Docket: 2006-1784(EI)

BETWEEN:

SHARON LAPERRIÈRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CANADA POST CORPORATION,

Intervenor.

Appeal heard on February 5, 2007 at Victoria, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Pavanjit Mahil
Counsel for the Intervenor:	Rhonda Shirreff

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed.

Signed at Sidney, British Columbia, this 21st day of May 2007.

"D.W. Rowe"

Rowe D.J.

Docket: 2006-1786(CPP)

BETWEEN:

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Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent,

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Appeal heard on February 5, 2007 at Victoria, British Columbia

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For the Appellant:	The Appellant herself
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JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed.

Signed at Sidney, British Columbia, this 21st day of May 2007.

"D.W. Rowe"

Rowe D.J.

Citation: 2007TCC252
Date: 20070521
Dockets: 2006-1784(EI)
2006-1786(CPP)

BETWEEN:

SHARON LAPERRIÈRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CANADA POST CORPORATION,

Intervenor.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant appealed from decisions issued by the Minister of National Revenue (the "Minister") on March 30, 2006, pursuant to the *Employment Insurance Act* (the *"Act ")* and the *Canada Pension Plan (*the "*Plan "),* as follows:

> - that the Appellant was not engaged in either insurable or pensionable employment with Canada Post Corporation (Canada Post) during the period from March 12, 2004 to July 9, 2004 because she was not employed pursuant to a contract of service.
>
> - that the Appellant was not engaged in either insurable or pensionable employment with Canada Post for the period from June 1 to August 31, 2004, because she was not employed pursuant to a contract of service.
>
> - that the Appellant was not engaged in either insurable or pensionable employment with Daisy Te Hennepe (DTH) from June 1 to August 31, 2004.

all parties agreed both appeals with respect to each relevant period referred to in the relevant decision could be heard together.

[2] The Appellant (Laperrière) lives on Pender Island, British Columbia. She testified that on February 10, 2004, she approached DTH whom she knew to be a rural letter carrier and inquired whether Canada Post (the "payer") was hiring workers. DTH replied in the negative but stated she was looking for a helper to assist with her route. Laperrière stated she trained the next day with DTH to learn the duties of a Rural & Suburban Mail Carrier (RSMC) by riding with her in the delivery van and observing procedures at the Canada Post office at Driftwood Centre (Driftwood) where Sharon MacDonald - Postmaster – also provided some instruction. The Appellant stated there was a certain amount of work required at Driftwood prior to an RSMC embarking on the daily delivery route which included observing posted instructions about the proper method of folding mail. Laperrière stated she went to the Driftwood office on February 12, 2004 and received instructions from DTH concerning various aspects of delivering different items and with respect to matters such as collection of Goods and Services Tax (GST) and certain requirements of Canada Customs and Revenue Agency (CCRA). On February 13, Laperrière rode with DTH in her 4-wheel Dodge truck while she delivered mail to residents along the Magic Lake route. DTH did not have a Canada Post logo displayed on her vehicle and did not wear a uniform identifying her as an employee or agent of that corporation. Laperrière stated the preparation work at Driftwood occupied about 1 hour per day – on average – but could take twice as long on a Monday or during a busy period in the year. On February 20 and February 22, 2004, the Appellant assumed delivery duties on the Magic Lake Route. Prior to taking over the route for DTH, a form – Exhibit A-1 – titled RSMC Leave Voucher – was completed by either DTH or Sharon MacDonald and was signed by MacDonald, covering the period from February 20 to February 23, 2004. On July 9, 2004, another Leave Voucher – Exhibit A-2 - was signed by MacDonald approving the Appellant as a replacement for DTH on the route for that day. Laperrière testified she had not been aware of any printing on the reverse of those forms and each copy received was exactly as when filed as an exhibit in these proceedings. The Leave Voucher stated the daily rate paid to the Appellant was $124.08 which included the use of her vehicle – a 4-wheel drive Subaru station wagon – to make the deliveries on the route. Laperrière stated there had been no discussions whether payment would be issued by Canada Post or DTH. When taking over the route for DTH, the Appellant began her day at the Canada Post office and returned before 4:00 p.m. to hand in a report - titled Items Delivered Bill - an example of which was filed as Exhibit A-3. The distance travelled to complete the Magic Lake route was 75 kilometres. The Appellant knew the Pender Island Canada Post office sent the payroll by facsimile on the 13th of each month to facilitate payment to the RSMC by the end of the month. A copy of a pay statement for the period 2004/03/01 to 2004/03/31 was filed as Exhibit A-4. The total amount paid to

