Docket: 2008-1249(GST)I

BETWEEN:

GREGORY L. NIKEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 18, 2008 at Montréal, Québec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Agent for the Appellant:	Guymond **Fortin**
Counsel for the Respondent:	Frédéric Morand

AMENDED JUDGMENT

Whereas the Judgment and paragraph 47 of the Reasons for Judgment carried an error in the surname of the Agent for the Appellant;

This Amended Judgment and these Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment signed on October 14, 2008. In all other respects, the Judgment and Reasons for Judgment remain unchanged.

In accordance with the attached Amended Reasons for Judgment, the appeal from the assessment made under the *Excise Tax Act*, notice of which is dated January 12, 2007 and bears number 08CP0200138 for the period from May 30, 2003 to December 31, 2005, is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the net tax should not have been increased by $5,172.93.

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

"Gaston Jorré"

Jorré J.

Citation: 2008 TCC 540
Date: 20081104
Docket: 2008-1249(GST)I

BETWEEN:

GREGORY L. NIKEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Jorré J.

The Issue

[1] The Appellant bought a property, a condominium[1], in a resort complex at Cap Tremblant in Mont-Tremblant, Québec.

[2] The issue to be determined is whether there is a change in use of the property and, if so, what is the quantum of the change.

[3] More specifically, the issue is how to measure the proportion of business use and of personal use of the condo during the periods in issue — the reporting periods from May 30, 2003 to December 31, 2005.

[4] If there is a change of use exceeding 10%, there will be a deemed supply of the property with a resulting liability for GST (Goods and Services Tax) to the extent of the reduction in commercial use of the property.

The Facts

[5] The Appellant bought the condo on June 13, 2003 for $241,500.

[6] At the time of acquisition, the intention of the Appellant was that substantially all of the use the condo was to be used for the purpose of renting it in the course of a

[1] To be more precise, the Appellant bought a residential unit in an immovable held in divided co-ownership pursuant to the provisions of Chapter III, Title Three, Book Four, of the *Civil Code of Québec*.

commercial activity. The Appellant claimed and received an input tax credit of $16,905, an amount equal to the GST paid on acquisition of the condo[2].

[7] The complex in which the condo is situated is operated as a resort that is open year-round, 24 hours a day offering accommodation both to tourists and to persons wishing to hold meetings. The complex is known since 2005 as "Wyndham Cap Tremblant".

[8] The facilities include an Italian restaurant, conference facilities that can accommodate over 200 people, two golf simulators, three tennis courts, swimming pools and spa facilities. One of the swimming pools is open year-round.

[9] The Appellant entered into two successive agreements with Tremblant Sunstar Properties and, after April 2005, Cap Tremblant Mountain Resorts Inc., a Wyndham co-franchisee. Tremblant Sunstar or Cap Tremblant (hereinafter the "Operator"), rented, operated and managed the Appellant's condo when the Appellant was not using the unit.

[10] Under the agreements, the Operator takes care of marketing, advertising, reservations, reception and customer services, establishing rental rates, condo housekeeping and linen services (except when the condo is occupied by the owner); the Operator also carries out repairs and replacements required due to wear and tear. As of the start of the second agreement, Wyndham Cap Tremblant and its condos were listed on the Wyndham reservation system.

[11] The Appellant's responsibilities include: providing furnishings; paying the costs of repair and maintenance of the condo and of furnishings as well as of replacing furnishings when needed; providing basic phone service and basic cable television; providing insurance (including $2 million personal liability insurance, rental interruption insurance and fire and contents insurance); providing for landscaping and snow removal as well as paying for spring and fall deep cleaning.

[12] Under the agreements, the Operator keeps 45% or 48% of "net rental income". The "net rental income" is equal to gross rental income less any agent commissions, promotional discounts or royalties paid by the owner to Intersite Real Estate Development Corporation. From the 55% or 52% he receives, the Appellant must cover all of his costs.

[13] From April 3, 2005, the effective date of the agreement with Cap Tremblant Mountain Resorts, royalties paid to Wyndham and credit card fees are also deducted

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[2] See subsections 141(2) and 169(1) in Part IX of the *Excise Tax Act* (the *GST*).

from gross rental income in determining "net rental income". It is also provided in the agreement that the Appellant will pay all utilities[3]. (The agreement with Sunstar does not explicitly say who pays for utilities.)

