Docket: 2011-1986(EI)

BETWEEN:

COPPER CREEK HOMES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of
Copper Creek Homes Inc. *2011-1988(CPP)* on
November 23, 2011 at Vancouver, British Columbia

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

Appearances:

Agent for the Appellant: Marvin Falk

Counsel for the Respondent: Alison Brown

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**JUDGMENT**

The appeal is dismissed and the decision of the Minister of National Revenue dated May 5, 2011 is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 22nd day of December 2011.

"D.W. Rowe"

Rowe D.J.

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The appeal is dismissed and the decision of the Minister of National Revenue dated May 5, 2011 is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 22nd day of December 2011.

"D.W. Rowe"

Rowe D.J.

Citation: 2011 TCC 570
Date: 20111222
Dockets: 2011-1986(EI)
2011-1988(CPP)

BETWEEN:

COPPER CREEK HOMES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

## REASONS FOR JUDGMENT

Rowe D.J.

[1] The Appellant, Copper Creek Homes Ltd. ("Copper Creek") appealed from two decisions issued by the Minister of National Revenue (the "Minister") on May 5, 2011, pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided Abraham Wiebe ("Wiebe") was employed in both insurable and pensionable employment with Copper Creek during the period from January 1, 2010 to September 2, 2010, because he was engaged under a contract of service.

[2] Counsel for the Respondent and Marvin Falk ("Falk"), agent for Copper Creek agreed both appeals could be heard together.

[3] Falk testified that he is Secretary of – and a shareholder in – Copper Creek which was incorporated in May, 2006. It builds homes either as a primary contractor or as a manager of construction in which case it prepares a cost analysis and oversees the subcontractors for which it charges a fee based on a percentage of the total cost of the project. If Copper Creek is acting as the builder, it hires sub-trades and proceeds to manage the project in the same manner as when representing a client. As an example of the accounting method utilized by Copper Creek, Falk filed a spreadsheet

– Exhibit A-1 – dated October 29, 2010. Although that date is beyond the end of the period relevant to the within appeals, this method was in place earlier and the purpose was to track actual costs at various points within the overall construction process and to compare them to initial budgeted amounts. Falk stated Wiebe had worked as a carpenter for Copper Creek in 2008 and was paid the hourly rate of $25 per hour which remained in effect during the relevant period. Falk stated Wiebe was informed that Copper Creek wanted him to provide his services as an independent contractor and that Wiebe agreed. During the relevant period in 2010, Wiebe's duties varied, as required, and included cutting grass, inspecting houses, cleaning houses, picking up materials and supplies, building forms for concrete driveways, and correcting deficiencies on otherwise completed homes. Falk spoke with Wiebe each day and specific duties were assigned and they also discussed matters at the end of most working days. In the interim, Wiebe was not supervised because he was an experienced and capable worker, familiar with the business activities of Copper Creek. Usually, the workday consisted of 8 hours but sometimes more time was required to complete certain tasks. Falk stated he attended at various worksites to supervise the sub-trades. On occasion, when there was a revision to an original plan, instead of bringing back the original framing crew, Wiebe did the additional framing to accommodate that change. Wiebe submitted his hours worked – by e-mail – to the Copper Creek bookkeeper and was paid by cheque every two weeks. Wiebe owned his own hand tools and was not reimbursed by Copper Creek for their use but larger tools and certain equipment were rented by the corporation, when required. If Wiebe had to purchase fuel to operate a generator or other equipment at a worksite, he was reimbursed by Copper Creek. A receipt – Exhibit A-2 – is an example of the type of expense incurred by Wiebe and submitted to Copper Creek along with his hours worked in a pay period. Wiebe used his own vehicles – a ½ ton GMC pick-up or a Jeep Cherokee – to travel from his residence to various job sites around the Lower Mainland and was not reimbursed for the expense associated therewith nor was he compensated for using his cell phone. Falk stated the amount of travel varied depending on the work locations and estimated that Wiebe drove up to 200 kilometers some weeks in the course of his work and communicated – by cell phone – with Falk and other persons involved in the various construction projects. Falk acknowledged that Wiebe was required to perform the services personally and stated they had not discussed any scenario whereby Wiebe would hire a substitute or assistant to perform the work. Copper Creek did not provide any benefits – usually associated with employment status – to Wiebe. Although it was rare that Wiebe made a mistake, he was paid his regular hourly rate to correct any error. Falk stated the hours worked by Wiebe were driven by demand and during certain periods Copper Creek had 5 projects underway. Falk filed – as Exhibit A-3 – respectively, a letter from Canada Revenue Agency ("CRA") – dated October 8, 2010 – addressed to