the Appellant was $248.16 comprised of 2 days pay - $222.86 - and a vehicle allowance of $25.30. Laperrière stated that between the dates of the two Leave Vouchers, i.e. February 20 and July 9 – she was hired by DTH to help her carry out duties on June 16, June 22, July 14, July 29, July 30, and August 24. These days were not covered by an official Leave Voucher which Laperrière understood – at that time – was used only when a replacement took over RSMC duties for an entire day rather than helping out for a few hours. However, she believed Postmaster MacDonald was aware she was providing her services to DTH since the Items Delivered Bill form had to be completed by the person who made the deliveries on a specific day even though no Leave Voucher had been issued. The Appellant stated she and DTH agreed her pay would be $14 per hour without any extra amount to cover vehicle expense. Sometimes, Laperrière helped DTH for one or two hours at the Driftwood office and other days she drove the route which required about 4 hours to complete. Laperrière stated that for work not sanctioned by a Leave Voucher, DTH paid her in cash, probably after receiving payment from Canada Post for that month. The Appellant stated she had never been informed that she was providing her services as an independent contractor and always considered herself as an employee – just like DTH – whom she believed held that status pursuant to a collective agreement between the union and Canada Post. Another pay statement – Exhibit A-5 – disclosed a cheque in the sum of $124.08 – including vehicle allowance of $12.65 – had been issued to the Appellant for working one day as an RSMC during the July 2004 pay period. Laperrière stated she had not obtained any additional vehicle insurance with respect to the mail delivery and had not had any discussions with DTH about using her vehicle to undertake deliveries of other publicity or advertising materials for other business entities. She did not have a business licence and was not otherwise employed. She did not have any logo or symbol on her vehicle to indicate she was delivering mail for Canada Post and did not have any identification with respect to her duties except she carried a card – without photograph – that had been issued to her by the Postmaster and had the telephone number of the Driftwood office printed thereon. The Appellant stated she worked on September 17, 2004 but that date was not included in the period covered by the decisions issued by the Minister and she did not raise that point in her Notice of Appeal. Laperrière continued to provide her services to Canada Post until May 10, 2006, working 6 days in 2005 and 3 days in 2006. She recalled that at some point during 2005, a Leave Voucher was required even if the duration of the replacement period was only one-half day. Laperrière stated that she applied for Unemployment Insurance (UI) benefits and included only those days covered by a Leave Voucher - because there were corresponding pay stubs - and not those worked for DTH at $14 per hour. A ruling was issued in which she was found to have been an employee and she received her benefits. However, she was advised subsequently that the Minister had decided she was not an employee of

either DTH or Canada Post during the two periods at issue in the within appeals. She obtained a copy of the Appeals Report – Exhibit A-6 for the period from March 12 to July 9, 2004 and a copy of the Appeals Report - Exhibit A-7 – for the period from June 1 to August 31, 2004. In her testimony, Laperrière asserted the position that while working for DTH at $14 per hour as an assistant, she was an employee of DTH and when serving as a replacement RSMC for DTH pursuant to a Leave Voucher, she was an employee of Canada Post. The Appellant referred to a bundle of handwritten sheets – Exhibit A-8 – with details thereon concerning the route, including instructions specific to certain addresses. When handling a route by driving her own vehicle, the Postmaster or her assistant – in the morning at the Driftwood office - handed Laperrière the key to open the mailboxes and she signed a receipt for the key which was returned at the end of the day.

[3] Laperrière was cross-examined by Ms. Pavanjit Mahil, counsel for the respondent. Laperrière stated she delivered mail on two routes on Pender Island, RR#1 and RR#2 and her duties were mainly the same except for geographical differences and that the Magic Lake route had more mail boxes. Between March 12 and July 9, 2004, she worked 3 days – subject to Leave Vouchers - for a total of 21 hours. Between June 1 and August 31, 2004, she worked for DTH - as a helper - for 28 hours and was paid directly by DTH. Only one day – July 9 - during that period was the subject of a Leave Voucher. Laperrière stated DTH - not the Postmaster - called to advise when her services were required and she accepted each time because she had an active UI claim and could not refuse work without a valid reason. The Appellant acknowledged that DTH could have called another person to assist with the work. She had not been interviewed for the position of replacement carrier and had not been remunerated by either DTH or Canada Post for hours worked in the course of training. Laperrière stated DTH determined the nature of duties to be performed each day her services were required. Route #2 was the subject of a guidebook - part of Exhibit A-8 – issued by Canada Post and the Appellant prepared her own copy and created the schedule in said exhibit. When delivering mail, she did not deviate from the established route and requested assistance from the Postmaster - whom she regarded as her supervisor – while sorting mail at the Driftwood office when DTH was not present. Sometimes, after a route was completed or early in the morning, the Appellant spoke – by telephone – with DTH. Laperrière identified the Questionnaire - Exhibit R-1 – as a form she had completed and signed - on March 16, 2005 - and returned to CCRA. She stated it had been stressful to fill out that form but agreed her answers therein were truthful to the best of her knowledge. She acknowledged her answers to Q. 10 - on p. 6 – explaining she did not have to report to the payor in any manner and that the question concerning supervision was N/A (not applicable) to her work situation. Laperrière stated the

hours of work – 8:30 a.m. to 4:30 p.m. – were constant even though the volume of work was heavier on some days. She arrived at the Driftwood office by 8:20 a.m. in time for the doors to be opened and had to return there by 4:00 p.m. to ensure the mail destined for the off-Island shipment could be packaged in time to be loaded on the next ferry. After 4:00 p.m., the Appellant returned supplies to DTH's desk, re-sorted certain items of mail and performed other routine office duties. She stated that on days when her deliveries were completed by 2:00 p.m., although she was free to leave, she remained at the office to read relevant Canada Post material. In responding to Q. 5(b) of the Questionnaire, Laperrière wrote that her daily hours of work were "9:30 til all mail delivered and collected." Although the situation never arose, Laperrière doubted she could have hired a replacement or a helper to perform her duties. No one ever suggested she could have sub-contracted another person to deliver the mail for her. Counsel pointed out the responses to Q. 16 where the Appellant marked the NO box (a) to affirm she was not required to provide her services personally and the YES box (b) to confirm that she could have "hired, supervised, dismissed helpers or find a replacement without the payor's consent". Laperrière stated she had not understood those questions at that time. With respect to tools and equipment, she used the Driftwood office for sorting mail and it was equipped with shelves. Canada Post provided stickers, report sheets, directories, plastic bins, mail bags, keys, and tools such as wrenches and dollies. The Appellant used her 1992 Subaru to deliver mail but did not supply any other tools or equipment. Although she did not know the value of her vehicle in 2004, she thought it was fairly low. She had received an ID badge, and sent a copy - Exhibit R-2 - by facsimile to the Appeals Officer. Printed thereon were the words "Temporary Mail Contractor" and "Entrepreneur Postal Temporaire." The Appellant stated she had not paid any attention to that card until requested to send a copy to CCRA. Her vehicle was not insured specifically for commercial use but the policy permitted limited business use. The Appellant or her husband purchased fuel and repairs for the Subaru and she agreed the sum of $12.65 was the maximum daily vehicle allowance paid by Canada Post. On days when the Appellant replaced DTH as an RSMC – pursuant to a Leave Voucher – she was paid exactly the same amount as DTH would have received. The Appellant's Social Insurance Number (SIN) appears on the Leave Voucher – Exhibit A-2 – in the space below the one reserved for insertion of the Replacement Contractor ID number. She stated she understood the Leave Voucher had to be completed in order to be paid for her work. She was aware income tax had not been deducted from cheques issued by Canada Post and even though she had been an employee throughout her working life, did not pay attention to that omission in the payment notifications for March 2004 – Exhibit R-3 – and July 2004 – Exhibit R-4. If she did not submit an invoice by the 13th of a month for work done to that date, she had to wait almost 6 weeks for payment. With respect to the issue of potential –

