Federal Court of Appeal | Cour d'appel fédérale

Date: 20100521

Docket: A-250-09

Citation: 2010 FCA 127

CORAM: **BLAIS C.J.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CITY OF CALGARY

Respondent

Heard at Calgary, Alberta, on January 13, 2010.

Judgment delivered at Ottawa, Ontario, on May 21, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20100521

Docket: A-250-09

Citation: 2010 FCA 127

CORAM: **BLAIS C.J.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CITY OF CALGARY

Respondent

REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] The City of Calgary (the City) constructed a transit system for the use of the residents of Calgary pursuant to obligations imposed on it by the *City Transportation Act*, R.S.A 2000, c. C-14 (the CTA). In the course of constructing that system, the City entered into funding agreements with the Province of Alberta as contemplated in the CTA.

[2] The City paid GST with respect to purchases made for the construction of the transit system. Since the provision of a municipal transit service is an exempt supply, as that term is defined in the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act), the City would not be entitled to claim input tax credits with respect to purchases made for the purpose of providing that exempt supply. The City took the position that the construction of the transit system (as opposed to its operation) was a separate supply to the Province of Alberta, pursuant to its contracts with the Province, for which the Province paid consideration, pursuant to those same contracts. The City claimed that this separate supply was not an exempt supply and claimed input tax credits with respect to that supply. The Minister rejected that argument but the Tax Court of Canada accepted it in a decision reported as *City of Calgary v. Canada*, 2009 TCC 272, [2009] T.C.J. No. 195. I disagree. For the reasons which follow, I would allow the appeal.

THE FACTS

[3] The City is constituted under the terms of the *Municipal Government Act*, R.S.A. 2000, c. M-26. As a city, it is subject to the terms of the CTA which requires it to prepare a transportation plan and to implement that plan by constructing a transportation system, for whose costs it is responsible. Prior to proceeding with construction of a transportation facility, the City must submit its proposal to the Province. If the Province approves the proposal, it may enter into a cost sharing agreement with the City. In the absence of any agreement to the contrary, title to the transportation system vests in the name of the City. In this case, there is no agreement to the contrary.

[4] In compliance with the legislation, the City developed a transportation plan (the Plan) and set about implementing it. The Province approved the Plan and entered into agreements with the City relating to the construction of transportation facilities contemplated by the Plan. While the agreements covered both roadway construction and public transit facilities, we are only concerned with the latter since no issue of exempt supply arises in connection with roadway construction.

[5] While four agreements were entered into by the parties, only three of them are relevant to this appeal since the fourth, the Primary Highway Connectors Grant Agreement, concerned roadway construction only. Of the remaining three agreements, two were substantially the same, the Basic Capital Grant Agreement (the BCG agreement) and the Transit Capital Grant Agreement (the TCG agreement). The third agreement, the City Transportation Fund Agreement (the CTF agreement) (collectively, the Agreements) differed from the other two in a number of ways, including its source of funding. The specific terms of those agreements which are relevant to this appeal will be discussed later.

[6] It is common ground that the City applied for and received funding under these three agreements for the construction of its public transit system.

[7] Prior to 2003, the City claimed public service body rebates under section 259 of the Act with respect to GST paid in connection with the development of its transit system. The Minister assessed the City on the same basis. This resulted approximately 56% of the GST paid by the City being returned to it in the form of rebates.

[8] However, in January 2003, the City filed a GST return for the period ending December 31, 2002, in which it claimed input tax credits with respect to GST paid in connection with the development of its transit system up to that time. The City acknowledged the amounts received as rebates under section 259 of the Act and claimed as an input tax credit the difference between the rebates received and the GST paid, some 6.5 million dollars. In assessing the City with respect to the period ending December 31, 2002, the Minister denied the City's claim for input tax credits. The City objected to the assessment and eventually appealed to the Tax Court of Canada.

THE DECISION BELOW

[9] The appeal was heard by Associate Chief Justice Rossiter (the Tax Court Judge) who, as noted above, allowed the City's appeal.

