

**SUPREME COURT OF CANADA**

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| **Citation:** Calgary (City) *v.* Canada, 2012 SCC 20, [2012] 1 S.C.R. 689 | **Date:** 20120426  **Docket:** 33804 |

**Between:**

**City of Calgary**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Deschamps, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 67): | Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

Calgary (City) *v.* Canada, 2012 SCC 20, [2012] 1 S.C.R. 689

City of Calgary *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as:** Calgary (City) ***v.*** Canada

2012 SCC 20

File No.: 33804.

2011:  November 15; 2012:  April 26.

Present: McLachlin C.J. and LeBel, Deschamps, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

*Taxation ― Goods and services tax ― Single supply or multiple supplies ― City acquiring and constructing transit facilities ― City claiming and receiving public service body rebates for portion of GST paid ― City also claiming input tax credits in respect of GST paid on purchases made for transit facilities ― Whether acquisition and construction of transit facilities constituting an exempt supply, a taxable supply or both ― Whether “transit facilities services” a taxable supply to the Province separate from exempt supply of “public transit services” to public ― City Transportation Act, R.S.A. 2000, c. C‑14 ― Excise Tax Act, R.S.C. 1985, c. E‑15, ss. 123(1), 169(1), Sched. V, Part VI, ss. 1, 24.*

The City of Calgary acquired and constructed transit infrastructure, facilities, and equipment for the use of the Calgary public as part of the municipal transit system pursuant to the *City Transportation Act*, R.S.A. 2000, c. C‑14 (“*CTA*”). Under the *CTA*, the Province of Alberta entered into funding agreements with the City. The City paid GST in respect of its purchases for the acquisition and construction of the transit facilities. The provision of a “municipal transit service” is an exempt supply under the terms of the *Excise Tax Act*, R.S.C. 1985, c. E‑15 (“*ETA*”). Input tax credits (“ITCs”) cannot be claimed with respect to purchases made for the purpose of providing an exempt supply. Prior to 2003, the City claimed public service body rebates for 57.14% of the GST paid. In January 2003, the City filed a GST return in which it claimed ITCs for the difference between the GST paid for the transit facilities and the rebates that the City had previously received. The Minister of National Revenue rejected the City’s position denying the City’s claim for ITCs; the Tax Court of Canada agreed with the City, allowing the appeal and remitted the matter to the Minister for reassessment. The Federal Court of Appeal allowed the Minister’s appeal.

*Held*: The appeal should be dismissed.

The question in this appeal is whether the acquisition and construction of the transit facilities constituted an exempt supply only, or whether it also, or instead, constituted a taxable supply. The City asserts it made two supplies: (1) operating the transit facilities on the one hand (“public transit services”), and (2) constructing, acquiring, and making transit facilities available to Calgary citizens (“transit facilities services”), on the other. The City claims that its “transit facilities services” are a separate, taxable supply, the recipient of which is the Province, thus entitling it to input tax credits.

Guidance on the question of whether there were one or two supplies in this case may be drawn from the way in which courts have dealt with whether a supplier has made a single supply comprised of a number of constituent elements, or multiple supplies of separate goods and/or services. The test to determine whether a particular set of facts reveals single or multiple supplies for the purposes of the *ETA*  is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. The question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense. Work preparatory to, or in order to make a supply, does not become a separate service subject to GST.

Here, the true nature of the City’s “transit facilities services” was work of a preparatory nature to the supply of a municipal transit service to the public. Transit facilities were constructed, acquired, and made available in order to supply a municipal transit service to the Calgary public. This would point to the “transit facilities services” being in fact a component of the overall supply of “public transit services” to the Calgary public. The leading separate supply cases do not contemplate a situation, such as in this case, in which there are allegedly two recipients of the supply or supplies. To determine whether the Province received any service or benefit from the City, the nature of the respective obligations of the City and Province under the funding agreements, having regard to the statutory context, must be analyzed. Here, nothing in the *CTA* provides for the supply, by the City, of any goods, services, or other benefit to the Province. Further, the City’s compliance with the accountability measures under the funding agreements with the Province did not amount to the provision of any goods, services, or benefit to the Province.

Accordingly, the City made only one supply: the exempt supply of a municipal transit system. The City’s activities of acquiring, constructing, and making public transit facilities available for the Calgary public, did not fall within its “commercial activit[ies]”, under s. 123(1) of the *ETA*. The City is not entitled to claim ITCs for GST paid for the acquisition and construction of the transit facilities. The *ETA* demonstrates that Parliament intended for public service bodies to receive rebates at specified rates for the GST that they pay in the course of making exempt supplies.

