Date: 20070608

Docket: A-505-06

Citation: 2007 FCA 221

CORAM: **DESJARDINS J.A.**
NOËL J.A.
NADON J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

HENRI BÉDIRIAN

Respondent

Hearing held at Montréal, Quebec on April 19, 2007.

Judgment rendered at Ottawa, Ontario on June 8, 2007.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: NOËL J.A.
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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The Court has before it an appeal from a decision of a Federal Court judge (*Bédirian v. Canada (Attorney General)*, 2006 FC 1239, [2006] F.C.J. No. 1564 (QL)), which allowed the application for judicial review of a decision by adjudicator Sylvie Matteau on a grievance pursuant to section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the Act).

FACTS

[2] The respondent is a lawyer with the Department of Justice of Canada (group and level LA-3A). Since 1996 he has held the position of director, tax litigation, in the Quebec Regional Office (QRO).

[3] On or about February 17, 2000 a complaint of sexual harassment was filed against him. An investigation was initiated and two lawyers were instructed to act as investigators. The investigators concluded that two of the allegations in the complaint were valid. They recommended as disciplinary action a suspension of three days without pay and demotion so as to completely abolish the relationship of subordination between the manager and the two victims, as well as any other employee (A.B. vol. V, pages 1376 to 1382).

[4] On July 28, 2000 the then Deputy Minister, Morris Rosenberg, approved the investigators' conclusions and imposed a number of disciplinary penalties on the respondent. *Inter alia*, he relieved the respondent of his position as manager and imposed on him a suspension of three days without pay, while preserving his classification level and rate of pay.

[5] The respondent challenged the Deputy Minister's decision by a grievance pursuant to paragraph 92(1)(*b*) of the Act, seeking a number of forms of relief, including general and punitive damages totalling nearly $2 million.

[6] On October 31, 2002, after 19 days of hearing, the Board Member, Anne E. Bertrand, concluded that there was no basis to the allegations of sexual harassment made against the respondent. She quashed the Deputy Minister's decision. She ordered that the employer reinstate the respondent in his position as manager, reimburse what he had lost in fringe benefits, strike out the three-day suspension imposed on the respondent, reimburse the lost salary resulting from that suspension and delete the Deputy Minister's letter dated July 28, 2000 from the file. The effect of deleting this letter was to remove all reference to the disciplinary action imposed on the respondent, including the warning of dismissal in the event of a repetition of harassing conduct, the requirement that he take training in harassment and sexual equality, the requirement that he write a letter of apology to the person who had alleged the sexual harassment and the description of the letter as being a reprimand. However, Board Member Bertrand did not believe it was appropriate for her to reserve jurisdiction on the additional claims contained in the respondent's grievance.

[7] After the grievance was allowed the employer, of its own accord, undertook a review of the respondent's performance appraisals, allowing the respondent to receive incentive pay. The employer also reimbursed him for 118 days of sick leave. It provided him with the services of a consultant in reasserting his authority on his return to his managerial position: this service lasted for nearly a year. The employer made him a written offer of a position at level LA-3B in Ottawa and training in the new duties of that position. It paid him the sum of $102,250 as representation fees in connection with the complaint, the grievance and the applications for judicial review.

[8] Board Member Bertrand's decision was the subject of an application for judicial review by the respondent. An application was also made by the employer, but was later discontinued without costs. The application for judicial review was allowed by the trial judge on April 14, 2004. The latter referred the grievance back to the adjudicator so she might exercise her jurisdiction fully and make a decision on the monetary claims filed by the respondent.

[9] Sylvie Matteau was the designated adjudicator. The parties were agreed that all the evidence presented to Board Member Bertrand should be included. It was further agreed that the function of adjudicator Matteau was not to revise the assessment of the evidence presented to Board Member Bertrand or the conclusions she had drawn from it. Adjudicator Matteau's function was "simply to exercise fully the adjudicator's jurisdiction with regard to the claim for damages contained in the grievor's grievance" (paragraph 143 of adjudicator Matteau's reasons).

[10] On January 19, 2006 the adjudicator dismissed the respondent's claim for damages in connection with the grievance. In her view, the employer had committed no separate fault making it liable in delict.

[11] On October 17, 2006 the trial judge allowed the respondent's application for judicial review, quashed the decision by adjudicator Matteau and referred the matter back to another adjudicator for a decision to be made on the awarding of damages. The trial judge considered that the investigative process was vitiated and this required compensation to the respondent.

APPLICABLE STANDARD OF REVIEW

[12] The trial judge was careful to set out the applicable standard of review according to the pragmatic and functional analysis. She considered each of the contextual factors and found that: (1) the Act contained no privative clause; (2) the application of the rules of civil liability was outside the labour law jurisdiction and expertise of the adjudicator; (3) the provision in question was essentially intended to resolve disputes or to determine the rights of parties; and (4) the adjudicator's decision involved the interpretation and application of the rules of civil liability. The trial judge came to the conclusion that the applicable standard of review was that of reasonableness *simpliciter*.

[13] The parties did not challenge that conclusion. They also accepted that the Court of Appeal's function was to review the administrative decision by determining the appropriate standard of review and then by deciding whether it was correctly applied by the trial judge (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans*), 2006 FCA 31, at paragraphs 13 and 14).

ANALYSIS

ISSUE

[14] The issue before adjudicator Matteau and before the trial judge was to determine whether, by taking the disciplinary action which it considered it was justified in taking, the employer had committed an independent civil fault giving rise to damages. This is a question of law and a mixed

question of fact and law. The *Public Service Staff Relations Act* contains no provision in this regard. The Court has to rely on the tests developed in earlier judgments in this area. The burden of proof is on the public servant.

APPLICABLE TESTS IN CASE LAW

[15] In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, the Supreme Court of Canada recognized that an employer may be liable in tort if it commits an actionable wrong (paragraph 29). The Supreme Court of Canada restated this principle in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paragraph 73.

