Docket: 2007-35(IT)I

BETWEEN:

STÉPHANE GARIÉPY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 7, 2007, at Québec, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Stéphanie Côté

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of September 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 8th day of November 2007.

Brian McCordick, Translator

Citation: 2007TCC513
Date: 20070926
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and

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REASONS FOR JUDGMENT

Bédard J.

[1] This appeal, heard under the informal procedure, is from an assessment made by the Minister of National Revenue ("the Minister") in respect of the Appellant for the 2002 taxation year. Under that assessment, the Minister added the following amounts to the Appellant's income from his employment by Abbott Laboratories Limited ("the Employer"): $3,641 as a standby charge for an automobile under paragraph 6(1)(*e*) of the *Income Tax Act* ("the Act"); and $1,120 as an automobile operating expense benefit under paragraph 6(1)(*k*) of the Act.

[2] In making and confirming the reassessment of March 23, 2006, in respect of the 2002 taxation year, the Minister relied on the following assumptions of fact:

> [TRANSLATION]
>
> (a) As part of a taxable employment benefit audit program, the Minister's auditor (hereinafter "the auditor") audited the Appellant's file. **(admitted)**
>
> (b) The Appellant began his employment with the Employer in June 2002. **(admitted)**

(c) The Employer supplied automobiles, which it owned, to some of its employees, including the Appellant. **(admitted)**

(d) For the 2002 taxation year, the calculation of the initial benefit reported on the Appellant's T4 (Statement of Remuneration Paid) indicated $298.44. **(admitted)**

(e) The auditor analysed the documents and information that the Appellant provided in relation to his daily business and personal travel for the 2002 taxation year. **(admitted)**

(f) During his audit, the auditor found as follows:

(i) Based on the Minister's records, in 2002, the Appellant lived at 1276 Chanoine-Morel Avenue in Sillery, Quebec, and then at 1600 De Champigny Street East in Ste-Foy, Quebec. **(admitted)**

(ii) The type of vehicle that the Employer provided to the Appellant was a 1998 Chevolet Astro (hereinafter "the vehicle"). **(admitted)**

(iii) The Appellant's travel log recorded business trips daily, but personal trips were only compiled weekly. **(admitted)**

(iv) The distances entered in the log appeared to be estimates, and full addresses were not always recorded. **(admitted)**

(v) The odometer readings at the beginning and end of the year were not entered in the Appellant's travel log. **(admitted)**

(vi) The Appellant's travel log was not consistent with the information stated on the invoices submitted to the Employer in connection with his expense account. **(no knowledge)**

(vii) An odometer reading was entered weekly in the expense account submitted to the Employer, but the single vehicle maintenance invoice found in the expense account was inconsistent with these entries. **(no knowledge)**

(viii) The Appellant's travel log indicated an annual total of 16,563 km driven, 15,539 km of which were on business. **(no knowledge)**

(ix) The information declared to the Employer was that a total of 10,556 km were driven, 9,905 km of which were on business. **(no knowledge)**

(g) Since the travel log did not reflect the actual number of kilometres driven, and therefore did not reflect the number of kilometres driven for personal purposes, the auditor calculated the automobile benefit as follows:

STANDBY CHARGE	
$20,013 x 2% 7 months =	$3,641.82
OPERATING EXPENSE	
1000 km* x $0.16/km x 7 mos. =	$1,120.00
TOTAL	$4,761,82
*kilometre	

(admitted)

(h) The cost of the vehicle supplied by the Employer was $26,013 **(no knowledge)**

(i) The total number of kilometres driven in the vehicle was determined to be 16,563 km per year. **(no knowledge)**

(j) The number of kilometres driven for personal purposes was determined to be 7,000 km (1000 km per month for 7 months). **(no knowledge)**

(k) The Appellant was granted no reduction for the standby charge because it was shown that the employee drove 1000 km per month for personal purposes. **(no knowledge)**

(l) The parking expense benefit was calculated based on the prescribed rate for the year 2002, namely $0.16 per kilometre **(no knowledge)**

(m) The Minister therefore added $4,463 ($4,761 – $298) to the Appellant's income as a taxable benefit for the Appellant's 2002 taxation year. **(admitted)**

The Appellant's testimony

[3] The Appellant stated as follows during his testimony:

(i) He started working for his Employer's diagnostic products division on June 17, 2002.

