Federal Court of Appeal | Cour d'appel fédérale

Date: 20130927

Docket: A-514-12

Citation: 2013 FCA 227

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RODNEY TORRANCE

Respondent

Heard at Vancouver, British Columbia, on September 19, 2013.

Judgment delivered at Ottawa, Ontario, on September 27, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This case illustrates the adage that hard cases make bad law.

[2] This is a hard case. The appellant, Mr. Torrance, a self-employed bicycle courier, fell and suffered a spinal injury that left him a quadriplegic. The time and place of his fall are such that it does not appear that he has any recourse in tort or under worker's compensation legislation to lessen

the enormous impact of his loss. He applied for Canada Pension Plan (CPP or the Plan) disability benefits in 1998 but, because of two errors in the address to which the denial letter was mailed, he did not become aware that his application had been denied until 2007.

[3] Mr. Torrance applied to the Minister of Human Resources and Skills Development Canada (the Minister) to be placed in the position in which he would have been had certain administrative errors not been made by CPP officials. That request was refused. His application for judicial review of that decision was allowed by the Federal Court in a decision reported as *Torrance v. Canada (Attorney General)*, 2012 FC 1269, [2012] F.C.J. No. 1371 (Reasons). Unfortunately for Mr. Torrance, I am of the view that the Federal Court's decision is not sound in law. As a result, the appeal should be allowed, the decision of the Federal Court set aside, and the Minister's original decision confirmed.

THE LEGISLATION

[4] In order to place the facts in their proper context, it is useful to set out a short summary of the Plan's operation and the text of the relevant legislative provisions.

[5] The Plan is a contributory plan which means that both eligibility for benefits and the amount of benefits are determined by a person's contributions to the Plan. In the case of employees, Plan contributions are deducted at source and remitted by the employer. In the case of those who are self-employed, contributions are remitted together with any tax owing when filing their income tax returns. As a result, the failure to file one's income tax return, as and when required, has

implications for one's position under the Plan. Subsection 30(5) of the Plan is particularly relevant in this regard:

30. (5) The amount of any contribution required by this Act to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where (*a*) the return of those earnings required by this section to be filed with the Minister is not filed with the Minister before the day that is four years after the day on or before which the return is required by subsection (1) to be filed; and (*b*) the Minister does not assess the contribution before the end of those four years.	30. (5) Lorsque aucune déclaration des gains pour une année provenant du travail qu'une personne exécute pour son propre compte n'a été produite auprès du ministre, ainsi que l'exige le présent article, et ce au plus tard quatre ans après la date à laquelle elle est tenue de produire pour l'année en question la déclaration visée au paragraphe (1), le montant de toute cotisation qui, d'après la présente loi, doit être versé par elle pour l'année, à l'égard de semblables gains, est réputé nul sauf si, avant l'expiration de ces quatre ans, le ministre a évalué la cotisation pour l'année à l'égard de ces gains.

[6] The effect of this provision is that when persons do not file their income tax returns with respect to their self employed earnings within 4 years of the date they are due, their CPP contributions with respect to those earnings are deemed to be zero. This is relevant to the determination of a person's eligibility for benefits.

[7] In order to be eligible to receive disability benefits (after January 1, 1998), a person must have made contributions for the "minimum qualifying period" which, for our purposes, means four out of the six calendar years ending at the date the person became disabled.

44. (1) Subject to this Part, … (*b*) a <u>disability pension</u> shall be	44. (1) Sous réserve des autres dispositions de la présente partie : … b) une pension d'invalidité doit être

paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

(i) has made contributions for not less than the minimum qualifying period,

(2) For the purposes of paragraphs (1)(*b*) and (*e*),

(*a*) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),

(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,

…

(*b*) the contributory period of a contributor shall be the period

(i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and

(ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(*b*),

payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(2) Pour l'application des alinéas (1)*b*) et *e*) :

a) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :

(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,

…

b) la période cotisable d'un cotisant est la période qui :

(i) commence le 1er janvier 1966 ou au moment où il atteint l'âge de dix-huit ans, en choisissant celle de ces deux dates qui est postérieure à l'autre,

(ii) se termine avec le mois au cours duquel il est déclaré invalide dans le cadre de l'alinéa (1)*b*)

…	…
(my emphasis)	(je souligne)

[8] The Plan includes provision for appeals and reconsiderations with respect to decisions as to eligibility and the amount of Plan benefits. There is also a specific provision that deals with remedying the consequences of administrative error or erroneous advice. Mr. Torrance sought relief from the Minister on the basis of this provision; the denial of his request was the subject of judicial review and, now, of this appeal.