[16] The Supreme Court of Canada recognized in *Wallace* that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. Some types of injury resulting from a failure to comply with this requirement, such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem, might all be worthy of compensation in the form of an extension of the period of reasonable notice. The compensation does not flow from the dismissal itself, but rather from the manner in which the dismissal was conducted by the employer. These principles were set out in paragraphs 98 and 103 of the Supreme Court of Canada's reasons in *Wallace*:

> ¶98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that <u>in the course of dismissal</u> employers ought

> to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.
>
> . . . . .
>
> ¶103 It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis*, *supra.* Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself but rather from the manner in which the dismissal was effected by the employer.
>
> [Emphasis added.]

[17] A breach of this duty of good faith and fair dealing in the manner of dismissal is one of several factors properly compensated for by an addition to the notice period (paragraph 88). The Supreme Court of Canada dismissed the argument that the employer could be sued in tort for breach of a good faith and fair dealing obligation with regard to dismissals. It expressly refused to recognize the existence of such a tort (paragraph 77).

[18] In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada applied the *Wallace* reasoning, saying at paragraph 74:

> ¶74 Where a dismissal is accompanied by bad faith or unfair dealing on the part of the employer, *Wallace* establishes that such conduct merits compensation by way of an extension to the notice period. This remedy is not triggered by the dismissal itself, but by the exacerbating factors that, in and of themselves, inflict injury upon the employee. The nature of this remedy thus was described in *Wallace*, at para. 103, as follows:

> [W]here an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself but rather from the manner in which the dismissal was effected by the employer.
>
> *Wallace* also made clear that the extent by which a notice period should be extended for bad faith or unfair dealing in the conduct of a dismissal will depend, in each case, on the degree of injury that an employee sustains. While recognizing that tactics that affect the employee's ability to find new employment is particularly deserving of such a remedy and may merit more compensation, the majority also ruled that "intangible injuries", which give rise to emotional damage, also may suffice to attract an award in the form of an extended notice period (para. 104).
>
> [Emphasis added.]

[19] Adjudicator Matteau applied the test developed in *Vorvis* and *Wallace*. At paragraph 144 of her reasons, she summed up the applicable test as follows :

> ¶144 In *Vorvis* (*supra*) and *Wallace* (*supra*), the Supreme Court of Canada developed a four-point analysis for determining whether the civil liability of the employer is engaged. The questions before me are therefore the following:
>
> (1) As worded by the Federal Court (2004 FC 566, ¶ 24), has the grievor shown, on a balance of probabilities, that the employer was at fault or acted negligently or in bad faith?
>
> (2) If so, is the fault <u>independently</u> actionable <u>on the basis</u> of the tort or contractual liability of the employer (*Vorvis* (*supra*) and *Wallace* (*supra*))? In other words, is the civil liability of the employer engaged?
>
> (3) If so, has the grievor established harm?
>
> (4) If so, has the grievor established a probable causal link between the harm sustained and the actions criticized and established?
>
> [Emphasis by adjudicator Matteau.]

[20] Adjudicator Matteau examined each of the faults alleged by the respondent and considered whether these were independent civil wrongs giving rise to delictual liability by the employer. She concluded that there was no independent fault.

[21] In the view of the trial judge, adjudicator Matteau properly defined the concept of fault as she did in paragraph 144 of her reasons (*supra*). However, she considered that adjudicator Matteau had said nothing about the actions or conduct of the employer which constituted fault that could make it civilly liable. It seemed proper to the trial judge that the awarding of compensation in a question of disciplinary action be treated in the same way as in the case of a dismissal (paragraph 25). The trial judge said the following:

> ¶22 It is also most important to note that the precedents which guide the Court in this area have to do with situations of dismissal for which a specific legal remedy exists, namely granting a period of reasonable notice (otherwise known as "*Wallace* damages"). *Wallace* established that where a dismissal is accompanied by bad faith or unfair dealing on the part of the employer, such conduct merits compensation by way of an extension to the notice period. This remedy is not triggered by the dismissal itself, but by the exarcerbating factors that, in and of themselves, inflict injury upon the employee. In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, dealing with a dismissal situation, Iacobucci J. summarized the rules set out in *Wallace* as follows, at paragraph 74:
>
> > Where a dismissal is accompanied by bad faith or unfair dealing on the part of the employer, *Wallace* establishes that such conduct merits compensation by way of an extension to the notice period. This remedy is not triggered by the dismissal itself, but by the exacerbating factors that, in and of themselves, inflict injury upon the employee.
>
> ¶23 The situation at bar arises in the context of disciplinary action imposed on the employee, not dismissal. Consequently, the remedy of an extension to the notice period is not available to compensate the applicant, despite the fact that, as we will see below, the harm suffered was related to unfair treatment by the employer. Strict construction of the case law would have the effect of denying the applicant adequate compensation for the harm suffered. In my opinion, this cannot be the case.
>
> ¶24 As I see it, in *Wallace* and *McKinley*, *supra*, the Supreme Court of Canada intended to indicate that conduct involving bad faith or unfair treatment by the employer

> opened the way to the possibility of compensating the employee. In a dismissal situation, such compensation takes the form of a reasonable extension of the notice period. In a situation of disciplinary action, fault by the employer should in my opinion lead to the same remedy. It would be illogical and inconsistent to suggest that the employer had such responsibility at the time of the dismissal, and not when it imposed disciplinary action.
>
> ¶25 Consequently, it seems proper to the Court for the awarding of compensation in a disciplinary action situation to be subject to the same analytical approach as in the case of a dismissal. Thus, I feel that the test which is appropriate for creating entitlement to compensation in such a case is the one stated in *Wallace* in a situation of reasonable notice relating to dismissal, at paragraphs 98 and 103 respectively:
>
> > . . . employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.
> >
> > . . . where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case.
>
> [Emphasis added.]