Wiebe, a Goods and Services Tax, Harmonized Sales Tax (GST/HST) Registration Notice and a Notice of Overdue Return(s). The first paragraph of the October 8th letter informed Wiebe that CRA had opened a Business Number and account on his behalf and the Registration Notice stated that his registration for purposes of GST/HST was effective as of November 1, 2008. Falk stated that in May, 2010, Wiebe inquired about his work status as he was concerned about owing income tax to CRA on monies earned from Copper Creek. Falk stated the company was willing to commence making source deductions but the matter did not arise again until September 2, 2010 - the last day of the working relationship – when Wiebe's services were no longer required due to a slowdown in the regional residential construction industry. Falk stated Wiebe had never held out that he was operating a business under a trade name. However, he understood that Wiebe had done carpentry work for other people during 2010 and at other times since 2008. During the relevant period, Copper Creek did not have any workers on a payroll as employees and persons such as finishing carpenters or workers pouring concrete had been hired to provide specific services at an hourly rate. Each of these workers did so personally and not via any business entity. Copper Creek had paid the Workers'Compensation Board ("WCB") premiums for Wiebe in accordance with the standard practice that ensures every person working on a site is covered. Falk stated Copper Creek checked the WCB website to ascertain whether a worker/service provider had an account and if so, whether it was in good standing. If an account was delinquent, Copper Creek would hold back – from money owing to a subcontracting individual or business entity – an amount sufficient to satisfy the outstanding balance and submit it directly to WCB.

[4] In cross-examination by counsel for the Respondent, Falk stated there was no written agreement between Copper Creek and Wiebe and that their initial discussions concerned only the hourly rate. Although Wiebe spoke – on two or three occasions – about being placed on a regular payroll, that matter was not pursued by Wiebe subsequent to being informed that the hourly rate would have to be reduced from $25 to about $17 if Copper Creek was required to remit Employment Insurance (EI) premiums and Canada Pension Plan (CPP) contributions and to remit income tax to CRA on a regular basis. Falk stated Wiebe did not agree to this reduction and the matter was not pursued further. Falk confirmed that work was assigned to Wiebe either during a meeting or by cell phone but they saw each other almost every day. Wiebe sometimes started later than usual if waiting for equipment to arrive on site. If Wiebe needed some time off, he requested it in advance. Falk acknowledged that – once – he had to be away for a certain period and informed Wiebe that his services were required during that absence. Falk stated that although Wiebe had his own hand tools, some items such as shovels or brooms were provided by Copper Creek when needed on a specific project. Falk agreed that it was not practicable for Wiebe to hire

an assistant or substitute and if extra help was required, Copper Creek retained the services of a qualified person. In 2008, Wiebe had worked with Falk on certain projects undertaken by Weststone Auguston Homes ("Weststone") and the amount attributable to the work done by Wiebe – and paid for by Weststone directly to Wiebe – was the subject of an invoice by Weststone to a numbered company – 0774441 B.C. Ltd. – operated by Falk, for services provided between October 9 and November 25, 2008. An invoice and others with attached time sheets were filed as Exhibit R-1 and Wiebe is identified therein as an employee only in those where Copper Creek was seeking payment from the client. Sometimes, as a result of having been on the site of the home construction, the owners hired Wiebe to perform some service but that was done personally and did not involve Copper Creek.

[5] The agent for the Appellant closed its case.

[6] Abraham Wiebe testified he is a construction worker and had worked for Copper Creek for nearly 3 years performing those duties described earlier by Falk. He agreed there had been no written contract and that their initial discussions concerned only the applicable hourly rate of $25. During the relevant period when he had inquired about being treated as an employee subject to the usual deductions, Falk informed him that his hourly rate would have to be reduced to about $17.50 per hour which was unacceptable. Wiebe agreed that he met with Falk nearly every day to discuss work and that they communicated regularly by cell phone. He requested time off – in advance – and was informed by Falk that he had to work during a certain period when Falk was absent. Wiebe purchased certain small items such as saw blades and did not seek reimbursement. He also paid all expenses associated with operating his own vehicle when travelling to and from work and between various work sites. Wiebe was referred to a bundle of sheets – Exhibit R-2 – on which receipts had been photocopied. Wiebe stated Copper Creek had reimbursed him for those purchases. Wiebe stated he understood that his services were required to be performed personally and had not contemplated hiring any helper. He kept track of his own time and printed out sheets – Exhibit R-3 - which he sent to the Copper Creek office every two weeks. He was paid by cheque and received a pay sheet – Exhibit R-4 – indicating the period worked, the deduction of 4.4% attributable to his WCB premium – paid by Copper Creek on his behalf – and the net amount payable. Wiebe stated that he did not have time to work for others since Copper Creek occupied all of his time from some point in 2008 until September 2, 2010. He was not entitled to any bonuses nor was he penalized for having to undertake a repair due to his mistake. When he worked for Weststone, he prepared time sheets and it paid him by cheque. Falk had worked with Wiebe on some of the Weststone projects prior to 2010. Wiebe stated he had not requested CRA to issue a business number and that