directly or indirectly - for profit or risk of loss – Q. 19 of Questionnaire – the Appellant wrote that a "helper would be responsible for any mail that went missing, was damaged or lost and vehicle expenses or if helper was injured." In her testimony, Laperrière retracted that answer by stating it was not correct. She agreed DTH was not compelled to use her services as a replacement carrier and that there had been no agreement with respect to any number of days to be worked or any commitment regarding a minimum amount of earnings. The Appellant reiterated her opinion that she had never been in business for herself when delivering the mail nor when helping DTH with other duties. In the course of her dealing with the Appeals Officer, she discovered she was excluded from the bargaining unit under the terms of a collective agreement dated September 20, 2003. When serving as a replacement carrier, she had never received a legible copy of the relevant Leave Voucher and had not been aware there were various terms and conditions printed on the reverse of that sheet. She stated she had not noticed the words "Replacement Contractor" at the bottom of the form. She did not receive a T4 slip from DTH nor from Canada Post, although she received a T5 slip - perhaps E designation – which she used to report that income in her 2004 tax return. When completing her UI report cards in 2004, she included the cash earned from working for DTH and included that total amount under the category of "other income" in her tax return. Between 1991 and 2002, the Appellant worked for Federal Express in the customer complaints office in Victoria, British Columbia. Laperrière identified her Request for Record of Employment (ROE) – Exhibit R-5 – dated August 17, 2004. Under Part A of page 1 of said form, she checked off the box indicating she had not requested the ROE and in the space provided below wrote, "I will request one. However, I feel one is not required as no deductions are made; uninsurable income." The Appellant stated she considered the status of her working relationship to have been complex. She requested an ROE from Postmaster MacDonald and then spoke to an official in the RSMC payroll department of Canada Post who advised her none would be issued in respect of her services as a replacement carrier.

[4] Laperrière was cross-examined by Ms Rhonda Shireff, counsel for the Intervenor. Laperrière agreed she was not a member of the union and had been recruited by DTH as a replacement carrier - for Route #2 - and had not applied to Canada Post for employment. She had not completed any forms with respect to source deductions from payment for her services. She stated her understanding that as a replacement carrier, she was ineligible for employment by Canada Post as an inside worker. She acknowledged that Canada Post had not supplied her with any manuals or training materials and that any instruction at the Driftwood office was carried out by DTH. During the relevant periods in the within appeals, the Appellant worked as a helper for Rod MacLean – another Pender Island RSMC – and was paid

by him. Laperrière stated DTH was responsible for keeping her informed of current procedures if she had not worked as a replacement or helper for an extended period. The Appellant acknowledged she had not paid any attention to the wording on the Leave Voucher document and explained that oversight by saying, “I just wanted to work.” She stated she was not aware of the legal effect of the term “Replacement Contractor” except she understood she was not entitled to any medical or other benefits. She had not received any direction from Canada Post regarding the type of vehicle to be used for mail delivery and could have used the one owned by DTH or borrowed one. She understood Canada Post would not have supplied her with a vehicle to service a route. Even though Route #2 is the longest, there was no extra payment for vehicle use nor was there additional compensation when the price of fuel increased. The Appellant agreed she could have arrived at Driftwood after 8:30 a.m. – rather than before – to sort mail for Route #2 according to the order of the drop boxes that serviced hundreds of customers. There are group mail boxes at various points where as many as 60 individuals receive their mail. It took 7 hours – on average – to complete the route and although the Appellant could have taken breaks at her own discretion, she chose not to do so as it would have required leaving mail unattended in the vehicle. She did not have a cell telephone and there was no communication device in her vehicle. The Appellant conceded she had been paid a flat rate to perform a specific task when acting as a replacement carrier and that during her work she was not supervised nor did she have any contact with anyone at Canada Post. When carrying out deliveries on the route, she performed her duties alone and in accordance with instructions provided by DTH during the initial training sessions.

