

Docket: 2006-997(EI)

BETWEEN:

ANIMAGINE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on September 19, 2006, at Montréal, Quebec.

Before: The Honourable Deputy Justice S.J. Savoie,

Appearances:

Agent for the Appellant: Manon Hébert

Counsel for the Respondent: Christina Ham

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**JUDGMENT**

The appeal is allowed and the Minister's decision is set aside in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

“S.J. Savoie”

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Savoie D.J.

Translation certified true  
on this 22nd day of February 2008.  
Gibson Boyd, Translator

Citation: 2006TCC642  
Date: 20061214  
Docket: 2006-997(EI)

BETWEEN:

ANIMAGINE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Savoie D.J.

[1] The appeal was heard at Montréal, Quebec, on September 19, 2006.

[2] It concerns the insurability of the employment of Véronique Lusignan Gravel (the “Worker”) when she worked for the employer from November 20 to December 17, 2004 (the “period at issue”).

[3] On January 6, 2006, the Minister of National Revenue (the “Minister”) informed the Appellant of his decision that the Worker held insurable employment during the period at issue.

[4] The Minister also informed the Appellant that the Worker had exercised insurable employment for 46.5 hours of work and that her insurable earnings were \$511.50 during the period at issue.

[5] In rendering his decision, the Minister relied on the following assumptions of fact:

- (a) the Appellant, incorporated on February 10, 1993, is a not-for-profit organization aimed at helping artists find contracts; (admitted with clarifications)

- (b) the Appellant's activities mainly consist in providing entertainment services in various shopping centres; (admitted)
- (c) the Appellant provides the services of actors, musicians, makeup artists, various personalities, public entertainers, i.e. all sorts of characters used to create a festive atmosphere; (denied)
- (d) the Appellant mainly covers the back-to-school period, Halloween and Christmas; (admitted)
- (e) the Appellant operates its business mostly during the months from August to December of each year; (admitted)
- (f) when it needs a worker, the Appellant recruits by using advertisements in local newspapers and holding interviews; (admitted)
- (g) in its letter of May 30, 2005, addressed to the Chief of Appeals, the Appellant stated to have acted, as with all the other artists, as an intermediary between the Worker and potential clients, although only one client retained the Worker's services; (admitted with clarifications)
- (h) the Worker had been hired, under a written contract, to greet children at Santa's Kingdom at the Place Rosemère shopping centre; (admitted)
- (i) more specifically, the Worker was to talk to and entertain the children waiting in line and introduce them to Santa Claus; (admitted)
- (j) the Worker had to dress up as a wooden soldier; (admitted)
- (k) under the employment contract, the Appellant was to come to the shopping centre dressed in street clothes, and put on her costume on arrival, in order to preserve the element of surprise for the children; (admitted)
- (l) the costume and accessories were supplied by the Appellant, while the Worker supplied her make-up; (admitted, except for clarifications to be made)
- (m) the Worker was able to get ready in a dressing room supplied by the shopping centre; (admitted)
- (n) despite a variable work schedule, the Worker had to respect a work schedule prepared based on the shopping centre's demands, those of the Appellant and her availability; (admitted)

- (o) if she could not go to work, the Worker had to notify the Payor 24 hours in advance so that it could replace her; (admitted)
- (p) at work, the Worker reported to a certain Richard, representative of the Appellant; (denied)
- (q) the Appellant received \$11.00 per hour and, during the period at issue, she received 3 cheques from the Appellant during the period at issue; (admitted)
- (r) during the period at issue, the Worker accumulated 46.5 hours of work for the Appellant; (admitted)
- (s) during the period at issue, the Worker received earnings totalling \$511.50 from the Appellant. (admitted)

[6] The Worker stated at the hearing that the Appellant had set a work schedule that she had to follow. She had to go to a designated area in advance for her make-up. She added that the dinner time was set by the Appellant. However, the Appellant explained that the work schedule was arranged to facilitate teamwork, but that the schedule was not fixed and could be modified at the Workers' request.

[7] The Worker's testimony also revealed that the wage of \$11.00 per hour was not negotiable. To this, the Appellant responded that it had offered the Worker a certain salary and that she had accepted it. The Worker had not wished to negotiate her wage and did not sign a contract.

[8] It was determined that the Appellant sometimes supplied the costume to the Workers, but that this only occurred when the worker was starting out and did not have a costume. Otherwise, the Appellant demanded that the workers provide their own costumes, all their equipment and everything necessary for their performances.