he had contacted that agency and the account opened on his behalf has since been cancelled. Wiebe stated he had not operated a business during the relevant period and did no work for others. As he had done in 2008 and 2009, Wiebe filed his 2010 income tax return on the basis he had earned business income and deducted expenses associated with the use of his own vehicles. He estimated that the amount of those deductions may have been "a couple of thousand dollars" for repair and fuel and parts. Wiebe's tax preparer also deducted the cost of some small tools he had purchased. Wiebe stated that during his working career he had been an employee with source deductions taken from his pay cheques, except for one situation prior to his relationship with Copper Creek.

[7] The agent for Copper Creek did not cross-examine.

[8] The Respondent closed his case.

[9] The agent for the Appellant submitted that the evidence adduced in the within appeal had demonstrated that from 2008 and throughout the relevant period, the working relationship was based on Wiebe providing his services to Copper Creek as an independent contractor. Although tasks were assigned, Wiebe was not under any direct control or supervision. He used his own tools and incurred the expense of operating his own vehicles for work. Further, Wiebe had borne the expense of his cell phone and filed income tax returns on the basis he had generated business income, against which he claimed expenses. The agent submitted that the clear understanding between the parties at the beginning of their relationship is sufficient to tip the balance in favour of finding that Wiebe was not employed under a contract of service and that the decision of the Minister was incorrect.

[10] Counsel for the Respondent submitted that Wiebe was provided with instructions by Falk on a daily basis either in the morning or throughout the day by cell phone communications. Wiebe was a reliable and trusted worker but requested time off and was instructed to work during a period when Falk was going to be absent. The work Wiebe had performed for Weststone was in 2008 and not relevant to the period under appeal in 2010. Counsel submitted it was beyond dispute that Wiebe had to perform the services personally and there was no opportunity to profit in the sense required by the jurisprudence. Counsel submitted the decisions of the Minister were correct and ought to be confirmed.

[11] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *Royal Winnipeg Ballet v. M.N.R. (F.C.A.)*, 2006 FCA 87 (CanLII) ("*Royal Winnipeg Ballet*"), *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*, 2006 FCA 350 (CanLII) ("*City Water*"), 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. That is not the case in the within appeals. There is no written agreement and the relevant period is in 2010. Wiebe's position is that he wanted to be treated as an employee and although the matter had been discussed two or three times, it was not pursued when it became apparent from speaking with Falk that Copper Creek would reduce his hourly rate from $25 to $17 or $17.50 if source deductions were taken from Wiebe's cheques and remitted to CRA. The issue of intent is muddled somewhat by the nature of a work association in 2008 when Falk – as an officer of a numbered company – was providing services to Weststone on the same sites as Wiebe who billed directly – and was paid – by Weststone. Copper Creek was not involved in those transactions. It is the relevant period that must be analyzed in accordance with the jurisprudence.

[12] 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. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553 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 47 and 48 of his judgment stated:

> 47 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.

> 48 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.

[13] 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

[14] Wiebe was an experienced, reliable worker capable of performing various construction-related duties without supervision. He was assigned work by Falk each morning and received communications during the day when necessary if the work schedule had to be modified. There was no evidence to suggest that Wiebe was free to come and go as he pleased and any delay in starting work was caused by having to wait for tools, supplies or rented equipment to be delivered to the work site. Wiebe understood that he had to remain at work while Falk was absent for a specified period even though he had requested time off. Wiebe did not consider that he had the right to refuse any work assignments. The work performed by Wiebe was directed by Falk and they met often at the end of the working day to discuss events.

Provision of equipment and/or helpers

[15] Wiebe used his own hand tools which is normal within the construction industry. Some small items were also provided by Copper Creek and it rented larger equipment when required by specific projects. Wiebe was required to perform his services personally and if he required assistance, Falk retained someone and Copper Creek paid for the work.