66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	66. (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(*a*) a benefit, or portion thereof, to which that person would have been entitled under this Act,	*a*) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(*b*) a division of unadjusted pensionable earnings under section 55 or 55.1, or	*b*) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(*c*) an assignment of a retirement pension under section 65.1,	*c*) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[9] With these legislative provisions in mind, I now turn to the facts giving rise to this litigation.

THE FACTS

[10] Mr. Torrance fell and became a quadriplegic on August 29, 1998. In November 1998, while resident in the G.F. Strong Rehabilitation Center, Mr. Torrance made an application for disability benefits. At that time, Mr. Torrance had not filed his 1996, 1997 and 1998 income tax returns.

[11] On December 14, 1998, Mr. Torrance was advised that his application for benefits was refused because he had only made contributions to the Plan in two of the six years between 1993 and 1998: see Appeal Book (A.B.), p. 70. Mr. Torrance responded on February 27, 1999, asking that his claim be kept open until he could file his income tax returns for 1996, 1997, and 1998: see A.B. p. 71. Shortly thereafter, he filed his tax return for 1996 but he did not file his tax returns for 1997 and 1998. On March 18, 1999, Plan officials acknowledged receipt of Mr. Torrance's letter and treated it as a request for reconsideration: see A.B. p.72.

[12] In May 1999, Plan officials contacted Mr. Torrance again to advise that they had received earnings information up to the year 1997 and to indicate that they required his notice of assessment for his 1998 taxation year "as soon as possible". Mr. Torrance had some employment earnings and some self-employed earnings in 1997. While he had not yet filed his income tax return for that year, Plan officials were aware of employer remittances with respect to his employment earnings, thus the reference to 1997 earnings. In any event, the same letter advised Mr. Torrance that the status of his application was being changed from "a reconsideration level application to an initial application": see A.B. at p. 76. This was the last communication from CPP officials that reached Mr. Torrance until he renewed contact with them in May 2007.

[13] In late June 1999, Plan officials wrote to Mr. Torrance again, advising that further information was required to process his claim and enclosing an Authorization to Disclose Information/Consent for Medical Evaluation form, as well as a Request Sheet for Additional Information questionnaire. The letter indicated that Mr. Torrance's application could not be processed without this information and asked him to return the forms within 45 days. This letter was returned undelivered because Mr. Torrance had left the rehabilitation center and had moved to his own apartment.

[14] In light of this, CPP officials made various attempts to obtain Mr. Torrance's current address by contacting the rehabilitation center as well as Mr. Torrance's family physician. They were given the correct street address by the rehabilitation center but that address referred to the wrong apartment number.

[15] On July 30, 1997, CPP officials wrote to Mr. Torrance once again, advising him that his claim for benefits was denied because he was not disabled at the last date on which he met the contribution requirement. The letter went on to say that Mr. Torrance could ask for reconsideration of this decision within 90 days of the receipt of the letter. If Mr. Torrance chose to ask for reconsideration, he was asked to provide his notice of assessment for his 1998 taxation year.

[16] This letter did not reach Mr. Torrance. The letter was addressed to the right street address but to the wrong apartment. To compound matters, the postal code was wrong. The correct postal code, as supplied by the rehabilitation center, was V5V 3N1. The postal code on the letter sent to

Mr. Torrance was incorrectly written as V5N 3N1. As a result of one or the other or both of these errors, Mr. Torrance did not receive the letter advising him that his claim for benefits was denied.

[17] In 2006, Mr. Torrance, with the help of a care aid, filed his 1997 and 1998 income tax returns. When Mr. Torrance's self-employed earnings were added to his employment earnings for that year, he had sufficient contributory earnings in 1997 and in 1998 to qualify for a disability pension. However, the Minister of National Revenue, who is responsible for collecting and accounting for contributions, applied subsection 30(5), deemed Mr. Torrance's contributions for those two years to be zero. Mr. Torrance attempted unsuccessfully to challenge this determination in the Federal Court. The Court found that the Minister of National Revenue had no discretion as to the application of subsection 30(5) of the Plan: see *Torrance v. Canada (Minister of National Revenue)*, 2008 FC 1083, [2008] F.C.J. No. 1349, at paragraph 21.

