of activities of the Appellant: the maintenance, operation and improvement of each Vacation Home; the operation of the Intrawest Program; the operation of the Appellant itself; and the maintaining of a reserve fund. It appears to me that, if I were to accept that the Appellant made separate supplies in respect of the Canadian Vacation Homes and the U.S./Mexico Vacation Homes, then I would have to accept that the Appellant made separate supplies in respect of the other three groups of activities.

[259] As a question of fact, the Appellant did not make four separate groups of supplies. It made a single supply by agreeing to use the Annual Resort Fee to fund its operations. The Master Declaration clearly treats the supply as a single supply, with the consideration being based upon the Appellant's total estimated costs. The Appellant could only continue to operate the Intrawest Program if it incurred all of the costs set out in Exhibit A-13; it could not cherry-pick certain costs.

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[100] *OA Brown Ltd v The Queen*, [1995] GSTC 40 at page 40-6, 3 GTC 2092 (TCC) at page 2095.

Taxation of the supply of a service that relates to real property in Canada and real property outside of Canada

[260] Having concluded that the Appellant made a single supply of a service, I must now determine if section 142 deems the supply to have been made in Canada.

[261] The actual wording of the section 142 place-of-supply rules for services is as follows:

> 142(1) For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if
>
> . . .
>
> (d) in the case of a supply of real property or of a service in relation to real property, the real property is situated in Canada;
>
> . . .
>
> (f) the supply is a supply of a prescribed service; or
>
> (g) in the case of a supply of any other service, the service is, or is to be, performed in whole or in part in Canada.
>
> 142(2) For the purposes of this Part, a supply shall be deemed to be made outside Canada if
>
> (d) in the case of a supply of real property or a service in relation to real property, the real property is situated outside Canada;
>
> . . .
>
> (f) the supply is a supply of a prescribed service; or
>
> (g) in the case of a supply of any other service, the service is, or is to be, performed wholly outside Canada.

[262] There are currently no prescribed services.

[263] The internal inconsistency only exists as a result of the wording of paragraphs 142(1)(d) and 142(2)(d). These paragraphs apply in the narrow situation where the supplied service is “in relation to real property”.

[264] Having determined that the Appellant made a single supply of a service, I must next determine if the Appellant made a supply of a service *in relation to real property* as those words are used in paragraphs 142(1)(d) and 142(2)(d).

[265] I agree with counsel for the Appellant that, in light of the Supreme Court of Canada's decision in *Nowegijick v. The Queen*,[101] the phrase "in relation to" as used in paragraphs 142(1)(d) and 142(2)(d) should be given a wide scope. However, within the context of section 142, the words require a direct relationship between the service and the real property. The service must be performed directly on the real property or relate directly to the real property. This would include services such as repairs to the real property, maintenance of the real property, architectural services relating to a specific building or legal services performed in respect of the sale or rental of the real property.

[266] The Appellant's only business is the operation of the Intrawest Program. As a result, all of the services it performs relate directly or indirectly to real property. However, paragraphs 142(1)(d) and 142(2)(d) only apply to services performed by the Appellant that relate directly to real property.

[267] The actual services the Appellant provided in the relevant periods in consideration of the Annual Resort Fee are set out in Exhibit A-13, Ms. Ruff's budgeting spreadsheet. It shows the following groups of costs,

- Front desk and concierge
- Member services
- Housekeeping
- Utilities
- Maintenance
- Cleaning and security

[101] [1983] 1 S.C.R. 29.

- General and administration (wages, general expenses, cost of the Appellant's annual general meeting, audit costs, income tax, legal expenses, property taxes, insurance, "fees payable to division" and local resort fees)

- Management fee paid to the Canadian Developer

- Reserve fund.

[268] Certain services, such as the front desk and concierge services, and the housekeeping, maintenance, and cleaning and security services, clearly relate directly to the Vacation Homes. However, some of the services do not relate directly to the Vacation Homes. For example, the general and administrative services are services provided at the Appellant's Vancouver office and do not relate directly to a Vacation Home. Rather these services are in relation to the operation of the Appellant as a corporation. This is the case, for example, with services relating to the holding of the Appellant's annual general meeting, the carrying out of its audit, and the preparation of its tax returns and with services giving rise to general costs for the Vancouver office.