[10] The Tax Court Judge began his reasons by summarizing the requirements of the CTA. He then summarized the terms of the Agreements.

[11] The Tax Court Judge described the City's obligations under the Agreements as follows:

> [14] In the course of fulfilling its obligations under the [Agreements], the Appellant incurred expenditures and paid GST in respect of those expenditures. These expenditures relate to specific transportation facilities, including LRT [Light Rail Transit] extensions, refurbishment of equipment, LRT equipment rebuilds, and the acquisition of communications systems, signalling systems, buses, shuttle buses, and LRT vehicles.

[12] The Tax Court Judge described the issue before him as follows:

> [18] The issue is whether [the City] is entitled to the additional ITCs [input tax credits] in respect of GST incurred in the course of constructing transit facilities pursuant to its agreements with the Province.

[13] The Tax Court Judge began his analysis by reproducing subsection 169(1) of the Act which sets out the formula for calculating the amount of input tax credit which a registrant can claim. He summarized the requirements for eligibility for input tax credits as follows: (1) the claimant must be registered; (2) the claimant must have acquired goods or service for consumption, use or supply in the course of commercial activities; and (3) the claimant must have paid, or be required to pay GST in acquiring the goods or services. The Tax Court Judge noted that the only issue in the appeal was whether the City had acquired the goods and services in respect of which it had paid GST for consumption. use or supply in the course of its commercial activities.

[14] The Tax Court Judge then quoted the definition of "commercial activities" found at subsection 123(1) of the Act and noted that the portion of the definition which applied to the City was paragraph (*a*) which provides that commercial activity means a business carried on by a person except to the extent that the business involves the making of exempt supplies.

[15] The Tax Court Judge noted the City's argument that meeting its obligations under the Agreements constituted a business. According to the City, "…in acquiring, constructing and making public transportation facilities available for the citizens of the City of Calgary, it made a taxable supply to the Province": see Reasons, at paragraph 25. The City took the position that the amounts paid by the Province under the Agreements were consideration for that supply. According to the City's argument, the property and services in question were acquired in the course of its business of making a supply to the Province, a separate business from that of supplying municipal transit services to members of the public.

[16] The Tax Court Judge reviewed the definitions of “business”, “supply” and “service” found at subsection 123(1) of the Act, noting that all were very broad. This, in conjunction with his interpretation of the Agreements between the City and the Province, led him to the conclusion that:

> [32] It follows that the Appellant's activities in performing its obligations under the BCG Agreement, the TCG Agreement and the [CTF] fell within its commercial activities except to the extent to which these activities involved the making of exempt supplies. As described above, *the activities under these agreements consisted of acquiring, constructing and making public transportation facilities available for the citizens of the City of Calgary*.
>
> [My emphasis.]

[17] This in turn led him to the conclusion that in acquiring, constructing and making available transit facilities, the City made a supply for the purposes of the Act. This left only the question of the recipient of the supply.

[18] In order to answer that question, the Tax Court Judge turned to the definition of “recipient” in subsection 123(1), the material portions of which are reproduced below:

“recipient” of a supply of property or a service means	« acquéreur »
(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,	a) Personne qui est tenue, aux termes d’une convention portant sur une fourniture, de payer la contrepartie de la fourniture;
(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration,	b) personne qui est tenue, autrement qu’aux termes d’une convention portant sur une fourniture, de payer la contrepartie de la fourniture;
…	[…]
and any reference to a person to	Par ailleurs, la mention d’une

whom a supply is made shall be read as a reference to the recipient of the supply;	personne au profit de laquelle une fourniture est effectuée vaut mention de l'acquéreur de la fourniture.