[22] The trial judge indicated that in her opinion the proper test was that set out in *Wallace* (referring to paragraphs 98 and 103 of *Wallace*, cited above). She considered adjudicator Matteau's conclusions on each of the faults alleged. For each of these faults the trial judge felt that adjudicator Matteau had not asked the right question, namely whether the employer had been candid and honest with the employee and whether it had acted in bad faith or treated the employee unfairly (paragraph 27).

[23] In the trial judge's view, the Deputy Minister's decision regarding the respondent was vitiated because of the employer's conduct. The evidence was not given a careful review. It is critically important in an investigation which has serious consequences for an employee's life and

career that the procedure be fair and equitable (paragraph 42). She explained that the employer's independent actionable fault was the unfair treatment of the employee in the process of making a decision regarding him:

> ¶44 There is no doubt that the Deputy Minister's decision was not taken on the basis of clear, cogent and compelling evidence that the acts complained of had been committed, that the conduct objected to was persistent and repetitive or that it was a serious act, as required by the following cases on the point: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Canada (Human Rights Commission) v. Canada (Canadian Armed Forces)(Re Franke)*, [1999] F.C.J. No. 757 (QL); *Lippé et Commission des droits de la personne et des droits de la jeunesse du Québec v. Québec (Procureur général)*, [1998] R.J.Q. 3397.
>
> ¶45 In short, where the employer takes disciplinary action which has such serious consequences for the employee on the basis of a deficient investigation and procedure, it cannot meet the standard of fair conduct to the employee. The serious harm that resulted for Mr. Bédirian, such as humiliation, embarrassment, loss of self-esteem and loss of the reputation so important to a lawyer, in my view gave rise to compensation for him.

[24] In my opinion, the trial judge made an error of law in imposing on the employer a duty of good faith and fair dealing outside the context of a dismissal and in characterizing a breach of that duty as an independent civil wrong giving rise to compensation.

[25] In *Wallace* the Supreme Court of Canada recognized the existence of a duty of good faith and fair dealing in the course of a dismissal so as to protect employees at a time when they are most vulnerable. As the Supreme Court of Canada explained, at paragraph 95 of its reasons:

> ¶95 The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger, supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when

> termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.
>
> [Emphasis added.]

[26] At paragraph 107 of its reasons, the Supreme Court of Canada added:

> ¶107 In my view, there is no valid reason why the scope of compensable injuries in defamation situations should not be equally recognized in the context of wrongful dismissal from employment. The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.
>
> [Emphasis added.]

[27] However, nothing in *Vorvis* and *Wallace* suggests that a breach of an obligation of good faith and fair dealing amounts to an actionable wrong. The Supreme Court of Canada has always required that there be an independent civil wrong for the employer to be liable in tort. This requirement undoubtedly applies whether in a case coming from a common law or from a civil law jurisdiction. In *Wallace*, it expressly refused to recognize that a breach of a duty of good faith and fair dealing could make the employer liable in tort (paragraph 77). Instead, the breach of the duty was to be compensated for by an extension of the period of reasonable notice, notice to which the employee was entitled under the employment contract.

[28] When she concluded that the unfair treatment of the employee by the employer in the course of disciplinary action gave rise to compensation in the form of damages, compensation which the respondent could not have obtained by other means, the trial judge essentially concluded that, contrary to *Wallace*, a delict existed.

[29] The question the trial judge should have asked was whether the employer had committed an independent and actionable civil wrong according to the well-settled principles of delictual liability, not whether the employer had acted in bad faith or treated the employee unfairly. Conduct in bad faith or unfair dealing is not in itself an actionable, independent civil wrong. The existence of a civil wrong is determined rather in terms of the reasonable person test (see Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 6th ed., Cowansville, Que., Yvon Blais, 2003, at pp. 127-130; Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed., Markham, Ont., Lexis Nexis Butterworths, 2006, at pp. 140-144).

NEED FOR INVESTIGATION

[30] Despite the respondent's contention that there should never have been an investigation (paragraph 149 of adjudicator Matteau's decision), the trial judge noted at paragraph 30 that it was necessary for the investigation to be held:

> ¶30 Before considering the alleged faults, it is worth mentioning that there is no question of blaming the employer for initiating an investigation. The evidence before both adjudicators established that the sexual harassment complaint made against the employee was serious enough to warrant such an investigation.

[31] She further added, at paragraph 31:

> ¶31 However, in view of the dramatic consequences of the result of such an investigation for the employee, it is of crucial importance for the investigation not to be vitiated by any serious procedural error that could cast doubt on the validity of the decision resulting from it. On this point, I concur entirely with the comments by the writers Geoffrey England, Roderick Wood and Innis Christie, *Employment Law in Canada,* loose-leaf, Markham, Ont., Butterworths, 2005, see § 11.97:
>
> > . . . The seriousness of the consequences to an employee of being found liable for sexual harassment … has occasioned courts to impose various procedural safeguards before dismissal is warranted. Thus, an employer must conduct an effective and fair investigation of an allegation of sexual harassment against an employee before invoking dismissal. … This includes … ensuring that all relevant witnesses are interviewed; maintaining accurate and comprehensive records of the course of the investigation; probing the credibility of the victim rather than pre-judging his or her account to be accurate; and not pre-determining the outcome of the investigation until all of the relevant evidence has been carefully sifted and weighted.

[32] Procedural error gives rise to an action in administrative law and labour law: however, there can only be liability in delict if there was a civil wrong which has a causal link to the damage.

APPLICATION OF LAW TO FACTS

[33] It is important to note when beginning this part of the analysis that Board Member Bertrand and adjudicator Matteau were the only ones who had the benefit of hearing the witnesses. The trial judge had only the transcript. This Court is thus in the same position as she was in assessing the evidence.