[18] Mr. Torrance then turned his attention to his application for disability benefits. He made a request under the *Privacy Act*, R.S.C. 1985 c. P-21 and obtained a copy of his CPP file. In reviewing that file, he learned for the first time of the July 1999 letter denying his claim. In May 2007, he wrote to the Minister asking for reconsideration of the July 1999 denial of his claim. He justified the delay in the making of his request on the fact that he had not received the refusal letter until March 2007.

[19] Up to this point, CPP officials had no reason to believe that Mr. Torrance had not received their July 1999 letter since, unlike the June letter, it was not returned undelivered.

[20] I am unable to find the Minister's response to the May 2007 letter in the record but, given subsequent events, I assume that it was denied.

[21] In October 2010, Mr. Torrance, through counsel, requested that the Minister exercise her discretion under subsection 66(4) so as to "award Mr. Torrance the disability pension that he would have received had it not been for the erroneous advice given and the administrative errors made in the handling of his file": A.B. p. 34. Mr. Torrance identified the erroneous advice and the administrative errors as follows:

> 1- Insufficient and inaccurate information was provided in the May 1999 letter.
>
> 2- CPP officials failed to ensure that the letters of June and July 1999 were delivered to Mr. Torrance in a timely fashion.
>
> 3- CPP officials made decisions with respect to Mr. Torrance's application and request for reconsideration on the basis of insufficient information.

[22] On November 8, 2011, Mr. Torrance's request for relief under subsection 66(4) was denied on the basis that the Minister had determined that "Mr. Torrance was not denied a benefit as a result of erroneous advice/administrative error" for reasons which can be summarized as follows:

> 1- It was Mr. Torrance's responsibility to file his income tax returns in a timely fashion. CPP officials were not responsible for informing Mr. Torrance of the consequences of the failure to file his income tax.
>
> 2- CPP officials did not make an administrative error when they denied Mr. Torrance's claim within the 45 days provided for supplying additional medical information in the June 1999 letter. The information received from the rehabilitation center confirmed that Mr. Torrance was not disabled until after his minimum qualifying period as established from the information on hand as of July 1999. This decision was made approximately five months after Mr. Torrance asked for an extension of time to file his income tax returns.
>
> A.B. p. 96

[23] Counsel for Mr. Torrance was critical of this letter, saying that it did not deal with the administrative errors that had been identified but focussed instead on Mr. Torrance's failings. Counsel points out, correctly, that subsection 66(4) requires an examination of the officials' behaviour not that of Mr. Torrance. That said, subsection 66(4) also requires that any administrative error have deprived a claimant of benefits to which he would otherwise have been entitled. It is therefore not inappropriate for officials to identify the reason the claimant was not entitled to benefits in order to show that any administrative error which may have occurred was not the cause of the claimant's ineligibility for benefits.

THE DECISION UNDER REVIEW

[24] Mr. Torrance brought an application for judicial review of the Minister's refusal to exercise her discretion under subsection 66(4).

[25] After setting out the facts, the application judge identified the issue as whether the Minister's delegate (the author of the November 8, 2011 letter) erred in determining that there was no erroneous advice or administrative error which would have permitted the Minister to exercise her remedial jurisdiction. He also noted the respondent Attorney General of Canada's contention that the Minister's remedial powers did not extend to setting aside the deemed failure to contribute mandated by subsection 30(5) of the Plan.

[26] The application judge identified reasonableness as the standard of review of the decision as to whether there has been administrative error, based on the prior jurisprudence of the Federal

Court. On the question of the extent of the Minister's remedial power with respect to subsection 30(5), the application judge ruled that the standard of review was correctness, based on this Court's decision in *Bartlett v. Canada (Attorney General)*, 2012 FCA 230, [2012] F.C.J. No. 1181 (*Bartlett*).

[27] After reviewing this Court's decision in *Bartlett* and *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254, [2005] F.C.J. No. 1163, the application judge found that it was unreasonable for the Minister not to acknowledge that the failure to give Mr. Torrance notice of denial of his benefits, an opportunity for reconsideration and to file his 1998 tax return as described in the July 27, 1999 letter was due to an administrative error. In the application judge's view, Mr. Torrance's failure to provide CPP officials with his current address was not determinative of the issue.

[28] The application judge found that the use of the wrong postal code was the administrative error which denied Mr. Torrance his opportunity for a pension. In the application judge's view, "it is unreasonable speculation as advanced by the Respondent [Attorney General] that, faced with the July 27, 1999 letter, Mr. Torrance would not have complied with the pension filing requirements. [...] but for the administrative error, Mr. Torrance would have filed his 1998 tax return and s. 30(5) would never have come into play": see Reasons at paragraphs 41-42.