[19] The Tax Court Judge also referred to the definition of consideration found at subsection 123(1) which includes, "any amount payable for a supply by operation of law". He then looked to this Court's decision in *Commission Scolaire des Chênes v. R.*, 2001 FCA 264, [2001] F.C.J. No. 1559 in which the question of the status of activities undertaken with government funding was examined. After quoting paragraphs 19 and 20 of that case, the Tax Court Judge concluded that:

> [41] Therefore in order for the funding provided by the Province to [the City] to constitute consideration, (1) it must have been provided pursuant to a legal obligation (contractual or otherwise), and (2) it must be closely enough linked to a supply that it may be regarded as having been made "for" that supply.

[20] Relying on the evidence before him to the effect that the agreements between the City and the Province were enforceable by action, as well as the history of the dealings between the Province and the City, the Tax Court Judge concluded that the Agreements were in fact valid and enforceable contracts. As a result, he was of the view that the provision of funding to the City by the Province according to the terms of the Agreements between them was a legal obligation of the Province.

[21] The Tax Court Judge was also of the view that there was a direct link between the funding provided and the supply in question. Citing the *Commission Scolaire des Chênes* case, he noted that "a payment under a contract will inevitably meet the requirement of a direct link since the very existence of the obligation to pay is conditional upon the co-contracting party fulfilling the

corresponding obligations under the terms of the contract.": see paragraph 45 of the Tax Court Judge's Reasons.

[22] The Tax Court Judge rejected the argument that the Province was not receiving anything in return for its money, relying once again on this Court's decision in *Commission Scolaire des Chênes*, where it was held that an amount paid to obtain a benefit for a third party was just as much consideration as money paid to obtain a benefit for the payor. In this case, the Province obtained from the City of Calgary "the service of making available for its citizens the transit facilities in accordance with the terms negotiated and agreed upon between the Province and [the City].": see paragraph 48 of the Tax Court Judge's Reasons.

[23] The Tax Court Judge then went on to bolster his conclusion by reference to the division of powers between the federal and provincial governments. Since the provinces have legislative authority over local works and undertakings, and since municipalities are the creatures of the provincial legislature, the Tax Court Judge concluded that where a municipality experiences financial difficulties, the provincial legislature has a duty to ensure that local government is provided funding. Furthermore, the province has the power to delegate jurisdiction over local works and undertakings to the municipal government and when it does so, it has a legal obligation to make adequate funding available: see paragraph 54 of the Tax Court Judge's reasons. This obligation was another indication of the direct link between the funds paid by the Province and the transit projects which they funded.

[24] After touching upon some other questions which are not in issue in this appeal, the Tax Court Judge addressed the issue of the distinction between the putting in place of a transit system (a taxable supply) and the supply of municipal transit service to the public (an exempt supply). The Tax Court Judge relied on the decision of this Court in *London Life Assurance Co. v. Canada*, [2000] F.C.J. No. 2121, to assert that an entity may carry on more than one business in the course of operating its enterprise. In *London Life*, it was held that an insurance company, whose business consisted of making exempt supplies, made a taxable supply to its landlord when it provided him with improved leasehold premises in return for a leasehold improvement allowance. The business of supplying improved leasehold premises to a landlord was a separate business from London Life's normal business of providing insurance contracts, which are exempt supplies.

[25] The Tax Court Judge concluded that "the construction, acquisition and making available of transit facilities reflected an independent commercial activity. The [City's] business so described did not include the making of exempt supplies.": see paragraph 68 of the Tax Court Judge's Reasons.

[26] In accordance with this reasoning, the Tax Court Judge found that the goods and services acquired by the City in the course of developing its transit system were acquired in the course of the City's commercial activities, that the supply of a transit system to the province in exchange for grant funding was a separate business which was not an exempt supply and that consequently, the City was entitled to claim input tax credits with respect to the GST paid in connection with those goods and services.

ISSUES

[27] The Tax Court Judge's formulation of the issue focused on the ultimate question, i.e. was the City entitled to input tax credit? His conclusion on that question was a function of his views as to the effect of the contracts between the City and the Province and, in particular, what the City supplied under those contracts. This led him to inquire as to the recipient of that supply, a question which turns on the question of consideration for the supply.