(ii) His job consisted in repairing, installing and maintaining various medical analysis devices used in hospital laboratories.

(iii) He covered the following territory as part of his duties: the North Shore to Blanc-Sablon; the Gaspé Peninsula; the Beauce region, the Saguenay region, and the Mauricie–Bois-Francs region. In addition, he occasionally travelled to Montréal and Ottawa to help out his colleagues.

(iv) As part of his duties, he had to transport various tools and replacement parts in the automobile (a minivan) that his employer made available to him. The automobile had been customized for this purpose. For example, a steel cage with sliding shelves had been installed in the automobile and the middle bench seat had been removed. The automobile had a maximum of two seats, including the driver's seat.

(v) The employer's diagnostic division, in which he was employed, was located in Mississauga, in the province of Ontario.

(vi) His employer sent calls to his cellular phone with service orders. His schedule could change at any time.

(vii) His work schedule was as follows: The normal schedule was eight hours a day from Monday to Friday. In addition, he was on call every five weekends. He explained that he occasionally helped out colleagues during weekends that he was not on call. Lastly, he added that he did not take any vacations in 2002.

(viii) He owned a car.

(ix) He did not know that he was responsible for keeping a log that recorded the use of the motor vehicle supplied by his employer in order to distinguish between the kilometres driven for personal purposes and the kilometres driven for work-related purposes during the period in issue. He added that he did not know that such a log had to include the following details for each trip: date, destination address, name of customer visited, and kilometres driven. He also admits that he recorded his trips during the period in issue in a log (Exhibit I-2) and that he provided that log to the Canada Revenue Agency (CRA) after it asked him to send him such a log on August 24, 2005 (Exhibit I-1). It should be noted that the Appellant admits to having prepared the log (Exhibit I-2) based on information in his agenda, which contained only

the names of the customers of his employer that were visited during the period in issue.

The testimony of Daniel Couture

[4] Daniel Couture, an auditor with the Canada Customs and Revenue Agency, testified that he carefully examined the travel log that the Appellant sent him. His testimony was essentially an explanation of the numerous anomalies and inconsistencies in the log that he noted in his audit report (Exhibit I-3). He added that, based on his examination of the travel log, he determined that it did not reflect the actual distances driven by the Appellant in the minivan during the relevant period or the actual breakdown between personal and employment-related use.

The Appellant's position

[5] The Appellant in the case at bar is not disputing the fact that his employer made an automobile available to him during the period in issue. He also admits that he was unable to refute the assumptions of fact set out in clauses (*f*)(iii), (*f*)(iv), (*f*)(v),(*f*)(vi), (*f*)(vii),(*f*)(viii) and (*f*)(ix) and in subparagraph 14(*h*) of the Reply to the Notice of Appeal, on which the Minister had relied in making the assessment against him.

[6] Rather, the Appellant is essentially arguing that I should allow his appeal because, in *Anderson*,[1] a case decided on facts similar to those in the instant appeal, the Court held that the taxpayers involved had derived no benefit from the use of the cars that their employers had made available to them. Lastly, the Appellant submitted that two of his co-workers, who worked in Ontario and had exactly the same job as he did, succeeded in having the CRA's Appeals Division cancel the assessments made against them under paragraphs 6(1)(*e*) and 6(1)(*k*) of the Act based on the Court's decision in *Anderson*, *supra*.

The law

[7] The relevant provisions of the Act read as follows during the period in issue:

> 6(1)(*a*) **Value of benefits** — the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, except any benefit

[1] A*nderson v. Canada* [2002] T.C.J. No. 361 (QL).

. . .

(iii)that was a benefit in respect of the use of an automobile;

. . .