**Cases Cited**

**Approved:** *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40; *Maritime Life Assurance Co. v. R.*, [2000] G.S.T.C. 89; **explained:** *Commission scolaire Des Chênes v. Ministre du Revenu national*, 2001 FCA 264, 286 N.R. 264; **referred to:** *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Hidden Valley Golf Resort Assn. v. R.*, [2000] G.S.T.C. 42; *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56; *Corp. des Loisirs de Neufchâtel v. R.*, 2006 TCC 339, [2008] G.S.T.C. 153.

**Statutes and Regulations Cited**

*City Transportation Act*, R.S.A. 2000, c. C‑14, ss. 1 “transportation facility”, “transportation system”, 2, 3, 4(1), (6), 6(1), (2), 7.

*Excise Tax Act*, R.S.C. 1985, c. E‑15, ss. 123(1) “business”, “commercial activity”, “exempt supply”, “recipient”, “service”, “supply”, 169(1), 259 [am. 2004, c. 22, s. 39(1)], Sched. V, Part VI, ss. 1 “municipal transit service”, 24.

*Municipal Government Act*, R.S.A. 2000, c. M‑26.

*Public Service Body Rebate (GST/HST) Regulations*, SOR/91-37, s. 5(*e*).

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Sharlow and Pelletier JJ.A.), 2010 FCA 127, 403 N.R. 41, 74 M.P.L.R. (4th) 93, [2010] G.S.T.C. 78, 2010 G.T.C. 1043, [2010] F.C.J. No. 700 (QL), 2010 CarswellNat 1410, setting aside a decision of Rossiter A.C.J., 2009 TCC 272, [2009] G.S.T.C. 85, 2009 G.T.C. 969, [2009] T.C.J. No. 195 (QL), 2009 CarswellNat 1309. Appeal dismissed.

Ken S. Skingle, Q.C., and D. Blair Nixon, Q.C., for the appellant.

Gordon Bourgard and Michael Lema, for the respondent.

The judgment of the Court was delivered by

Rothstein J. —

I. Introduction

1. The City of Calgary acquired and constructed transit infrastructure, facilities, and equipment (“facilities”) for the use of the Calgary public as part of the municipal transit system pursuant to the *City Transportation Act*, R.S.A. 2000, c. C‑14 (“*CTA*”). Under the *CTA*, the Province of Alberta was authorized to share the cost of the transit system with the City, and to that end, entered into funding agreements with the City.
2. The City paid Goods and Services Tax (“GST”) in respect of its purchases for the acquisition and construction of the transit facilities. The provision of a “municipal transit service” is an exempt supply under the terms of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“*ETA*”). Input tax credits (“ITCs”) cannot be claimed with respect to purchases made for the purpose of providing an exempt supply. However, the City took the position that the construction of the transit facilities (in contrast to their operation) was a separate, non-exempt supply to the Province, pursuant to its contractual obligations to the Province under the funding agreements, for which the Province paid consideration. It therefore claimed ITCs in respect of the purchases made for the construction of the transit facilities. The Minister of National Revenue rejected the City’s position. The Tax Court of Canada agreed with the City, allowing the appeal and remitting the matter to the Minister for reassessment. The Federal Court of Appeal allowed the Minister’s appeal.
3. I would dismiss this appeal. The City made only one supply: the exempt supply of a municipal transit system to the public. Fulfilling the accountability obligations under the funding agreements with the Province did not result in a separate supply to the Province. The acquisition and construction of transit facilities was an input to the single supply of the municipal transit service to the Calgary public. In accordance with the *ETA*, the City had applied for and received rebates of a portion of the GST that it had paid on the facilities for the municipal transit service supply. The City was not entitled to claim ITCs in respect of the GST paid on the facilities for the municipal transit service. Therefore, it cannot recover the portion of GST paid that exceeds the rebates that it had received.