[269] In addition, sections 2.1 and 3.1 of the Management Agreement state that the services provided by the Canadian Developer to the Appellant include administrative and financial services. A number of the actual services are set out in paragraphs a) to t) of section 3.1. These services include a number of services that do not relate directly to real property, such as the filing of forms with regulatory bodies with respect to the operation of the Appellant, instructing lawyers and accountants on behalf of the Appellant with respect to the preparation of financial statements, income tax returns and audits, providing administrative services with respect to meetings of the Appellant's board of directors and meetings of the Members of the Appellant, and providing financial services.

[270] In addition, I believe that a number of services performed by the Appellant in respect of the administration of the membership program do not relate directly to real property. From the testimony of the Appellant's witnesses and the documentary evidence before me, it appears that a number of the services relate to the operation of the membership program as opposed to the operation of a Vacation Home. This would include such services as the tracking of memberships, providing information to members, the drafting and circulation of membership newsletters and dealing with inquires by members relating to the status of their membership.

[271] In my view, the Appellant made a single supply of services that relate to real property situated outside of Canada (the U.S./Mexico Vacation Homes), real property situated in Canada (the Canadian Vacation Homes) and things other than real property, such as the operating costs of the Appellant.

[272] Since the supply of the Annual Services relates in part to real property in Canada and real property outside of Canada, I must address the legislative inconsistency in paragraphs 142(1)(d) and 142(2)(d).

[273] I have already discussed the text of the relevant provisions; it is the text that creates the internal inconsistency.

[274] A consideration of the context of the section 142 place-of-supply rules must begin with subsection 165(1): the provision that imposes the tax. As discussed previously, that subsection imposes the tax on taxable supplies that are *made in Canada*. The actual tax is calculated on the consideration for the taxable supply.

[275] Both the Appellant and the Respondent ask the Court to interpret subsection 165(1) in such a manner that the tax is levied on only a portion of the consideration for a single taxable supply.

[276] I do not see how subsection 165(1) can be interpreted in such a manner. In my view, it clearly states that, if the supplier makes a taxable supply and the supply is made in Canada, then tax is payable on the value of the consideration for the taxable supply. There is no ambiguity in these words; the subsection imposes the tax on the full consideration for the taxable supply.

[277] Further, the *GST Act*, when read as a whole, does not contemplate splitting a single supply that is made in Canada into a taxable portion and a non-taxable portion.

[278] For example, subsection 169(1) is a key provision of the *GST Act*. It contains the basic rules for the claiming of input tax credits. Its operation is based on the assumption that all of the consideration for a single taxable supply is subject to tax.

[279] Under this subsection, a GST registrant is entitled to claim an input tax credit based upon the formula A x B where A is equal to the tax paid or payable in respect of the supply and B, in most instances, represents the extent to which the registrant acquired the property or service for consumption, use or supply in the course of commercial activities.

[280] This formula allows input tax credits based on the tax paid on the total consideration, and on the use of the entire property or service. It does not apportion the tax and the use of the property between taxable and non-taxable portions of a single supply. As a result, this formula will not produce the result intended by Parliament if only a portion of the consideration for a single supply is taxed. For example, consider the following situation:

- A single taxable supply is made of services that relate to real property in Canada and real property outside of Canada.

- Only the portion of the consideration allocated to the services that relates to the real property situated in Canada is taxed.

- The portions of the services that relate to the real property situated in Canada are consumed in GST exempt activities.

- The portions of the services that relate to real property situated outside of Canada are consumed in GST commercial activities.

[281] In such a situation, since the tax was paid on services that were consumed solely in exempt activities (the services consumed in Canada), one would expect that no input tax credits would be available under subsection 169(1). However, subsection 169(1) looks at the total consumption of the single supply. It does not distinguish between a taxable and a non-taxable portion of a single supply. As a result, it would allow the registrant to claim an input tax credit for a portion of the tax paid, to the extent that the service was used in commercial activities (the activities outside of Canada). This would be the result even though the portion of the services in respect of which the tax was paid (the portion related to the services in Canada) was consumed solely in exempt activities. In my view, this is not a result intended by Parliament under subsection 169(1).

[282] Taxing only a portion of the consideration for a single supply would cause similar difficulties when one tries to apply the change-in-use rules in section 199 and the all-or-substantially-all rules in section 141.

[283] If Parliament had intended that subsections 165(1) and (2) levy tax on only a portion of the consideration for a single supply of a service or property, then, in my view, it would have included in the input tax credit rules a provision allocating the tax paid to the taxable portion of the supply.

[284] Parliament, when enacting the *GST Act*, did turn its mind to situations where it wanted portions of a single supply to be taxed in different manners. In such situations, it deemed the single supply to be two or more separate supplies.