6(1)(*e*) **Standby charge for automobile – w**here the taxpayer's employer or a person related to the employer made an automobile available to the taxpayer, or to a person related to the taxpayer, in the year, the amount, if any, by which

(i) an amount that is a reasonable standby charge for the automobile for the total number of days in the year during which it was made so available

exceeds

(ii) the total of all amounts, each of which is an amount (other than an expense related to the operation of the automobile) paid in the year to the employer or the person related to the employer by the taxpayer or the person related to the taxpayer for the use of the automobile;

6(2) **Reasonable standby charge --** For the purposes of paragraph 6(1)(*e*), a reasonable standby charge for an automobile for the total number of days (in this subsection referred to as the "total available days") in a taxation year during which the automobile is made available to a taxpayer or to a person related to the taxpayer by the employer of the taxpayer or by a person related to the employer (both of whom are in this subsection referred to as the "employer") shall be deemed to be the amount determined by the formula

$$A/B \times [(2\% \times (C \times D) + 2/3 \times (E - F)]$$

where

A is

(*a*) the lesser of the total number of kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the total available days and the value determined for the description of B for the year in respect of the standby charge for the automobile during the total available days, if

(i) the taxpayer is required by the employer to use the automobile in connection with or in the course of the office or employment, and

(ii) the distance travelled by the automobile in the total available days in primarily in connection with or in the course of the office or employment, and

(*b*) the value determined for the description of B for the year in respect of the standby charge for the automobile for the total available days, in any other case;

B is the product obtained when 1,667 is multiplied by the quotient obtained by dividing the total available days by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;

C is the cost of the automobile for the employer where the employer owns the vehicle at any time in the year;

D is the number obtained by dividing such of the total available days as are days when the employer owns the automobile by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;

E is the total of all amounts that may reasonably be regarded as having been payable by the employer to a lessor for the purpose of leasing the automobile during such of the total available days as are days when the automobile is leased to the employer; and

F is the part of the amount determined for E that may reasonably be regarded as having been payable to the lessor in respect of all or part of the cost to the lessor of insuring against

(*a*) the loss of, or damage to, the automobile, or

(*b*) liability resulting from the use or operation of the automobile.

6(1)(*k*) A**utomobile operating expense benefit** – where

(i) an amount is determined under subparagraph 6(1)(*e*)(i) in respect of an automobile in computing the taxpayer's income for the year;

(ii) amounts related to the operation (otherwise than in connection with or in the course of the taxpayer's office or employment) of the automobile for the period or periods in the year during which the automobile was made available to the taxpayer or a person related to the taxpayer are paid or

payable by the taxpayer's employer or a person related to the taxpayer's employer (each of whom is in this paragraph referred to as the "payor"),

and

(iii) the total of the amounts so paid or payable is not paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer,

the amount in respect of the operation of the automobile determined by the formula

A – B

where

A is

(iv) where the automobile is used primarily in the performance of the duties of the taxpayer's office or employment during the period or periods referred to in subparagraph (ii) and the taxpayer notifies the employer in writing before the end of the year of the taxpayer's intention to have this subparagraph apply, 1/2 of the amount determined under subparagraph 6(1)(*e*)(i) in respect of the automobile in computing the taxpayer's income for the year, and

(v) in any other case, the amount equal to the product obtained when the amount prescribed for the year is multiplied by the total number of kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the period or periods referred to in subparagraph 6(1)(*k*)(ii), and

B is the total of all amounts in respect of the operation of the automobile in the year paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer; and

248(1) **"automobile"** means

(*a*) a motor vehicle that is designed or adapted primarily to carry individuals on highways and streets and that has a seating capacity for not more than the driver and 8 passengers;

but does not include

(*b*) an ambulance,

(*b.1*) a clearly marked emergency-response vehicle that is used in connection with or in the course of an individual's office or employment with a fire department or the police;

(*c*) a motor vehicle acquired primarily for use as a taxi, a bus used in a business of transporting passengers or a hearse used in the course of a business of arranging or managing funerals,