II. Facts

1. As the Tax Court judge set out the facts thoroughly and accurately, in accordance with the evidence, the summary that follows parallels his findings closely. The City is a body corporate existing under the *Municipal Government Act*,R.S.A. 2000, c. M-26 (“*MGA*”), and is a city for the purposes of the *MGA*. The *MGA* imposes both its own duties and the duties of other enactments, including the *CTA*, on the City.Under the *CTA*, the City is required to prepare a comprehensive transportation study report for the development of a public transportation system, and then, by bylaw, to establish such a system.
2. “[T]ransportation system” is defined in s. 1(i) of the *CTA* to mean a system of transportation facilities, including streets, highways, rapid transit, and all types of transportation facilities to which the *CTA* applies, on, above and below the ground. The expression “transportation facility” is defined in s. 1(g) of the *CTA* to mean everything necessary for the efficient transportation of persons or goods in a particular manner. A “municipal transit service”, as defined in the *ETA*, is a public passenger transportation service supplied by a transit authority. The *CTA* definition of “transportation system” is broader than the *ETA* definition of “municipal transit service”, since the former includes roadways, which are not at issue in this case. In these reasons, I will refer to the Calgary public passenger transportation service as a “municipal transit service”.
3. Under the *CTA*,each city, including the City of Calgary, is responsible for the costs of establishing and maintaining all transportation facilities subject to its direction, control, and management. However, by complying with the *CTA*, a city may qualify for financial assistance from the Province. The City entered into funding agreements with the Province, which provided for the funding of eligible transportation projects. Under the agreements, funding could only be used to pay for expenditures relating to the construction or acquisition of transit facilities that had been specifically approved by the Province. Projects approved under the agreements included, among other things, the extension of the Light Rail Transportation System (“LRT”), the acquisition of buses, LRT vehicles, and LRT communication systems. The *CTA* provides that in the absence of any agreement or statute to the contrary, title to all transportation facilities forming the transportation system vests in the City. In this case, there is no agreement or statute to the contrary.
4. The funding agreements between the City and Province covered both roadway construction and public transit facilities. This appeal only deals with the transit facilities, since no issue of exempt supply arises in connection with roadway construction. The City and Province entered into four agreements: the Basic Capital Grant Agreement (“BCG agreement”); the Transit Capital Grant Agreement (“TCG agreement”); the City Transportation Fund Agreement (“CTF agreement”); and the Primary Highway Connectors Grant Agreement. The fourth of these concerned highway construction only. The other three agreements (together, “Agreements”) are all relevant to this appeal.
5. Prior to March 2000, the Province provided funding to the City under the BCG and TCG agreements. These two agreements provided for the funding of eligible transportation projects, subject to provincial budgetary restrictions. The BCG and TCG agreements established an application process by which it would be determined whether the City’s proposed projects met grant eligibility criteria. The City applied for funding following this process, providing the Province with detailed financial and technical information concerning the transit projects. Once approved, the City accepted funding from the Province under the BCG and TCG agreements, subject to certain additional terms and conditions, including: an obligation to maintain separate accounting for the funds; obligations relating to the investment of the funds; an obligation to comply with timeframes for and restrictions on fund usage; an obligation to submit to audits and investigations by the Province; and when carrying out work, an obligation to comply with prevailing legislative and industry standards, and with the standards set down in the *CTA*. The City carried out all of its obligations pursuant to the BCG and TCG agreements with the Province.
6. The City and Province entered into the third of the Agreements, the CTF agreement, in March 2000. Funding under this agreement was subject to terms and conditions similar to those in the BCG and TCG agreements. However, unlike those agreements, funding under the CTF agreement was not subject to provincial annual budget availability, but was based on a $0.05 per litre tax on the delivery of gasoline and diesel products within the City of Calgary over a specified period of time. The CTF agreement also expanded the scope of eligible transit projects to include noise barriers, landscaping, upgrades to security and scheduling and communications systems for the LRT. The CTF agreement differed from the BCG and TCG agreements in several additional respects that are not relevant to this appeal. The City complied with the terms of the CTF agreement and fulfilled its obligations to the Province.
7. In the course of completing the transit facilities under the three Agreements, the City incurred expenditures. The expenditures related to the acquisition and construction of the transportation facilities, and included the cost of extensions to the LRT system, the refurbishment of equipment, LRT vehicle rebuilds, and the acquisition of communication systems, signalling systems, buses, shuttle buses, and LRT vehicles. The City owned all of the facilities that it upgraded or acquired in the course of completing the transit projects.
8. The City paid GST in respect of the expenditures that it incurred to construct and acquire the transit facilities. Prior to 2003, it claimed public service body rebates under s. 259 of the *ETA*, which resulted in the return by rebate of 57.14% of the GST paid by the City. In January 2003, the City filed a GST return for the period ending December 31, 2002, in which it claimed ITCs in the amount of $6,351,967, which was the difference between the GST paid for the transit facilities and the rebates that the City had previously received. The Minister reassessed, denying the City’s claim for ITCs. The City objected to the re-assessment and eventually appealed to the Tax Court of Canada.