[34] The trial judge analyzed the faults noted from the evidence by Board Member Bertrand, which adjudicator Matteau could not question. There were six of these, as follows:

> 1. the use of a workplace assessment report dating from 1998 as evidence against Mr. Bédirian when the report did not concern him;
>
> 2. failure to inform the investigators of the apologies offered by Mr. Bédirian;
>
> 3. failure to give the investigators the various initial statements and documents in the record before the investigation began;
>
> 4. use by the investigators of a burden of proof not consistent with the law existing in Canada;
>
> 5. failure by the Senior Advisor to inform the Deputy Minister of Mr. Bédirian's offer of apologies;
>
> 6. the Deputy Minister's decision based on inadequate conclusions.

[35] I will analyze each of these faults considered by the trial judge.

1. *The use of a workplace assessment report dating from 1998 as evidence against Mr. Bédirian when the report did not concern him*

[36] Board Member Bertrand referred to the 1998 appraisal, in paragraphs 16 to 24 of her reasons, citing certain passages from pages 37 and 42 of the 1998 appraisal (E-1):

> ¶16 In 1998, at the request of Mr. Dion from the QRO, who had been told that there were problems at that office, Ms. Gravelle-Bazinet initiated a workplace assessment to be conducted by the experts at Watson Wyatt. According to Ms. Gravelle-Bazinet, the assessment report noted that the QRO employees had a perception that there were sexual harassment problems involving senior management (see the assessment report, E-1, at page 37). The experts recommended that the QRO make a firm decision on sexual harassment practices in its workplace (pp. 41-42). The following are the passages from pages 37 and 42 of the assessment (E-1):

> [Translation]
>
> A few women testified that sexual advances had been made toward them. The testimony refers to harassment and unacceptable (sexual) behaviour toward some women by a few men at the QRO or by senior management.
>
> . . . . .
>
> That the QRO and its managers take a firm position on sexual harassment practices by making the employees, among others, aware of what action they can take in response.

¶17 Ms. Gravelle-Bazinet testified that the Deputy Minister at the time, George Thompson, said that he was very concerned about the situation, as did the Assistant Deputy Minister, Mario Dion. Mr. Dion told Ms. Gravelle-Bazinet to follow up on the matter with the QRO's Regional Director, Jacques Letellier.

¶18 In July 1998, Ms. Gravelle-Bazinet reminded Jacques Letellier of his responsibility as a manager. She referred in particular to the statement of managers' obligations in Policy E-4 (p. 28). She told him to meet with his managers and remind them of their responsibility in this regard.

¶19 In August or September 1998, Ms. Gravelle-Bazinet met with the QRO management team to discuss the assessment conducted a few months earlier, and she then met with the employees of the QRO three times; she said that the meetings generated a great deal of discussion. The main complaint was that there was a lack of respect. A committee was created to establish an action plan, and a joint advisory subcommittee was also created.

¶20 A new Deputy Minister, Morris Rosenberg, was appointed at that time, in August 1998. Ms. Gravelle-Bazinet briefed him on Policy E-4 and the report on the assessment conducted at the QRO. He shared the others' concerns, and he asked Ms. Gravelle-Bazinet to be [translation] “extremely attentive to the problems at the QRO” and “to tell him” if there were any.

¶21 Ms. Gravelle-Bazinet admitted that the assessment conducted at the QRO did not uncover any allegations against Mr. Bédirian. There are 70 employees in the QRO's tax sector and, according to Ms. Gravelle-Bazinet, “senior management” includes the Director General (of the QRO) and all the managers under the Director General.

¶22 The federal Deputy Minister of Justice, Morris Rosenberg, testified in this case. He was appointed to the position on July 1, 1998. He was called to the bar in 1977, and his studies include a Master of Laws from Harvard University. Mr. Rosenberg has been working in the Public Service of Canada since 1979.

¶23 Mr. Rosenberg too stressed that the main work of the Office of Conflict Resolution is to resolve conflicts in the workplace, including conflicts involving harassment. When he began in his new position, he reviewed the assessment conducted at the QRO in 1998 with the help of the advisor, Ms. Gravelle-Bazinet. He recalls that there was a problem with "respect" from management at the QRO and, in the Tax Litigation Section, concerns about "equitable treatment". There was also a reference to a sexual harassment problem involving "senior management" (see page 37 of E-1).

¶24 A national forum was held in Montreal on October 22-23, 1998, and Deputy Minister Rosenberg chose that opportunity to convey the general message that respect and equality for everyone had to be achieved. During the forum, a woman employed by the Department of Justice even asked him what he was going to do about sexual harassment in the workplace. He openly affirmed his commitment to creating a conflict-free workplace (see E-2 and E-3).

[Emphasis added.]

[37] Board Member Bertrand also noted at paragraph 143:

¶143 During her testimony, Ms. Dufresne provided the preliminary report dated April 1998 that was written following the interviews conducted at the time of the assessment. All of the information was available at that time, and the preliminary report set out the findings. The groups and persons identified as sources of conflict were grouped together by sector. For the tax sector, the criticism was that the female lawyers were more like "assistants". Among the six people named as sources of conflict, it was not Mr. Bédirian but rather Jacques Letellier who was named as the head of senior management. In Ms. Dufresne's opinion, when the respondents in the preliminary or even the final assessment report referred to "senior management", they meant the sector directors. The tax sector was not identified in the references to senior management in the negative comments in the report. Ms. Dufresne testified that, during the on-site sessions held after the preliminary report (E-41) was tabled, it became increasingly obvious that Jacques Letellier was the sixth person identified as a source of conflict. Ms. Gravelle-Bazinet and Sylvie Charleboix were involved with her in those sessions.

[Emphasis added.]