[28] In my view, the City framed its argument, and the Tax Court Judge based his reasons, on the nature and effect of the Agreements. The City argued, and the Tax Court Judge concluded, that the Agreements required the City to provide the Province with a municipal transit system, in return for which the City received funding which constituted consideration flowing from the Province. The issue in the appeal is the interpretation of the Agreements and the determination of the obligations which they imposed on the parties.

ANALYSIS

The Standard of Review

[29] Since this is an appeal from the decision of a judge after a trial, the standard(s) of review are as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. With respect to findings of fact, the standard of review is palpable and overriding error. As for questions of law, the standard of review is correctness. Questions of mixed fact and law are to be reviewed on the same standard as questions of fact unless it is possible to identify an extricable question of law, in which case that question is reviewable on a standard of correctness.

The legislative context

[30] As noted earlier in these reasons, the City is subject to the CTA. The relevant provisions of that Act are reproduced below:

> 2. Each city is responsible for the costs of establishing and maintaining all transportation facilities subject to its direction, control and management but may qualify for financial assistance from the Government by complying with this Act.
>
> 3. The city shall prepare a comprehensive transportation study report for the development of an integrated transportation system designed to service the needs of the entire city.
>
> 4(1) The city council shall by bylaw establish a transportation system in accordance with the transportation study report and the bylaw shall designate the transportation system.
>
> 4(6) The city council shall submit the bylaw to the Minister for approval by the Lieutenant Governor in Council and the Lieutenant Governor in Council may vary or approve the bylaw in whole or in part and if the bylaw is varied or approved in part only, it shall be enforced and take effect as approved.
>
> 6(1) When a city considers that a transportation facility included in the transportation system should be constructed it shall submit the proposal to the Minister.
>
> 6(2) If the proposal is approved by the Minister, the Minister may enter into an agreement with the city with respect to the sharing of costs of establishing the transportation facility.
>
> 7. The title to all transportation facilities forming the transportation system is, subject to any Act or agreement to the contrary, vested in the city.

[31] The obligations of the City under the CTA are the following:

- To prepare a comprehensive transportation study report for the development of an integrated transportation system.
- To establish by bylaw a transportation plan in accordance with the report.
- To submit the bylaw for approval by the Lieutenant Governor in Council.
- To submit a proposal to the Minister when it considers that a transportation facility should be constructed.

- To pay the costs of establishing and maintaining its transportation facilities.

[32] The obligation of the Province under the CTA is to review and approve the City bylaw establishing its transportation plan and to approve the construction of specific transportation facilities.

[33] While the wording of subsection 6(1) suggests that the decision as to whether or not to proceed with the implementation of the transportation plan is a matter left to the City's discretion, the better view is that subsection 6(1) refers only to the sequencing of the steps to be taken in the implementation of the transportation plan. In my view, the CTA imposes on cities the obligation to implement the approved transportation plan but leaves the sequencing of the work to the City's discretion. Section 2 makes the city responsible for the costs of *establishing* and maintaining its transportation system while subsection 4(6) provides that if the Province approves the City's bylaw, it shall be enforced as approved. In my view, these are indications that the City's statutory obligations are not limited to planning a transportation system but include the construction and operation of the approved transportation plan.

[34] On the other hand, the CTA vests in the Province the discretion to either provide financial assistance to the City to enable it to meet the costs for which section 2 makes the City responsible, or to share in the cost of construction of those transportation facilities which it has approved pursuant to subsection 6(1). Theoretically, the Province could decline to share in the cost of

construction of a transportation facility but could provide financial assistance in the form of loans or loan guarantees or otherwise.

[35] In summary, the City has a statutory obligation to establish and maintain the public transportation system described in its comprehensive transportation study and adopted in its bylaw, as approved by the Province. The Province, on the other hand, has statutory authority to provide the City with financial assistance with respect to the costs of its transportation system or to share in the costs of construction of approved transportation facilities.

