Docket: 2005-1113(GST)G

BETWEEN:

SOCIÉTÉ DE TRANSPORT DE LAVAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 31 and August 1, 2006, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Claude P. Desaulniers

Counsel for the Respondent: Benoît Denis

JUDGMENT

The appeal from the reassessments made under the *Excise Tax Act*, the notices of which are dated April 18, 2001, and numbered 03260110839, 03260110840 and 03260110841, is allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was entitled to

(a) a goods and services tax rebate of $132,782.74 for 1999,
(b) a goods and services tax rebate of $170,845.26 for 2000,
(c) a goods and services tax rebate of $171,331.97 for 2001, and
(d) a goods and services tax rebate of $152,076 for 2002,

with a corresponding adjustment to interest and both parties bearing their own costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of March 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 28th day of November 2008.

Erich Klein, Revisor

Citation: 2008TCC14
Date: 20080304
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REASONS FOR JUDGMENT

Bédard J.

[1] The Appellant is appealing the following three assessments made on July 16, 2004, by the Quebec Minister of Revenue on behalf of the Minister of National Revenue ("the Minister") under the *Excise Tax Act* ("the ETA"):

No.	Period covered	
03260110839	January 1, 1988, to December 31, 2001	("first period covered")
03260110840	January 1, 1998, to December 31, 2001	("second period covered")
03260110841	January 1, 2002, to December 31, 2002	("third period covered")

[2] The Appellant is a public transit authority constituted as a legal person established in the public interest by the *Act respecting public transit authorities* (R.S.Q. c. S-30.01) ("the APTA").

[3] Under section 246 of the APTA, the Appellant succeeded to the rights and obligations of the Société de transport de la Ville de Laval, which had itself been constituted for the same purposes by the *Act respecting the Société de transport de*

la Ville de Laval (S.Q. 1984, c. 42). The Société de transport de la Ville de Laval was dissolved by section 245 of the APTA.

[4] During the periods covered by the reassessments, the Appellant and the Société de transport de la Ville de Laval were properly registered for the purposes of the ETA. They thus acted as agents of the Minister in collecting the goods and services tax ("GST") and were entitled to claim input tax credits ("ITCs") and tax rebates to the extent allowed by the ETA.

[5] The APTA came into force on December 31, 2001, which means that any reference to the Appellant in this judgment must be read as a reference to the Société de transport de la Ville de Laval for the period prior to December 31, 2001.

[6] In the course of its activities during the periods covered, the Appellant acquired property and services that it used for mixed purposes under the ETA, that is, both to make taxable supplies and to make exempt supplies. As a general rule, the Appellant did not initially claim ITCs for the property and services so acquired and used by it for mixed purposes, and it was entitled to the partial rebate of 55.14% granted to municipalities and the public sector bodies put in the same category as municipalities. Believing that it was entitled to an ITC considering the proportion of its taxable use of the property and services acquired for mixed purposes, the Appellant claimed the difference between the amount to which it maintained it was entitled and the amount of the rebate paid by the Minister, as follows:

Date	Period	Amount
17/05/02	1998 to 2002	$856,345.53
10/03/03	2002	$298,500.00

[7] The Appellant's claim was calculated on the basis, *inter alia*, that the following supplies made by it were taxable supplies such that the property and services acquired for mixed purposes were used by it primarily in the course of its commercial activities:

(a) the supply of transit services to the Agence métropolitaine de transport ("AMT") for customers of the AMT with metropolitan transit tickets issued by it;

(b) the exclusive supply of transit services by the Appellant to the AMT on a line operated by the AMT, namely line 902 (Le Carrefour), in

accordance with an agreement entered into on June 27, 2000, and renewed on December 1, 2001;

(c) the supply of transportation to the Sir-Wilfrid-Laurier and Laval school boards, for students of those boards, pursuant to agreements entered into on November 3, 1998, and August 4, 1999, in the case of the former board and on July 11 in the case of the latter;

(d) various other taxable supplies, such as management contracts, charters, the sale of scrap metal, maintenance and repairs, which are not in dispute, made by the Appellant to various clients.

[8] In the course of its activities during the periods covered, the Appellant also had to supply a paratransit service for handicapped persons. It subcontracted that service under contractual agreements, and 75% of the cost of the service was assumed by the Minister of Transport under the *Act respecting the Ministère des Transports* until 2002, when the payment formula was changed somewhat under the *Transport Act* to between 65% and 75%.

[9] Considering the services thus provided for the transportation of handicapped persons to be a taxable supply, the Appellant filed an ITC claim on May 17, 2002, for the period from January 1, 1998, to December 31, 2001. The claim was for $224,901.42, net of any rebate already received from the Minister, for the tax paid by it with respect to the acquisition of property and services used exclusively to supply such transportation.

[10] It was in this context that the Appellant filed the following with the Minister on May 17, 2002:

(a) two general GST rebate applications dated May 15, 2002, on the English version of the prescribed form (FP-189-V), one for an amount of $224,901.43 in GST paid during the first period covered, which the Appellant claimed as an ITC, and the other for an amount of $856,345.53 in GST paid during the second period covered, which the Appellant claimed as an ITC;

(b) two additional net tax returns, which were undated, one, for the monthly period of February 2002, in which the Appellant again claimed an additional ITC in the amount of $224,901.43 mentioned above, and the other, for the monthly period of March 2002, in which

the Appellant again claimed an additional ITC in the amount of $856,345.53 mentioned above.

[11] On March 10, 2003, the Appellant, through its representative, filed the following:

(a) one general GST rebate application, which was undated, on the French version of the prescribed form (FP-189-V), for an estimated $298,500 in GST paid during the third period covered, which the Appellant claimed as an ITC;

(b) one additional net tax return, which was undated, for the monthly period of December 2002, in which the Appellant again claimed an additional ITC in the estimated amount of $298,500 mentioned above.

[12] On July 13, 2004, after receiving the three general rebate applications and three additional net tax returns referred to in the preceding two paragraphs, an employee of the Minister informed the Appellant in three separate letters, one for each of the three general rebate applications/additional net tax returns, of the amounts that would be refunded to it and of the fact that it would be later sent notices of assessment in that regard. Thus,

(a) for the first period covered, the Minister informed the Appellant that the ITC claim for $224,901.43 had been disallowed in full;

(b) for the second period covered, the Minister informed the Appellant that the ITC claim for $856,345.53 had been allowed in part: $117,234.21 was to be refunded to the Appellant, while the difference, $739,111.22, could not be refunded;

(c) for the third period covered, the Minister informed the Appellant that the ITC claim for $298,500 had been allowed in part: $36,750.43 was to be refunded to the Appellant, while the difference, $261,749.57, could not be refunded.