III. Judicial History

A. *Tax Court of Canada (Rossiter A.C.J.), 2009 TCC 272, [2009] G.S.T.C. 85*

1. At the Tax Court of Canada, Rossiter A.C.J. found that all three requirements to claim an ITC were fulfilled: (1) the City was a registered claimant; (2) the City had paid GST in acquiring goods and services; and (3) the City had acquired goods and services in the course of “commercial activit[ies]”, as defined in the *ETA*. Of the three requirements, only the third was disputed at trial.
2. Rossiter A.C.J. found the definition of “commercial activity” in the *ETA* to be broad enough to include the City’s performance of its obligations to the Province under the Agreements. The definition excludes the making of an exempt supply. He considered whether the construction of the transit facilities was an exempt supply, which would turn on the question of who was the recipient of the supply: the Province, or the public. If the Province was the recipient, the supply of the transit facilities would not be an exempt supply, and the City would be eligible for ITCs in respect of its GST expenditures.
3. Rossiter A.C.J. determined that under the terms of the Agreements, funding was a legal obligation of the Province, directly linked to the City’s obligation to supply the Province with the transit facilities. He held that the Province had received from the City the service of making available for its citizens the transit facilities, in accordance with the terms of the Agreements.

B. *Federal Court of Appeal (Blais C.J. and Sharlow and Pelletier JJ.A.), 2010 FCA 127, 403 N.R. 41*

1. Pelletier J.A., for the court, concluded that the Tax Court judge erred in his conclusion that the Agreements required the City to supply a municipal transit system to the Province for the use of the Calgary public. He found that the City had 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, by contrast, had statutory authority, but no obligation, to provide the City with financial assistance. The Agreements did not require the City to provide the Province with a transportation system, but merely provided a mechanism by which the financial assistance would be administered, and accountability for public funds would be maintained. The Minister’s appeal was allowed.

IV. Analysis

1. The basic structure of the GST regime was well explained in *Reference re Goods and Services Tax*,[1992] 2 S.C.R. 445. The GST is designed to be a tax on consumption, and as such, the *ETA* contemplates three classes of goods and services: (1) taxable supplies; (2) exempt supplies; and (3) zero-rated supplies. Taxable supplies currently attract a goods and services tax of 5% (7% at the relevant time) each time they are sold. To the extent that the purchaser of a taxable supply uses that good or service in the production of other taxable supplies, that is, in the course of commercial activities, the purchaser is entitled to an ITC and can recover the tax it has paid from the government. This is to prevent the cascading of GST, and to allow the obligation to pay GST to flow through to the ultimate consumer. The other two classes of goods and services, exempt supplies and zero-rated supplies, do not attract GST from the ultimate consumer. Vendors of exempt supplies, while paying the GST on their purchases, are not entitled to ITCs. In consequence, GST is paid to the federal government at the penultimate stage in the production chain rather than by the ultimate consumer.
2. Provincial governments are not liable to pay GST on their purchases. However, a number of subordinate entities created by the provincial governments, including municipalities, are liable to pay GST. These entities are entitled to claim ITCs to the extent that their purchases are used in making taxable supplies, and are eligible for public service body rebates of the GST paid on other purchases. The rebate rate for municipalities applicable at the relevant time was 57.14%: *Public Service Body Rebate (GST/HST) Regulations*,SOR/91-37, s. 5(*e*). (Subsequent to 2004, the municipal public service body rebate was increased to 100%: S.C. 2004, c. 22, s. 39(1), amending s. 259(1) of the *ETA*.) In the instant case, the City was eligible for and had collected public service body rebates for the GST paid in the course of constructing the transit facilities, pursuant to s. 259 of the *ETA*.
3. The requirements for claiming an ITC are set out in s. 169(1) of the *ETA*, the portion relevant to this case being:

**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:

A × B

where

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

B is

. . .

(*c*) in any other case, the extent (expressed as a percentage) to 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.

1. For the purposes of this appeal, the requirements to claim an ITC are (1) the claimant is registered; (2) the claimant has acquired the goods or services for consumption, use or supply in the course of commercial activities; and (3) the claimant has paid, or is legally required to pay GST (or HST, in provinces with harmonized provincial and federal sales tax) in acquiring the goods or services. It is not disputed that the City is registered and has paid GST (in Alberta, there is no provincial sales tax) in respect of its acquisition of goods and services. The only issue is whether the City acquired the goods and services, for which it paid GST, for “consumption, use or supply” in the course of its commercial activities.
2. “[C]ommercial activity” is defined for the purposes of the *ETA* in s. 123(1) as

(*a*) a business carried on . . . except to the extent to which the business involves the making of exempt supplies . . . .

1. “Exempt supply” is defined in s. 123(1) to mean

a supply included in Schedule V [to the *ETA*].

1. The supply of a municipal transit service to a member of the public is enumerated in Sched. V, Part VI, s. 24 of the *ETA*:

1. In this Part,

. . .