[9] Despite the contract signed with the Appellant, the Worker does not consider herself an independent worker. She indicated that she could not choose her replacement when she could not be present. The Appellant indicated that the workers were free to work elsewhere. This was confirmed by another worker, Stéphanie Bacon, who stated at the hearing that she worked for several businesses as a public entertainer and that she provided her own accessories. Moreover, in this field, workers are always looking for future jobs; this work has become a lifestyle.

[10] The Appellant challenged the assertion of the Worker that Richard Dufresne acted as supervisor and specified that he acted rather as a contact person to whom the workers could speak if they had any problems or difficulties.

[11] The Appellant also indicated that it provided no training to the workers. The only measures taken with regard to the workers was to indicate the place where they were to give their performance and explain to them the basis of their mandate, but the Appellant allowed them to entertain in their own way. The Appellant demanded a satisfactory result from the workers' performances.

[12] The issue is whether the Worker held insurable employment for the purposes of the *Employment Insurance Act* (the "Act"). The relevant provision is paragraph 5(1)(a) of the Act, which states the following:

Subject to subsection (2), insurable employment is:

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[Emphasis added.]

[13] The section cited above defines the term "insurable employment." It is employment under a personal service contract, i.e. under a work contract. However, the Act does not define what constitutes such a contract. In this case, there is a written contract. It is reproduced hereafter. The intentions of the parties are expressed in this contract.

[14] The personal service contract is a civil law concept described in the Civil Code. The relevant provisions of the Civil Code will determine the nature of this contract.

[15] In an article entitled "Contract of employment: Why *Wiebe Door Services Ltd.* Does not Apply in Quebec and What Should Replace It," published in the fourth quarter of 2005 by the Association de planification fiscale et financière (APFF) and the federal Department of Justice in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law*, Pierre Archambault J. of this Court describes, in respect of any period of employment after May 30, 2001, the procedure that the courts must

follow since the coming into force, on June 1, 2001, of section 8.1 of the *Interpretation Act*, R.S.C. (1985), c. 1-21, as amended, when they are confronted with cases like this one. Here is what is set out by Parliament in this section:

*Property and civil law*

**8.1** Both the common law and the civil law are equally authoritative and are recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

[Emphasis added.]

[16] It is appropriate to reproduce the relevant provisions of the Civil Code, which will be used to determine the existence of an employment contract in Quebec to distinguish it from a contract of enterprise:

Employment contract

**2085.** A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

**2086.** A contract of employment is for a fixed term or an indeterminate term.

...

Contract of enterprise or for services

**2098.** A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

**2099.** The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[Emphasis added.]

[17] The Civil Code provisions reproduced above establish three conditions essential to the existence of an employment contract:

(1) the worker's prestation in the form of work; (2) remuneration by the employer for this work; (3) a relationship of subordination. The significant distinction between a contract for service and a contract of employment is the existence of a relationship of subordination, meaning that the employer has a power of direction or control over the worker.

[18] Legal scholars have reflected on the concept of "power of direction or control" and, from the reverse perspective, a relationship of subordination. Here is what Robert P. Gagnon wrote in *Le droit du travail du Québec*, 5th ed. (Cowansville: Yvon Blais, 2003) at pages 66-67:

[TRANSLATION]

(c) *Subordination*

**90** - *A distinguishing factor* - The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 et seq. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.

...

[Emphasis added.]

[19] In order to explain the nature of its business, its product, its objectives and its relationship with the recruited workers, the Appellant filed Exhibit A-1, which is reproduced here in its entirety:

[TRANSLATION]

**GENERAL INFORMATION ON ANIMAGINE**



**Definition of the company (See also attached letter patents)**

**Creation of concepts**

Incorporated as a not-for-profit for profit business in 1993, Animagine has the mission of promoting recreative entertainment and related activities such as circus arts, recreation, theatre, holiday activities. Organize entertainment activities and promote excellence in the field. In essence, we design special events, thematic concepts (days or evenings), we create games, dramatic arts for children, parades, etc., which we sell to fulfill these contracts. We hire people from various fields for a fixed term.