[13] On July 16, 2004, in reply to the three general rebate applications for the first, second and third periods covered ("the three periods covered") and the three additional net tax returns referred to in paragraphs 10 and 11 above, and as indicated in the preceding paragraph, the Minister made the three assessments concerning the Appellant, in which its rebates were determined to be $0,

$117,234.31 and $36,750.43. The Minister thus disallowed the entire $224,901.42 claimed as an ITC as well as amounts of $739,111.22 and $261,749.57. The Minister sent the Appellant three notices of assessment to this effect, which were numbered 03260110839, 0326011041 and 03260110840, respectively, and dated the same day. Those three assessments are under appeal here.

[14] In making those three assessments concerning the Appellant, the Minister relied, *inter alia*, on the following findings and assumptions of fact:

> [TRANSLATION]
>
> (a) . . .
>
> (b) the Appellant is a registrant for the purposes of Part IX of the ETA;
>
> (c) the Appellant filed its net tax returns with the Minister every month during the three periods covered;
>
> (d) the Appellant's monthly reporting periods correspond to calendar months;
>
> (e) during the three periods covered, the Appellant made both taxable and exempt supplies in the course of carrying on its activities, including its public transit activity;
>
> (f) the Appellant primarily operates a public transit enterprise in the territory of the city of Laval, with service links to places outside that territory, and this includes the paratransit service for mobility-impaired persons;
>
> (g) in this connection, for its local public transit services, the Appellant issues its own tickets, which provide persons who purchase them with access to the said local services;
>
> (h) the Agence métropolitaine de transport has established a metropolitan bus transit system that forms all or part of a public transportation service that allows a person to travel, *inter alia*, in the territory of the Appellant, the Société de transport de

Montréal and the Société de transport de Longueuil, as well as from one of these territories to any other territory in the metropolitan bus transit system established by the Agence métropolitaine de transport;

(i) the Agence métropolitaine de transport has created metropolitan transit tickets for those, including the Appellant, who use the services provided by two or more public transit authorities, and has fixed the prices for those tickets, which provide the persons who purchase them with access to the said services in several territories;

(j) the Agence métropolitaine de transport does not itself operate a public passenger transportation enterprise in the Appellant's territory;

(k) the Appellant gives access to its local public transit system to persons with metropolitan transit tickets at no additional cost, which is to say that it carries in its buses persons with such tickets;

(l) the Appellant sells to public transit users both its own transit tickets and the metropolitan transit tickets issued by the Agence métropolitaine de transport;

(m) the Appellant hands over to the Agence métropolitaine de transport the proceeds of sale of the metropolitan transit tickets;

(n) the Agence métropolitaine de transport shares with, among others, the public transit authorities, including the Appellant, the revenue derived from the sale of metropolitan transit tickets, according to the utilization of their respective systems by users;

(o) there is no written agreement between the Appellant and the Agence métropolitaine de transport concerning the foregoing;

(p) during the three periods covered, the Appellant acquired taxable supplies of property and services for consumption, use or supply in the course of both its commercial activities (the making of taxable supplies) and its non-commercial activities (the making

of exempt supplies), and it paid its suppliers the GST on those supplies;

(q) the Appellant entered in its accounting records the GST so paid or payable on the taxable supplies it acquired and then claimed from the Minister under section 259 of the ETA the partial rebate for selected public service bodies (hereinafter "partial GST rebate") of the GST paid when acquiring the property and services during the three periods covered; the Appellant received this partial GST rebate, representing 57.14% of the GST paid throughout the three periods covered;

(r) in the general GST rebate application for the first period covered and in the additional net tax return for the period of February 2002, in both of which the same amount, $224,901.43, is claimed as an ITC, that amount represents the difference between the amount of GST the Appellant paid its suppliers when it acquired supplies of property and services consumed, used or supplied for the purpose of supplying a paratransit service for mobility-impaired persons and the portion of the said amount of GST that was refunded to the Appellant by the Minister after the Appellant had claimed that portion as a partial GST rebate with respect to the said supplies under section 259 of the ETA;

(s) the Appellant determined that all the supplies of property and services it had acquired exclusively for the purpose of supplying a paratransit service for mobility-impaired persons, which were current expenses, had been consumed, used or supplied in the course of its commercial activities, that is, for the purpose of making taxable supplies;

(t) the Minister instead determined that the Appellant's supply of a paratransit service for mobility-impaired persons was an exempt supply and thus did not entitle the Appellant to any ITC;

(u) moreover, part of the said $224,901.43 claimed as an ITC, namely, $11,996.31, was claimed from the Minister more than four years after the end of the reporting period in which the Appellant could first have claimed that amount as an ITC in

computing its net tax for the reporting periods of January, February and March 1998;

(v) in the general GST rebate application for the second period covered and the additional net tax return for the period of March 2002, in both of which the same amount, $856,345.53, is claimed as an ITC, the said amount is broken down as follows:

(i) a first amount, of $649,091.82, representing, as the case may be, between 47.52% and 55.85% of the difference between the amount of GST the Appellant paid its suppliers when acquiring supplies of property and services (current expenses) that were consumed, used or supplied for the purpose of making all the supplies it made, other than the supply of a paratransit service for mobility-impaired persons, and the portion of the said amount of GST that was refunded to the Appellant by the Minister after the Appellant had claimed that portion as a partial GST rebate with respect to the said supplies under section 259 of the ETA;

(ii) a second amount, of $207,253.71, representing the difference between the amount of GST the Appellant paid its suppliers when acquiring supplies of capital personal property that were consumed or used for the purpose of making all the supplies it made, other than the supply of a paratransit service for mobility-impaired persons, and the portion of the said amount of GST that was refunded to the Appellant by the Minister after the Appellant had claimed that portion as a partial GST rebate with respect to the said supplies under section 259 of the ETA;

(w) for the second period covered, the Appellant determined, using a convoluted method that is not fair and reasonable, that all the supplies of property and services it had acquired as current expenses, other than those acquired to supply a paratransit service for mobility-impaired persons, had been consumed, used or supplied in the course of its commercial activities, that is, for the purpose of making taxable supplies, in a proportion that varied between 47.52% and 55.85%, depending on the calendar year involved;

(x) for the second period covered, the Appellant determined, using a convoluted method that is not fair and reasonable, that the supplies of capital personal property, other than those acquired to

supply a paratransit service for mobility-impaired persons, had been consumed or used in the course of its commercial activities, that is, for the purpose of making taxable supplies, in a proportion that varied between 52.56% and 55.85%, depending on the calendar year involved;