[14] The agreements provide that the owner may reserve up to 36 days a year and may not reserve the condo if it has already been reserved by a customer.

[15] It is not entirely clear what happens if the owner were to stay more than 36 nights. The agreement with Sunstar provides, in effect, that if an owner were to stay beyond a reservation for an extra night beyond the 36th night, the owner would pay the Operator the prevailing daily room rate[4]. The agreement with Cap Tremblant says nothing on this question.

[16] One further provision in the agreement with Sunstar is clause 4m). It requires the Operator to maintain reception services 24 hours a day, except for week days when the occupation rate of the condos managed by the Operator is less than 20%[5].

[17] Usage of the Appellant's condo is set out in the three tables below:

2003 Usage (in days)

	Total	Personal	Maintenance	Rented	Not Used
January	0	0	0	0	0
February	0	0	0	0	0
March	0	0	0	0	0
April	0	0	0	0	0
May	0	0	0	0	0
June	18	0	1	2	15
July	31	16	1	9	5
August	31	0	0	15	16
September	30	0	0	7	23
October	31	0	0	8	23
November	30	0	0	3	27
December	31	0	0	9	22
	202	16	2	53	131

[3] That would appear to include heat since it is not mentioned elsewhere.
[4] See clause 8g) at tab 1 of Exhibit I-2.
[5] Tab 1, Exhibit I-2.

2004 Usage (in days)

	Total	Personal	Maintenance	Rented	Not Used
January	31	0	0	8	23
February	29	0	0	13	16
March	31	0	0	17	14
April	31	6	0	0	25
May	30	0	0	2	28
June	30	5	0	0	25
July	31	22	0	0	9
August	31	0	0	12	19
September	30	0	0	6	24
October	31	0	0	6	25
November	30	0	0	3	27
December	31	0	0	8	23
	366	33	0	75	258

2005 Usage (in days)

	Total	Personal	Maintenance	Rented	Not Used
January	31	0	0	12	19
February	28	0	0	15	13
March	31	0	0	14	17
April	31	0	0	0	31
May	30	2	0	0	28
June	30	0	0	2	28
July	31	21	0	1	9
August	31	0	0	16	15
September	30	0	0	7	23
October	31	0	0	2	29
November	30	0	0	3	27
December	31	0	0	2	29
	365	23	0	74	268

There was no evidence as to the Appellant's revenues from the rentals or output tax collected on the rentals[6].

[18] During the period in issue, the occupancy rate for the condo *when it was available for rent* was low:

[6] It would have been useful to have this information as well as an idea of what revenues were potentially foregone when the Appellant used the unit — especially in July.

Year	Approximate Occupancy Rate[7]
2003 (about 6.5 months)	29%
2004	23%
2005	22%

[19] If one excludes June 2003, where the Appellant only owned the condo for 18 days, as well as the month of July during the three years, a month where the Appellant used the condo for 16, 22 and 21 days respectively, there are 27 remaining months.

[20] During those 27 months, there were only three months during which the Appellant used the condo — for six days, five days and two days, respectively. In 11 of those 27 months the condo was either not rented or rented for three days or less; put another way during 11 of those 27 months the condo was rented 10% or less of the time.

[21] The parties provided me with four charts[8]. First was a chart showing the monthly total number of nights a condo was occupied in the years ending April 30, 2006, 2007 and 2008. The first year shown has nine months overlapping with the last nine months covered by the assessment in this appeal. During that first year ending April 30, 2006, the month of highest occupancy is July with 1,903 nights when a condo was occupied in the complex[9].

[22] The lowest month in that same year is November when there were only 227 nights when a condo was occupied. We do not know the number of condos in the complex at that time although the evidence is that there either are now or there will eventually be 400 units[10].

[23] The second chart, for the same three years, shows the occupancy rate and is reproduced below. It shows the same strong seasonality as the first chart. July and August have the best occupancy — the highest occupancy rate being about 60% in August 2006[11]. November and April have particularly low occupancy and the ski season appears to be quite variable.