[5] Gerard Mathieu is retired but worked 22 years for Canada Post until March 2006. As Human Resources Director, he was in charge of various policies and programs including payroll and was responsible for implementation of an 8-year term collective agreement between Canada Post and Canadian Union of Postal Workers (CUPW) which – *inter alia* - converted the status of 6,000 RSMCs from independent contractor to employee as of January 1, 2004. Canada Post wanted to secure an agreement whereby letter carriers and clerks were included as part of the bargaining process and to achieve that end agreed RSMCs would become employees and – therefore - members of CUPW. Mathieu developed the forms necessary to deal with replacement carriers and helpers and was assisted in matters of administration by two colleagues on a committee and between 15 and 20 employees. Prior to the coming into force of the collective agreement, the rural and suburban carriers were known as Rural Route Contractors who performed deliveries and related services on a specific route pursuant to 5-year contracts awarded in accordance with a competitive bidding process. Upon becoming the successful bidder on a route, the contractor was paid for

his or her annual services by 12 equal monthly instalments. Mathieu stated that under that regime, the contracts were silent with respect to replacement carriers because Canada Post was interested only in the proper delivery of mail on a route as the end result and played no part whatsoever in finding any replacement worker. The securing of replacements was the sole responsibility of the contractor who paid that individual – directly – at an agreed rate. Prior to January 1, 2004, Canada Post conducted security checks on the successful bidders whereas the current policy requires that any individual wanting to work as a replacement RSMC must be qualified in accordance with Canada Post policy. The Canada Post estimates of the time needed to complete routes vary from 2 to 9 hours since a route is a grouping of customer addresses within a geographical area. Prior to the collective agreement, Canada Post had to request a contractor not to hire a certain replacement carrier if the work done by that person was unsatisfactory. After January 1, 2004, usual source deductions were taken from the pay cheques issued to RSMCs and they were eligible for a pension plan, company benefits, employee programs, vacation pay, and could participate in all matters associated with the status of employee. The new collective agreement contained clauses with respect to discipline for RSMCs but no files were maintained by Canada Post regarding replacement carriers. According to clause 13.03 in the extract from said agreement – Exhibit I-1, tab 1 – if a helper is required to assist an RSMC, that person must sign a contract for services with Canada Post and the corporation will pay the helper the daily rate determined by the employee/RSMC and such amount will be deducted from the wages otherwise paid. According to clause 14.01, the RSMC is required to "take the necessary measures to have another qualified person cover his or her route for the entire duration of his or her absence" and that in the absence of special circumstances, "such person shall meet security requirements." Clause 14.02 of the agreement states, "[T]he person who covers such absence shall not be considered an employee of the Corporation while performing such work." This provision also stated that the daily rate – including vehicle expenses – paid to the replacement was the same as the one applicable to the RSMC being replaced. Mathieu stated that if an RSMC hires a helper – to assist rather than as a replacement carrier for the route – that is a matter between them and Canada Post has no role in their arrangement. Mathieu was referred to a photocopy of a form entitled RSMC Leave Voucher - Tab 2 in Exhibit I-1 – and to a page thereof labelled "Back side of Voucher." The procedure requires the RSMC to complete Part 1 of the form and to submit it to the Post Manager (Postmaster) who forwards it to a pay centre operated by Ceridian, a private company providing payroll services to Canada Post. The bottom portion of the Leave Voucher is completed by either the RSMC or the replacement worker who must sign thereon where indicated. Each year, Canada Post remits T4s to CRA in respect of employee RSMCs and a T1204 form pertaining to amounts paid to individuals described as

Replacement Contractors who must include their SIN on the Leave Voucher in order to be paid. Mathieu estimated Canada Post – through Ceridian – issued between 2,000 and 3,000 payments each month to replacement carriers. The Leave Vouchers could be submitted in advance of the work being performed provided the date thereof was certain and sometimes circumstances were such that this document could not be completed until after the work had been done. In 2004, the Leave Voucher comprised 3 copies and Mathieu acknowledged the print used was small and difficult to read and numerous complaints had been received from replacement carriers concerning problems with legibility. As a result, the forms were reprinted in 2005. According to paragraph 3 of the Leave Voucher – Exhibit I-1 – the contractor "agrees to personally furnish all labour, materials, tools and equipment necessary for the performance of the service." The vehicle used by the replacement carrier must be adequate for the purpose of completing the route in one trip and a flat daily rate is paid for such use on that specific route. Pursuant to paragraphs 5 and 6, respectively, of the Leave Voucher, the contractor is liable for loss or damage to any property of Canada Post, and the liability of Canada Post to the contractor is limited exclusively to the payment of the contractor in accordance with the payment provisions set forth therein. According to paragraph 8 thereof, the contractor has to provide adequate insurance to comply with the conditions of the contract. Mathieu stated that if a problem arose with respect to the performance of a replacement carrier, Canada Post would request the RSMC not to obtain the services of that person again.

[6] Gerard Mathieu was cross-examined by the Appellant, Sharon Laperrière. Mathieu conceded there was no warning on the face of the 2004 Leave Voucher that would indicate there were contents printed on the reverse. He agreed there was no difference between the duties performed by an RSMC and a replacement carrier nor in the rate of daily pay and the vehicle allowance. He stated this method of payment was chosen deliberately by Canada Post to prevent RSMCs from obtaining work from Canada Post and then sub-contracting it out at a lower rate. The replacement worker must be able to substitute for the RSMC in all relevant respects during the period of absence.

[7] Gerard Mathieu was cross-examined by Pavanjit Mahil, counsel for the respondent. Mathieu stated that pursuant to the collective agreement of January 1, 2004, an RSMC is subject to disciplinary measures and has the right to file a grievance and to access arbitration. Mathieu stated that a special form was developed in 2005 to deal with people who assisted RSMCs to carry out duties – as helpers rather than replacements – and it is no longer permissible for an RSMC to hire a helper and pay them directly without any involvement by Canada Post.

Mathieu stated the method of delivery on the routes is suggested by Canada Post but a carrier may deviate therefrom as there is no supervision.