(y) using an output-based allocation method, which is a fair and reasonable method, the Minister instead determined that all the supplies of property and services acquired by the Appellant as both current expenses and capital personal property, other than those acquired to supply a paratransit service for mobility-impaired persons, had been consumed, used or supplied in the course of its commercial activities, that is, for the purpose of making taxable supplies, in a proportion of 6.82% for the 1998 calendar year and in a proportion ranging between 10.22% and 12.53% for the other three calendar years in the second period covered;

(z) the difference between the percentages determined by the Appellant and those determined by the Minister can be explained (other than by the allocation method used) mainly as follows:

(i) the Appellant considered certain supplies it had made, namely, the supplies made to the Laval and Sir-Wilfrid-Laurier school boards for the transportation of their students, to be taxable supplies, that is, supplies made in the course of its commercial activities, whereas the Minister determined that those supplies were instead exempt supplies, that is, supplies made in the course of activities of the Appellant that were not commercial activities;

(ii) the Appellant believed that it was making a taxable supply to the Agence métropolitaine de transport for the transportation of persons with metropolitan transit tickets issued by that agency, whereas the Minister determined that the Appellant was not making any supply of which the Agence métropolitaine de transport was the recipient;

(aa) accordingly, with regard to the $649,091.82 in ITCs referred to in subparagraph 23(v)(i) above with respect to supplies of property and services (current expenses) that the Appellant acquired and consumed, used or supplied, the Minister determined as follows:

(i) for the 1998 calendar year in the second period covered, the Appellant was not entitled to any amount because substantially all of the use, consumption or supply of the said supplies of property and services (current expenses) was in the course of activities that were not commercial activities, that is, in a proportion greater than 90% (100% - 6.82%);

(ii) for the other three calendar years in the second period covered, the Appellant was entitled to only $117,234.31, which was calculated on the basis of the proportion in which the said supplies of property and services (current expenses) had been used, consumed or supplied in the course of its commercial activities, which was determined to be 10.22% for the 1999 calendar year, 12.12% for the 2000 calendar year and 12.53% for the 2001 calendar year;

(bb) moreover, part of the said $649.091.82 claimed as ITCs for the second period covered, namely, $38,885.54, was claimed from the Minister more than four years after the end of the reporting period in which the Appellant could first have claimed that amount as an ITC in computing its net tax for the reporting periods of January, February and March 1998;

(cc) with regard to the $207,253.71 in ITCs referred to in subparagraph 23(v)(ii) with respect to supplies of capital personal property that the Appellant acquired and consumed or used, the Minister determined that the Appellant was not entitled to any amount for the second period covered because the said supplies of capital property had been used or consumed primarily in the course of its non-commercial activities, that is, the proportion was greater than 50% (100% - [between 6.82% and 12.53%]);

(dd) in addition, part of the said $207,253.71 claimed as ITCs, namely, $9,361.03, had already been refunded to the Appellant following a rebate claim dated March 26, 2002, made under section 258.1 of the ETA, in respect of which claim the Minister made an assessment relating to the Appellant, the notice of which was numbered **032G0110324** and dated December 10, 2003;

(ee) in the general GST rebate application for the third period covered and the additional net tax return for the period of December 2002, in both of which the same estimated amount, $298,500.00, is claimed as an ITC, the said amount represents 86.36% (according

to departmental calculations, since the Appellant, at the time of filing the general rebate application/additional net tax return, had not calculated any proportion whatsoever with respect to use, consumption or supply in the course of its commercial activities) of the difference between the amount of GST the Appellant paid its suppliers when acquiring the supplies of property and services (current expenses) that were consumed, used or supplied for the purpose of making all the supplies it made, other than the supply of a paratransit service for mobility-impaired persons, and the portion of the said amount of GST that was refunded to the Appellant by the Minister after the Appellant had claimed that portion as a partial GST rebate with respect to the said supplies under section 259 of the ETA;

(ff) using an output-based allocation method, which is a fair and reasonable method, the Minister instead determined that all the supplies of property and services acquired by the Appellant as current expenses, other than those acquired to supply a paratransit service for mobility-impaired persons, had been consumed, used or supplied in the course of its commercial activities, that is, for the purpose of making taxable supplies, in a proportion of 10.63% for the third period covered;

(gg) the difference between the percentage determined by the Appellant and that determined by the Minister can be explained mainly by the reasons set out in subparagraph 23(z) above and the fact that the Appellant did not use a fair and reasonable allocation method to establish the proportion of 86.36% but instead estimated an arbitrary rebate amount to be claimed as an ITC without any other type of calculation;

(hh) accordingly, the Minister determined that, with regard to ITCs in respect of the acquired supplies of property and services (current expenses) that the Appellant had consumed, used or supplied, the Appellant was entitled to only $36,750.43, which was calculated on the basis of the proportion in which the said property and services had been used, consumed or supplied in the course of its commercial activities, which was determined to be 10.63% for the third period covered;

(ii) therefore, the Appellant is entitled to an ITC of only $153,984.74 ($117,234.31 + $36,750.43) out of the total of $1,379,746.96 ($224,901.43 + $856,345.53 + $98,500.00) claimed by it for the three periods covered.

[15] It should be noted that the facts set out in subparagraphs (b), (c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n), (o), (p), (q), (u), (bb) and (dd) of the Reply to the Notice of Appeal were admitted.

Issues

[16] The Court must decide the following issues:

(a) whether the Appellant makes a supply of municipal transit services or some other supply with respect to the transportation of persons with metropolitan transit tickets, of which the AMT is the recipient and, if so, whether the said supply is taxable or exempt;

(b) whether the supply made by the Appellant to the Laval and Sir-Wilfrid-Laurier school boards is taxable or exempt;

(c) whether the Appellant's supply of a paratransit service for mobility-impaired persons is taxable or exempt;

(d) the extent (proportion) to which the Appellant acquired property and services that it consumed, used or supplied both for the purpose of making taxable supplies (that is, in the course of a commercial activity) and for the purpose of making exempt supplies (that is, not in the course of a commercial activity or, in other words, in the course of a non-commercial activity);

(e) out of the total ITC claimed, namely $1,379,746.96 ($224,901.43 + $856,345.53 + $298,500.00), excluding the amount already allowed, $153,984.74 ($0 + $117,234.31 + $36,750.43), to what additional ITC amount the Appellant is entitled.

