



## Recent Changes Involving the GST and Pension Plans

By

[Lisa Chamzuk](#)

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EXPENSES

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## Recent Changes Involving the GST and Pension Plans

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Lisa Chamzuk  
Lawson Lundell LLP

In 2009, pension plans witnessed two fairly significant Goods and Services Tax ("GST")-related developments. In September of 2009, the Department of Finance announced significant changes to the manner in which employers will claim input tax credits in respect of expenses related to their plans. In December of 2009, a further announcement from the Department of Finance stated that it would legislate a response to a decision of the Federal Court of Appeal that exempted fees charged for discretionary investment management services from GST.

Both of these developments are discussed in greater detail below.

### GST on Pension Costs Generally

In September of 2009, the Department of Finance announced new GST rebate provisions for pension plans which will replace Technical Interpretation Bulletin 032R (the "Bulletin"). The Bulletin has been in place since 1993. It was designed to help ensure that GST on employer expenses was recoverable and that GST on plan expenses was not. The Bulletin divides expenses into "Employer Expenses," for which an input tax credit may be claimed (such as establishment of the plan, retaining a trustee, appointing an investment manager and filing actuarial reports) and "Plan Expenses," for which no input tax credit is available (including portfolio management and custodial services).

Historically, the Canada Revenue Agency has taken the position that employers who participate in multi-employer pension plans are not entitled to claim input tax credits in respect of any expenses, based on the view that the individual employers are not responsible for plan administration. Instead (and since 1999), administrators of multi-employer

pension plans have been allowed to claim a refund of 33% of the GST paid in the course of a year, which is an approximation of the value of the input tax credits that employers in single-employer plans would obtain pursuant to the Bulletin.

On September 23, 2009, the Department of Finance announced proposed changes to this approach. If and when those proposed changes are brought into effect, all pension plans will qualify for a rebate of 33% of the GST paid, regardless of the structure of the plan. Again, with 33% being an approximation of the value of "employer expenses." Further, the rebate applies in respect of all the GST paid in respect of the plan, whether it has been paid by the employer or the plan itself. Finally, the rebate may be transferred from the plan to one or more of the participating employers.

The Department of Finance has yet to release draft legislation for the new rebate process.

### GST on Investment Management Fees Specifically

The other GST-related development we saw in 2009 was the Department of Finance's proposed legislative response to a decision of the Federal Court of Appeal. In April of 2009, the Court rendered its decision in *Canada v. The Canadian Medical Protective Association*<sup>1</sup> ("CMPA"), holding that GST is not payable on the fees charged for discretionary investment management services. The decision was of obvious interest to pension plan administrators across the country given the large investment management fees incurred by the plans.

In the CMPA decision, the Court of Appeal considered provisions of the *Excise Tax Act*<sup>2</sup> that set out what goods and services will be subject to GST. Specifically, the ETA exempts "financial services" from GST. The ETA defines "financial services" in a very broad manner. Essentially, an investment manager will be engaged in a financial service if it causes a transfer of ownership of a financial instrument to occur. The definition is sufficiently broad to cover almost any security or interest that is ordinarily traded by an

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<sup>1</sup> 2009 FCA 119 (2009).

<sup>2</sup> R.S.C. 1985, c. E-15, hereinafter referred to as the "ETA."



investment manager. The Court held that because the investment manager in question did not seek instructions from the client to initiate and make trades (it had discretion to make those decisions), its activities were properly described as "financial services" and thus exempt from GST.

The Canada Revenue Agency did not seek leave to appeal the CMPA decision to the Supreme Court of Canada. A number of pension plan and employee benefit plan administrators filed applications with the Canada Revenue Agency for a rebate of GST as permitted by the terms of the ETA, on the strength of the CMPA case.

However, in December of 2009, the Department of Finance issued a news release advising of its intention to amend the ETA to exclude investment management services from the definition of "financial service" which, as noted above, is an exempt supply under the ETA. More surprising than the government's decision to amend the ETA was its decision to make that amendment retroactive. That is, it appears that the amendment will not only apply to investment management services rendered after the date of the announcement (being December 14, 2009), but also in respect of investment management services rendered after the CMPA decision and before that announcement date. The announcement did not grandfather those plans that had made an application for a refund of GST on the basis of the law as it stood after the CMPA decision was released.

The only exception noted in the press release issued by the Department of Finance is if the investment manager did not charge GST in that intervening period.

We have yet to see draft legislation amending the ETA, but in the recent Federal Budget announcement, the Finance Minister confirmed the Department's intention to proceed with the announced changes in respect of GST and investment management fees. We will be watching this legislation carefully and expect that if it is introduced on a retroactive basis, it might be subject to legal challenge.

**Vancouver**

1600 Cathedral Place  
925 West Georgia Street  
Vancouver, British Columbia  
Canada V6C 3L2  
Telephone 604.685.3456  
Facsimile 604.669.1620

**Calgary**

3700, 205-5<sup>th</sup> Avenue SW  
Bow Valley Square 2  
Calgary, Alberta  
Canada T2P 2V7  
Telephone 403.269.6900  
Facsimile 403.269.9494

**Yellowknife**

P.O. Box 818  
200, 4915 – 48 Street  
YK Centre East  
Yellowknife, Northwest Territories  
Canada X1A 2N6  
Telephone 867.669.5500  
Toll Free 1.888.465.7608  
Facsimile 867.920.2206

[genmail@lawsonlundell.com](mailto:genmail@lawsonlundell.com)  
[www.lawsonlundell.com](http://www.lawsonlundell.com)

