Docket: 2001-746(GST)G

BETWEEN:

CLIVE TREGASKISS INVESTMENT INC.,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

Motion heard on May 29, 2003, at Windsor, Ontario,

By: The Honourable Judge E.A. Bowie

Appearances:

Counsel for the Appellant: Gino Morga, Q.C.

Counsel for the Respondent: Michael Ezri

ORDER

UPON motion by the Respondent for an Order that the Appellant answer certain questions and undertakings, permit an appraiser to inspect the property located at 5656 Riverside Drive East, Windsor, Ontario; and to amend the Reply to the Notice of Appeal;

AND UPON reading the Notice of Motion, affidavits and other materials, filed;

AND UPON hearing counsel for the parties;

IT IS ORDERED that:

1. The Appellant shall answer questions number 113 and 116, and shall produce to the Respondent the two documents referred to in paragraph 6 of the affidavit of Alicia Stein as (b) and (c);

2. The Appellant need not answer the follow-up question relating to questions number 129 and 131;

3. The Appellant is directed to permit the appraiser designated by the Minister of National Revenue to have access to the residence at 5656 Riverside Drive East, Windsor, Ontario, both inside and outside the house and any other buildings, for the purpose of inspecting the property and taking such measurements and photographs as he deems necessary. If the parties are unable to agree as to a date and time for the inspection then this motion may be brought back on before me by teleconference on short notice;

4. The Respondent shall have leave to amend the Reply to the Notice of Appeal by adding to it paragraphs 16 and 17 in accordance with the draft Reply attached to the Notice of Motion; and

5. The Appellant shall pay forthwith to the Respondent the costs of the motion in any event of the cause.

Signed at Ottawa, Canada, this 10th day of June, 2003.

"E.A. Bowie"

J.T.C.C.

Citation: 2003TCC398
Date: 20030610
Docket: 2001-746(GST)G

BETWEEN:

CLIVE TREGASKISS INVESTMENT INC.,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

REASONS FOR ORDER

Bowie J.

[1] This appeal is from an assessment to goods and services tax (GST) under Part IX of the *Excise Tax Act*[1] (the *Act*). The assessment results from the construction by the Appellant of a single family residence in Windsor, Ontario for the use of Mr. Clive Tregaskiss, the president of the Appellant company. The date of substantial completion of the house was May 29, 1998, and Mr. Tregaskiss took possession under a lease on August 1 that year. It is common ground that the Appellant comes within the definition of a builder for purposes of the self-supply rules in the *Act*, and so was required to remit GST on the self-supply of the residence at the rate of 7%. The parties dispute the fair market value of the property on August 1, 1998. The Appellant says that it was not more than $1,500,000; the Minister of National Revenue has assessed the Appellant on the basis that it was $3,300,000.

[2] A representative of the Appellant was examined for discovery on February 3, 2003. At the end of the examination 32 questions remained unanswered. The Appellant refused to answer 3 questions, took 12 under advisement, and gave undertakings in respect of 17. The time fixed for completion of undertakings ran out at the end of March, with no answers having been given. Counsel for the Respondent wrote twice to counsel for the Appellant requesting that the undertakings be fulfilled, once on February 20 and again on April 1. Having received no reply to either letter,

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[1] R.S. 1985 c.E-15, as amended.

he brought this motion for answers to the questions not answered on discovery, a direction under Rule 77 permitting the Respondent's appraiser to inspect the residence, and an Order under Rule 54 permitting the Respondent to amend the Reply to the Notice of Appeal. The motion was returnable on May 15 by way of a conference telephone call; at the request of the Appellant it was adjourned, and I heard it at Windsor on May 29. By that time, counsel for the Appellant had provided answers to all but five of the questions in issue. The Appellant refused to answer questions number 113, 116 and 126 on the basis of solicitor-client privilege; number 156 was refused on the basis of relevance, and is no longer pursued by the Respondent. Number 241 was a request by the Respondent to permit an appraiser to inspect the property within the next 30 days (that is by March 5, 2003), and it was refused. Certain follow-up questions were asked by the Respondent by letter dated May 22, and on May 23 counsel for the Appellant answered all but one of these; an answer to that one was refused on the basis that it was not properly a follow-up question.