The nature and effect of the contracts between the City and the Province

[36] The next step in the analysis is to examine the nature of the City's obligations in its contracts with the Province. Since the City has based its claim on its agreements with the Province, the issue is what those agreements required the City to do. If they did not require the City to make a supply of a transit system to the Province, then the City's claim fails and the appeal must be allowed.

[37] The BCG agreement and the TCG agreement are substantially the same and will be discussed together. The preamble of each agreement is incorporated into the Agreement. The preamble of the BCG agreement is reproduced below. The preamble of the TCG agreement is substantially the same except for the references to the grant program in question and the omission of the conditions upon which the Province will make grants:

> Whereas the Province has agreed to conditionally grant to the City 75% (seventy-five per cent) of the funds required for projects meeting the criteria under the Basic Capital Grant of the Alberta Cities Transportation Partnership upon the terms and conditions contained herein; and

> Whereas the Province has agreed to conditionally advance such funds, as approved annually, to the City upon:
>
> a) Legislature approval of the required Basic Capital Grant budget contained within the Province's budget for each of the calendar years 1989 to1991 inclusive; and
>
> b) Review and approval by the Province of the City's Application for Project Acceptance for cost-sharing on eligible projects; and
>
> c) Commencing in 1990, receipt and acceptance by the Province of the City's previous calendar year-end (December 31) Statement of Funding and Expenditures pertaining to the Basic Capital Grant, including certification of the financial statement and attesting to compliance with the terms and conditions of both this Agreement and the document entitled "Administrative Procedures – Cities Transportation Partnership"; (hereinafter referred to as "Administrative Procedures").
>
> Whereas these funds are to be used by the City as the Province's portion of the eligible capital expenditures incurred on projects approved by the City Council; and
>
> Whereas the City has agreed to accept these funds upon the terms and conditions contained herein;
>
> Now therefore this agreement witnesseth that in consideration of the mutual terms and conditions hereinafter specified, the parties agree as follows:
>
> 1. The preamble is incorporated as an integral part of this agreement.

[38] The preamble recognizes a previous commitment by the Province to contribute 75% of the cost of projects approved under the terms of the particular grant program and the City's agreement to use the funds for those projects. The City, for its part, agrees to accept the funds to be made available by the Province upon the terms set out in the agreement.

[39] Article 2 of the BCG agreement sets out the conditions to which the City agrees in order to receive the funds from the province. The conditions in the TCG are the same except for some small elements which are immaterial to this discussion. The conditions generally relate to the application of the funds, the required accounting, the application of interest earned on the funds, the application

of unexpended funds and other matters of an administrative nature. The one condition which relates to construction is condition (h), which provides as follows:

> (h) on any accepted project, the work shall be carried out in accordance with the rules, regulations and laws governing such work and in accordance with the best general practice, and in a manner agreeable to the Province.

[40] In response to the Crown's argument that the contracts do not require the City to construct anything whatsoever, the City argues that condition (h) requires the City to undertake construction of an "accepted project". In my view, the City's argument misconstrues the nature of the condition. It does not contain an obligation to build anything, but requires that any construction which is funded by the grant program must meet the prevailing legislative standards and best practices. It is essentially a warranty of good workmanship.

[41] Article 4 of the BCG agreement provides as follows:

> 4- The parties agree that all projects receiving funds from the Province under the Basic Capital Grant shall be undertaken fully in accordance with the City Transportation Act R.S.A 1980 Chapter C-10, the Regulations passed pursuant to that Act and any amendments to both which may be made from time to time, and in accordance with the Administrative Procedures as same may be amended by the Province from time to time.

[42] Article 5 of the TCG agreement is to the same effect.