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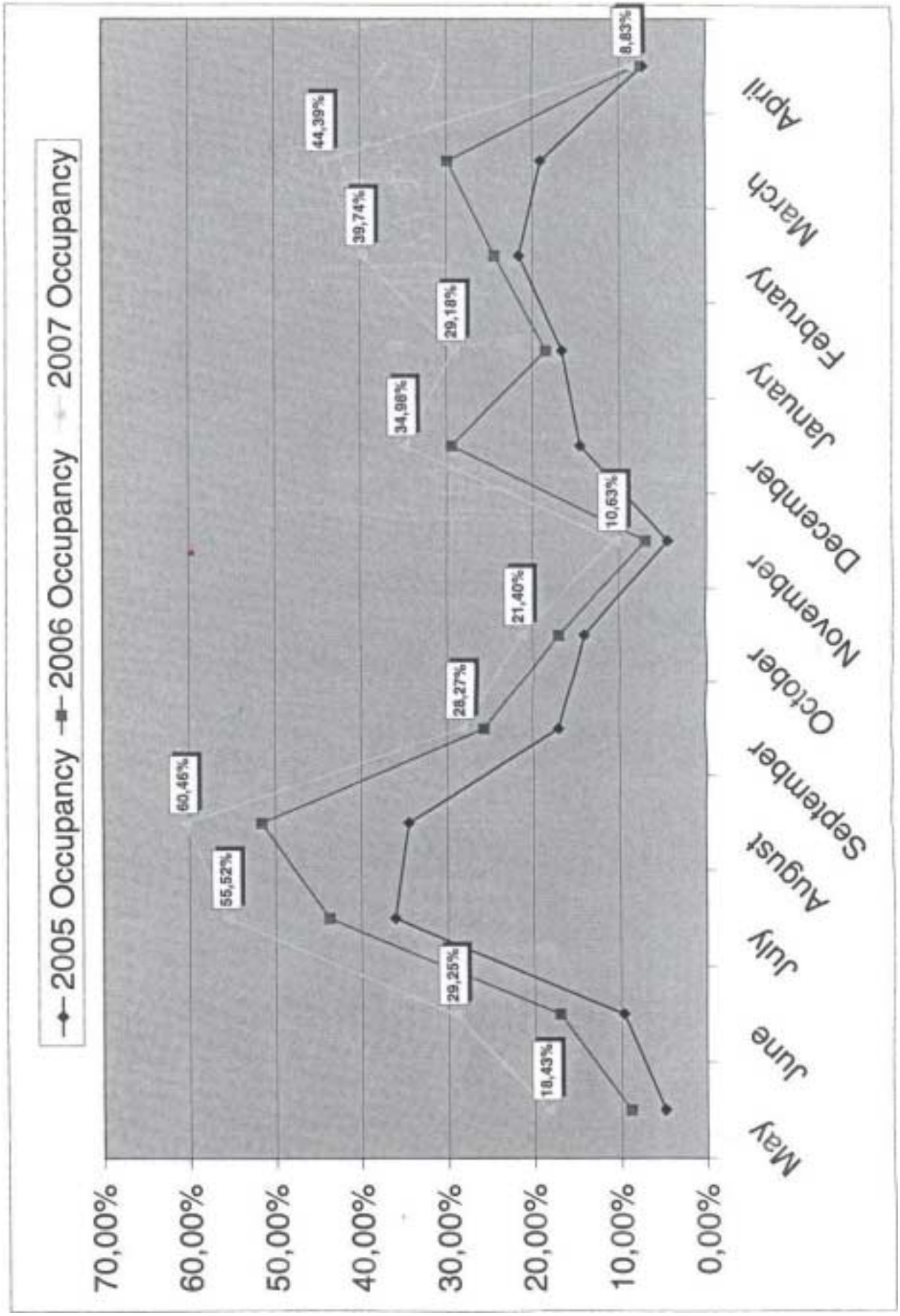
7 The calculation is [(days rented) ÷ (days condo available for rent plus days rented)].

8 Tab 5, Exhibit I-2.

9 Even though the left axis of the first chart at tab 5 was unlabelled, the only logical meaning to 1,903 is the total number of nights a condo was occupied.

10 Based on the information at tab 6 of Exhibit I-2, which refers to a 400-unit complex. The document at tab 6 is undated; we only know it was printed on August 12, 2008. One can compute using the occupancy nights in November 2005 in the first chart and the percentage of occupancy in the second chart at tab 5 of Exhibit I-2 that there must have been fewer than 200 units at that time given that few owners would be present in November.