(*d*) except for the purposes of section 6, a motor vehicle acquired to be sold, rented or leased in the course of carrying on a business of selling, renting or leasing motor vehicles or a motor vehicle used for the purpose of transporting passengers in the course of carrying on a business of arranging or managing funerals, and

(*e*) a motor vehicle

(i) of a type commonly called a van or pick-up truck, or a similar vehicle, that has a seating capacity for not more than the driver and two passengers and that, in the taxation year in which it is acquired or leased, is used primarily for the transportation of goods or equipment in the course of gaining or producing income,

(ii) of a type commonly called a van or pick-up truck, or a similar vehicle, the use of which, in the taxation year in which it is acquired or leased, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income, or

(iii) of a type commonly called a pick-up truck that is used in the taxation year in which it is acquired or leased primarily for the transportation of goods, equipment or passengers in the course of earning or producing income at one or more locations in Canada that are

(A) described, in respect of any of the occupants of the vehicle, in subparagraph 6(6)(*a*)(i) or (ii), and

(B) at least 30 kilometres outside the nearest point on the boundary of the nearest urban area, as defined by the last census dictionary published by Statistics Canada before the year, that has a population of at least 40,000 individuals as determined in the last census published by Statistics Canada before the year.

Analysis and conclusion

[8] Based on the relevant provisions of the Act, it appears that the initial question to be answered is this: Was the minivan supplied to the Appellant by his employer an automobile within the meaning of subsection 248(1) of the Act? Indeed, the relevance of this question is that, if the minivan does not come within that definition, the Minister incorrectly added $3,641 to the Appellant's income on account of a standby charge for an automobile under paragraph 6(1)(*e*) of the Act, and incorrectly added $1,120 to that income on account of an automobile operating expense benefit under paragraph 6(1)(*h*) of the Act.

[9] Paragraph (*a*) of the definition of "automobile" set out in subsection 248(1) of the Act states that an automobile is a motor vehicle that is designed or adapted primarily to carry individuals and that has a seating capacity for not more than the driver and eight passengers. Thus, *a contrario*, if a motor vehicle is not designed ("*conçu*" in the French version) or adapted ("*aménagé*" in the French version) primarily to carry individuals, it will not be considered an automobile within the meaning of subsection 248(1) of the Act. I should immediately note that, in defining "automobile", Parliament has not specified when, or by whom, the vehicle must have been designed or adapted primarily to carry individuals.

[10] Was the minivan adapted primarily to carry individuals? Since the word "adapted" ("*aménagé*" in the French version) is not defined in the Act and has no established and accepted legal meaning, the ordinary and grammatical meaning of these words must be determined. The *Oxford English Dictionary* (1989) and *Le Robert, dictionnaire de la langue française* (1988) define the words "adapted" and "*aménagé*", respectively, as follows:

> *Oxford English Dictionary*
>
> Adapted
>
> 1. Fitted; fit, suitable
>
> . . .
>
> 2. Modified so as to suit new conditions.
>
> *Le Robert*
>
> *Aménagé*

> *1. Disposé, distribué, et préparé méthodiquement (une construction, un espace organisé par l'homme) en vue d'un usage déterminé […] Organisé.*
>
> *[…]*
>
> *Vx ou régional. Installé, préparé en vue d'une installation (une chose concrète).*
>
> *[…]*
>
> *4. Adapté pour rendre plus efficace, plus adéquat.*

[11] Based on the common and grammatical meanings of the words "adapted" and "*aménagé*", I find that a thing is "adapted" and "*aménagé*" if it has been changed or modified. In the case at bar, the evidence discloses that the rear bench was removed and that a steel cage with sliding shelves was installed in its place so that various tools and replacement parts could be carried. The evidence also discloses that, following these modifications, the minivan had seating capacity for no more than the driver and one passenger. It can therefore be concluded that the minivan was adapted, and that it was not adapted primarily to carry individuals.