“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;

. . .

24. A supply made to a member of the public of a municipal transit service or of a public passenger transportation service designated by the Minister to be a municipal transit service.

1. A registrant may claim an ITC to the extent that GST has been paid for property used, consumed or supplied in the course of the registrant’s commercial activities which, by definition, exclude the making of exempt supplies. Thus, to establish entitlement to ITCs in respect of the GST paid on transit facilities, the City must show that in acquiring, constructing and making available transit facilities, it carried on a business of making a separate, taxable supply, rather than, or in addition to, an exempt supply of a municipal transit service.
2. “[B]usiness”, as defined in s. 123(1) of the *ETA*, includes

a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

1. The Tax Court judge concluded that the activities of the City under the Agreements of acquiring, constructing, and making public transit facilities available for the citizens of Calgary, constituted a “business”, as that term is broadly defined in s. 123(1), because those activities involved an “undertaking of any kind whatever”. I would agree with the Tax Court judge. I see no reason why the words “undertaking of any kind whatever” would exclude the construction of a public transit facility. Therefore, the City’s activity of constructing the transit facilities would fall within the definition of “commercial activity”, except to the extent to which that activity involved the making of exempt supplies.
2. The question in this appeal is whether the acquisition and construction of the transit facilities constituted an exempt supply only, or whether it also, or instead, constituted a taxable supply. The City asserts that it made two supplies. The first, which it has called “public transit services”, it provides in operating its transit facilities. This, it acknowledges, meets the definition of a “municipal transit service”, an exempt supply under the *ETA*.The recipient of this supply, according to the City, is the Calgary public. The second supply, which the City has called “transit facilities services”, it argues it has provided in “acquiring, constructing and making available the transit facilities to the citizens of Calgary”. The City claims that its “transit facilities services” are a separate, taxable supply, the recipient of which is the Province.
3. Under s. 123(1) of the *ETA*, “supply” means

the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

1. The term “service” is defined in s. 123(1) of the *ETA* to mean

anything other than

(*a*) property,

(*b*) money . . . .

1. The Tax Court judge was satisfied that under these expansive definitions, the City had made a supply. His analysis centred on whether the supply was made to the public or to the Province. This was because he was of the view that whether the acquisition and construction of the transit facilities was an exempt supply turned on the question of who was the recipient of the supply: the Province, or the public. However, the recipient of the supply may not be dispositive of the exempt supply issue. Having determined the recipient of a supply, it still must be determined whether the supply is taxable or exempt, with reference to the applicable *ETA* definitions*.* Further, the learned judge did not address whether the City made one supply only, or two supplies. The issue in this appeal is what supply or supplies were made by the City, and whether the supply or supplies were taxable or exempt.

A. *Supplies Made*

1. The distinction that the City draws is between (1) operating the transit facilities on the one hand, and (2) constructing, acquiring, and making them available, on the other. The City argues that the Province is the only recipient of the second supply, and the Calgary public is not a recipient. If the City is right, then its second supply would fall outside Sched. V, Part VI, s. 24 of the *ETA*, would be a taxable supply, and the City would be entitled to ITCs. If the City is wrong and there is only one supply of a municipal transit service to the public, then the supply is exempt and ITCs are not available.
2. While not precisely on point, guidance on the question of whether there were one or two supplies in this case may be drawn from the way in which courts have dealt with whether a supplier has made a single supply comprised of a number of constituent elements, or multiple supplies of separate goods and/or services.
3. In determining whether a supplier has made a single supply or multiple supplies, the relevant principles were summarized by Justice Rip (as he then was) in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (T.C.C.). His approach was confirmed by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn. v. R.*, [2000] G.S.T.C. 42.
4. In *O.A. Brown*,the appellant O.A. Brown Ltd. (“OAB”) bought livestock for customers, but on its own account and at its own risk, not as agent for its customers. Customers would contact OAB’s salesman to place an order specifying the type of cattle they required. OAB charged its customers disbursements, such as the cost of branding and inoculations, and a clearing commission, in addition to the cost of livestock. Livestock is a zero-rated supply for GST purposes, which means that the vendor neither pays GST on his acquisition of the livestock, nor collects it from his customers. The Minister assessed GST on the commission and the other disbursements. The main issue in the appeal was whether OAB supplied a service of acquiring livestock according to its customers’ specifications, or whether it was supplying livestock and other supplies, in which case it should have collected and remitted GST on the other supplies.
5. Justice Rip found that the *Value Added Tax* statute in the United Kingdom contained many provisions similar to our GST (*Value Added Tax Act* (UK), 1983, c. 55). In the English cases the issue had been defined as whether the supply in question comprises a compound supply or a multiple supply. A compound supply is a single supply with a number of constituent elements which, if supplied separately, some would have been taxed and some not. Multiple supplies are made and taxed separately.
6. *O.A. Brown* established the following test to determine whether a particular set of facts revealed single or multiple supplies for the purposes of the *ETA*:

The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. [p. 40-6]

1. When reaching his decision, Justice Rip made the following observation:

. . . one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. [p. 40-6]

(Citing *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported).)

1. Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56, at para. 18:

From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense.

1. Applying the test, Justice Rip found that the disbursements and commission were not charged for services that were “distinct supplies, independent of the whole activity” (p. 40-8). Only if taken together did the activities of buying, branding, inoculation, and other disbursements form a useful service. He concluded:

In substance and reality, the alleged separate supply, that of a buying service, is an integral part of the overall supply, being the supply of livestock. The alleged separate supplies cannot be realistically omitted from the overall supply and in fact are the essence of the overall supply. The alleged separate supplies are interconnected with the supply of livestock to such a degree that the extent of their interdependence is an integral part of the composite whole. . . . The appellant is making a single supply of livestock and the commission and disbursements charged are part and parcel of the consideration for that supply. They do not amount to separate supplies. [pp. 40-8 to 40-9]

1. In *O.A. Brown*, Rip J. characterized the commission, inoculation, branding and transportation costs not as distinct services but as inputs for the cattle and part of the cost of supplying the cattle. If this approach is followed, the public transit facilities would not be a separate supply, but would be an input to, or part and parcel of, the supply of the municipal transit service to the Calgary public.
2. *Maritime Life Assurance Co. v. R.*, [2000] G.S.T.C. 89 (F.C.A.), also supports the proposition that work preparatory to, or in order to make a supply, does not become a separate service subject to GST. In *Maritime Life*, the taxpayer, Maritime Life Assurance Co., issued insurance policies of various kinds, including a number of deferred annuity contracts. The holder of such a policy would pay periodic premiums to Maritime Life as consideration for the right to receive, on a specified future date, a payment of money or an annuity of equivalent value.
3. The Tax Court judge found two kinds of services were being provided to Maritime Life’s policy holders, the insurance services represented by the issuance and administration of the policies, and the services represented by its management of the segregated funds. The Federal Court of Appeal held that the only supply Maritime Life made to the policy holders was the provision of the policies. Maritime Life administered the policies and maintained the investments that backed its obligations under the policies, but that was the work it had to do to ensure that it remained in position to fulfil its policy obligations. The Federal Court of Appeal reasoned that the work should not be treated as a service that Maritime Life provided to the policy holders, any more than the work undertaken by a cleaning service to keep its cleaning equipment in good repair is a service provided to its clients. Applying the same reasoning in the present case, the acquisition and construction of the transit facilities, work undertaken by the City to develop a municipal transit service that meets the needs of the Calgary public, would not be treated as a supply that is separate from the supply of the municipal transit service itself.
4. Applying the *O.A. Brown* test,the question in this appeal is whether, in substance and reality, the alleged separate “transit facilities services” supply is an integral part, integrant or component of the overall supply of “public transit services”. According to the jurisprudence, if one supply is work of a preparatory nature to another supply (an “input” to that supply), then the input is a part or component of the single overall supply.
5. In my opinion, the true nature of the City’s “transit facilities services”, a determination to be made with common sense, was work of a preparatory nature to the supply of a municipal transit service to the public. Transit facilities were constructed, acquired, and made available in order to supply a municipal transit service to the Calgary public. This would point to the allegedly separate “transit facilities services” being in fact a component of the overall supply of “public transit services” to the Calgary public.
6. Further, the single supply/multiple supplies analysis, as it has emerged, presupposes that several distinct elements or components of a supply can be identified before the analysis can be performed. In the present case, the alleged separate supplies are so interconnected that it would be difficult to identify distinct elements or components.
7. The purchase of an LRT vehicle (part of the alleged “transit facilities services” provided to the Province), and the operation of that vehicle as part of a municipal transit service (part of the “public transit services” provided to the Calgary public), are distinct activities. However, these activities are better seen as steps taken in order to produce a municipal transit service than they are seen as distinct elements or components of that transit service. The City’s acquisition and construction of the transit facilities served the purpose of enabling the City to provide a transit service to the public. The end result of those activities was that a municipal transit service, featuring several expansions and improvements, could be operated. Nothing else was produced as a result of the activities. In this regard, this case is analogous to *O.A. Brown*, in which all disbursements and services for which customers were charged ultimately enabled OAB to deliver livestock as ordered by its customers. Further, the transit facilities have no use and provide no service except to the extent to which they are deployed for use within the Calgary municipal transit service. The interdependence and interconnectedness of the “transit facilities services” and the “public transit services” is obvious.
8. The application of the test for a separate supply would indicate that there is only one supply in the circumstances. However, in the leading separate supply cases, the allegedly separate supplies are provided to single recipients. The cases do not contemplate a situation in which there are allegedly two recipients of the supply or supplies. In addition to the *O.A. Brown* test, there are other relevant factors to consider. Here, it has been argued that the “transit facilities services”, which ultimately benefit the Calgary public, provide a separate and distinct benefit to the Province. To determine whether the Province received any service or benefit from the City, the nature of the respective obligations of the City and Province under the Agreements, having regard to the statutory context, must be analyzed.