[38] Board Member Bertrand concluded, at paragraphs 341 and 342:

> ¶341 An appreciable amount of evidence was filed on the assessment that had been conducted at the QRO in 1998 (E-1) in order to show the problems that had existed there, including the perception of a sexual harassment problem, which had reached even the men of the QRO or senior management. With reference to the complainant, the employer attempted to show that this perception could stem from his behaviour as a man at the QRO or again as a member of senior management. It is my view after having heard the whole of the evidence and having read the documentation filed in this dispute that the references to behaviour problems related to sexual harassment at the QRO and in particular the passages noted on pages 37 to 42 of the assessment (E-1), which are repeated in the executive summary, do not apply to Mr. Bédirian and therefore should not have been used as evidence against him.
>
> ¶342 I would add that "senior management" refers to the Department's executives rather than the directors of the various sections at the regional offices, who as a group comprise the management committee. In support I am relying on Exhibit E-3, the agenda for the forum held in Montreal in October 1998, which clearly indicates the composition of senior management, namely the Deputy Minister, Associate Deputy Minister Mr. Dion, Director General Jacques Letellier, Ms. Gravelle-Bazinet and other Department executives. The Directors, such as the complainant Mr. Bédirian, do not appear on that list. Accordingly, the passage found on page 37 of the assessment (E-1), which talks about harassment and unacceptable behaviour on the part of some men at the QRO or of senior management simply cannot be applied to apply to Mr. Bédirian, since he was Director at that time and was not yet part of senior management.
>
> [Emphasis added.]

[39] Document E-1, [TRANSLATION] "workplace assessment, June 1998", was entered in evidence (A.B. Vol. IV, page 1309). The passage cited by Board Member Bertrand on page 37 is part of the unfairness factors which were listed. The respondent was not concerned as a member of "senior management" on page 37 of assessment E-1, but he was concerned as a manager at paragraph 42 of the same document, dealing with recommendations made by the consulting firm Watson Wyatt. In short, as a manager after 1998 the respondent had the responsibility of applying a firm policy of non-tolerance to sexual harassment and had received special training in this regard. The testimony of Deputy Minister Rosenberg leaves no doubt as to the weight he

attached to the respondent's responsibility for acting responsibly under that policy. However, at no time in his testimony did the Deputy Minister mention that he considered the respondent a member of the group covered by the events leading up to the work assessment made in 1998.

[40] I will explain.

[41] Deputy Minister Rosenberg took up his duties on July 1, 1998 (A.B. vol. I, page 232, line 15, to page 235, line 18). He explained the reasons which guided his decision when he commented on the letter of July 28, 2000 which he sent to the respondent (A.B. vol. I, from page 287, line 14, to page 290, line 23):

> A The first one, it says:
>
> > [TRANSLATION]
> >
> > I am relieving you of your position as manager forthwith. At the same time, you will be assigned by your regional director Donald Lamer to a position without managerial responsibility at your current level of pay.
>
> And I thought about this and I felt that it was warranted for the following reasons. Firstly our policy, the departmental policy is quite explicit on the responsibilities of managers, at page five (5) of the policy, it says:
>
> > "Department of Justice managers had a special responsibility for creating a workplace, where harassment is not likely to occur and for responding quickly and effectively if it does."
>
> Further down on that page, it says:
>
> > "Your presence, oh sorry make it clear, this is in the last paragraph, that insults and derogatory jokes would not be tolerated and that they could lead to disciplinary action."

So I thought there was a responsibility of setting out our policy, our policy is probably one of the more explicit policies in the government of those much further, for example than the Treasury Board policy in stipulating the role of managers, with respect to harassment and conflict in the workplace. I also felt that there were some specific circumstances in this case, that Maître Bedirian had not come to this without any knowledge of this. He had the knowledge of this policy and the office, the Quebec office was briefed on this policy when it came out; but he also had had positions as a harassment agent in 1993, and I understand had taken some training as a result, that there had been a further opportunity for training in 1996. That following the workplace assessment, there had been meetings both between Matilde and the management of the Quebec regional office and Jacques Letellier, that then had a management with the Quebec regional office to make the point that we would not tolerate, the department would not tolerate sexual harassment and it was up to managers to do everything they could to put a stop to it. I also understand that Maître Bedirian, after the workplace assessment, was a chair of harassment committee in the office. So I felt that he had special knowledge and should have had special sensitivity to these issues. At the same time, I was really trying to balance off to interest, I felt that it was not tenable under the circumstances to keep Maître Bedirian in the management position. I was concerned about Maître Bedirian being in a position of authority over specially young female staff, not just the complainants but other young female staff. At the same time, I wanted to balance it in a way that was going to deal with the problem, but in all other ways, trying to preserve Maître Bedirian's status, his seniority, his compensation, his paying benefits. That is why we created a position at the equivalent rank, Maître Bedirian was in a, what is called an L.A.3.A. management position, we created an L.A.3.A.

Me MICHEL BEAUDRY:
L.A.3.A., L.A. what L.A. ?

A. 3.A
Q. 3.A. O.K.

A. Management position which is what he was in, we created a position, what we call senior practitioner L.A.3.A. We have two (2) senior streams in the department, one is management, one is senior practice. The L.A.3.A. senior practitioner recognizes people at a very senior level in the department and Maître Bedirian, in terms of the practice of law, had always been well regarded, well respected in the office and we felt that we wanted to maintain that, but simply wanted to deal with the management part of it, because of the concern for employees in the office, so that was the reason for that. I had already spoken about three (3) day suspension, it was a notice that any repetition of any sexual harassment could result in immediate dismissal. I request that Maître Bedirian undertake a training on harassment and gender quality, and given the impact of the incidents on the complainant, that Maître Bedirian send a letter of apology. And as is our

> policy, letters of reprimand, of which this is one would stay on the file for a period of two (2) years from the date of the position.