[29] The application judge then considered the effect of subsection 30(5) of the Plan. He referred to this Court's decision in *Bartlett* as authority for the proposition that subsection 66(4) gives the Minister broad and unfettered authority to take remedial action to ensure that the claimant is made

whole as though the administrative error had not occurred. According to the application judge, this broad remedial power would be defeated if it were circumscribed by subsection 30(5).

[30] The application judge concluded his decision by addressing Mr. Torrance's request that the Court order the Minister to provide him a pension in light of the statement in the Attorney General's memorandum that Mr. Torrance lacked sufficient contributions to qualify for a disability pension. The Court declined to do so on the basis that it was to be presumed that the Minister would act in accordance with the Court's finding with respect to the primacy of subsection 66(4) in relation to subsection 30(5).

ANALYSIS

[31] The first issue to be considered is the standard of review.

[32] The role of an appellate court on appeal from a decision of a trial court sitting in judicial review of an administrative decision is to determine whether the trial court identified the correct standard of review and, if so, whether it applied it properly: see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43.

[33] In this case, the application judge identified reasonableness as the standard of review of the Minister's determination as to whether there had been an administrative error: see Reasons, at paragraph 28. The application judge further identified correctness as the standard of review of the

legal question as to whether the Minister's remedial authority under subsection 66(4) was limited by subsection 30(5) of the Plan: see Reasons, at paragraph 29.

[34] I agree that the question as to whether or not there was an administrative error is reviewable on a standard of reasonableness because it is a question of fact. I would also say that the question as to whether the administrative error resulted in a deprivation of benefits which would otherwise have been payable is also a question of fact, reviewable on the standard of reasonableness. The application judge did not frame the latter question as I have but it is clear from his Reasons that he was aware that the central question before him was one of causation.

[35] The difficulty is that, having correctly identified the standard of review, the application judge did not apply it correctly. He did not examine the Minister's decision and the record, including the detailed analysis found at pages 263-267 of the Appeal Book, with a view to determining whether, in light of those documents, the Minister's decision fell within the range of acceptable outcomes: see *Newfoundland and Labrador Nurse's Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraphs 12-13.

[36] The application judge's conclusion as to the unreasonableness of the Minister's decision was based on the fact that the latter did not recognize that the "failure to give Mr. Torrance notice of the denial of his benefits, an opportunity to file for reconsideration, and to file his 1998 tax return" was due to an administrative error: see Reasons, at paragraph 37. The application judge then laid out his view of the chain of causation by noting that had Mr. Torrance received notice of the denial of

his claim, he would have filed his 1998 income tax return, subsection 30(5) would never have come into play and Mr. Torrance would have received his disability pension.

[37] In my view, the application judge erred in substituting his reasoning for the Minister's. In effect, he applied the correctness standard. In these circumstances, it falls to this Court to apply the reasonableness standard to the Minister's decision.

[38] This Court has held that in order for subsection 66(4) of the Plan to give rise to a remedy, there must be a causal link between the administrative error or erroneous advice and the loss of benefits: see *King v. Canada*, 2010 FCA 122, [2010] F.C.J. No. 634, at paragraph 11. Thus, the proper inquiry is not whether there was an administrative error but whether there was an administrative error causing a loss of benefits.

[39] In this case, the Minister took the position that any error which may have occurred did not result in a denial of benefits to which Mr. Torrance would otherwise have been entitled: see A.B. p. 96.

[40] In the Minister's view, it was Mr. Torrance's responsibility to file his income tax returns, a responsibility that Mr. Torrance acknowledged in his letter in his letter of February 1999. The Minister went on to say that it was not the responsibility of Plan officials to inform clients of the repercussions of not filing their income tax returns. These points go to Mr. Torrance's allegation that incomplete and inaccurate information was provided to Mr. Torrance in the May 1999 letter

advising that earnings information for the 1997 tax year had been received and asking Mr. Torrance to submit his notice of assessment for the 1998 tax year as soon as possible.

[41] The Minister's response rests on two points. The first is that Mr. Torrance knew, independently of the requirements of the Plan, that he was required to file his income tax annually. The second is that, after the first refusal of his claim for benefits in December 1998, Mr. Torrance knew that he had to file his 1996 to 1998 income tax returns in order to qualify for disability benefits. The only piece of information which Mr. Torrance did not have was that if he did not file his income tax returns within four years of the time at which they were due, he would be precluded from making contributions for those years. Nothing was communicated to Mr. Torrance which would have led a reasonable person to conclude that he had an indefinite period of time to file his income tax returns.