[8] The position of the Appellant is that she is not bound by the collective agreement between Canada Post and CUPW. She conceded the 28 hours of work performed – as a helper – for DTH at $14 per hour does not involve Canada Post since DTH paid her directly. However, she submits she is entitled to recognition as an employee for the 21 hours she worked for Canada Post in accordance with the terms of the Leave Vouchers permitting her to replace DTC as a carrier. The Appellant contends she was subject to some control and had not been given any opportunity to consider her status prior to providing her services to Canada Post and should not be bound by the terms of a document that was nearly impossible to read.

[9] Counsel for the respondent submitted it was difficult to ascertain the nature of the working relationship between the Appellant and DTH since DTH had not been called as a witness. Counsel pointed out the Appellant had worked only a few days in the course of several months and the evidence did not demonstrate there was control over the manner in which the work was done. With respect to the Appellant's work as a replacement carrier, counsel referred to the Leave Voucher form which indicates clearly that the individual performing the service is regarded as a Replacement Contractor. The payment notifications issued by Canada Post make it clear no source deductions were taken and the Appellant provided answers in her Questionnaire that indicate she considered her services were provided in a context that rendered them uninsurable. Counsel submitted it was apparent the Appellant provided the main tool for the job – the Subaru vehicle – and was compensated for its use by a flat, daily rate. Counsel conceded that when performing duties as a replacement carrier pursuant to a Leave Voucher, the Appellant could not hire a substitute and had to service the route personally. Taking all matters into consideration, counsel submitted the Appellant had failed to prove that she was an employee of either DTH or Canada Post during the relevant periods.

[10] Counsel for the intervenor submitted all relevant factors point to the status of independent contractor. The Appellant was subject to almost no control, could decline work, was not subject to any rules and could not be disciplined. She was under no obligation to work exclusively for Canada Post and could have delivered publicity and advertising material for competitors. When being trained by DTH for 3 days, the Appellant was not paid for her time and voluntarily contacted DTH now and then to keep current with delivery procedures. Counsel submitted the intention of the Appellant can be ascertained from her conduct in the course of her working relationship and that pursuant to relevant federal legislation pertaining to Canada

Post, a mail contractor is deemed not to be a dependent contractor or an employee within the meaning of the *Public Service Superannuation Act.*

[11] The relevant provision of the *Act* is:

> 5.(1) 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;

[12] The relevant provision of the *Plan* is:

> 6.1 Pensionable employment is
>
> (a) employment in Canada that is not excepted employment;

[13] In the within appeals, there is no agreement by the parties regarding their intention at the outset to characterize the status of the service provider within the working relationship. In several recent cases including *Wolf v. Canada*, [2002] DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue*, [2006] DTC 6323 (*RWB*), *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.)*, [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was no issue in this regard due to the clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee.

[14] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 – Major J. at paragraphs 45 to 48, inclusive, of his judgment stated:

Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" [1987], 37 U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in London Drugs where he stated at p. 339 that "vicarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, ... ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416) Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, ...(Vicarious Liability in the Law of Torts. London: Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:

> It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for

> investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[15] I will examine the facts in the within appeals in relation to the indicia set forth in the judgment of Major J. in *Sagaz.*

Level of control:

[16] First, I will deal with those 3 days on which the Appellant delivered mail on the route subject to the terms and conditions of the two Leave Vouchers signed by Sharon MacDonald, Postmaster. Any training required to serve as a replacement carrier for DTH – the regular RSMC on the route – was undertaken by DTH, some of which occurred at the Canada Post office in the context of daily operations there. Any involvement by the Postmaster or her assistant was peripheral and the actual instruction concerning methods of sorting and delivery of mail along the route was primarily imparted by DTH. The Appellant worked as a replacement for DTH on February 20, February 23 and July 9, 2004. During the course of these days, she was free to perform her work in whatever manner she chose provided she could complete the route and return to the Driftwood office in time to complete the necessary paperwork - by 4:00 p.m. - so the items collected could be shipped via ferry that afternoon or early evening. Laperrière chose to follow the route designated by Canada Post and as adopted by DTH. The Appellant was not supervised while completing the route. She was under no obligation to accept any work from DTH as a replacement carrier but if she did, it was necessary to provide certain information – including her SIN – on the prescribed form and to sign it. She was not subject to any discipline by Canada Post with respect to any legitimate complaints arising from her performance as a replacement carrier, although it is probable DTH would have been requested to refrain from using her services in the future.

[17] The Appellant provided her services to DTH both as a helper sorting the mail and along the route and assumed delivery duties on days that were not subject to any Leave Voucher. She worked as an assistant for a total of 28 hours, 11 in June, 14 in July and 3 in August. The Appellant’s evidence was that sometimes she was paid $14 an hour by DTH to sort mail at the Driftwood office and other times took over the route and completed the necessary paperwork at Driftwood at the end of the day. When delivering on the route, she used her own vehicle and was not subject to any

supervision by DTH. She had been trained in sorting techniques by DTH early in February so it is reasonable to infer she did not require any further instruction or supervision when performing those duties later in the year.

[18] When responding to the Questionnaire regarding requirements to report and to provide details of supervision, the Appellant stated she did not need to report to anyone and that the issue of supervision was not applicable to her work situation.

Provision of equipment and/or helpers

[19] The Appeals Officer determined the Appellant could have hired someone to perform the work, probably because that is the answer Laperrière provided when responding to the Questionnaire even though she had not done so. The evidence does not support that conclusion and it was conceded by counsel for the respondent that the work performed by the Appellant – whether pursuant to a Leave Voucher or when paid directly by DTH for certain services – had to be performed personally.