[12] The other question to be asked is whether the minivan was primarily designed to carry individuals. Since the word "designed" ("*concevoir*" in the French version) is not defined in the Act and has no established and accepted legal meaning, the ordinary and grammatical meaning of the word must be determined. The *Oxford English Dictionary* (1989) and *Le Robert, dictionnaire de la langue française* (1988) define the words "designed" and "*concevoir*", respectively, as follows:

> *Oxford English Dictionary*
>
> **Designed**
>
> Marked out, appointed . . . Planned, purposed, intended . . . Drawn, outlined; formed, fashioned, or framed according to design.
>
> *Le Robert*
>
> **Concevoir**
>
> . . .
>
> 3. Créer par l'imagination, former, imaginer, inventer.
> Concevoir un projet, un dessein

[13] These definitions seem very broad (though Parliament has not specified who is considered to have designed the vehicle or when) but they appear to imply that the designer of the minivan is the one who gave it life or is responsible for its creation. In the case at bar, in the absence of evidence to the contrary, I must presume that the entity that originally designed the minivan is General Motors, its manufacturer, and that the minivan was originally designed by its manufacturer primarily to carry individuals.

[14] I should note that, based on *a contrario* reasoning, paragraph (*a*) of the definition of automobile provides that if a motor vehicle is neither designed nor adapted primarily to carry individuals, then it is not an "automobile". In the case at bar, the evidence has very clearly shown that the minivan was adapted primarily to carry goods and that the adaptation resulted in seating capacity for no more than the driver and one passenger. Moreover, since I have already determined that it was designed by General Motors to carry individuals, it is difficult for me to conclude that the minivan is not an automobile by virtue of paragraph (*a*) of the definition of that term.

[15] It is certainly true that subsection 248(1) of the Act defines the term "automobile" as a motor vehicle designed or adapted to carry individuals . . . and having seating capacity for no more than the driver and eight passengers. In addition, such a vehicle is excluded from the definition of "automobile" if it is of a type commonly called a van that has a seating capacity for not more than the driver and two passengers and if, in the taxation year in which it is acquired or leased, it is used primarily for the transportation of goods or equipment in the course of gaining or producing income. Moreover, a van the use of which, in the taxation year in which it is acquired or leased, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income, is also excluded from the definition of the word "automobile". Thus, even if a vehicle was originally designed to seat more than three, but was later adapted to seat three at the most, and it fulfils the other conditions set out in subparagraphs (*e*)(i) and (*e*)(ii) of the definition in subsection 248(1), the vehicle will not be considered an "automobile" within the meaning of the Act. In the case at bar, the Appellant has proven that the minivan was adapted to provide a seating capacity for not more than the driver and two passengers. He did not prove that the minivan fulfilled the other conditions set out in subparagraphs (*e*)(i) and (*e*)(ii) of the definition set out in subsection 248(1) of the Act.

[16] Since I have concluded that the minivan is an automobile within the meaning assigned to the term in subsection 248(1) of the Act, we will consider paragraph 6(1)(*e*) and subsection 6(2) of the Act, which deal with standby charges for an automobile, and paragraph 6(1)(*g*) of the Act, which deals with the automobile operating expense benefit.

[17] Essentially, paragraph 6(1)(*e*) and subsection 6(2) of the Act provide that where an employer has made an automobile available to an employee during the year, the employee must include, in computing his income from employment for that year, an amount that is a reasonable standby charge for the automobile for the total number of days in the year during which it was made so available. That charge is generally fixed at 2% per month of the initial cost of the automobile (or two-thirds of the lease payment). It may be reduced only if the personal use of the automobile supplied by the employer is less than 1000 km per month, and 90% of the use of the automobile is in the performance of the duties of the employee's employment. In order to receive such a reduction, the employee must provide clear, explicit evidence of the actual use of the automobile in terms of kilometres. Thus, to be entitled to such a reduction, the employee must clearly and expressly show the number of kilometres driven during the year in the performance of the duties of his employment, and the number of kilometres driven for personal reasons.