**Internal team**

Animagine is a micro-business managed by a board of directors comprised of volunteers. Of the Board of Directors, only Nicole Côté (chair) is employed by Animagine, as she is also responsible for the business's book-keeping on a full-time basis. Animagine also employs Manon Hébert full-time as representative and idea manager and Mariève Bourget, part-time recruiter and representative. Christiane Côté is also employed part-time as a production assistant.

The internal team creates the concepts and responds to specific requests by submission, does the advertising, recruits new contributors and clients, drafts the contracts (clients and contributors), looks after the logistics of large events, makes sure the entertainment is properly carried out on the sites of the contracts and obtains adequate third-party liability insurance every year.

**Number of contractors**

All of the artists and contributors who perform for Animagine are fixed-term contract workers. Animagine's activities and contracts generate occasional work for roughly one hundred different artists and contributors annually (actors, musicians, entertainers, sound technicians, singers, public entertainers, etc.) in order to meet its commitments.

**All independent workers**

No artist or contributor is exclusive to Animagine. All of them work or can also work for other companies simultaneously.

**Duration of the assignments given to contributors**

Each contract offered is for a short duration (minimum 4 hours and maximum 9 hours per day (very rare) for one to 15 days (very rare)). No contract is automatically renewable; each year brings a certain number of various requests depending on the clients' needs or on their reactions to concepts suggested by Animagine. An artist can work 10 times in one year and not at all in the following year. Animagine does not offer any guarantee of work.

**Contracts**

In order to facilitate their comprehension of their condition of independent worker, Animagine prefers to draw up a contract for each worker. Apart from the

description, the date/duration and the place of the assignment offered, our contracts only consist in reminders of the releases pertaining to their condition of independent worker.

While being bound to follow instructions on the nature of the work to be done, the artist has the choice of the method to use; he or she is fully responsible for the quality of the work; he or she has been chosen for his or her skills and performs the work as he or she decides. No training is provided by Animagine.

### **Schedule of payment of talent fees**

In the field of entertainment, the contributors are often required to join a team. In these cases, schedules are devised based on each person's availability. They can be modified during the contract; we are always understanding of this and the schedule planning is always done in collaboration with the artists.

When a schedule is imposed, we may include in our contracts talent fees in the form of an hourly rate. However, this does not differ in any way from contracts providing for so-called "piecework" payments.

### **Clients**

Animagine's clientele consists of 70% shopping centres and public places, 20% corporations and 10% municipalities, schools and festivals. None of these purchasers of entertainment services guarantees contract renewal or long-term contracts; each year brings with it its lot of various small contracts (always short-term) from clients with fluctuating needs.

### **Equipment supplied and benefits for independent workers**

Each contributor provides his or her own equipment and vehicle (if necessary), can be called upon to attend the meeting with the client, is responsible for his or her product and its quality, collaborates in setting his or her schedules based on his or her other commitments and does his or her own administration (therefore agrees to report earnings to tax authorities at the end of the year).

To make sure this is clear, Animagine provides an artist's booking contract to each contributor.

However, when a theme is imposed by Animagine (or the client), we may supply certain accessories such as the costume so that the artist does not need to acquire equipment for an isolated event.

Also, we provide third-party liability insurance for \$3,000,000.00 to cover any incident that may occur at the contract locations; most artists cannot afford to purchase such insurance.

## **MATTER AT ISSUE**

### **Duties of Véronique Lusignan Gravel**

Ms. Lusignan Gravel, like all the other starting contractual entertainers came to meet us in autumn 2004, wishing to obtain work in this field. We found her apt to perform this type of work.

She was offered an assignment of 62 hours spaced over 15 days (which seldom occurs at Animagine).

Ms. Lusignan Gravel was chosen to perform at Santa's Kingdom at Place Rosemère. In performing her duties, she had to follow a work schedule (which she had accepted after being consulted). A schedule is inevitable in a team work setting. She had to entertain the people in line and entertain the children meeting Santa Claus. She did the work her way, based on her experience and her ability; she was totally free to choose how she would play her character and what interactions she would have with the children. Animagine provided her costume because a Christmas character was required and Ms. Lusignan Gravel did not have such a costume and was starting out in the trade. However, it was her responsibility to provide any complementary accessory necessary for the performance of her work. She was also responsible for maintaining the costume that was loaned to her.

Ms. Lusignan Gravel was free to refuse the so-called "contracting artist" contract for any reason. Had she not been interested in the contract, Animagine would have offered it to another qualified entertainer.