[42] In cross-examination, he said the following (A.B. vol. I, from page 296, line 12, to page 298, line 18):

> [TRANSLATION]
>
> CROSS-EXAMINED BY MARYSE LEPAGE,
> Counsel for the applicant:
>
> Q Mr. Rosenberg, I understand you indicated you were familiar with Exhibit E-1, which is the workplace assessment made in June '98?
>
> A That's right.
>
> Q You are familiar with this document?
>
> A Yes.
>
> Q Is Mr. Bédirian identified in the document?
>
> A I don't believe so, not specifically.
>
> Q Does his name appear in it?
>
> A Not specifically.
>
> Q Is it referred to directly?
>
> A No.
>
> Q I refer you to Exhibit E-5, which are my comments on June 16, 2000, and in particular I refer you to the last page of the document, the affidavit, the sworn statement of Louise Martin. Are you familiar with this document?
>
> A Yes.
>
> Q In particular, are you familiar with paragraph 3 of the document?

A Yes.

Q Can you read us paragraph three?

A It says:

> [TRANSLATION]
> The verbal feedback given following the workplace investigation by Sylvie Charlebois indicated, among other things, that Henri Bedirian was a gentleman.

Q Thank you. You have referred us to certain passages from the Wyatt report – Exhibit E-1.

A Hum! Hum!

Q I understand that the only passage relevant to the questions of harassment is that on page 37?

A There are two (2) passages, the one on page thirty-seven which starts with:

> [TRANSLATION]
> Some women testified they were subjected to advances of a sexual nature . . .

Q Hum! Hum!

A And the one on page forty-two, this is recommendations that …

Q O.K.

A . . . which says could it be our case:

> [TRANSLATION]
> Managers take a firm position on sexual harassment practices, and among other things make employees aware of recourses available to them.

Q Right, thank you. To your personal knowledge, sir, how long has Henri Bedirian been a manager in the Montréal regional office?

A From what I understand, he has been a manager since 1980, I will have to refresh my memory on this.

[Emphasis added.]

[43] Further on, he stated (A.B. vol. I, from page 299, line 16, to page 301, line 6):

[TRANSLATION]

Q O.K. Do you have any personal knowledge of Mr. Bedirian's file, his general file, his file as an employee?

A When you say "personal knowledge", what do you mean?

Q Are you familiar with Mr. Bedirian's file, without having specific knowledge of it?

A The knowledge I have of Mr. Bedirian's file, I understand that it comes out of what I have learned about it from this case.

Q O.K. From what you have learned of this file, have complaints been made against Mr. Bedirian in the past?

A I am not aware of any specific complaint that was made against Maître Bedirian, prior to the complaints that were, the complaint that was lodged by Maître Letellier de St-Just.

Q So, to your knowledge, no other complaint in the past?

A I am not aware of any other complaints in the past.

Q O.K.

A Any formal complaints in the past.

Q You mentioned, during the forum which followed the workplace assessment, you mentioned you had been notified and informed that the harassment was continuing, is that right?

A That's right.

Q Could you explain at what point in the forum exactly?

A The best I could do, during the passage of time, I believe that it was the second day, it was a two (2) day forum, the Thursday and the Friday, the Friday the 23rd, I believe that before the sum up, there was a period of questions and answers; that anybody in the room could ask me questions or raise any issues.

Q O.K.

A And it was in that context that it took place.

Q Right, when you were notified at that time, was Mr. Bedirian's name mentioned?

A When that question was asked, there was no, no specific person was named.

[Emphasis added.]

[44] In her decision Board Member Bertrand summarized the Deputy Minister's testimony as follows :

Deputy Minister Rosenberg's decision of July 28, 2000

¶202 Deputy Minister Rosenberg testified that he read all the documents given to him by Ms. Gravelle-Bazinet and obtained legal advice from within his Department. He agreed with the investigators' conclusion that two of the seven allegations had been proved. He met with Ms. Gravelle-Bazinet and John Power to determine the next steps to take, and he made his decision on July 28, 2000 (see P-1).

¶203 According to the Deputy Minister, his decision was based on the fact that Mr. Bédirian was a manager, that the Policy in his Department went further than those in other departments in the sexual harassment context and that the complainant knew the Policy and had sat on a sexual harassment committee in the past, not to mention the fact that he had received training in this regard. Moreover, since Mr. Bédirian had chaired the harassment committee following the assessment conducted at the QRO in 1998, he had a greater responsibility in relation to this sort of conduct. Taking away his manager's position was appropriate, said the Deputy Minister, because he should no longer supervise young female lawyers. Notwithstanding these facts, the Deputy Minister said that Mr. Bédirian was highly regarded in his Department and was well respected as a lawyer. Keeping him at the same level was therefore fair.

¶204 The Deputy Minister was not aware of any complaint against Mr. Bédirian prior to this one. According to him, he relied on the fact that the 1998 assessment pointed indirectly at Mr. Bédirian given the passages on pages 37 and 42 (E-1).

[Emphasis added.]

[45] There is nothing in the Deputy Minister's testimony to support the final sentence in Board Member Bertrand's paragraph 204.

[46] Consequently, the trial judge could not say at paragraph 35:

> ¶35 Thus, the employer relied on material which was never proven and which, in the Deputy Minister's admission, was taken into account in the decision.
>
> [Emphasis added.]

[47] However, it is true that the Deputy Minister had read among other things the executive summary (A.B. vol. V, pages 1385-1386), which read in part as follows:

> • In the WA questionnaire, the employees of the Tax Litigation Section raised the following as sources of conflict (Annex 9):
>
> • Management of Henri Bédirian:
> - lack of transparency in his decision making
> - inability to deal with conflict
> - female lawyers feel disadvantaged when high profile files are assigned
> - shows lack of respect for employees: frequently ridicules or intimidates employees when they request clarification
> - one respondent in this section stated that many female employees complained of sexual advances on the part of the "haute gestion".
>
> [Emphasis added.]

[48] However, nothing in the Deputy Minister's testimony indicated that he associated the respondent with the [TRANSLATION] "senior management" of the assessment conducted in 1998, in view of the passage at page 37 of assessment E-1. On the contrary, as indicated earlier at paragraph 43 of my reasons, the Deputy Minister said (and Board Member Bertrand also noted it):

> I am not aware of any specific complaint that was made against Maître Bédirian, prior to the complaints that were, the complaint that was lodged by Maître Letellier de St-Just.