Appellant's position

[17] The Appellant argues that the supplies described in paragraphs 7 and 8 above were taxable supplies for the purposes of calculating the ITC to which it claims to be entitled, for the following reasons:

(a) with regard to the supply of transit services made by the Appellant to the AMT for customers of the AMT with metropolitan transit tickets issued by the AMT, the Appellant submits that it is a taxable supply, particularly because

(i) the supply is made entirely to the AMT and is not an exempt supply within the meaning of section 24 of Part VI of Schedule V to the ETA;

(ii) in supplying such services, the Appellant acts as a mandatary for, or subcontractor of, the AMT, which is the entity that provides the said transit services to holders of metropolitan transit tickets issued by it;

(b) the transit service supplied for the AMT on the AMT's 902 line (Le Carrefour) is a taxable supply and not an exempt supply because it is not a "municipal transit service" as defined in section 1 of Part VI of Schedule V to the ETA; it should be noted that the Respondent has admitted that this supply is taxable;

(c) the paratransit service is not an exempt supply within the meaning of section 24 of Part VI of Schedule V to the ETA but rather a taxable supply, since the recipient of the supply in question is the Ministère des Transports;

(d) with regard to the transportation provided for the Laval and Sir-Wilfrid-Laurier school boards, those boards are the recipients of the said supplies pursuant to bilateral agreements, and so this is not a "municipal transit service" within the meaning of section 24 of Part VI of Schedule V to the ETA.

Analysis and conclusion

The law

[18] The provisions of the ETA relevant to this case are as follows:

(a) the expression "exempt supply" defined in subsection 123(1) of the ETA, which refers to the supplies included in Schedule V to the ETA;

(b) section 24 of Part VI of Schedule V to the ETA, under which a supply made by the Appellant to a member of the public of a "municipal transit service", an expression defined in section 1 of Part VI of Schedule V to the ETA, is an exempt supply;

(c) the definition of "commercial activity" in subsection 123(1) of the ETA, which indicates that the making of exempt supplies is not a "commercial activity";

(d) subsection 169(1) of the ETA, under which a registrant may, in computing its net tax, claim an ITC corresponding to the GST paid or payable by it when acquiring any supply of property or services, based on the extent (expressed as a percentage) to which the property and services were acquired by the registrant for the purpose of making taxable supplies for consideration in the course of its commercial activities or for other purposes;

(e) subsection 141.01(5) of the ETA, which provides that a registrant must use a fair and reasonable method to determine the extent to which property and services were acquired by the registrant for the purpose of making taxable supplies for consideration in the course of its commercial activities or for other purposes;

(f) subsection 141(3) of the ETA, which provides, with regard to supplies of property and services acquired by a registrant and characterized as current expenses, that, where substantially all of the consumption or use of the said property and services is in the course of particular activities of the registrant that are not commercial activities, all of the consumption or use of the property and services is deemed to be in the course of those particular activities; in other words, a minimum of 10% of the use or consumption of the property and services must be in the course of the Appellant's commercial activities for the Appellant to be entitled to an ITC in proportion to that consumption, use or supply, but otherwise it is entitled to nothing;

(g) subsection 199(2) of the ETA, which provides, with regard to supplies of property acquired by a registrant as capital personal property, that,

where the said property is used primarily in the registrant's commercial activities, the property is deemed to have been used exclusively in those commercial activities; in other words, for the registrant to be entitled to an ITC at 100%, a minimum of 50% of the use of the said property must be in the registrant's commercial activities (it does not matter whether such use is 51%, 66% or 98%, for example), but otherwise it is entitled to nothing;

(h) insofar as a registrant that is a municipality or other body included in the term "municipality" is not entitled to an ITC or is entitled only to a partial ITC, section 259 of the ETA provides for a rebate of 57.14% of the amount not eligible for an ITC;

(i) moreover, under paragraph 225(4)(*b*) of the ETA, a registrant may not claim ITCs in computing its net tax under section 225 of the ETA unless, *inter alia*, the claim is made within four years after the end of the reporting period in which the registrant could first have claimed the said amount as an ITC in computing its net tax; in addition, a registrant may not, in computing its net tax, claim an amount as an ITC if the GST has already been refunded to the registrant under section 258.1 of the ETA;

(j) the definition of the term "recipient" in subsection 123(1) of the ETA, which definition reads as follows:

> (*a*) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> (*b*) where paragraph (*a*) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
>
> (*c*) where no consideration is payable for the supply,
>
> (i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
>
> (ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered;

(k) the definition of the expression "commercial activity" in subsection 123(1) of the ETA, which definition reads as follows:

"commercial activity" of a person means

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

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

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

(l) the definition of the term "consideration" in subsection 123(1) of the ETA, which definition reads as follows:

"consideration" includes any amount that is payable for a supply by operation of law;

(m) the definition of the expression "taxable supply" in subsection 123(1) of the ETA, which definition reads as follows:

"taxable supply" means a supply that is made in the course of a commercial activity.

[19] In light of the relevant provisions of the ETA, the following conclusions can be drawn:

(a) where property and services are acquired by a registrant for use exclusively or almost exclusively for commercial purposes, the registrant is entitled to a full ITC;

(b) where property and services are acquired by a registrant for mixed purposes and are used primarily in activities that are not commercial activities, the registrant is not entitled to an ITC if substantially all of the use of the property and services is in the course of non-commercial activities;

(c) where property and services are acquired by a registrant for mixed purposes and are used primarily in activities that are not commercial activities, the registrant is entitled to a full ITC in the case of capital personal property and to an ITC in proportion to their use in the case of other expenses;

(d) where property and services acquired by a registrant for mixed purposes are not used primarily in commercial activities nor is all or substantially all of their use for non-commercial purposes, the registrant is not entitled to an ITC in the case of capital personal property but is entitled to an ITC in proportion to their commercial use in the case of other expenses;

(e) where a registrant that is a municipality or other body included in the term "municipality" is not entitled to an ITC or is entitled only to a partial ITC, 57.14% of the amount not eligible for an ITC is refunded to the registrant.

[20] Accordingly, using a fair and reasonable method (here the ridership method) as required by subsection 141.01(5) of the ETA, the Appellant concluded that 55.79% of all of its supplies were taxable and that it was therefore entitled, in calculating its ITC, to apply that percentage to all the property and services it had acquired for mixed purposes during the periods covered.

[21] In the alternative, even if the Court were to find that one or more of the supplies described in paragraphs 7 and 8 above were not taxable supplies, the

Appellant submits that it would still be entitled to a proportional ITC, since not all or substantially all of the use of the property and services acquired by it for mixed purposes during the periods covered was for non-commercial purposes.