11 August 2006 is part of the year ending April 30, 2007.


2005 Occupancy
2006 Occupancy
2007 Occupancy
70,00%
60,00%
50,00%
40,00%
30,00%
20,00%
10,00%
0,00%
May
June
July
August
September
October
November
December
January
February
March
April
60,46%
55,52%
44,39%
39,74%
34,98%
29,18%
29,25%
28,27%
21,40%
18,43%
10,63%
8,83%

[24] The third chart shows occupancy by calendar year rather than by fiscal year. The fourth chart shows the monthly revenue for the same three fiscal years as the first and second chart. Again, there is strong seasonality with November and April being very low in Revenue terms in all years. The peak month is December 2006[12] — presumably because of strong revenue in the Christmas/New Year season.

[25] The key points that come out of these charts are:

a) the very strong seasonality with very low occupancy and revenue potential in certain months. In the year with the best revenues shown on the fourth chart — after the period in issue — the best six months represent around three quarters of the revenue while the three worst months represent around 6% of the revenue;
b) the relatively low overall occupancy.

One should note that only the first nine months out of the 36 months shown in the first, second and third charts overlap with the period under appeal.

Analysis

[26] The Appellant takes the position that the appropriate measure of personal as opposed to business use is simply the ratio of days of personal use to days available for rent. Using this method the Appellant says that personal use has never exceeded 10%.

[27] The Respondent has assessed on the basis that it is more reasonable to use the ratio of actual days of personal use to actual days of rental.

[28] Subsection 141.01(5) in Part IX of the *Excise Tax Act* (the *GST*) states:

> Method of determining extent of use, etc.
>
> (5) The methods used by a person in a fiscal year to determine
>
> . . .
>
> (*b*) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,
>
> shall be fair and reasonable and shall be used consistently by the person throughout the year.
>
> [Emphasis added.]

[12] December 2006 is part of the year ending April 30, 2007.

The key question is whether the Appellant's method is "fair and reasonable".

[29] In *Magog (City of) v. Canada*, 2001 FCA 210, Noël J.A., speaking for the Court, sets out that the role of the trial judge with respect to subsection 141.05(1) of the *GST* is to determine whether the method used by the taxpayer was fair and reasonable. There may be more than one fair and reasonable method and it is not the role of the trial judge to choose the best method.

[30] There is no question that the Appellant's condo is rented under an arrangement where there may be some revenue year-round. The complex is open 365 days a year and the facilities, including the meeting rooms, are designed to try to obtain customers year-round.

[31] If the Appellant made no use of the condo there is no doubt that the use would be 100% in a commercial activity.

[32] Starting from that perspective, it at first seems startling to suggest that withdrawing the condo from the market for 33 days of the 2004 year in order to use it personally (about 9% of the year) could result in a reduction of use in the rental activity to about 71%, as computed[13] by the Minister, rather than 91% as argued by the Appellant.

[33] On the other hand, considering the low actual occupancy, the very high seasonality in spite of efforts to attract a year-round clientele, I have reservations in accepting that one should simply allocate all days the condo is rented or available for rent to the rental activity, the commercial activity.

[34] The best way I can explain these reservations is as follows. The value of the condo is a function of a number of factors that will influence the demand to rent the unit:

a) the size and layout of the condo — enabling it to accommodate a certain number of persons — as well as certain other features affecting the inherent use that can be made of it — for example the presence or absence of kitchen facilities;
b) its location in a resort complex with certain facilities and in a resort area, Mont-Tremblant, that offers a number of activities and services;
c) the time of year.

[13] The Minister's computation is that rental use = (75 days rented) ÷ (75 days + 33 days of personal occupancy).

[35] The evidence here shows very clearly that potential occupancy and potential revenue vary quite a bit at different times of the year. For example, in the second chart at tab 5 of Exhibit I-2 the ratio of the occupancy rate in the best month to the occupancy rate in the worst month in each of the three years is of the order of 5 or 6 to 1. The revenue appears to be more variable than that[14].

[36] If the condo were divided up in time with ownership sold separately for each month of the year, the price would vary quite substantially for different months. For example, given the relative demand there is no question that persons buying every July or every August in perpetuity would pay more than someone buying every November or April.

[37] The Appellant's primary use of the condo is in July. It is clear that this July usage reduces the revenue potential for the property more than in an average month and much more than in a very low month such as November. While this is somewhat offset by limited use in April of one year and May of another — both months of low demand — the Appellant's method in no way takes account of this and appears to significantly understate the personal use in relation to its impact on rental revenue.