[285] For example, subsection 136(2) addresses the situation where a single supply is made of a piece of real property that includes a non-taxable residential unit and a taxable commercial unit. The subsection deems the supply of the residential unit and the commercial unit to be separate supplies. Further, subsections 141(5) and 153(2) ensure that, if only a portion of the supply of real property is taxed because of the application of the subsection 136(2) deeming rules, then a registrant is only entitled to claim input tax credits for tax paid on goods and services consumed in relation to the taxable portion.

[286] Parliament has used the same approach in subsections 136(3) and 136(4) and sections 136.2, and 136.3.

[287] The *GST Act* does not contain similar provisions that apply for the purposes of the section 142 place-of-supply rules. In my view, this means that Parliament did not intend that tax would only apply to a portion of the consideration for a single supply of property or a service that is deemed to be made in Canada.

[288] In summary, the *GST Act*, particularly the sections that impose the tax and the sections that allow for the claiming of input tax credits, contemplates a single supply which is either subject to tax on the whole of the consideration paid for the supply or not subject to tax at all.

[289] Both of the parties appear to be arguing that it is not the intent behind the section 142 place-of-supply rules that a supply consumed both inside and outside of Canada be deemed to be made in Canada. I do not agree.

[290] Paragraphs 142(1)(g) and 142(2)(g) contain what is normally referred to as the general place-of-supply rules for services. The two paragraphs apply to the supply of all services other than a service that is in relation to real property. The two paragraphs determine the place-of-supply according to where the service is physically performed. Parliament has equated the place of consumption of a service to the place where the supplier of the service performs the service.

[291] The only exception to the general rule is where the supply is a supply of a service in relation to real property. In such a situation, paragraphs 142(1)(d) and 142(2)(d) look at the location of the real property.

[292] The effect of the general rule contained in paragraphs 142(1)(g) and 142(2)(g) is that a single supply of a service that is performed both inside and outside of Canada and does not relate to real property will be deemed to be a supply made in Canada. This means that, for most supplies of services (i.e. supplies of services that do not relate to real property), Parliament has decided that the supply will be deemed to be a supply made in Canada even if the supply is consumed both inside and outside of Canada.

[293] Similarly, under paragraphs 142(1)(c)(i) and 142(2)(c)(i) a single supply of intangible personal property that may be used both inside and outside of Canada and does not relate to real property, tangible personal property or a service will be deemed to be a supply made in Canada.

[294] This does not mean that Parliament intended tax to apply to all such supplies. The section 142 place-of-supply rules are only one of the sets of rules that determine when a taxable supply is subject to tax.

[295] In certain situations, Parliament has removed the tax from taxable supplies that are deemed under section 142 to be made in Canada by zero-rating the supply under the Export Schedule. Specifically, the Export Schedule provides for a zero rate of tax on certain taxable supplies that are made in Canada.[102]

[296] The Export Schedule contains twenty-two provisions that zero-rate supplies of services that are deemed to be made in Canada. In all but two of these sections, the zero-rated supply is made to a non-resident person. For example, section 7 of the Export Schedule zero-rates numerous supplies of services that are performed in whole or in part in Canada where the supply of the service is made to a non-resident person and is not subject to the numerous exclusions set out in the section. Section 23 zero-rates professional services (such as legal services) performed in whole or in part in Canada where the supply is made to a non-resident and is not subject to one of the four exclusions.

[297] In my view, Parliament has assumed that, if the supply is made to a non-resident in a situation that qualifies for zero-rating under the Export Schedule, then, generally, the supply is consumed outside of Canada.

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[102] Subsections 165(1), (2) and (3).

[298] The only two zero-rating sections that do not require the supply to be made to a non-resident are sections 2.2 and 4 of the Export Schedule. Section 4 involves services in respect of temporarily imported tangible personal property. In effect, this section zero-rates the supply of services performed on tangible personal property, where the tangible personal property is consumed or used outside of Canada. Section 2.2 provides for zero-rating for certain cross-border air navigation services.

[299] Sections 10 and 10.1 of the Export Schedule are the two sections that zero-rate the supply of intangible personal property. Both sections require the supply to be made to a non-resident of Canada.

[300] The place-of-supply rules in section 142 are subject to sections 143, 144 and 179.

[301] Section 143 contains the so-called non-resident override rule. The effect of section 143 is that supplies that would otherwise be deemed to be made in Canada under section 142 are deemed to be made outside of Canada. Section 143 applies if a non-resident person makes the supply, unless the non-resident makes the supply in the course of a business carried on in Canada by the non-resident or the non-resident is registered under the *GST Act*. If the non-resident supplies services or intangible personal property, Division IV of the *GST Act* attempts to tax such supplies if they are consumed in Canada in non-commercial activities.