Supply of transit service to the AMT

[22] First of all, we will determine whether the Appellant made a supply of municipal transit services or some other supply involving the transportation of persons with metropolitan transit tickets, of which the AMT was the recipient, and if so, whether the said supply was taxable or exempt.

[23] To answer this question, the relevant provisions of the APTA and the *Act respecting the Agence métropolitaine de transport* should first be examined to better understand the nature of the legal relationship between the Appellant and the AMT.

[24] The AMT is a legal person established by the *Act respecting the Agence métropolitaine de transport*[1] ("AMT Act"). The Appellant operates a public transportation enterprise in its area of jurisdiction but may provide service links to places outside that area.[2] The Appellant issues its own transit tickets for its local public transit services. In addition, the AMT has established the metropolitan bus transit system with the approval of the Government.[3] Under the AMT Act, "metropolitan transportation by bus" means all or part of a public transportation service, determined by the AMT, that allows a person to travel from one territory to another territory unless both are situated in the territory of the same public transit operating authority.[4] The AMT may establish metropolitan transit tickets for the use of services—which may include suburban train services—provided by two or more public transit operating authorities (TOAs), issue them on any medium and fix the fares for them.[5] Like the Société de transport de Montréal and the Société de transport de Longueuil,[6] the Appellant is a TOA, that is, a legal person established in the public interest that is authorized by an Act or its constituting Act to organize public transportation services in the AMT's area of jurisdiction. The Appellant must give the bearer of a metropolitan transit ticket access to its local transit system.[7] When the AMT establishes metropolitan transit tickets for the use of

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1 R.S.Q., c. A-7.02.
2 *Act respecting public transit authorities* (R.S.Q., c. 30.01), sections 1 and 78.
3 R.S.Q., c. A-7.02, sections 30 and 35.
4 *Idem*, section 27, second paragraph.
5 *Idem*, section 35, first paragraph, subparagraph 4.
6 *Idem*, section 19.
7 *Idem*, section 42, first paragraph.

services provided by two or more TOAs, it must share with the TOAs the revenue derived from the sale of those tickets according to the utilization of their respective systems by users.[8] The AMT may also, on the basis of factors and in the manner it establishes, grant financial assistance to the TOAs to compensate in whole or in part for the cost of their contribution to the metropolitan bus transit system.[9] The AMT imposes on the TOAs its requirements relating to schedules, transfers and routes.[10] The AMT must acquire the equipment and facilities it identifies as being necessary for the operation of its metropolitan bus transit system.[11] The AMT may institute penal proceedings for fraudulent use of a metropolitan transportation service, and it keeps the fines imposed.[12] Revenue from the sale of metropolitan transit tickets belongs to the AMT.[13] Lastly, the TOAs must sell metropolitan transit tickets as mandataries of the AMT.[14] The mandate is gratuitous.

[25] It was in the context we have just examined that the Appellant sold metropolitan transit tickets during the periods covered and handed over to the AMT the proceeds of sale. It was also in this context that, during the periods covered, the Appellant transported passengers with metropolitan transit tickets in its buses and received money from the AMT in return. During the years in question, the Appellant also received amounts from the AMT as financial assistance, in accordance with section 45 of the AMT Act.

[26] Counsel for the Respondent basically reiterated the reasoning relied on by the Minister in support of his decision dated April 28, 2003 (Exhibit A-1, Tab 1), namely that the supply in question is a supply of a municipal transit service made to a member of the public and is thus exempt. It is worth quoting that decision in full:

Decision

> [TRANSLATION]
>
> Under its enabling legislation, the AMT may establish metropolitan transit tickets and fix the fares for those tickets, in particular where users make use of services provided by two or more public transit operating authorities.

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[8] *Idem*, section 35, first paragraph, subparagraph 4, and section 42, second paragraph.
[9] Idem, section 45.
[10] Idem, section 43.
[11] *Idem*, section 37.
[12] *Idem*, sections 99.1 and 99.3.
[13] *Idem*, section 166.
[14] *Idem*, section 168.

> The ETA provides that a supply of a municipal transit service made to a member of the public is exempt. In our opinion, when the Société (Appellant) sells a user a metropolitan transit ticket, it is, with respect to that user, the supplier of an exempt municipal transit service to a member of the public.
>
> With regard to the AMT's role, its enabling legislation provides that its objects are to support, develop, coordinate and promote shared transportation and to foster the integration of the services provided through various modes of transportation.
>
> It is also our opinion that the amounts the AMT gives the public transit operating authorities (TOAs), including the Société (Appellant), are not remuneration paid by the AMT to the TOAs. As its enabling legislation provides, the AMT is merely sharing with the TOAs the revenue derived from the sale of metropolitan transit tickets according to the utilization of their respective systems by users. Moreover, the AMT's enabling legislation provides that such sharing can occur only where services provided by two or more TOAs are used.
>
> Likewise, the amounts that the AMT may grant to the Société (Appellant), over and above the revenue derived from the sale of transit tickets, to compensate for the cost of its contribution as a TOA to the metropolitan bus transit system are, according to the terms used in the AMT's enabling legislation, financial assistance and not consideration for a supply made by the Société (Appellant) to the AMT.
>
> We conclude that the amounts handed over to the Société (Appellant) by the AMT are not consideration for a supply. Thus, the Société (Appellant) cannot claim an ITC for the expenses it incurs in the course of its metropolitan bus transit activity.

[27] Lastly, counsel for the Respondent argued that the Appellant had not submitted any evidence to rebut the assumption of fact set out in subparagraph 23(j) of the Reply to the Notice of Appeal, which reads as follows:

> [TRANSLATION]
>
> (j) the Agence métropolitaine de transport does not itself operate a public passenger transportation enterprise in the Appellant's territory;

[28] Thus, the question that must be answered first is as follows: Do the amounts paid by the AMT in sharing the revenue derived from the sale of metropolitan transit tickets constitute consideration for a taxable supply made by the Appellant to the AMT? Section 24 of Part VI of Schedule V to the ETA provides that a supply made to a member of the public (emphasis added) of a municipal transit service or of a public passenger transportation service designated by the Minister to be a municipal transit service is an exempt supply. In my opinion, the phrase