[38] However, it is not apparent to me that the Minister's approach is any more appropriate — particularly given that the condo is professionally managed, open year-round and given that the Appellant does incur some expenses he would not incur if the condo were not available for rent. Put another way it does not appear to recognize that the condo is used in the rental activity when the Appellant is not using the condo. The method also does not take into account the fact that any hotel type operation will have a certain level of vacancies. Finally I note that the Minister's method could produce surprising results if one considers that someone always used the condo for the same four weeks every summer would have a different proportion of personal use every year depending on the varying number of rentals from year to year[15].

[39] Neither party's method seems appropriate. In theory if one could determine the proper relative allocation of the price of the condo over the different days of the year then the personal use would be the sum of the prices of the price of each day of personal use divided by the total value of the property for the year.

[40] Such an approach, while having theoretical merit, is impractical. It is hard to imagine how taxpayers could comply or the Minister could administer this.

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[14] In the fourth chart at the same tab the revenue ratio between December and November in fiscal years 2005, 2006 and 2007 is about 9 to 1, 16 to 1 and 10 to 1, respectively.

[15] It also produces a very inappropriate use if all of the Appellant's use were in November.

[41] The question remains whether the Appellant's method is a fair and reasonable method. It is appropriate to take into account practical considerations, specifically that methods used must be relatively straightforward for the taxpayer to comply with and the Minister to administer.

[42] Given that it is not apparent that there is a practical allocation method that gives a more reasonable allocation[16], given that the complex is professionally managed, that the condo is available for rent whenever the Appellant is not using it, that there are facilities in the complex aimed at obtaining year-round customers, and given the expenditures the Appellant incurs to keep the condo on the market during the year, notwithstanding that there are serious weaknesses in the Appellant's method[17], I find that it is a fair and reasonable method.

[43] Given my conclusion there is no change in use of 10% or more. As a result of the operation of section 197 of the *GST*, there is no deemed supply pursuant to subsection 207(2) of the *GST* and no resulting output tax.

[44] I hasted to add that in computing personal use, one must take into account not only days of personal use but also any days where the owner has kept the condo off the rental market by reserving it or otherwise.

[45] The factual circumstances in the other cases cited to me are different from those in this case[18].

Conclusion

[46] As a result, the appeal will be allowed, without costs, and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the net tax assessed should not have been increased by $5,172.93.

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[16] The Respondent did not argue any alternative approaches to the assessment method. Whether the existence of an alternative allocation method that is reasonable and practical to apply in circumstances such as these, if such a method exists, would change the outcome is a question for another case.

[17] It is interesting to note that while there was no evidence other than the fourth chart at tab 5 with respect to revenues, a very rough back-of-the-envelope calculation suggests that it would be many years before the net GST remitted by the Appellant equals the original input tax refund of $16,905 received by the Appellant.

[18] The case of *Morris v. The Queen*, 2006 TCC 502, is an income tax case involving an individual cottage not part of a complex and not having professional management of the rentals. In *Navaho Inn v. Canada*, [1995] T.C.J. No. 338 (QL), the question was how to allocate vacant rooms where the Inn made both exempt supplies and taxable supplies. In circumstances where a majority of supplies were exempt, the Court rejected the Appellant's contention that vacant rooms should always be allocated to taxable supplies. Finally, in the case of *Royal Canadian Legion (Branch 164) v. Canada*, [1996] T.C.J. No. 1402 (QL), the Minister allocated 15% of GST on indirect costs to exempt supplies. The decision turned on the potential usage of the downstairs level for taxable supplies, as opposed to exempt supplies. The Court found that there was no possibility for additional use of the basement.

[47] I wish to thank Mr. **Fortin** and Mr. Morand for the organized and efficient way in which the case was presented.

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

"Gaston Jorré"

Jorré J.

CITATION:	2008 TCC 540
COURT FILE NO.:	2008-1249(GST)I
STYLE OF CAUSE:	GREGORY L. NIKEL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	August 18, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	October 14, 2008
DATE OF AMENDED JUDGMENT:	November 4, 2008

APPEARANCES:

Agent for the Appellant:	Guymond **Fortin**
Counsel for the Respondent:	Frédéric Morand

COUNSEL OF RECORD:

For the Appellant:

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Firm:	

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