[302] Section 144 contains a rule that applies to certain tangible personal property imported into Canada. It is intended to avoid the double payment of Division II and Division III tax.

[303] Section 179 contains a number of extremely complex rules that apply to certain supplies of services and tangible personal property. The rules are referred to as the *drop-shipment rules*. Generally speaking, the rules will apply to the supply of a service where a Canadian supplier sells goods to a non-resident, the non-resident has a service performed on the goods in Canada and the goods are exported from Canada after the service is performed and before they are consumed or used. In such a situation, even though the service is performed in Canada, the supply of the service will be deemed to be made outside of Canada provided the non-resident complies with the administrative provisions of section 179. In such a situation, the taxation of the service is not dependent on where the service is performed but rather on where the goods are consumed or used.

[304] The section 179 drop-shipment rules do not apply to intangible personal property.

[305] In my view, it is the combination of section 142, the Export Schedule and section 179 that determines whether a supply of a service will be subject to tax.

[306] With respect to section 142, the general place-of-supply rules for services, contained in paragraphs 142(1)(g) and 142(2)(g), assume that the services are consumed in the place where they are rendered. This assumes that the services are not portable. Further, the supply of the service will be deemed to be made in Canada provided the service is performed at least partly in Canada. It is only supplies of such services that are performed entirely outside of Canada that are deemed to be made outside of Canada.

[307] In situations where the service is portable, consumption may occur in a location other than the place where the service is performed. Parliament has provided relief from tax under the Export Schedule for portable services that are consumed outside of Canada.[103] In most instances, Parliament has only provided relief if the supply is made to a non-resident person or the supply is a supply of a service in respect of tangible personal property where the tangible personal property is consumed or used outside of Canada.

[308] In the situation where the service is in relation to real property, paragraphs 142(1)(d) and 142(2)(d) apply for the purpose of determining whether the supply is made in Canada. These rules are based on the assumption that the services are consumed where the real property is located.

[309] How then does one resolve the section 142 internal inconsistency?

[310] In my view, section 142 must be interpreted in a manner that respects Parliament's intention to impose the tax, at the applicable rate, on all of the consideration for a single taxable supply that is deemed to be made in Canada, its general intention to deem, under section 142, supplies of services that are performed inside and outside of Canada to be made in Canada, and its intention to impose the tax on supplies of services to residents of Canada where the services are consumed at least partly in Canada.

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[103] See, for example, sections 7 and 23 of the Export Schedule.

[311] In my view, the parties are asking the Court to interpret section 142 in a manner that offends all three of these intentions. In particular, their interpretation would allow residents of Canada to escape a portion of the tax on a single supply of services that the resident consumes partly in Canada. A significant portion of the supplies made by the Appellant in consideration of the Annual Resort Fee is made to residents of Canada, specifically the Canadian Resort Point Purchasers and the Canadian Developer. The parties are asking the Court to interpret section 142, subsection 165(1) and subsection 165(2) of the *GST Act* in such a way that tax will only apply to a portion of the consideration such Canadian residents pay for supplies of services that are consumed inside and outside of Canada and for supplies of intangible personal property that is used inside and outside of Canada.

[312] They appear to be arguing that I should interpret the *GST Act* in a manner that offers special relief from taxation for a supply of services in relation to real property, relief that is not offered with respect to any other supplies of services, since the GST applies to all of the consideration for a supply of a service that does not relate to real property and is performed (consumed) partly in Canada.[104]

[313] I cannot accept such an interpretation. First, it would require the Court, as suggested by the Respondent, to read words into section 142. As the Supreme Court of Canada noted in *The Queen v McIntosh*, supra, it is not my task to create or amend legislation; that is a legislative, not a judicial, function.

[314] Further, in my view, such an interpretation is not consistent with Parliament's intention, as reflected in section 142, the Export Schedule and section 179, to impose the tax on the full consideration for a supply made to a resident of Canada that is consumed partly in Canada.

[315] The internal inconsistency must be resolved in a manner that respects Parliament's intention without adding words to the relevant paragraphs.

[316] Paragraphs 142(1)(g) and 142(2)(g) apply to the supply of all services that do not relate to real property.[105] There is no inconsistency in the application of these paragraphs and they address all situations that may arise: namely, a service performed completely in Canada, a service performed completely outside of

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[104] Assuming the supply of the service is not zero-rated and not deemed to be made outside of Canada under section 143 or section 179.