[18] In my opinion, the Appellant did not provide such evidence. The Appellant's evidence in this regard essentially turned on a travel log that he prepared and provided to the CRA after that agency asked him, on August 24, 2005, to provide it with such a log. I found the log unreliable, not only because it contained numerous anomalies and inconsistencies, but also because the annual total and work-related distances set out in it are completely inconsistent with previous statements that the Appellant made to his employer. As I noted earlier, the Appellant told his employer that he drove 10,556 km in the minivan during the relevant period, 9,905 km of which were in the performance of the duties of his employment, yet the log indicated a total distance of 16,563 km for the same year, 15,539 km of which were for business purposes.

[19] Since the Appellant was unable to prove that the personal use of the minivan supplied by the employer was less than 1000 km per month, and that 90% or more of the use of the minivan was in the performance of the duties of his employment, I find that the Minister correctly added to the Appellant's income, for his 2002 taxation year, an amount on account of a standby charge for an automobile, equal to 2% per month (seven months in the instant case) of the cost of the minivan ($26,013 in the instant case).

[20] The gist of paragraph 6(1)(*g*) of the Act is that if, in a given year, an employer pays any fraction of the operating expenses of an automobile that it owns and has made available to an employee, the employee must include, in computing his income from employment for that year, an amount equal to a fixed number of cents per kilometre ($0.168 in 2002) for personal use. Since the Appellant was unable to rebut the assumption of fact in the Notice of Appeal to the effect that the distance driven in the minivan for personal purposes in 2002 was 7,000 km, I am of the opinion that the Minister correctly added $1,120 to the Appellant's 2002 employment income toward operating expenses.

[21] As I have stated, the Appellant submits that I should allow his appeal because, in *Anderson*, *supra*, the facts of which are, in his view, similar to the facts of the instant appeal, the Court held that the taxpayers concerned derived no benefit from the use of the vehicles that had been made available to them by their employer.

[22] In *Anderson*, *supra*, the Minister assessed the employees under paragraph 6(1)(*a*) of the Act, adding to their income a standby charge for the use of a vehicle commonly known as a pickup truck. The issue for determination was whether the appellants had received or enjoyed a benefit in respect of, in the course of, or by virtue of an office or employment, in the form of their use of the vehicle (specially equipped for their job) to travel from their home to their workplace and back in 1999. In his decision, Judge Beaubier, who had also determined that the vehicles were not automobiles within the meaning of subsection 248(1) of the Act because they had seating for no more than two persons, also held that the employees derived no benefit from the use of an automobile because they were under their employers' control when they were in their vehicle, and therefore, that it was only the employers who obtained a benefit.

[23] In my opinion, the decision in *Anderson*, *supra*, is of no assistance in the case at bar because the very brief reasoning on the question of whether the pickup trucks were automobiles within the meaning of subsection 248(1) of the Act was erroneous.

[24] I have already noted that, in *Anderson*, the Minister assessed the employees concerned under paragraph 6(1)(*a*) of the Act, not under paragraphs 6(1)(*e*) and 6(1)(*g*) of the Act, because he was of the view that the pickup trucks in question were not automobiles within the meaning of subsection 248(1) of the Act. I would emphasize that, under subparagraph 6(1)(*a*)(iii) of the Act, benefits in respect of the use of an automobile are excluded from the application of paragraph 6(1)(*a*) of the Act. And, in the case at bar, I have determined that the minivan was an automobile within the meaning of subsection 248(1) of the Act. Consequently, paragraphs 6(1)(*e*) and 6(1)(*k*) of the Act set out the way in which

benefits in respect of the use of an automobile are to be included in computing a taxpayer's employment income.

[25] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 26th day of September 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 8th day of November 2007.

Brian McCordick, Translator

CITATION:	2007TCC513
COURT FILE NO.:	2007-35(IT)I
STYLE OF CAUSE:	Stéphane Gariépy and Her Majesty the Queen
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	June 7, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	September 26, 2007

APPEARANCES:

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