[3] The issues before me on this motion that arise out of the discovery, then, are:

(i) whether questions 113 and 116 should be answered;
(ii) whether certain documents referred to in the Reply to question 126 are subject to solicitor-client privilege;
(iii) whether the follow-up question relating to questions 129 to 131 should be answered; and
(iv) whether I should direct that the Appellant permit an inspection by the Respondent's appraiser.

In addition, the Respondent moves for leave to amend the Reply to the Notice of Appeal by the addition of two paragraphs.

questions 113 and 116

[4] To deal with these two questions, it is necessary to consider questions 112 to 116 and the responses to them in full.

> Q.112 Mr. Campbell, can you explain why the corporation was set up? Why was this Appellant set up?
>
> MR. MORGA: If you know.

A. Yeah, that goes back a few years. I don't recall, I'd have to give that some thought.

Q.113 Okay. Can I get an undertaking to find out why the corporation was established?

MR. MORGA: We'll take that under advisement.
(UNDERTAKING AND/OR REQUEST)

Q.114 Why was the house owned by a corporation instead of just having it owned by Mr. Tregaskiss personally?

A. That was some advice that we had received. Again, I would have to go back and refer to the -- I'm sure there's a -- there was some recommendations that were made. I'd have to refer to that.

Q.115 Do you know who would have made those recommendations?

A. I believe it was the firm BDO Dunwoody.

Q.116 Was this done for tax money purpose?

MR. MORGA: If you know.

A. I'd have to go back and -- I'd have to go back and -- refer to the document.

MR. EZRI: I'll ask for an undertaking as to why the house was owned by the corporation instead of by Mr. Tregaskiss personally.

MR. MORGA: I'll take that under advisement and let you know.
(UNDERTAKING AND/OR REQUEST)

MR. EZRI: Okay.

MR. MORGA: Anything that I take under advisement, I'll let you know within 30 days.

MR. EZRI: That's fine. And also if you can confirm who gave the advice? He said he thought it was BDO, but just in case he's not right about that.

MR. MORGA: The same response.
(UNDERTAKING AND/OR REQUEST)

In answering the undertakings on May 20, this is what counsel for the Appellant had to say about these questions:

> Q. 113 The corporation was established based in part on advice by counsel and as such, is not subject to disclosure in the context.
>
> Q. 116 The advice was given by the accounting firm of BDO Dunwoody and the law firm of Corrent & Macri is not subject to disclosure.

[5] Alicia T. Stein is an associate in the law firm Wilson, Walker, Miller Canfield, counsel of record for the Appellant. She swore an affidavit in opposition to the motion on May 26, 2003. The paragraphs dealing with the issue of solicitor-client privilege read as follows:

> 6. During the course of the examination for discovery of Robert Douglas Campbell on behalf of the Appellant, the Respondent made inquiries with respect to the decision to have the subject property owned by Clive Tregaskiss Investments Inc. rather than by Mr. Tregaskiss personally. In response, the Appellant advised that the advice with respect to the formation of the corporation to own the subject property was received from the accounting firm of BDO Dunwoody and the law firm of Corrent and Macri. As such, the communications are not subject to disclosure as they are privileged. Correspondence and memoranda which have been exchanged in respect of the formation of the corporation include the following:
>
> (a) Correspondence from BDO Dunwoody to Corrent and Macri to the attention of J.P. Corrent dated December 2nd, 1997;
>
> (b) BDO Dunwoody internal memorandum dated November 24th, 1997 which was provided to Clive Tregaskiss for the use of counsel;
>
> (c) BDO internal memorandum dated December 15, 1997 which was provided to Clive Tregaskiss for the use of counsel;
>
> 7. I have reviewed the communications as between BDO Dunwoody and Corrent and Macri and found that in the communications, the accountants placed two factual scenarios before the legal representative for the appellant and required the lawyers to carry out certain instructions to achieve the desired end.
>
> 8. It is submitted that in the circumstances, these communications are protected from disclosure on the basis of solicitor/client privilege as the accounting firm of BDO Dunwoody stood in the shoes of the Appellant in

> providing instructions to Corrent and Macri to obtain assistance in achieving a legal outcome.