Ms. Lusignan Gravel never expressed a desire for employee status. She signed a contracting artist contract with full knowledge of the facts. She ended up interrupting her contract prior to completion of her assignment, working a total of 46.5 hours rather than 62 hours. She received a total fee of \$539.00 rather than \$682.00.

[20] The Appellant also filed a booking contract entered into with the Worker. This is Exhibit A-4, reproduced hereafter:

[TRANSLATION]

**BOOKING CONTRACT  
FOR CONTRACTING ARTIST**

**BETWEEN: ANIMAGINE INC.**  
7782 d'Outremont Avenue  
Montréal, Quebec H3N 2L9  
TEL.: (514) 278-6780 Fax.: (514) 495-3198  
EMAIL: animagine@sympatico.ca

**AND VÉRONIQUE LUSIGNAN GRAVEL**  
6195-2 Rouge-Gorge Street  
Laval, Quebec  
H7L 4X5  
Tel.: (450) 624-0107  
SIN: XXX-XXX-XXX

**ROLE:** Entertainer in wooden soldier costume #2

**DATE(S) AND SCHEDULE:** From November 20 to December 24, 2004  
(see attached schedule)  
**EVENT:** Holiday programming  
**PLACE:** Place Rosemère

**WITHDRAWAL:**

If for whatever reason you wish to terminate your contract before the end of the assignment that is given to you, you must notify us two weeks in advance so that we have reasonable time to replace you.

**DISMISSAL:**

The company Animagine may also relieve you of your assignment without notice if you go against the instructions given in the document "La parfaite accompagnatrice" ["The Perfect Companion"] of which you have a copy.

**THE COSTUME:**

All accessories you need to perform effectively (costumes, accessories, make up, etc.) are your responsibility. Your costume must always be clean. You must maintain your shirts and tights and make sure that nothing is ever wrinkled.

You must notify Animagine if your wooden soldier costume requires a cleaning. This must be done prior to a leave of 24 hours or 48 hours, so that we have time to clean it.

The parties agree that all clauses set out in this agreement or its schedules are integral parts of the agreement and agree to respect them.

**TALENT FEE AND TERMS OF PAYMENT:**

Total of fee: ~~62~~ hours X \$11.00/hour = \$682.00  
*49 x 11.00*

**PAYMENTS**

1st payment of November 20 to December 3, 2004	\$154.00 +27.50=181.50
2nd payment of December 4 to <u>December 10, 2004</u>	\$148.50
3rd payment of December 11 to <u>December 24, 2004</u>	<del>\$379.50</del> \$209.00

*Withdrawal on 12-18-2004*

*Paid 4841  
Paid 4867  
Paid 4933*

**LONG-TERM AGREEMENT FOR ALL 2004 CONTRACTS ASSIGNED TO  
INDEPENDENT WORKERS OR ENTERTAINMENT SERVICE  
PROVIDERS REPRESENTING THEMSELVES UNDER THE NAME OF A  
PRODUCTION COMPANY OR AS AN "AUTHORIZED**

**REPRESENTATIVE OF AN ARTISTIC (OR OTHER) GROUP  
INCLUDING SEVERAL CONTRIBUTORS**

**FORCE MAJEURE**

All signed contracts can be cancelled without prejudice or notice for any reason of force majeure such as death, serious illness, accident, destruction of premises (Animage and entertainment locations), strike, sale of the establishment (work places) or other uncontrollable reasons of the same nature.

Animage may terminate the contracts of an independent worker without any penalty in any case where the Worker is no longer apt to complete his or her assignment or for violation of any instruction in the document (schedule of the contract) pertaining to your employment.

**RELEASE OF ANIMAGINE**

**CIVIL LIABILITY**

Animage has a civil liability insurance policy for \$2,000,000 covering clients and their clientele, in case of incident in a place of work.

**For the following clause, the term independent worker refers to you** and also applies to any supplier of entertainment services represented under the name of a production, or other, company.

**The term mandataries designates any physical or moral person for whom the mentioned party is legally responsible.**

The independent worker and his or her mandataries cannot file any claim or formal demand against Animage, its mandataries or the owners of its place of work, in the case of injuries, death, loss of property (including vehicles) or material damage incurred by the independent worker or his or her mandataries bound under this contract or any action or omission under the terms hereof or stemming herefrom, and the independent worker hereby abandons any such claim or formal demand against Animage, its mandataries and owners of its places of work.