"supply made to a member of the public" in section 24 refers only to the "recipient" of a supply as defined in subsection 123(1) of the ETA. In light of the definition of the word "recipient" in subsection 123(1) of the ETA, it can be concluded that, to the extent that the amounts paid by the AMT to the Appellant in sharing the revenue derived from the sale of metropolitan transit tickets are not "consideration" within the meaning of subsection 123(1) of the ETA, it is the users who are the recipients of the transit service under subparagraph (*c*)(iii) of the definition of the word "recipient" in paragraph 123(1) of the ETA and this supply is therefore exempt under section 24 of Part VI of Schedule V to the ETA. Since an exempt supply is excluded from the definition of "commercial activity" in subsection 123(1) of the ETA and only a supply made in the course of a commercial activity can create entitlement to an ITC, the Appellant would not be entitled to the ITCs claimed. On the other hand, to the extent that the amounts paid by the AMT to the Appellant are "consideration", the AMT is the recipient of the transit service under paragraph (*b*) of the definition of the word "recipient" in subsection 123(1) of the ETA, so that the supply of this transit service is part of the Appellant's commercial activities and the Appellant is entitled to the ITCs claimed. It should be noted, moreover, that the Minister did not dispute the fact that the Appellant's supply of transit services may have been made in the course of its commercial activities. Therefore, the issue to be determined is only whether the amounts paid to the Appellant in sharing the revenue derived from the sale of metropolitan transit tickets are or are not "consideration" within the meaning of the ETA. In my opinion, to be "consideration", a payment must result from a legal obligation (whether contractual or otherwise) and must be sufficiently connected with a supply to be considered to have been made "for" the supply.

[29] In my view, when the AMT issues metropolitan transit tickets to users, it enters into a contract of carriage with them within the meaning of article 2030 of the *Civil Code of Québec*. In issuing such tickets to users, the AMT undertakes to provide metropolitan transit services in return for a price which the users undertake to pay at the agreed time. It must be pointed out that the Appellant sells metropolitan transit tickets as a mandatary for the AMT and that the revenue from the sale of the tickets belongs to the AMT.

[30] I also note that the Appellant must give the bearer of a metropolitan transit ticket access to its local transit system. Finally, I note that, when the AMT establishes metropolitan transit tickets for the use of services provided by two or more TOAs, it shares with the TOAs the revenue derived from the sale of the tickets according to the utilization of their respective systems by users. Thus, the Appellant acts as a mandatary of, or subcontractor for, the AMT, which is the

entity that provides services to users holding metropolitan transit tickets. I conclude from this that the payments made by the AMT to the Appellant are consideration within the meaning of the ETA, since they result from a legal obligation, namely, that created by sections 35 and 42 of the AMT Act, and are directly connected with the services rendered to the AMT by the Appellant. Accordingly, since the amounts paid by the AMT to the Appellant constitute consideration, the AMT is the recipient, within the meaning of paragraph (*b*) of the definition of this term in subsection 123(1) of the ETA, of the transit service, hence the supply of the service is made in the course of the Appellant's commercial activities and the Appellant is entitled to ITCs.

Supply made to school boards

[31] We will now consider whether the supply made by the Appellant to the Laval and Sir-Wilfrid-Laurier school boards is taxable or exempt. Under the contracts between the Appellant and those boards (Exhibits A-2 and A-3), the Appellant undertakes to transport the boards' students under the age of 18 in its buses used in its system. Moreover, the contracts require the school boards, which have to provide free school bus service to their students under the age of 18, to pay consideration equal to the cost, set out in the contracts, of the transit tickets used by their students. The amounts so paid to the Appellant are thus consideration within the meaning of the ETA, since they result from a contractual obligation and are directly connected with the supply the Appellant has undertaken to make. Accordingly, the school boards are the recipients, within the meaning of paragraph (*b*) of the definition of this term in subsection 123(1) of the ETA, of the transportation service, hence the supply of services is made in the course of the Appellant's commercial activities and the Appellant is entitled to ITCs.

Allocation method

[32] Under subsection 141.01(5) of the ETA, a registrant must use a fair and reasonable method to determine the extent to which property and services were acquired by the registrant for the purpose of making taxable supplies for consideration in the course of its commercial activities or for other purposes.

[33] In the instant case, the Minister used an allocation method based on outputs, that is, revenue. Using that method, the Minister determined that the proportion in which the Appellant had used, consumed or supplied property and services in the course of its commercial activities was 6.82%, 10.22%, 12.12%, 12.53% and 10.63% for the 1998, 1999, 2000, 2001 and 2002 calendar years respectively.

[34] The Minister determined those percentages from the Appellant's detailed revenue (which he accepted as established) as set out in Exhibits I-7, I-5, I-3, I-1 and I-10 for the 1998, 1999, 2000, 2001 and 2002 calendar years respectively. For each of those years, the Minister determined the percentage of commercial use in the same way, namely, by dividing the taxable revenue (from which he excluded the revenue from the AMT and the Laval school board) by the total revenue. In light of my decision that the revenue from the AMT and the Laval school board is taxable, the commercial-use percentages based on the output method should instead be 9.10%, 51%, 48%, 46% and 44% for the 1998, 1999, 2000, 2001 and 2002 calendar years, respectively.

[35] As noted earlier, the Minister relied on the commercial-use percentages he had established to make the determinations set out hereunder.

(a) In 1998, the Appellant was not entitled to any ITC with respect to any of the supplies of property and services it had acquired as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons), since substantially all of the use, consumption or supply of the said supplies of property and services (current expenses) was in the course of particular activities of the Appellant that were not commercial activities, that is, the proportion was greater than 90% (100% - 6.82%).

(b) Although I have found, employing the output method used by the Minister, that the commercial-use percentage for 1998 was 9.10%, I am of the opinion that, under that method, the Appellant was not entitled to any rebate in 1998 for any of the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons). Indeed, the Appellant was not entitled to any ITCs in 1998 in respect of any of the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons) because substantially all of the use, consumption or supply of the said supplies of property and services (current expenses) was in the course of particular activities that were not commercial activities, that is, the proportion was greater than 90% (100% - 9.10%). Moreover, the Minister did not (contrary to what was done for 1999, 2000, 2001 and 2002) consider the current expenses for that year as established, and

the Appellant did not submit any evidence in this regard. I note that the current expenses for 1998 were never verified by the Minister, as he determined that substantially all of the use, consumption or supply of the said supplies of property and services (current expenses) was in the course of particular activities of the Appellant that were not commercial activities, that is, the proportion was greater than 90% (100% - 6.82%).