[42] The second point in the Minister's letter went to Mr. Torrance's allegation that the Plan officials' decision with respect to his entitlement was made on the basis of inadequate and incomplete information because it was made on the basis of partial information as to Mr. Torrance's 1997 earnings and without knowledge of his 1998 earnings. According to Mr. Torrance, this occurred because the decision was made before the expiry of the 45 days given to Mr. Torrance to provide further information in the June 1999 letter: see A.B. at p. 40.

[43] The June 1999 letter did not request further financial information from Mr. Torrance nor did it provide a window of 45 days in order to provide that information. The relevant parts of the June 30, 1999 letter are as follows:

Could you please:

- **sign and date** the enclosed *Authorization to Disclose Information/Consent for Medical Evaluation* form. As you will note from the first paragraph of the form, this gives us permission to ask for information from your doctor and other authorities.

- fill out all the blank areas on the enclosed *Request Sheet for Additional Information* questionnaire and sign it and date it. If you need more space, please attach an additional sheet of paper.

We cannot process your application until we receive this information. Please send it back to us in the enclosed envelope within **45 days**.

A.B. p. 78

[44] The June 1999 letter dealt with medical information. It did not request financial information.

[45] The Minister's decision indicates that information had been received from the G.F. Strong Rehabilitation Center within the 45 day period which confirmed that Mr. Torrance's last day worked, August 29, 1998, was outside his minimum qualifying period, which was determined at that time to be December 30, 1997. As a result, waiting for the expiration of the 45 day period in order to determine eligibility was unnecessary. The Minister noted that this decision was made 5 months after Mr. Torrance asked for an extension of time to allow him to file his 1996, 1997 and 1998 income tax returns.

[46] It is true, as subsequent events have shown, that Plan officials did not have a complete picture of Mr. Torrance's contributory history as of July 27, 1999 when they denied his claim. The question is whether this lack of information was due to an administrative error. Plan officials knew from a questionnaire which had been completed by Mr. Torrance that he had self-employed

earnings in 1997 and 1998. On February 27, 1999, Mr. Torrance asked for an extension of time to file his income tax returns. On May 17, 1999, he was asked to provide his notice of assessment for 1998 as soon as possible.

[47] The question this raises is whether the Plan officials' decision to deny Mr. Torrance's claim as of July 1999 was an administrative error. No doubt every case will turn on its particular facts. In this case, Mr. Torrance did not follow up on his claim for seven years. As a result, if Plan officials had postponed making their decision until the end of the 45 days, or indeed, for a further 6 months, it would have made no difference since Mr. Torrance did not turn his attention to his claim until 2006. A further delay in making the decision to deny benefits would not have changed the outcome since Mr. Torrance was not attending to his claim. Plan officials were obviously of the view that sufficient time had elapsed to allow Mr. Torrance to file his income tax returns. As a result, when they received medical information which confirmed that his date of disability was outside his minimum qualifying period, they did not require any further medical information to conclude that he was ineligible for benefits. In my view, that decision did not constitute an administrative error and, as a result, did not give rise to a remedy under subsection 66(4) of the Plan.

[48] In my view, the Minister's conclusion that the failure of the July 1999 letter to reach its destination was not the cause of Mr. Torrance's failure to file his income tax returns in a timely fashion is reasonable. It was Mr. Torrance's failure to file his 1997 and 1998 income tax returns within four years of their due date which triggered the operation of subsection 30(5), which in turn led to Mr. Torrance's ineligibility for benefits. The application judge's conclusion that Mr. Torrance would have filed his income tax returns had he received the July 30, 1999 letter cannot be sustained

in light of Mr. Torrance's failure to do so after the first denial of his claim in December 1998 on the basis of insufficient contributions.

[49] In light of this conclusion, I do not have to deal with the question of whether the Minister's remedial authority under subsection 66(4) is constrained by subsection 30(5) of the Plan. That said, I should not be taken as approving of the application judge's conclusions on this point.

CONCLUSION

[50] In the end result, an examination of the Minister's decision shows that it falls with the range of acceptable outcomes, having regard to the reasons given for it and the record before the Minister. As a result, the appeal should be allowed, the decision of the Federal Court should be set aside and Mr. Torrance's application for judicial review should be dismissed. As costs were not sought, there will be no order as to costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marc Nadon J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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