[43] While this clause could be construed as importing into the Agreements the City's obligation to construct a municipal transit system, the better view is that it simply ensures that the work which is funded under the agreement will be carried out in conformity with the terms of the CTA and the Regulations. The CTA contains four parts. Part 1 deals with the establishment of transportation

systems. Part 2 deals with protection and acquisition of land while Part 3 deals with control of access, parking and adjacent development. Part 4 contemplates the implementation of the CTA by agreements and regulations. These provide detailed requirements for the implementation of the transportation plan. This clause simply provides that to the extent that projects are funded by the Province, their development will comply with the standards set down in the CTA.

[44] The clause only applies to those projects which are funded under the agreement. The CTA, however, imposes on the City the obligation to establish the municipal transit system and makes it responsible for the cost of the system. If the City, for whatever reason, did not apply for funding, it would nonetheless remain responsible for the establishment of the municipal transit system and its cost. As a result, I conclude that, properly construed, this clause does not require the City to construct a municipal transit system but requires it to construct those portions of it for which it receives funding from the Province in accordance with the CTA and the regulations made under the CTA.

[45] The remaining clauses of the BCG agreement impose certain reporting requirements on the City and deal with the accounting for unused funds. The TCG agreement contains similar requirements.

[46] In my view, a proper interpretation of the BCG and the TCG agreements does not support the view that the City was required by those agreements to provide the province with a transportation system. Both agreements are framework funding agreements which govern the

manner in which funds for approved projects are to be disbursed and administered. Nothing in those agreements requires the City to submit any project for approval or prevents the City from constructing transportation facilities without applying for grant funding.

[47] The CTF agreement differs from the other two in that it is built upon a funding arrangement which is described in the Preamble to the agreement:

> Whereas the Minister [of Infrastructure] has agreed to provide to the City, for capital transportation infrastructure, funding for projects meeting the eligibility criteria contained herein; and
>
> Whereas the amount of the funding provided will be an equivalent of five cents per litre of taxable gasoline and diesel fuel delivered to service stations and bulk dealerships within the City of Calgary as confirmed by Alberta Treasury in accordance with Schedule 1; and
>
> Whereas this funding is to be used by the City to establish a "City Transportation Fund" which will be the Minister's contribution towards the eligible expenditures incurred or to be incurred on Capital Transportation Projects approved by City Council and the Minister; and
>
> Whereas the City has agreed to accept these funds upon the terms and conditions contained herein;
>
> Now therefore this agreement witnesseth that in consideration of the mutual terms and conditions hereinafter specified, the parties agree as follows:
>
> 1. The preamble is incorporated as an integral part of this Agreement.

[48] The change introduced by the CTF agreement is the establishment of a dedicated fund to be funded by payment to the City of five cents on the sale of each litre of taxable gasoline or diesel fuel within the City of Calgary. The balance of the agreement deals with the administration of that Fund and the uses to which it may be put.

[49] Section 7 of the agreement sets out certain obligations of the City:

> 7- The City agrees to provide to the Minister as a condition of the Agreement:
>
> i) prior to March 31, 2000, for review and acceptance, the Program Application as outlined in Schedule 2 listing all projects to be carried out utilizing the funding provided under section 5. [Section 5 provides for an advance against future payments in the amount of $170,000,000.]
>
> > A) the Program Application may be updated in accordance with the timing specified by the Minister following consultation with the City. The program update may be in the form of either a Supplementary Program Application or a full annual updated Program Application. The full annual program update shall list all previously accepted projects being continued as well as new projects being initiated and for which the City wishes to allocate funding from the City Transportation Fund,
>
> ii) the City's annual Pavement Management System Summary Report indicating the current average pavement condition for each of the following road classifications i) all numbered highway connector routes, ii) freeways, iii) major streets and iv) other streets as may be determined by the Minister from time to time following consultation with the City, commencing with the 1998 report; and
>
> iii) the City's annual Transit Indicator Summary Report indicating i) the percent of the total in service transit vehicle fleet with a vehicle age in excess of the optimum vehicle design life, ii) the number of transit rides carried per annum per 1,000 population, iii) the current percentages of the total fleet which is accessible to persons with disabilities in accordance with the barrier free design guidelines, or iv) other indicators as may be determined by the Minister following consultation with the city, commencing with the 1998 report, and
>
> iv) commencing in 2001, the City's previous calendar year-end (December 31) Statement of Funding and Expenditures as outlined in Schedules 3A and 3B pertaining to the Transportation Fund, including certification by the City of the statement and attesting to compliance with the terms and conditions of this Agreement prior to March 31 of each year.