[49] As regards the passage on page 42 of assessment E-1, as I said at paragraph 39 of my reasons, the respondent was concerned as a manager.

[50] The Deputy Minister was also aware of the recommendations of the investigators, who had stated (A.B. vol. V, page 1380):

> [TRANSLATION]
>
> We note that the manager has been employed by the Department for 16 years. We have had no information indicating that his record is not clean and we assume that it is.

[51] Board Member Bertrand's factual conclusion, in the final sentence of her paragraph 204, was unreasonable, even patently unreasonable, because it was not supported by the evidence. The trial judge erred in approving it.

[52] It is worth pointing out that the Deputy Minister again testified before adjudicator Matteau. I reproduce paragraphs 54 to 57 of adjudicator Matteau's decision, which summarize his testimony.

> ¶54 Morris Rosenberg, Deputy Minister of Justice from July 1, 1998 to December 20, 2004, testified. He confirmed that he was the author of the disciplinary measure imposed on the grievor and confirmed that the Senior Advisor reported directly to him at that time.

¶55 The Deputy Minister stated that, in determining the disciplinary measure to be imposed on the grievor, he took into consideration a number of factors. He specified that, first of all, the decision was made under the departmental workplace harassment prevention policy, for which the employer is responsible. He took into consideration the fact that the investigation had been conducted by not one but two investigators, one of them an experienced investigator and a former member of the Public Service Staff Relations Board. Also considered was the fact that the grievor had management responsibilities, including additional responsibilities under the departmental workplace harassment prevention policy, and had received training in these matters.

¶56 The Deputy Minister also took into consideration the fact that the QRO had had morale problems for a few years because of the workplace atmosphere, and the fact that the Senior Advisor had held discussions on this point with this group in the past. He also took into consideration his own workplace harassment prevention responsibilities. Lastly, he considered the fact that, at a meeting with the employees of the QRO on October 22 and 23, 1999, some female lawyers openly complained to him about the workplace atmosphere at the QRO. He acknowledged that he made his decision after reviewing all the material on the matter provided to him by the Senior Advisor.

¶57 The Deputy Minister also confirmed that to some extent he followed the progress of the case during the hearing before Adjudicator Bertrand. He stated that, although he was not informed of the progress of the hearing on a daily basis, he was kept informed in a general way by the legal counsel involved. He stated that he considered the case an important one that the Department took seriously. He realized that the case would have repercussions and some degree of notoriety. It was the first such case at the Department.

[53] I now analyze faults 2, 3, 4 and 6 considered by the trial judge.

2. *Failure to inform the investigators of the apologies offered by Mr. Bedirian*

3. *Failure to give the investigators the various initial statements and documents in the record before the investigation began*

4. *Use by the investigators of a burden of proof not consistent with the law existing in Canada*

6. *The Deputy Minister's decision based on inadequate conclusions.*

[54] In this regard, Board Member Bertrand wrote at paragraphs 368 and 369 of her decision:

¶368 In my view, the Department of Justice's Policy does not provide for a high enough burden of proof to establish allegations of sexual harassment. The case law indicates that

> such allegations attract a stigma that will likely persist for the so-called *harasser* for years, in some cases forever. It is for that reason that these cases require such great sensitivity in their handling, procedures and outcome. A decision must never be made in the case of a person "accused" of sexual harassment without evidence that is clear, cogent and compelling and definitely more than probable. It is my view that the burden of proof indicated in the Policy, which entails a general assessment, as well as the burden of proof used by the investigators in this case, were not in accordance with the law that exists in Canada.
>
> ¶369 I would also like to add that the investigators did not receive all of the information that had been disclosed by the two lawyers Ms. Letellier de St-Just and Ms. O'Bomsawin further to their conversations and meetings in December 1999 and January 2000, namely the notes of Ms. Meagher, Ms. Lévesque, Monique Bond of the Office of Conflict Resolution and Mr. Dion, which included the information gathered from Mr. Bédirian. As I noted earlier, The Policy emphasizes the importance of keeping a record that includes dates and times of the alleged incidents in order to document the accuracy of the events and the response.

[55] According to the evidence, independent and experienced investigators were appointed pursuant to the policy *Towards a Conflict- and Harassment-Free Workplace*, a policy that applied to all the Department's staff, including senior managers (policy commented on by Board Member Bertrand in her decision, A.B. vol. I, page 171, paragraphs 343 to 350). One of the investigators also had experience in the field of harassment investigations. Assessment of the mistakes made by the employer in not forwarding initial statements and errors of law made by the investigators were within the expertise of Board Member Bertrand. They gave rise to the grievance and to the relief provided by the Act and labour law. They did not involve delictual liability.

> 5. *Failure by the Senior Advisor to inform Deputy Minister of Mr. Bedirian's offer of apologies*

[56] On fault 5, the trial judge (at paragraph 36 of her reasons) cited adjudicator Matteau, who considered that the evidence had shown that the Senior Advisor had herself heard the offer to make

apologies from the respondent's own mouth, had failed to inform the Deputy Minister of this in her executive summary and had falsely indicated that no apologies were made. The trial judge blamed adjudicator Matteau for not considering whether such action by the employer was fair to the respondent.