Animage declines all liability for cases of bodily injury, accidents, theft of personal property or any other incidents causing damages by or to the independent worker and his or her mandataries.

The independent worker hereby certifies that he/she has no criminal record.

The parties agree that all clauses set out in this agreement or its schedules are integral parts of the agreement and agree to respect them.

**The Animage corporation is not required to issue a Relevé 1 or a T4 slip at the end of the taxation year. It is the independent worker's responsibility to report his/her income.**

In witness whereof the parties have signed on this November 10, 2004

\_\_\_\_\_  
ANIMAGINE INC.

\_\_\_\_\_  
INDEPENDENT WORKER

[21] This contract was signed by the parties on November 10, 2004.

[22] A series of indicators developed by the case law allows the Court to determine whether or not a relationship of subordination exists between the parties.

[TRANSLATION]

The indicia of control include:

- mandatory presence at a workplace
- compliance with work schedule
- control of the employee's absences on vacations
- submission of activity reports
- control over quantity and quality of work
- imposition of the methods for performing the work
- power to sanction the employee's performance
- source deductions
- benefits
- employee status on income tax returns
- exclusivity of services for employer

[23] It must be specified, however, that the analysis must not stop because certain indicia support the conclusion that there is a relationship of subordination. The exercise used to determine the overall relationship between the parties must be pursued. In this case, the relationship of subordination could perhaps be established based on the following elements: mandatory presence at a place of work, compliance with the work schedule and control of the employee's absences. However, given the explanations provided by the Appellant, this conclusion is less convincing. The schedule, explained the Appellant, was designed to facilitate the work of an entire team and, in its opinion, could be modified. As for the place of work, it cannot be considered in the traditional way because the work must be performed where the clients are. This is not a fixed place. It changes constantly based on the client's needs. As for the other indicia, they mostly support the conclusion that the Worker was an independent worker.

[24] Because of the existence of a booking contract, I find it appropriate in this analysis to consider the words of the Federal Court of Appeal in *Le Livreur Plus Inc.*, 2004 FCA 68, in which Létourneau J.A. stated the following:

[16] I do not think there is any need to restate some of the legal rules which apply to the question of insurability of employment. A decision on that question involves a decision on the nature of the contractual relationship between the parties.

[17] What the parties stipulate as to the nature of their contractual relations is not necessarily conclusive, and the Court may arrive at a different conclusion based on the evidence before it: *D & J Driveway Inc. v. The Minister of National Revenue*, 2003 FCA 453. However, if there is no unambiguous evidence to the contrary, the Court should duly take the parties' stated intention into account: *Mayne Nickless Transport Inc. v. The Minister of National Revenue*, 97-1416-UI, February 26, 1999 (T.C.C.). Essentially, the question is as to the true nature of the relations between the parties. Thus, their sincerely expressed intention is still an important point to consider in determining the actual overall relationship the parties have had between themselves in a constantly changing working world: see *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (F.C.A.); *Attorney General of Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54.

[18] In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid.*

[25] The oral evidence clearly revealed that the appreciation of the Worker's work came from the clients, i.e. the children, spectators of the performance; it was therefore a control of the result.

[26] There is consistent case law according to which the clear intention expressed by the parties on the nature of their contractual agreement should be determining in the analysis.

[27] Due to this rule, the contract signed by the parties represents an irrefutable argument in favour of the Appellant and goes to show that the Appellant successfully proved the facts presented at the hearing met its burden of proof.

[28] The Federal Court of Appeal, in *Légaré v. the Minister of National Revenue*, [1999] F.C.J. No. 878, stated the following on the role and power of this Court in an analysis of the Minister's decision:

[4] The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[29] According to this analysis, the Court must conclude that the facts relied on by the Minister were not correctly assessed. The Minister did not give any importance to the intention expressed by the parties in the booking contract filed at the hearing. Therefore, the conclusion with which the Minister was "satisfied" no longer seems reasonable.

[30] Accordingly, the appeal is allowed and the decision of the Minister is vacated.

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

S.J. Savoie

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Savoie D.J.

Translation certified true  
on this 22nd day of February 2008.  
Gibson Boyd, Translator



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REASONS FOR JUDGMENT BY: The Honourable S.J. Savoie, Deputy Justice  
DATE OF JUDGMENT: December 14, 2006

APPEARANCES:

Agent for the Appellant: Manon Hébert

Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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