(c) In 1999, the Appellant was entitled to an ITC of $27,407.69 with respect to all the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons). The Minister determined that amount on the basis of the Appellant's current expenses as detailed in Exhibit I-6 (which current expenses he considered as established). To determine the amount of $27,407.69, the Minister multiplied by 10.22% (the commercial-use percentage he had established) the amount of $268,201.47 found at page 3 of Exhibit I-6, which was the total GST paid by the Appellant that year (with regard to the current expenses detailed in Exhibit I-6) minus the total of the amounts refunded to the Appellant in respect of those current expenses in the course of that year under section 259 of the ETA (which provides for a partial rebate for selected public service bodies of 57.14% of the GST paid when acquiring property and services). Since I have already determined that the commercial-use percentage for 1999 was 51%, I am of the opinion that the Appellant was instead entitled, on the basis of the output method used by the Minister, to a rebate of $136,782.74 (51% x $268,201.47) with respect to all the supplies of property and services it acquired in 1999 as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons).

(d) In 2000, the Appellant was entitled to an ITC of $43,133.89 with respect to all the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons). The Minister determined that amount on the basis of the Appellant's current expenses as detailed in Exhibit I-4 (which current expenses he considered as established). To determine the amount of $43,133.89, the Minister multiplied by 12.12% (the commercial-use percentage he had established) the amount of $355,928.39 found at page 3 of

Exhibit I-4, which was the total GST paid by the Appellant that year (with regard to the current expenses detailed in Exhibit I-4) minus the total of the amounts refunded to the Appellant in respect of those current expenses in the course of that year under section 259 of the ETA, which provides for a partial rebate for selected public service bodies of 57.14% of the GST paid when acquiring property and services. Since I have already determined that the commercial-use percentage for 2000 was 48%, I am of the opinion that the Appellant was instead entitled, on the basis of the output method used by the Minister, to a rebate of $170,845.26 with regard to all the supplies of property and services it acquired in 2000 as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons).

(e) In 2001, the Appellant was entitled to an ITC of $46,642.73 with respect to all the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons). The Minister determined that amount on the basis of the Appellant's current expenses as detailed in Exhibit I-2 (which current expenses he considered as established). To determine the amount of $46,642.73, the Minister multiplied by 12.53% (the commercial-use percentage he had established for 2001) the amount of $372,460.82 found at page 3 of Exhibit I-2, which was the total GST paid by the Appellant that year (with regard to the current expenses detailed in Exhibit I-2) minus the total of the amounts refunded to the Appellant in respect of those current expenses in the course of that year under section 259 of the ETA, which provides for a partial rebate for selected public service bodies of 57.14% of the GST paid when acquiring property and services. Since I have already determined that the commercial-use percentage for 2001 was 46%, I am of the opinion that the Appellant was instead entitled in 2001, on the basis of the output method used by the Minister, to a rebate of $171,331.97 with regard to all the supplies of property and services it acquired in 2001 as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons).

(f) In 2002, the Appellant was entitled to an ITC of $36,750.43 with respect to all the supplies of property and services it had acquired that year as current expenses (other than those acquired to supply a

> paratransit service for mobility-impaired persons). The Minister determined that amount on the basis of the Appellant's current expenses as detailed in Exhibit I-11 (which current expenses he considered as established). To determine the amount of $36,750.43, the Minister multiplied by 10.63% (the commercial-use percentage he had established for 2002) the amount of $345,628.93 found at page 3 of Exhibit I-11, which was the total GST paid by the Appellant that year (with regard to the current expenses detailed in Exhibit I-11) minus the total of the amounts refunded to the Appellant in respect of those current expenses in the course of that year under section 259 of the ETA, which provides for a partial rebate for selected public service bodies of 57.14% of the GST paid when acquiring property and services. Since I have already determined that the commercial-use percentage for 2002 was 44%, I am of the opinion that the Appellant was instead entitled in 2002, on the basis of the output method used by the Minister, to a rebate of $152,076 with regard to all the supplies of property and services it acquired in 2002 as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons).

[36] On the other hand, the Appellant, using the so-called ridership method, which it considers fair and reasonable in this case, concluded that 55.79% of all of its supplies were taxable and that it was therefore entitled, in calculating its ITC, to apply that percentage to all the property and services it had acquired for mixed purposes during the periods covered. The explanations given by Marcel Chaput (the person authorized by the Appellant to prepare and file the GST rebate applications dated May 17, 2002, and March 10, 2003) during his testimony on this so-called ridership method and the reasons why it must be considered fair and reasonable are worth quoting insofar as they are relevant: [15]

> [TRANSLATION]
>
> Q. So, you . . .
>
> A. In simple terms, ultimately we preferred the ridership approach because we said to ourselves that, when a passenger is transported, no matter what transit ticket the passenger holds or has bought, the passenger will take up the same space in the bus and generate approximately the same costs. So, the fairest way to allocate costs, because we recover on costs and not

[15] See transcript, pages 57-58.

> revenue, we said, if we have the data, since we have the ridership data, we can identify local ridership versus regional ridership and total ridership; it's much more accurate to use that data. So, based on ridership, we said, as you can see on page 2 of the document, for 98 to 2002, there is the local ridership . . .
>
> . . .

[37] Mr. Chaput also explained that, in determining its local ridership versus its regional ridership, that is, the proportion of users it transported who had local tickets compared with the proportion who had metropolitan transit tickets, the Appellant had relied on statistical studies (surveys) conducted by external consultants it hired.

[38] The so-called ridership method used here by the Appellant to establish that 55.79% of all the supplies it made during the periods covered were taxable seems, in principle, to be a fair and reasonable method within the meaning of subsection 141.01(5) of the ETA. However, I cannot accept the figure of 55.79% determined by the Appellant, since the Appellant did not prove what its local ridership versus its regional ridership was. The Appellant should have introduced in evidence the statistical studies (surveys) conducted by the external consultants it had hired to determine the proportion of users it transported who had local tickets compared with the proportion who had metropolitan transit tickets. For reasons of procedural fairness, I allowed the objection of counsel for the Respondent to the filing of those studies in evidence at the hearing. Procedural fairness required that, first, the studies be on the Appellant's list of documents, and that they then be introduced in evidence during the testimony of the authors of the studies so that the Respondent could effectively challenge their accuracy or reliability.

Acquisition of buses

[39] With regard to the $207,253.71 in ITCs referred to in subparagraph 23(u)(ii) of the Reply to the Notice of Appeal, which ITC's are in respect of supplies of capital personal property (acquisition of buses[16]) that the Appellant acquired in 2000 and consumed and used, I am of the opinion that the Appellant was not entitled to any ITC because the said supplies of capital property were used or consumed primarily in the course of activities of the Appellant that were not commercial activities, that is, the proportion was greater than 50%. In this

[16] See Exhibit I-9.

connection, I refer to my earlier conclusion that the proportion of use for commercial purposes was 48% in 2000.