[50] These requirements illustrate that the City Transportation Fund is intended to be used for all of the City's transportation needs including roadway construction and maintenance. That intention is further evidenced by the list of "general types of transportation projects [which] may be funded from the city transportation fund" at article 13 of the CTF, a list which includes roadways, transit, and general roadway/transit projects.

[51] The CTF agreement goes on to require the City to meet the same administrative and accounting requirements as the BCG and the TCG (articles 8 to 12). Provision is made for the

winding up of previous grant programs (articles 14 and 15) and for the completion of certain outstanding highway construction projects (article 16).

[52] Once again, there is nothing in the CTF which requires the City to construct anything whatsoever. The agreement is a funding agreement which provides for the creation of a fund from which the City may fund certain approved transportation projects. There is nothing in the agreement which, properly interpreted, would give contractual effect to the City's statutory obligations with respect to the provision of a municipal transit system.

[53] Given the capital intensive nature of infrastructure programs, it is not surprising that the Province would make financial assistance available to municipalities, just as it is not surprising that municipalities would take advantage of the availability of provincial grants. But it is, in my view, an error to construe these agreements in such a way so as to make the City the Province's general contractor for the construction of a municipal transit system.

[54] The interpretation of contracts is a question of law: see *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306, [2009] F.C.J. No. 1358, at paragraph 26, and the cases cited therein. Accordingly, the Tax Court Judge's interpretation of the Agreements in force between the City and the Province is a matter reviewable on the standard of correctness. In my view, the Tax Court Judge erred in law in his interpretation of these Agreements when he held that:

> [14] *In the course of fulfilling its obligations under the Previous Funding Agreements and the New Agreement*, the Appellant incurred expenditures and paid GST in respect of those expenditures. These expenditures relate to specific transportation facilities, including LRT

> extensions, refurbishments of equipment, LRT vehicle rebuilds, and the acquisition of communications systems, signaling systems, buses, shuttle buses, and LRT vehicles.
>
> [My emphasis.]

[55] It is true that the City made the expenditures enumerated by the Tax Court Judge. It is false that those expenditures were made by the City in the course of fulfilling its obligations under its agreements with the Province.

[56] Similarly, the Tax Court Judge erred when he held that:

> [32] It follows that the Appellant's activities in performing its obligations under the BCG Agreement, the TCG Agreement and the New Agreement fell within its commercial activities except to the extent to which these activities involved the making of exempt supplies. As described above, the activities under these agreements consisted of acquiring, constructing, and making public transportation facilities available for the citizens of the City of Calgary.

[57] In my view, the Tax Court Judge erred in his conclusion that the Agreements required the City to supply to the Province a municipal transit system for the use of the citizens of Calgary. The Agreements were made in the context of the CTA, whose terms were set out above. The legislation required the City to elaborate a transportation plan, to have it approved by the Province and to implement the approved plan. The Province is authorized by the CTA to provide financial assistance. The Agreements are simply the mechanism by which that financial assistance is administered and by which accountability for public funds is maintained.

[58] It may be true, as the Tax Court Judge found, that the City's activities under the Agreements constituted a business, but that business, as defined in the Agreements, did not consist of making a supply of transit facilities to the Province for the benefit of the residents of Calgary.