[105] This is the result since there are no prescribed services.

Canada and a service performed both inside and outside of Canada. In my view, these paragraphs reflect Parliament's intention with respect to the application of the deeming rules to supplies of services. If the service is performed partially or wholly inside of Canada, the supply is deemed to be made in Canada; it is only when the service is performed wholly outside of Canada that the supply is deemed to be made outside Canada.

[317] Paragraphs 142(1)(d) and 142(2)(d) provide a narrow exception to this general rule. This exception only applies when the supply is in respect of a service in relation to real property. In my view, any interpretation of paragraphs 142(1)(d) and 142(2)(d) that resolves the inconsistency must be consistent with Parliament's intention as reflected in the general rule contained in paragraphs 142(1)(g) and 142(2)(g).

[318] Further, the words "a service in relation to real property" in paragraphs 142(1)(d) and 142(2)(d) should be interpreted to mean that these paragraphs only apply if the single supply of a service relates **solely** to real property. The paragraphs do not apply if only a portion of the single supply of the service relates to real property. In such a situation, the supply is subject to the general deeming rules set out in paragraphs 142(1)(g) and 142(2)(g).

[319] For example, if a supplier supplies a service and a portion of that service relates to real property and the remaining portion does not relate to any real property, then paragraphs 142(1)(d) and 142(2)(d) do not apply to the supply. In such a situation, the supply will be deemed under paragraphs 142(1)(g) and 142(2)(g) to be made in Canada if the service is performed in whole or in part in Canada and to be made outside of Canada only if the service is performed wholly outside of Canada.

[320] This interpretation is consistent with the immediate context in which the relevant words are used in section 142. Both paragraph 142(1)(d) and paragraph 142(2)(d) deal first with the supply of real property and then with the supply of a service in relation to real property. In fact, paragraphs 142(1)(d) and 142(2)(d) contain the only reference in the place-of-supply rules to the supply of real property. This supports an interpretation that Parliament intended paragraphs 142(1)(d) and 142(2)(d) to apply to supplies that relate solely to real property, including services that relate only to such real property.

Is the supply before the Court deemed to be made in Canada?

[321] I have already determined that the Annual Resort Fee is paid as consideration for a single supply of the Annual Services and that those services relate to real property situated in Canada, real property situated outside of Canada and things other than real property. As a result, since the single supply relates, at least partly, to things other than real property, the place of supply of the service must be determined under paragraphs 142(1)(g) and 142(2)(g). Paragraph 142(1)(g) deems the supply to be made in Canada since the Appellant performed the Annual Services partially in Canada.

[322] Therefore the GST applied to all of the Annual Resort Fee paid by the Members of the Appellant in consideration of the Annual Services.[106]

[323] I appreciate that my finding results in more tax being payable than would be payable under the Canada Revenue Agency's administrative policy. However, this Court must determine the application of tax on the basis of the provisions of the *GST Act*. The Canada Revenue Agency's administrative position, while beneficial to recipients of supplies, does not comply, in my view, with the provisions of the *GST Act*. Further, since the Respondent cannot appeal its own decision, my judgment cannot increase the tax assessed by the Minister.

VI. **Third Issue: Whether the Minister followed the provisions of the *GST Act* when calculating the Appellant's net tax**

[324] The Minister, under subsection 296(1), reassessed the net tax for each of the Appellant's October monthly reporting periods from 2002 to 2008 (the **October Reporting Periods**).

[325] As is allowed by section 302 of the *GST Act*, the Appellant appealed these reassessments of net tax for each of its October Reporting Periods to the Court. The Appellant did not appeal with respect to any other reporting periods. As a result, the issue before the Court is the calculation of the Appellant's net tax for the October Reporting Periods.

[326] The net tax of a person for a specific reporting period is determined under subsection 225(1). Generally speaking, that determination is made as follows:

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[106] The question of whether any of the single supplies of the Annual Services were zero-rated under the Export Schedule is not before the Court.

GST that became collectable during the reporting period

\+ GST that was collected during the reporting period

\- input tax credits claimed in the GST return filed by the person

[327] There is no provision in the *GST Act* that specifically states when the tax becomes collectable. However, subsection 221(1) provides that every person who makes a taxable supply shall collect the tax payable by the recipient in respect of the supply. Accordingly, it would appear that GST becomes collectable by a registrant at the time it becomes payable by the recipient of the supply. As a result, GST became collectable by the Appellant on the supply of the Annual Services at the time the tax in respect of the supply became payable by the Members of the Appellant.