[20] It is apparent the major tool or equipment required was the vehicle owned by the Appellant. Even when working for DTH at $14 per hour, she used her own vehicle and was not paid any expenses by DTH and when delivering on the route pursuant to a Leave Voucher, was paid a flat daily rate to cover her vehicle costs. Any other items provided by Canada Post were insignificant and were in the office for use by all workers involved in the sorting and other routine daily functions.

Degree of financial risk and responsibility for investment and management

[21] The degree of financial risk arose in respect of the potential for vehicle costs to outstrip the fixed, daily compensation paid by Canada Post to the Appellant as a replacement carrier. The Appellant's vehicle was an older 4-wheel drive model and not particularly fuel-efficient. It is reasonable to conclude it required some repairs from time to time in addition to regular maintenance and these costs were borne by the Appellant. When providing services directly for DTH for 6 days between June 16 and August 24, 2004, the Appellant worked a total of 28 hours. If the task was sorting at Driftwood office - and it occupied only one or two hours - the pay earned was not substantial in relation to the actual expense involved in operating the vehicle nor in light of the potential for an accident or to incur damage while delivering on the route – at $14 per hour - without any additional compensation for using her own vehicle. There was also the potential of being held liable for loss or damage to mail pursuant to the terms of the Leave Voucher.

Opportunity for profit in the performance of tasks

[22] When delivering on the route pursuant to the terms and conditions of a Leave Voucher, the Appellant was paid a flat daily rate for her services and received a fixed allowance for vehicle use. During those periods when she worked as an assistant for DTH, she was paid $14 per hour and could earn more money only if she worked more hours. She was not entitled to sub-contract her services and the entire thrust of the replacement carrier system utilized by Canada Post was to ensure that a replacement received exactly the same compensation and expense allowance as the RSMC in order to eliminate the opportunity for profit by any RSMC who might consider hiring someone to deliver the mail at a lower price and pocket the difference.

[23] In the case of *Direct Care In-Home Health Services Inc. v. Canada (Minister of National Revenue)*, [2005] T.C.J. No. 164, Hershfield J. had to determine the status of a care worker who was part of a pool of nurses upon which the payor drew in order to fulfil its contract with various agencies to provide care for certain people. With respect to the important indicia of control, at paragraphs 11 and 12 of his judgment, Hershfield J. stated:

> Control
>
> **11** Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship.[3] However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.[4] Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.[5]
>
> **12** In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. She could leave a client and still be engaged with another more to her liking. She was free to do other work as and when she pleased. Moreover, although nursing care tasks were offered to her, there was no promise of that and she was not supervised in her performance of those tasks. Each task offered was a results oriented task from the Appellant's perspective. The fact that the Appellant could offer such tasks from time to time and to some extent monitor performance does not militate toward a finding of an

> employee-employer relationship. As in D & J Driveway, where there was not a sufficient relationship of subordination between the company and drivers to warrant a conclusion that a contract of employment existed, there is not a sufficient relationship of subordination in the case at bar to warrant a conclusion that the relationship of the parties is that of employee-employer. In D & J Driveway specific delivery tasks were available to drivers who could agree or refuse to make deliveries when called upon. When drivers agreed to make a delivery no control was exercised over the way in which they carried out their duty. Similarly in Wolf, Justice Desjardins noted that a link of subordination had not been created where the worker, a free-lance mechanical engineer hired on a one-year renewable contract, was assigned tasks over which the worker was the "master".[6] As in these cases, I do not see the Worker, in the case at bar, as being in a subordinate relationship with the Appellant as is required to find a contract of service. That is, the control test points toward a finding of an independent contractor relationship.

[24] Concerning the intention of the parties, at paragraphs 25 and 26, Hershfield J. commented:

> **25** Although the parties' intentions should not be regarded as determinative, they can be helpful in a close case.[11] That is, if one were to conclude on a review of the evidence as a whole that this is a close case where the relevant factors point in both directions with equal force and that the mutual understandings of the parties must therefore be regarded and considered, how would this case be resolved?
>
> **26** I have no difficulty finding that the Appellant intended to hire the Worker as an independent contractor. This much is clear from the testimony of Mr. Blais and from the terms of the Agreement. As to the intention of the Worker, I begin by noting that it is not as easily discernible as that of the Appellant. The Worker's testimony seemed to indicate that the matter did not concern her. She seemed indifferent to the classification. As much as it might be said that she never really thought of herself as an independent contractor, it cannot be overlooked that she never took on the role performed by her thinking that she was an employee. To the contrary, she took on the role knowingly agreeing to the relationship intended by the Appellant. Moreover, I am compelled to find that she must have had at least some minimal intention to operate as an independent contractor in light of the fact that she agreed to an arrangement whereby she was not entitled to any employee benefits whatsoever and without the apparent protection of labour laws in terms of such benefits or job security. At the hearing she evidenced no concern as to seeking relief from this state of affairs knowing full well that it was, and is, the arrangement she willingly agreed to. Her intention was and is to carry on her undertaking as required under the Agreement.

[25] In *Thomson Canada Ltd. (c.o.b. Winnipeg Free Press) v. Canada (Minister of National Revenue – M.N.R.)*, [2001] T.C.J. No. 374, the issue before Judge Porter

was whether a carrier delivering newspapers and inserts was an employee or an independent contractor. In the course of deciding the worker was not an employee, Judge Porter considered the relevant indicia and with respect to the matter of control – at paragraph 89 – stated:

> **89** Over and above this, WFP exercised no control. The evidence did not disclose that WFP controlled the carriers by giving them any orders or instructions. On the contrary, the carriers were complete masters of the way in which (how) they provided their services. The sole requirement was that they had to be done before 6:00 a.m. and the papers had to be delivered in good condition. They were not required to wear uniforms, nor were markings required on their vehicles. The order of delivery was not specified. How they went about their respective routes was entirely up to the carriers. They were not restricted from taking competitor's papers with them at the same time. They did not have to report in at any time after collecting the papers, and in particular, when they finished their deliveries. No one imposed any control over the carriers once they left the depot with the papers or exercised any supervision over the provision of their services. They set their own schedules.