The application of the Act

[59] The basis on which input tax credits are calculated is set out at subsection 169(1) of the Act:

169. (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:	169. (1) Sous réserve des autres dispositions de la présente partie, un crédit de taxe sur les intrants d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle acquiert, importe ou transfère dans une province participante, correspond au résultat du calcul suivant si, au cours de cette période, la taxe relative à la fourniture, à l'importation ou au transfert devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :
A × B	A × B
where	où :
A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and	A représente la taxe relative à la fourniture, à l'importation ou au transfert, selon le cas, qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable;
B is … (c) in any other case, the extent (expressed as a percentage) to	B : […] c) dans les autres cas, le pourcentage qui représente la

which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for *consumption, use or supply in the course of commercial activities of the person*	mesure dans laquelle la personne a acquis ou importé le bien ou le service, ou l'a transféré dans la province, selon le cas, pour *consommation, utilisation ou fourniture dans le cadre de ses activités commerciales*.
[Emphasis added.]	[Je souligne.]

[60] The relevant portion of the definition of commercial activities found at subsection 123(1) is reproduced below:

123(1) "commercial activity" of a person means	123(1) « activité commerciale » Constituent des activités commerciales exercées par une personne :
(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, …	a) l'exploitation d'une entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées; […]

[61] Exempt supplies are defined as those described in Schedule V to the Act. Section 24 of Part VI of Schedule V reads as follows:

24. A supply made to a member of the public of a municipal transit service or	24. La fourniture, effectuée au profit d'un membre du public, de services

of a public passenger transportation service designated by the Minister to be a municipal transit service.	municipaux de transport ou de services publics de transport de passagers désignés par le ministre comme services municipaux de transport.
1. In this Part…	1. Les définitions qui suivent s'appliquent à la présente partie….
"municipal transit service" means a public passenger transportation service (other than a charter service or a service that is part of a tour) that is supplied by a transit authority all or substantially all of whose supplies are of public passenger transportation services provided within a particular municipality and its environs;	« service municipal de transport » Service public de transport de passagers (sauf un service d'affrètement ou un service qui fait partie d'un voyage organisé) fourni par une commission de transport et dont la totalité, ou presque, des fournitures consistent en services publics de transport de passagers offerts dans une municipalité et ses environs.

[62] Reading these provisions together, a registrant is entitled to claim an input tax credit to the extent that tax has been paid for property or services used, consumed or supplied in the course of the registrant's commercial activities which, by definition, exclude the making of exempt supplies. In this case, the property and services with respect to which GST was paid were consumed, used or supplied in the course of constructing and operating a municipal transit system, which is an exempt supply. Consequently, the City is not entitled to claim input tax credits with respect to those payments of GST

[63] The City's argument that the Province was the recipient of the supply because it paid the consideration for the supply of a municipal transit system is based upon a mistaken interpretation of the City's obligations under the Agreements. The Agreements exist to provide a framework for the

administration of the financial assistance authorized by the CTA. It may be that the Province was obligated to make payments under the Agreements, as the Tax Court Judge found, but those payments do not determine the nature of the supply made under the Agreements. One must look to the terms of the Agreements. When they are properly interpreted, it is clear that they do not require the City to supply to the Province a municipal transit system.

CONCLUSION

[64] As a result, I conclude that the Tax Court Judge erred in law in finding that the City made a taxable supply of a municipal transit system to the Province pursuant to the Agreements. I would therefore allow the appeal with costs here and below, set aside the judgment of the Tax Court of Canada and confirm the Minister's assessment.

"J.D. Denis Pelletier"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-250-09
(APPEAL FROM A JUDGMENT OF THE HONOURABLE ASSOCIATE CHIEF JUSTICE E.P. ROSSITER OF THE TAX COURT OF CANADA, DATED MAY 21, 2009.)	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN and CITY OF CALGARY
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 14, 2010
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	MAY 21, 2010

APPEARANCES:

MARTA E. BURNS MARK HESELTINE	FOR THE APPELLANT
KEN S. SKINGLE Q.C.	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MYLES J. KIRVAN DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE APPELLANT
FELESKY FLYNN LLP CALGARY, ALBERTA	FOR THE RESPONDENT