[328] Subsections 168(1) and (2) of the *GST Act* contain the general rules for determining when GST in respect of a taxable supply becomes payable. Subsection 168(1) provides that the tax becomes payable on the earlier of the day the consideration for the supply is paid and the day it becomes due. Subsection 168(2) provides that if the consideration is paid or becomes due on more than one day, the tax becomes payable on a part of the consideration on the earlier of the day that that part is paid and the day that it becomes due.

[329] Section 152 of the *GST Act* provides that the consideration for a taxable supply is deemed to be due on the earliest of the following three dates:

- The earlier of the day an invoice is issued in respect of the supply for that consideration or part and the date of the invoice,

- The day the invoice would have been issued but for undue delay, and

- The day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

[330] Ms. Ruff testified that the Appellant issued invoices in October of each year to each Canadian Resort Point Purchaser and American Resort Point Purchaser who held Resort Points on September 30 of the particular year. The invoice was for the full amount of the Annual Resort Fee, being the consideration for the Annual Services. As a result, under section 152, the full consideration (the Annual Resort Fee) for the supply of these services became due in October of each year.

Therefore, under subsection 168(1), all of the GST on the Annual Resort Fee invoiced to Canadian Resort Point Purchasers and American Resort Point Purchasers who held Resort Points on September 30 of each year became payable and collectable in October of each year.

[331] However, Ms. Ruff also testified that the Appellant did not issue invoices to the Canadian Developer and the U.S. Developer in October of each year for the full amount of the Annual Resort Fee. Rather, the Appellant billed each of the Canadian Developer and the U.S. Developer monthly for their portions of the Annual Resort Fee. I have assumed that, because of the broad definition of invoice in subsection 123(1), the monthly bill issued by the Appellant to each of the Canadian Developer and the U.S. Developer constituted an invoice. I have also assumed that the Appellant billed the Annual Resort Fee in twelve equal amounts. In other words, only 1/12 of the Annual Resort Fee billed to the Canadian Developer and U.S. Developer became due in October of each year. Therefore, GST on 1/12 of Annual Resort Fee paid by the Canadian Developer and the U.S. Developer became payable and collectable in October of each year.

[332] In summary, when calculating the net tax of the Appellant for the October Reporting Periods, the Minister should have only added the GST payable in respect of the amount of the Annual Resort Fee invoiced to each of the Canadian Resort Point Purchasers, the American Resort Point Purchasers, the Canadian Developer and the U.S. Developer in October of each year. For the Canadian Resort Point Purchasers and the American Resort Point Purchasers, this was the full amount of the Annual Resort Fee. For the Canadian Developer and the U.S. Developer, it was 1/12 of the Annual Resort Fee.

[333] This is not how the Minister calculated the net tax. Mr. Lum testified that the Canada Revenue Agency did not determine the amount of tax collectable by the Appellant in its October Reporting Period by looking at the amounts invoiced by the Appellant in October of each year. Rather, as evidenced by Exhibit A-29, the Canada Revenue Agency calculated the tax collectable in October of each year on the total Annual Resort Fees reported in the annual financial statements of the Appellant for the following year.

[334] For example, Mr. Lum testified that he determined the GST collectable by the Appellant in its October 2002 reporting period as follows:

- He first determined the total revenue reported on the Appellant’s December 31, 2003 financial statements in respect of the Annual Resort Fee.

- He then determined, using the Minister's assumption that only a portion of the Annual Resort Fee was subject to GST, that 68.55% of the Annual Resort Fee was subject to GST.

- He then applied the 7/107 ratio to the result to determine an amount for GST collectable. The 7/107 ratio was used since the tax rate at the time was 7% and the Appellant had invoiced the Annual Resort Fee on the basis that the invoiced amount included any tax payable by the Member of the Appellant.

[335] This calculation is not based on the amount invoiced by the Appellant in October 2002, but rather is based on amounts reported on the Appellant's 2003 financial statements, which were prepared at least fourteen months after the end of the October 2002 reporting period, and includes all revenue earned by the Appellant in 2003.

[336] In short, instead of following sections 168 and 152, the Canada Revenue Agency used their own method to determine the Appellant's net tax for its October reporting periods, a method that is not consistent with the definition of net tax in subsection 225(1) and does not comply with the provisions of sections 168 and 152.