Paratransit

[40] We will now look at the issue of ITCs with respect to the supplies of property and services acquired by the Appellant exclusively for the purpose of supplying a paratransit service for mobility-impaired persons.

[41] The evidence showed the following in this regard:

(a) The Appellant was required to provide a paratransit service for handicapped persons.

(b) 75% of the cost of that service was paid by the Ministère des Transports under the *Act respecting the Ministère des Transports* until 2002, when the payment formula was changed somewhat under the *Transport Act* to between 65% and 75%.

(c) The Appellant could not require handicapped persons to pay a fare higher than that paid by users of regular public transit.

(d) The Appellant subcontracted its entire obligation to transport handicapped persons to 9062-5498 Québec Inc. for a 38-month period starting on April 1, 1999, and ending on March 31, 2002, at an estimated total cost of $3,362,523.24, in accordance with the terms of a tender (Exhibit A-5) submitted to the Appellant by that corporation on February 9, 1999. Notwithstanding that exclusivity granted to the corporation by the Appellant with respect to the transportation of handicapped persons for that 38-month period at an estimated total cost of $3,362,523.24, the Appellant also had the CO-OP des propriétaires de taxi de Laval provide part of the transit services for handicapped persons (Exhibit A-4). It should be noted that there is nothing in the evidence adduced by the Appellant that makes it possible to determine what amounts were actually paid to those two subcontractors during the periods covered or whether the amounts paid to the CO-OP des propriétaires de taxi de Laval must be subtracted from estimated total cost of $3,362,253.24. The Appellant's evidence in this regard was consisted solely of certain documents it filed (Exhibits A-4 to A-9), which, in my opinion, do not provide any

> way of determining the amounts actually paid to those two subcontractors during each of the periods covered, and the testimony of Louis Champagne[17] (the Appellant's treasurer and executive director), which was scarcely more conclusive in this regard. Indeed, Mr. Champagne was not even able to say with certainty whether the amounts the Appellant paid to the CO-OP des propriétaires de taxi de Laval should be subtracted from the estimated amount of $3,362,523.24.

[42] The Respondent's arguments are as follows:

(a) The supply by the Appellant of a paratransit service for mobility-impaired persons was an exempt supply under section 24 of Part VI of Schedule V to the ETA, hence the Appellant could not claim an ITC corresponding to the GST it paid on the amounts paid to its two subcontractors for providing that service. In this regard, the Respondent argues essentially that the recipient of such a supply (paratransit) is the user, that is, the handicapped person, and not the Ministère des Transports.

(b) The Appellant has not proved what amounts were paid to its two subcontractors for providing a paratransit service during each of the periods covered.

[43] In my opinion, the Appellant could not claim an ITC corresponding to the GST it paid on the amounts paid to its two subcontractors for providing a paratransit service unless the subsidies it received from the Minister of Transport for that service (from 65% to 75% of the cost) constituted "consideration" within the meaning assigned to that term in subsection 123(1) of the ETA. Thus, to the extent that the subsidies were "consideration", the Ministère des Transports can be considered a "recipient" of the paratransit service under paragraph (*b*) of the definition of the word "recipient" in subsection 123(1) of the ETA, so that the supply of that service would have been part of the Appellant's commercial activities and the Appellant would be entitled to the ITCs claimed. Therefore, the issue in this regard is only whether the subsidies paid to the Appellant were or were not "consideration" within the meaning of the ETA. In my opinion, there is no doubt that there was an obligation to pay a subsidy to the Appellant, and the Minister of Transport could not pay such a subsidy for any purpose other than to

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[17] See transcript, pages 17-36.

enable the Appellant to transport handicapped persons. There is no ambiguity about either the purpose of the subsidy or its connection with the contemplated supply. If the Appellant did not provide that service to handicapped persons as provided for in the orders in council (that is, at the regular fare), the Minister of Transport would not pay the Appellant any subsidy (the subsidy being between 65% and 75% of the paratransit costs). In the absence of a contractual relationship between the Appellant and the Ministère des Transports, it is difficult to imagine a more direct connection between the payment (the subsidy) and the supply of a paratransit service for mobility-impaired persons. It can therefore be concluded that the subsidies so paid were "consideration". The difficulty here lies in the fact that the user might also be considered a "recipient" of the supply of transportation. While the definition of the word "recipient" in subsection 123(1) of the ETA does not specifically provide that there must be several recipients of a given supply, nor does it state, in my opinion, that there can be only one "recipient" of that supply.

[44] However, I cannot allow the ITCs claimed by the Appellant because it has simply not proved what amounts it paid its two subcontractors during each of the periods covered. I stress that the amounts paid by the Appellant to its two subcontractors were never verified by the Minister, since the Minister disallowed the claim for an ITC corresponding to the GST paid on the amounts paid to the two subcontractors for providing the paratransit service on the basis that the "recipient" of the supply was the registered user and that the supply was therefore exempt under section 24 of Part VI of Schedule V to the ETA. It should be added that, during the hearing, the Respondent never accepted as an established fact that the Appellant had paid any amount to its two subcontractors.

[45] Accordingly, the appeal is allowed in that, on the basis of the output method employed by the Department, which I consider fair and reasonable, the Appellant is entitled to the following with respect to all the supplies of property and services it acquired as current expenses (other than those acquired to supply a paratransit service for mobility-impaired persons):

(a) a GST rebate of $136,782.74 rather than $27,407.69 for 1999;[18]

(b) a GST rebate of $170,845.26 rather than $43,133.89 for 2000;[19]

(c) a GST rebate of $171,331.97 rather than $46,642.73 for 2001;[20]

[18] See the analysis in subparagraph 35(c).
[19] See the analysis in subparagraph 35(d).
[20] See the analysis in subparagraph 35(e).

(d) a GST rebate of $152,076 rather than $36,750.43 for 2002;[21]

and both parties shall bear their own costs.

The Appellant is not entitled to any other GST rebate.

Signed at Ottawa, Canada, this 4th day of March 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 28th day of November 2008.

Erich Klein, Revisor

[21] See the analysis in subparagraph 35(f).

CITATION:	2008TCC14
COURT FILE NO.:	2005-1113(GST)G
STYLE OF CAUSE:	SOCIÉTÉ DE TRANSPORT DE LAVAL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	July 31 and August 1, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	March 4, 2008

APPEARANCES:

Counsel for the Appellant:	Claude P. Desaulniers
Counsel for the Respondent:	Benoît Denis

COUNSEL OF RECORD:

For the Appellant:

Name:	Claude P. Desaulniers
Firm:	McCarthy Tétrault LLP

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