B. *The Statutory Context*

1. If the Province has a statutory obligation to provide municipal transit services for the public in its cities, then the City’s work in establishing the municipal transit service, including the acquisition and construction of the transit facilities, would provide the benefit to the Province of enabling it to fulfill its statutory obligation. If there is no such obligation, it would point away from a service to the Province.
2. As noted earlier, the City is subject to the *CTA.* Under the *CTA*, the City has several obligations. It must prepare a comprehensive transportation study report for the development of an integrated transportation system under s. 3. Section 4(1) obliges the City to establish the transportation system described in its report, by bylaw. Under s. 4(6), the bylaw must be submitted for approval by the Lieutenant Governor in Council, and if approved, the bylaw must be enforced as approved.
3. With respect to the cost of establishing and maintaining its transportation system, s. 2 makes the City responsible for the cost, but provides that it may qualify for financial assistance from the Province. Section 6(1) provides that, when the City determines that a particular transit facility, included in the transportation system, is to be constructed, it must submit a proposal to the Minister. This provision makes provincial approval necessary for the construction or acquisition of any transit facilities. Further, under s. 6(2), provincial approval of a transit facility is a precondition to entry into a funding agreement, between the City and Province, with respect to a transit facility. Section 6(2) of the *CTA* vests in the Province the discretion to share in the cost of the construction of those transportation facilities which it has approved pursuant to s. 6(1).
4. The relevant provisions of the *CTA* are:

**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.

. . .

**(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.

**(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.

1. Since the *CTA* imposes no obligations on the Province with respect to the establishment or operation of municipal transit services, the statutory context does not support the contention that the City provided the benefit or service to the Province of fulfilling a statutory obligation on its behalf.
2. If any provision of the legislation provided for a transfer, from the City to the Province, of title to the transportation facilities, it would support the argument that the City made a supply to the Province. However, there is no statutory provision to such effect. Under s. 7 of the *CTA*, title to all facilities constructed vested in the City.
3. Nothing in the *CTA* provides for the supply, by the City, of any goods, services, or other benefit to the Province.

C. *The Agreements*

1. The next question is whether the City supplied a service or benefit to the Province by complying with the terms of the Agreements. The Tax Court judge concluded that the Agreements required the City to supply to the Province a municipal transit service for the use of the Calgary public. However, the Court of Appeal held that the Tax Court judge had erred in this interpretation. Pelletier J.A. found that the Agreements were simply the mechanism by which the financial assistance given by the Province to the City was administered, and by which accountability for those public funds was maintained (para. 57).
2. The Court of Appeal found that the preambles to the BCG and TCG agreements recognized 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, agreed to accept the funds to be made available by the Province upon the terms set out in the agreements (para. 38).
3. As the Court of Appeal recognized, art. 2 of the BCG agreement set out the conditions to which the City agreed in order to receive funds from the Province. The conditions in the TCG were 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 related to construction was condition h), which required that any construction which was funded by the grant program had to meet the prevailing legislative standards and best practices (paras. 39 to 40).
4. The Court of Appeal further found that art. 4 of the BCG and art. 5 of the TCG operated so as to ensure that the work which was funded under the agreements would be carried out in conformity with the terms of the *CTA* and its Regulations (paras. 41 to 43). Finally, the remaining clauses of the BCG and TCG agreements imposed certain reporting requirements on the City and dealt with the accounting for unused funds (para. 45). The Court of Appeal concluded that both of these agreements were framework funding agreements which governed the manner in which funds for approved projects were to be disbursed and administered (para. 46).
5. The CTF agreement differed from the other two in that it established a dedicated fund to be funded by payment to the City of $0.05 on the sale of each litre of taxable gasoline or diesel fuel within the City of Calgary. The balance of the agreement addressed the administration of that fund. As in the BCG and TCG agreements, the Court of Appeal concluded that nothing in the CTF required the City to construct anything whatsoever. Nothing in the agreement would give contractual effect to the City’s statutory obligations with respect to the establishment of a transportation system (para. 52).
6. The Province provided funding under the Agreements to assist the City in carrying out its own activities. The Province did not contribute funding to obtain a supply of accountability from the City; the contributions only went to assist the City with the capital costs of improving its municipal transit system. I agree with the Court of Appeal that the City’s compliance with the accountability measures did not amount to the provision of any goods, services, or benefit to the Province.
7. Following the jurisprudence on single or multiple supplies, the construction and acquisition of the transit facilities were inputs into the supply of the municipal transit service to the public. In addition, nothing in the applicable statutes, and nothing in the Agreements, indicates that there was a separate supply of “transit facilities services” by the City to the Province. For these reasons, there was only one supply by the City in this case, the supply of a municipal transit service.