[337] The Canada Revenue Agency's method included in the Appellant's net tax for October amounts that were not collectable in that particular month. Specifically, the Canada Revenue Agency included GST on the 11/12 of the Annual Resort Fee invoiced to the Canadian Developer and the U.S. Developer in months other than October.

[338] In addition, it is not clear to the Court that the amounts reported on the Appellant's 2003 financial statements as Annual Resort Fees received from the Canadian Resort Point Purchasers and the American Resort Point Purchasers represent only the amounts invoiced to these members in October 2002. For example, Mr. Lum testified that the numbers that appear in the 2003 financial statements include write-offs for bad debts. I assume that they also include the Annual Resort Fee paid by Canadian Resort Point Purchasers and American Resort Point Purchasers who were not invoiced for the Annual Resort Fee in October of a particular year because they joined the Intrawest Program in October, November or December of that particular year.

[339] Further, the Canada Revenue Agency's administrative method would result in potential non-compliance with a number of other provisions of the *GST Act*, such as the rules in section 225(4) that provide a two-year or four-year limitation period for the claiming of input tax credits, and the transitional rules that applied when the rate of tax was reduced from 7% to 6% in July 2006.

[340] The Canada Revenue Agency, when assessing a GST registrant, must follow the provisions of the *GST Act*. It cannot use its own administrative methods simply because they facilitate the assessing process.

[341] Counsel for the Respondent argued that section 306.1 precluded the Appellant from raising this issue, since the Appellant is a specified person as defined in section 301 and did not raise the calculation of its net tax issue in its notice of objection.

[342] I do not accept this argument. The Minister, under subsection 296(1), assessed the Appellant's net tax for each October reporting period. In my view, the Appellant raised the application of section 225(1) as soon as it objected to the amount of the net tax it was assessed.

[343] The very issue before the Court is the Appellant's net tax for the relevant October reporting periods.

[344] Further, the Respondent states in her Reply that she relies on section 225. As a result, even if I were to accept that the Appellant did not raise the application of subsection 225(1), the Respondent certainly raised its application in her Reply. Also, the Respondent's witness took the Court to the method used by the Canada Revenue Agency to calculate the Appellant's net tax.

[345] The Respondent also argued that the legal principle of conduct estoppel applies since the Appellant agreed to the method used by the Canada Revenue Agency to determine its net tax in October of each year. In effect, the Respondent is arguing that, provided it has the consent of the taxpayer, the Canada Revenue Agency can ignore the provisions of the *GST Act* and assess using its own methods. It is trite law that the Canada Revenue Agency, when assessing, must follow the law as laid down by Parliament. It cannot rely on the consent of the taxpayer as a reason to ignore the provisions of the *GST Act*.

[346] I must now determine the Appellant's net tax for the October reporting period under subsection 225(1) of the *GST Act*.

[347] Unfortunately, the parties did not provide the Court with the number of Resort Points held by the Members of the Appellant on September 30 of each year or the amount the Appellant billed its members in October of each of the relevant years.

[348] However, the PASF indicates the total number of Resort Points held by the Members of the Appellant on December 30 of each year.[107] The Resort Points are divided between Resort Points held by *Non-Developer Members* (the Canadian Resort Point Purchasers and the American Resort Point Purchasers) and Resort Points held by *Developers* (the Canadian Developer and the U.S. Developer). Exhibit A-13 contains the amount billed per outstanding Resort Point for each of the relevant years.

[349] Using these numbers, I have determined that the amount assessed by the Minister is less than the amount that should have been assessed given my determination that the Appellant's net tax for each October included GST on the full amount of the Annual Resort Fee payable by the Canadian Resort Point Purchasers and the American Resort Point Purchasers who owned Resort Points on September 30 and GST on 1/12 of the Annual Resort Fee payable by the Canadian Developer and the U.S. Developer.

VII. **Conclusion**

[350] For the foregoing reasons, the appeal is dismissed. The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award to the Respondent. If no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 9th day of June 2016.

"S. D'Arcy"

D'Arcy J.

[107] PASF, paragraph 18.

APPENDIX A

25. The annual resort fee payable by a member for a calendar year is a per point dollar amount (the per point rate) established by the Club for that year multiplied by the number of resort points owned by the member.

26. The Club, through its board of directors, establishes the per point rate for a calendar year by dividing the budgeted membership costs for the particular year by the total amount of resort points issued by the Club, subject to the limitations on the master declaration on the maximum per point rate that the Club is entitled to assess for a particular year.

27. Section 1.33 of the master declaration defines Membership Costs as "all costs incurred by the Club for and on behalf of the Members as provided in Section 10.3 hereof."