[26] Concerning the matter of tools, Judge Porter – at paragraph 95 commented:

> **95** Thus, apart from the motor vehicle, there was little provision of tools. Exclude the motor vehicle and this aspect of the test is really quite ambivalent. Add in the motor vehicle, and it points more to an independent contractor situation. Nonetheless, it is far from unknown for employees engaged under contracts of service to have to use their own vehicles in the course of their employment. In this case, however, it is not a question of some use of the vehicle. The use of the vehicle was fundamental to the daily services being provided by the carriers. The major investment in equipment being used to provide these services came from the carriers, and this aspect of the test on balance points to a contract for services, rather than a contract of service.

[27] It is difficult to reconcile the Appellant's lack of appreciation of her probable status during the within proceedings with her sharper, focused perceptions when responding to the Questionnaire regarding matters of control and supervision, the ability to hire other workers and responsibility for damage or loss incurred in the performance of her duties. Even though the precise wording on the reverse of the Leave Voucher forms may have escaped her attention, the words "Replacement Contractor" in clear letters on the bottom of those forms should have alerted the Appellant to the fact she was not an employee – in the usual sense - of Canada Post. She was aware that she only worked when DTH called her and that payment for her services would be made by Canada Post only for those days covered by a Leave Voucher. When working directly for DTH – at $14 per hour – the Appellant was paid

in cash and knew no source deductions were taken and that there was no guarantee of any minimum amount of work in any given period. She accepted the work when offered because of the need to abide by the rules governing UI benefits which she was receiving at that time.

[28] After the Minister decided the Appellant was neither an insurable nor a pensionable employee of either Canada Post or DTH, Laperrière discovered she needed 10 more insurable hours to qualify for UI benefits. This situation can be a powerful motivator when one is called upon later to relate his or her understanding of the original terms of engagement in any working relationship. The temptation – both consciously and sub-consciously – to engage in strategic revisionism is powerful and often difficult to resist. I find the Appellant was not as naïve and bewildered as to the nuts and bolts of her short-term – and sporadic – work arrangements with either Canada Post or DTH as she asserted in the course of her testimony. She had been an employee of an international courier company for many years and it would have been obvious to her that her pay notification statements issued by Canada Post had not treated her as an employee, probably because she had not performed her services as an employee. As for the work done for DTH, I cannot conclude on the evidence that she was performing her services in any context except that of an independent contractor. The Appellant had worked as a replacement carrier for Rob MacLean - the other RSMC on Pender Island - during the relevant period of these appeals and had done so without any involvement of Canada Post and had been paid by him directly. Obviously, she was holding herself out as an individual who could be called upon to perform the specific service of mail delivery along a route – and to supply the necessary vehicle - for a limited period in return for payment at a negotiated hourly or daily rate. The evidence considered as a whole supports the view that the characterization by the Minister of the Appellant as an independent contractor in respect of her services both as a helper and as a replacement carrier was correct.

[29] There is another matter to be considered and that is the effect of the provisions of Section 13 of Part 1 of the *Canada Post Corporation Act* that reads:

> *Presumption*
>
> 13. (1) Except as provided in subsections (2) and (4), every person employed or engaged pursuant to section 12 is deemed not to be employed in the federal public administration.
>
> (2) [Repealed, 1999, c. 34, s. 227]
>
> *Idem*

> (3) The *Public Service Superannuation Act* does not apply to any director of the Corporation, other than the Chairman, President and any director selected from among persons employed in the federal public administration, unless, in the case of any one of them, the Governor in Council otherwise directs.
>
> *Aeronautics Act*
>
> (4) For the purposes of any regulation made pursuant to section 9 of the *Aeronautics Act*, the Chairman, President, officers and employees of the Corporation shall be deemed to be employed in the federal public administration.
>
> *Canada Labour Code*
>
> (5) Notwithstanding any provision of Part I of the *Canada Labour Code*, for the purposes of the application of that Part to the Corporation and to officers and employees of the Corporation, a mail contractor is deemed not to be a dependent contractor or an employee within the meaning of those terms in subsection 3(1) of that Act.

[30] The Federal Court of Appeal in *Canada Post Corp. v. Assn. of Rural Route Mail Couriers* [1989] 1 F.C. 176 considered an application to set aside a decision of the Canada Labour Relations Board that rural route mail couriers were employees within the meaning of section 107 of the Canada Labour Code. Hugessen J.A. and Desjardins J.A. decided the decision should be set aside while Marceau J.A. would have referred the matter back to the Board. At paragraph 6 of his reasons, Hugessen J.A. stated:

> **6** The subjects of the decision are rural route mail couriers. These are the persons who can be seen almost daily in most inhabited rural areas of the country. They drive their own cars along a designated mail route and deliver and pick up mail from private roadside mailboxes.

[31] The provision considered by the Court were substantially the same as the one quoted above and was referred to in paragraphs 12 and 13 of the reasons of Hugessen J.A., as follows:

> **12** The relevant provision is subsection 13(6):
>
> *13. ...*
>
> (6) Notwithstanding any provision therein, for the purposes of the application of Part V of *the Canada Labour Code* to the Corporation and to officers and employees of the Corporation, a mail contractor is deemed not to be a dependent

contractor or an employee within the meaning of those terms in subsection 107(1) of that Act.

13 The following provisions from the definition section, section 2, are also relevant:

2. ...