[57] At paragraphs 58 and 59 of her reasons, adjudicator Matteau wrote the following (A.B. vol. I, page 27, paragraphs 58 and 59):

> ¶58 The Deputy Minister did not recall being told that the grievor apparently offered apologies to the complainant. When the Deputy Minister was informed of Adjudicator Bertrand's decision, which found that apologies had been offered, he did not follow up or confront the Senior Advisor on this point. The transfer of responsibilities to Associate Deputy Minister Collette had already taken place. In fact, he did not follow up on Adjudicator Bertrand's decision in any way. He also stated that he had not discussed the case with anyone other than the persons involved, but conceded that people in the field must have been aware of the grievor's reassignment following the Deputy Minister's decision to relieve him of his management responsibilities.
>
> ¶59 Associate Deputy Minister Dion explained his reaction to the apologies offered by the grievor. He stated that he had just spent several hours with the two female lawyers involved. He noted how upset they were. The grievor could not get off that easily. Simple apologies were not enough given the state of the two female lawyers. As well, those apologies were offered at the very end of the discussion with the grievor, when it had become clear that there would be repercussions including an investigation. Associate Deputy Minister Dion specified that, in his opinion, the point was not to determine whether the apologies were sincere or not. Rather, in his opinion the apologies appeared inadequate in the circumstances. Under cross-examination, he stated that, at later meetings including the meeting at which the Deputy Minister made his decision, he did not recall discussions about these apologies being offered.
>
> [Emphasis added.]

[58] She then wrote, at paragraphs 168 to 175:

> ¶168 It was alleged that the Senior Advisor presented a document that falsified the facts. In her executive summary, she did not inform the Deputy Minister of the offer to apologize

that she herself had heard the grievor utter. In that document she wrote that, at the February 2, 2000 meeting, the grievor had not acknowledged wrongdoing and had not offered apologies (Exhibit E-34, page 3). As well, in the memorandum accompanying the executive summary (Exhibit E-35, page 2) and containing her recommendations, she indicates that the grievor:

> [TRANSLATION]
> . . . . .
>
> 7. *Denied any wrongdoing, showed no concern for the complainant or even for* [the other female lawyer], *and expressed no desire to apologize, from the time he was first informed of the allegations by Mario Dion and the Senior Advisor until his final submissions were presented;*
>
> . . . . .

¶169 Although the grievor may be convinced that he offered sincere apologies, the wording he used throughout this matter leaves room for interpretation. That was what the Senior Advisor and Associate Deputy Minister Dion concluded. Before Adjudicator Bertrand, the grievor was quite clear: [translation] ". . . I am prepared to apologize, Madam Chair, I am prepared to apologize if I made a misstep, if I ever failed to express myself properly and if they misinterpreted my comments. I never wanted to harass anyone." (page 111 of Henri Bédirian's examination and cross-examination, August 22, 2001).

¶170 This wording of the apologies offered by the grievor, even before Adjudicator Bertrand, is conditional: if the complainants have misinterpreted his words, he will apologize. He does not acknowledge having "made a misstep". However, he does not appear to acknowledge that his apologies are conditional.

¶171 At the hearing before Adjudicator Bertrand, the grievor acknowledged issuing a blanket denial of all the allegations of which the Senior Advisor and Associate Deputy Minister Dion informed him in February 2000 (page 51 of his August 22, 2001 examination and cross-examination): [translation] ". . . I realize that I issued a blanket denial of all those allegations, the way they threw them at me; I did not admit to any incident for which I was blamed." Thus it cannot be concluded that the assessment of the grievor's statements by Associate Deputy Minister Dion and the Senior Advisor was erroneous.

¶172 As well, the Deputy Minister testified that he alone made the decision to suspend the grievor and to relieve him of his staff management responsibilities. The Deputy Minister confirmed that he did not recall being told that apologies had been offered by the grievor. However, when the Deputy Minister explained the factors taken into consideration in determining the appropriate disciplinary measure, he did not note a lack of contrition or an absence of apologies by the grievor.

¶173 The Deputy Minister stated, instead, that he took into consideration a number of other factors. The responsibility of the employer and the managers under the departmental

> workplace harassment prevention policy was the first factor. He also took into consideration the fact that not just one but two respected investigators had come to the conclusion that two allegations were founded. As well, he took into consideration the fact that the grievor had received workplace harassment prevention training and that the Office had already intervened with the grievors and managers at the QRO. Lastly, given the matter in its entirety and the fact that the grievor was a manager, the Deputy Minister considered it inappropriate to allow the grievor to continue in his responsibilities. That said, a demotion was not called for, and the Deputy Minister protected the grievor's classification level.
>
> ¶174 It was not established that the representations by the Senior Advisor concerning the apologies had a determining effect on the disciplinary measure imposed. The Deputy Minister based his decision on the information then available to him, which was mainly made up of the investigation report prepared by two experienced investigators who found merit in two allegations out of a total of seven.
>
> ¶175 It was only when the entire matter was considered in detail by Adjudicator Bertrand that she found that certain conclusions of the investigation were erroneous, that the grievor could be blamed only for inappropriate comments, and that the disciplinary measure imposed by the Deputy Minister was inappropriate and should have been limited to a reprimand.
>
> [Emphasis added.]

[59] However, it should be noted that, in preparing their recommendations for the Deputy Minister, the investigators twice noted that the respondent had not made any apology (A.B. vol. V, pages 1380 and 1381). Paragraph 172 of adjudicator Matteau's decision indicates that the Deputy Minister did not mention before her that the respondent's lack of contrition or failure to apologize was a factor in making the decision.

[60] I accept adjudicator Matteau's finding of fact at paragraph 174 of her decision, that:

> ¶174 It was not established that the representations by the Senior Advisor concerning the apologies had a determining effect on the disciplinary measure imposed. The Deputy Minister based his decision on the information then available to him, which was mainly

> made up of the investigation report prepared by two experienced investigators who found merit in two allegations out of a total of seven.
>
> [Emphasis added.]

CONCLUSION

[61] I conclude that the order made by adjudicator Matteau, in which she dismissed the claim for damages in the grievance, is well founded. The trial judge erred in finding otherwise.

[62] I would allow the appeal and would set aside the judgment of the Federal Court dated October 17, 2006 and I would dismiss the application for judicial review.

"Alice Desjardins"
J.A.

I concur.
Marc Noël J.A.

I concur.
M. Nadon J.A.

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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