28. Section 10.3 of the master declaration states that Membership Costs "shall include but not be limited to:"

(a) The maintenance, repair, modification, alteration, redecoration, or replacement of any Resort Accommodation;

(b) The maintenance, repair, modification, alteration, redecoration, replacement, and rental of the Equipment;

(c) Insurance coverage;

(d) A capital contribution for reserves;

(e) Domestic services, including cleaning and maid service, the frequency which shall be determined from time to time by the Board, furnished to or on behalf of Members;

(f) Assessment levied against Resort Accommodations by a Project or association for a Project; and

(g) Any other costs incurred by the Club in connection with the maintenance, repair, replacement, restoration, redecoration, improvement, operation, and administration of the Resort Accommodations, or in connection with the operation or administration

> of the Club, which are directly attributable to the commitment of one (1) or more Resort Accommodations in accordance with the provisions [of the Master Declaration].

29. **Tab [17]** contains copies of the Club budgeted membership costs for the relevant period which were used by the Club to set the per point rate for the applicable timeframe.

30. Section 9.1 of the master declaration states that "[t]he Club shall act as agent of all the Members in collecting Assessments and in paying taxes, utility costs, and other Membership Costs."

31. After the Club has determined the per point rate for a calendar year, letters detailing the correlation between the resort fee and the budgeted membership costs on a per point basis for the particular year are distributed to members together with an invoice for payment. Tabs [15a and 15b] contain copies of the letters for the relevant period and a representative invoice.

32. Section 10.5 of the master declaration states that resorts fees may not exceed a certain amount (maximum resort fee) and the "Maximum Resort Fee shall be determined and shall vary in accordance with the following provisions:

> (a) The Maximum Resort Fee during each fiscal year may be increased by the Board during the same fiscal year without the vote or written assent of the Membership by a maximum of five percent (5%) of the budgeted gross expenses for the fiscal year;
>
> (b) The Maximum Resort Fee for each new fiscal year may be increased by the Board without the vote or written assent of the Membership by a maximum of twenty percent (20%) of the total Resort Fees for the previous fiscal year. Any such increase shall be effective at the beginning of each fiscal year; and
>
> (c) The Maximum Resort Fee may be increased above the limits set forth under subsections (a) and (b) above, provided that any such increase shall have the affirmative vote or written assent of a majority of the Voting Power of the Club residing in the Members other than the [developer(s)]; provided, however, that in no event shall the Maximum Resort Fee for each new fiscal year exceed one hundred and twenty five

percent (125%) of the Maximum Resort Fee for the previous fiscal year;

(d) Notwithstanding anything to contrary herein, the Maximum Resort Fee during a fiscal year or for a new fiscal year may be increased above the limitations in subsections (a) and (b) above, respectively, without the consent of the Membership if such addition is due to (i) a change in the exchange rate between the currency of the location in which certain Resort Accommodations are located and U.S. currency, or (ii) an increase in the assessments levied against a Resort Accommodation by a Project or Project association, or as a result of an increase in the property or municipal taxes against Resort Accommodation or an increase in utility charges imposed by any public or private utility."

33. Section 10.8 of the master declaration states, in part, that special assessments may be levied and "[n]o vote or written assent of the Members shall be required for the following:

(a) Special assessments that do not, in the aggregate, exceed five percent (5%) of the budgeted gross expenses of the Club for that fiscal year;

(b) A Special assessment for repair, rebuilding or replacement of a Resort Accommodation(s) which does not exceed ten percent (10%) of the budgeted gross expenses of the Club for that fiscal year in which the assessment is levied; and

(c) Special assessments against a Member(s) for the purpose of reimbursing the Club for costs incurred in bringing the Member(s) into compliance with this Declaration, the By-Laws or the Guidelines.

(d) A Special Assessment due to an expenses of any type levied against a Resort Accommodation by a Project or Project association which the Declarant has no control."

34. Special assessment(s) made to replace a vacation home(s) require the consent of the board and the members.

35. Special assessments are levied in the same manner as an assessment of annual resort fees and are payable within thirty (30) days or at the direction of the developer(s).

36. All resort fees must be current in order for a member to make reservations using their resort points, to bank, borrow or transfer resort points, to use vacation homes, or maintain any other member rights or privileges.

37. Members who fail to pay their resort fees by the due date are in default. In the event of default, the Club may exercise its right to forfeit the defaulting member's membership.

38. The payment of the resort fees does not entitle members to any additional rights or privileges.

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