"mail contractor" means a person who has entered into a contract with the Corporation for the transmission of mail, which contract has not expired or been terminated;

...

"transmit" means to send or convey from one place to an other place by any physical, electronic, optical or other means;

[32] At paragraphs 35 to 38, Hugessen J.A. continued:

35 One final matter calls for comment. The Board had before it an extract from the proceedings of the Parliamentary Committee which studied the *Canada Post Corporation Act* prior to it becoming law. The Minister responsible for the bill is reported as explaining the purpose of subsection 13(6) in the following terms:

> There are a number of reasons. One of the big ones obviously is that the override of the Canada Labour Code must continue in this proposed Canada Post Corporation Act, because without this override we believe the tendering system that exists presently would be destroyed. The present land mail service contracts that we have are valued at about $90 million. If we were to carry this to the extreme -- and I do not want to exaggerate the figure -- the possibility of increased expenditures could be doubled or even tripled.
>
> Thirdly (sic), the rural mail contractors represent almost 69 per cent of all land mail service contracts. Approximately 60 per cent of these work fewer than four hours per day, therefore, if we were to have these people pressing for unions the next step would be for the union to press for equalization of work and [page195] full-time employment with, obviously, the triple effect in terms of escalation of costs. These are just a few of the reasons why I think it would be risky at this time to change this clause. (at pages 41:53 and 41:54).

36 The Board refused to consider this material, citing *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

37 In view of the Board's broad discretionary powers regarding the sources of information it may choose to rely on, I find it impossible to say that the Board erred in not considering this material. I do, however, find its attitude curious in

> the light of other published decisions in which the Board has relied heavily on just this sort of material as an aid to the interpretation of the *Canada Labour Code*.
>
> **38** For my part, while I do not consider the Minister's statement to be conclusive nor even very weighty, I do think it is of some help as providing a part of the background to the enactment of subsection 13(6). I also find helpful the provisions of the former *Post Office Act* dealing with mail contractors (subsection 2(1), "postal employees", and sections 22 to 35 inclusive). All this material serves to throw light on the situation as it existed prior to the passing of the *Canada Post Corporation Act*. That situation, as is common ground here, was that rural mail couriers were considered to be mail contractors and not postal employees. I have already indicated that I think the provisions of the *Canada Post Corporation Act* are clear and are to the same effect. That statute, far from altering the position of the rural mail couriers, continued it unchanged.

[33] With respect to the within appeals, the status of DTH as an RSMC in the context of her working relationship with Canada Post is not an issue. According to her union – CUPW – and Canada Post, the collective agreement – effective January 1, 2004 - considers her an employee of Canada Post. It seems a bit odd that while DTH is now regarded as an employee, any person replacing her from time to time is not, even when paid exactly the same amount per day for handling the route and for a vehicle allowance. The rationale of the Minister responsible for the bill - as expressed by Hugessen J. at paragraph 35 of his reasons – may have changed over the course of 16 years but it seems strange that a provision of an Act of Parliament can be effectively overruled by means of a few clauses in a collective agreement. One may admire and even identify with the nobility of the cause to keep the mail moving and to secure labour peace with the postal workers' union which historically has been a crafty, unified and obdurate opponent during periods of labour strife.

[34] I do not have to decide this issue and there may be some amending provisions somewhere that otherwise enable this transformation of approximately 6,000 RSMCs from independent contractors – pursuant to statute – to employees according to that new collective agreement.

[35] On the evidence before me, if the issue had involved an assertion by DTH that she was truly an independent contractor – and not an employee - despite the wording of the collective agreement applicable to her as a member of CUPW, that would have been interesting. However, the real issue is whether Laperrière was employed by Canada Post and/or by DTH pursuant to a contract of service and was – therefore – engaged in both insurable and pensionable employment in each case during the relevant periods stated in the decisions issued by the Minister.

[36] Further to my earlier analysis and findings based on the usual tests – taken as a whole in accord with relevant jurisprudence – I also conclude that the Appellant was not an employee of Canada Post because she was deemed not to be a dependent contractor or an employee pursuant to the wording of section 13(5) of the *Canada Post Corporation Act.* Laperrière was not a member of CUPW nor otherwise a party to the collective agreement with Canada Post which – at least – purported to accord her the status of employee. Instead of having the benefit of that potentially buoyant device, she must drift alone on a complex, bobbing sea of jurisprudence - replete with ebbs and flows – as it pertains to characterizing the status of individuals in working relationships in the context of a modern workplace.

[37] I am aware of a decision by Justice O'Connor in the case of *Rebecca Anne Skipsey v. Minister of National Revenue,* Dockets 2006-1802(EI) and 2006-1803(CPP) delivered from the Bench at Nanaimo on November 28, 2006. The reasons are very brief – slightly more than one page - and I am unable to discern the facts in those appeals. In finding the Appellant replacement mail carrier to have been an employee of Canada Post, Justice O'Connor commented that he was "greatly influenced by the absolute credibility, sincerity of the Appellants and the witnesses she brought." He also added "this is perhaps a unique case, not meant to be a judgment by every substitute employee of Canada Post."

[38] In the within appeals, an examination of all the evidence and analysis of relevant jurisprudence leads me to conclude that the decisions issued by the Minister were correct.

[39] Both appeals are hereby dismissed.

Signed at Sidney, British Columbia, this 21st day of May 2007.

"D.W. Rowe "

Rowe D.J.

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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Pavanjit Mahil
Counsel for the Intervenor:	Rhonda Shirreff

COUNSEL OF RECORD:

For the Appellant:

Name :	
Firm :	

For the Respondent :	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada

For the Intervenor:

Name :	Rhonda Shirreff
Firm :	Heenan Blaikie