Degree of financial risk and responsibility for investment and management

[16] The only expense incurred by Wiebe was the cost of operating one or other of his motor vehicles during the performance of his duties but that would not put him into a deficit position since he was earning $25 per hour and working full-time and – sometimes – extra hours throughout the relevant period. He did not have any investment in any equipment beyond the older-model vehicles and his hand tools. He used his personal cell phone for work when required. Wiebe was not required to carry out any management function when performing his duties as Falk handled all matters pertaining to supplying workers or equipment and supplies to a site. Wiebe picked up certain items and delivered them to various work sites in the course of his assigned duties. Although a rare occurrence, even when required to correct an error, Copper Creek paid him the regular hourly rate. The lack of job security within the

construction industry during the fall 2010 was attributable to the economy in the Lower Mainland rather than the status of their working relationship.

Opportunity for profit in the performance of tasks

[17] Wiebe was paid an hourly rate of $25. There was no provision to receive a bonus or overtime pay. He did not participate in any profit-sharing mechanism.

[18] The agent for the Appellant relied on the decision in the case of *Panache Fine Cabinetry Ltd. v. The Minister of National Revenue*, 2008 TCC 513 wherein Justice Webb held that a cabinet maker – Mancini – was an independent contractor based on the mutual intention of the parties in accordance with the decision of *Royal Winnipeg Ballet, supra.* Justice Webb found that the worker could set his own hours of work and was able to work for other clients and had done so and could perform work for the payor at his own home but did so mostly at the payor's premises. He was retained to build cabinets according to the specifications dictated by the payor's clients. The issue of tools in that case was not a helpful factor in the analysis and Mancini understood he could not hire other workers, although the payor's position was contrary. Mancini did not incur any financial risk and earned a set amount per hour but could work for other clients.

[19] The facts in the within appeals are similar to those in the case of *Stephen Twilley v. The Minister of National Revenue ("Twilley")*, 2009 TCC 524 that I heard in 2009. In that case the worker agreed to provide his services at the flat rate of $25 per hour. The payor – Twilley – was charging his customers a flat rate based on a certain amount per square foot.

[20] In *Twilley*, counsel for the appellant relied on my decision in the case of *Beaver Home Improvements Ltd. v. Canada (Minister of National Revenue – M.N.R.),* [2003] T.C.J. No. 56 ("*Beaver Home*"). In that case, I found the worker to have been an independent contractor when undertaking roofing work for which he was paid by Beaver. There are some significant differences in the facts between that case and those in the within appeals. First, the only attendance at the job site by anyone from Beaver was a salesperson/estimator for the purpose of ensuring the work conformed with the demands of the customer. Second, 90% of the time, the jobs were ordinary and could be performed by using the personal hand tools and other equipment owned by the worker. If specialized equipment was required, it was provided by Beaver. The worker – O'Flynn – used his own vehicle to travel to and from work and also transported his fellow workers as a matter of convenience. Beaver provided O'Flynn's helpers with tools and equipment.

[21] In the *Beaver Home* case, there was not a significant amount of financial risk and O'Flynn received payment from Beaver whether or not the homeowner paid the invoice and the helpers were paid directly by Beaver. However, there was an opportunity for profit because of a particular revenue-sharing arrangement whereby O'Flynn could gain a profit from work performed by another worker. He also had the right to accept or decline a job and could negotiate for an additional payment if the project turned out to be more difficult than anticipated. In *Beaver Home*, I found O'Flynn had the ability to increase his own income by operating in an efficient manner and by exercising supervision over other workers to ensure efficiency. At paragraph 27 of that decision, I commented as follows:

> 27 That leaves the central question to be decided. Was O'Flynn providing services to Beaver as a person in business on his own account or was he performing them in his capacity as an employee? In this case, there is no doubt that he had - initially - been an employee of Beaver and, thereafter, both parties had agreed the nature of the working relationship should be transformed into one involving two entities each carrying on a specific activity within the context of an overall industry. One must remember that Beaver also had its own employees who were installers, apart from the trainees working on O'Flynn's crew. In fact, about 40% of roofing and siding installations were undertaken by Beaver employees rather than by offering those jobs to the pool of roofers. Beaver also undertook new home construction, renovation, deck, patio, sun-room construction, and installation of siding. All work except for roofing and/or siding installations was performed by workers having the undisputed status of employees. That range of supply of material and services constituted the Beaver business, while the business of O'Flynn was to perform the installation of specified material in a satisfactory manner and, by doing so, becoming entitled to collect an agreed-upon amount from which he had to account to his co-venturer - Aspinall - for 40% of the revenue attributable to the overall work performed. In a sense, O'Flynn, Aspinall and Beaver were co-venturers on each job since Beaver incurred the expense of paying the wages for the two helpers and provided them with tools and equipment. In accordance with that working arrangement, O'Flynn and Aspinall were then able to divide the balance of the remuneration attributable to a job without having to share it with other workers/partners who would probably require more remuneration for their services than that paid by Beaver to the helpers as mere trainees.