D. *The Recipient of the Supply*

1. The City urges this Court to follow the approach of the Federal Court of Appeal in *Commission scolaire Des Chênes v. Ministre du Revenu national*, 2001 FCA 264, 286 N.R. 264. In *Des Chênes*, the Federal Court of Appeal held that Des Chênes, a school board, having received a subsidy from the Province of Quebec, had made a taxable supply of its school bussing services to the Province, and that ITCs were available to the school board.
2. Here, the City has acknowledged that members of the Calgary public are the recipients of its supply of “public transit services”. Its acknowledgment is consistent with the definition of “recipient” in s. 123(1) of the *ETA*, according to which the recipient of a supply is the person liable to pay consideration for that supply. Users of the municipal transit service pay fares in consideration for the supply, and are therefore recipients of the supply under the *ETA*. Nothing in the *ETA* requires a supply to have only one recipient.
3. In my view, *Des Chênes* does not assist the City. Even if this Court were to find, following *Des Chênes*, that because the Province contributed grant funding to the City, the Province was a recipient of the supply of municipal transit services, the public would remain a recipient of the supply. In *Corp. des Loisirs de Neufchâtel v. R.*, 2006 TCC 339, [2008] G.S.T.C. 153, Lamarre Proulx T.C.J. found that there were two recipients of a supply of community leisure services: the community, who enjoyed the leisure services and paid part of the consideration, and the municipality, which had paid the other part of the consideration for the supply.
4. As observed above, the identity of the recipient of a supply may not determine whether the supply is taxable or exempt. The identity of the recipient only determined the nature of the supply in *Des Chênes* because the parties had agreed that, if the subsidy from the Province of Quebec did not constitute consideration for the supply of transportation services, then the students were the recipients of the supply, and that the supply would be exempt. However, if the subsidy constituted consideration, then the province would be the recipient of the supply of transportation services, making it a taxable supply. The Federal Court of Appeal noted that whether the supply was taxable or exempt was an issue, but in light of the parties’ agreement, limited its analysis to the issue of whether the subsidy was “consideration”. Finding that it was, it followed that the Province was the recipient, and that the supply was therefore taxable, entitling the school board to ITCs.
5. Schedule V, Part VI, s. 24 of the *ETA* provides that a supply is exempt if it is the supply of a municipal transit service made to members of the public. Section 24 does not indicate that the supply must be made exclusively to members of the public. As determined above, the City made only one supply, the supply of a municipal transit service. The construction, acquisition, and making available of the transit facilities were inputs into that supply. Whether or not the Province is a recipient of the supply in addition to the public, the supply is of a municipal transit service to the public, and is therefore exempt. Accordingly, the City’s activities of acquiring, constructing, and making public transit facilities available for the Calgary public, did not fall within its “commercial activit[ies]”, under s. 123(1) of the *ETA*, because they involved the making of exempt supplies. The City is not entitled to claim ITCs for GST paid for the acquisition and construction of the transit facilities for the municipal transit service that it supplied to the Calgary public. To the extent that *Des Chênes* is inconsistent with this reasoning, it should not be followed.

V. Conclusion

1. There was only one supply in this case, the exempt supply of a municipal transit service to the Calgary public. The *ETA* demonstrates that Parliament intended for public service bodies to receive rebates at specified rates for the GST that they pay in the course of making exempt supplies. There was no separate, non-exempt supply to the Province, and accordingly, ITCs for GST paid in the course of acquiring and constructing the municipal transit facilities are not available to the City.
2. I would affirm the findings of the Federal Court of Appeal and dismiss the appeal with costs.

*Appeal dismissed with costs.*

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