[22] As for the purported agreement at the outset that Wiebe provide his services to Copper Creek as an independent contractor, although there was no coercion, that status was offered by Falk on a "take-it-or-leave-it" basis at the negotiated hourly rate and the working relationship – in 2008 – commenced on that basis. Wiebe was providing his services to others – including Weststone – at that time but had not

registered with GST nor had he considered that he was carrying on his own business. The manner of filing his income tax returns for the years 2008 and 2009 was dictated by the absence of a T4 slip from Copper Creek and in 2010 his return was prepared – again – by his tax preparer on the basis the money earned was business income. The manner of filing is not determinative nor is the arbitrary issuance of a GST/HST number to Wiebe, which was probably based on the filing of his income tax returns wherein he reported business income and claimed appropriate deductions.

[23] The central question posed in *Sagaz, supra,* is:

> … whether the person who has been engaged to perform the services is performing them as a person in business on his own account.

[24] The evidence in the within appeals does not indicate Wiebe was carrying on business on his own account during the relevant period. The business registration was thrust upon him by the Minister and it has been cancelled. Wiebe did not work for others during the period at issue and did not advertise his services nor did he consider that he had any status other than as an employee who should have been on the Copper Creek payroll. The overall evidence strongly favours a finding that Wiebe was employed by Copper Creek pursuant to a contract of service. Their conduct was consistent with that status even though Wiebe's earlier working relationship with Copper Creek – and the numbered company – may have been sufficiently different to have justified the decision of the Minister to issue Wiebe a business account number. Those circumstances are not before me except by way of background to explain the origins of the relationship between Wiebe and Falk and Wiebe and Copper Creek. Whether a clear expression of mutual intent would have saved the day for the Appellant is doubtful in any event but it was not a reliable factor in the within appeals. There was no true meeting of the minds on this point and early in 2010, Wiebe sought to have his status characterized as an employee. It was apparent that Falks' statement that Wiebe's hourly rate would have to be reduced from $25 to $17 or $17.50 if he were to be treated as an employee and subject to source deductions, was a negotiating ploy on his part that put an end to Wiebe's inquiries on that point. The difference of $7 or $7.50 per hour amounted to 30% which was disproportionate to the percentage of earnings required to be paid by the employer when making remittances pursuant to the *Act* and the *Plan* which – to a certain maximum not relevant here – are based on 2.42% and 4.95% or earnings, respectively. As an employer, Copper Creek would have been responsible for paying the 4.4% WCB premium so the total percentage payable by Copper Creek would have been 11.77%. Based on the hourly rate of $25, that would have reduced Wiebe's pay by $2.94.

[25] In the case of *Standing v. Canada (Minister of National Revenue – M.N.R.)(F.C.A.)*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ... There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test. ...

[26] The Appellant has not discharged the burden of demonstrating that the decisions issued by the Minister were incorrect. Therefore, they are confirmed and both appeals are dismissed.

Signed at Sidney, British Columbia this 22nd day of December 2011.

"D.W. Rowe"

Rowe D.J.

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| CITATION: | 2011 TCC 570 |
| COURT FILE NOS.: | 2011-1986(EI); 2011-1988(CPP) |
| STYLE OF CAUSE: | COPPER CREEK HOMES INC. AND M.N.R. |
| PLACE OF HEARING: | Vancouver, British Columbia |
| DATE OF HEARING: | November 23, 2011 |
| REASONS FOR JUDGMENT BY: | The Honourable D.W. Rowe, Deputy Judge |
| DATE OF JUDGMENT: | December 22, 2011 |

APPEARANCES:

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| Agent for the Appellant: | Marvin Falk |
| Counsel for the Respondent: | Alison Brown |

COUNSEL OF RECORD:

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| For the Appellant: | |
| Name: | |
| Firm: | |
| For the Respondent: | Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Ottawa, Canada |