[6] A number of difficulties with this affidavit are immediately apparent. First, it is sworn by an associate in the firm of counsel for the party on whose behalf it is filed, which is not permissible,[2] except perhaps as to merely formal matters. The claim of privilege as to which these paragraphs speak is a contested and substantive matter. Moreover, Rule 72 provides:

> 72. An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

Paragraph 1 of the affidavit reads:

> 1. I am an associate with the Wilson, Walker, Miller Canfield Law Firm, the solicitors of record for the Appellant, and as such have knowledge of the matters hereinafter deposed to. To the extent that I am relying on information obtained from others named herein, I verily believe that information to be true.

[7] The affidavit gives no source for the statement that the memoranda described as a) and b) in paragraph 6 were "provided to Clive Tregaskiss for the use of counsel". These two documents were provided to me in a sealed envelope by counsel for the Appellant, with the concurrence of counsel for the Respondent. They are, as described in the affidavit, internal memoranda. Nothing identifies them as being prepared by BDO Dunwoody, or any other firm. One is from "Mike" to "File" re "Clive Tregaskiss Investments Inc. (Cliveco) Purchase of House", and the other is from "Ron St. Pierre" to "Mike McCreight", re "GST implications on transfer of house to a holding company". Obviously Ms. Stein must be relying on some other source of information to depose that these "were furnished to Clive Tregaskiss for the use of counsel". The same is true of the statement that "the accountants placed two factual scenarios before the legal representative for the Appellant and required the lawyers to carry out certain instructions to achieve the desired end". No source for any of this is disclosed in the affidavit. Both because it is made by an associate in counsel's firm, and because it fails to specify any source of information as to the important matter of the purpose for which the memoranda were prepared, I give no weight to the

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[2] See *Sherman v. The Queen*, 2000 DTC 1970 and the cases there cited; *Bilson v. University of Saskatchewan*, [1984] 4 W.W.R. 238; *Canadian Bar Association Code of Professional Conduct.*

affidavit. What I am left with is two memoranda which on their face were not apparently prepared by lawyers or prepared specifically for the use of lawyers in the business of the client. The Appellant could have produced a proper affidavit from the accountants, from the client, or from the lawyers, if in fact these memoranda were prepared for the client to give to the lawyers as part of its instructions to them. That was not done, and I conclude that the documents are simply tax advice given by an accountant to a client, which of course is not subject to any privilege at all. Nor, in my view, has it been shown that to answer questions 113 and 116 would infringe any privilege. It is obvious from the context that the Respondent's counsel is not looking for the substance of any legal advice. Two memoranda were apparently written for Mr. Tregaskiss, by accountants, as to the tax implications of having a corporation own his residence. Nothing demonstrates to me that lawyers were involved in giving any such advice. The Appellant shall answer questions 113 and 116, and shall produce to the Respondent the two memoranda referred to as (b) and (c) in paragraph 6 of the affidavit of Ms. Stein. At the hearing Mr. Ezri conceded that the document referred to as (a) is covered by solicitor-client privilege.

the follow-up question to questions 129 to 131

[8] The questions and answers are:

Q.129 Can you tell me at what point in time a decision was made to self-assess on the basis on a fair market value of less than the cost of construction?

A. Do you want me to recall when that decision was made?

Q.130 Well, what I'd like to know is was it before or after you received the first appraisal report?

A. I don't recall, that's -- that's going back some time now.

Q.131 Okay.

MR. EZRI: I'm going to ask for an undertaking if there's any correspondence or memoranda in the possession of the Appellant that indicates when they first decided the fair market value of the house was less than the cost of construction.

MR. MORGA: I'm going to ask that under advisement. Again, it's a question of whether or not there was counsel involved. I don't know if

> such documents exist, but if they do, it may be a question of counsel being involved at that stage.
>
> MR. EZRI: Okay.
>
> MR. MORGA: And if there is, then of course, we get into that privilege issue again.

The response provided was:

> The decision to assess the property at the fair market value was made on or about May 29, 1998 upon obtaining the appraisal report prepared by Ray Bower Appraisal Services Inc.

[9] Counsel for the Respondent then asked, as a follow-up question:

> Did the Appellant anticipate, prior to May 1998 that the fair market value of the house might be less that its construction cost, and if so when did it anticipate this result?

I agree with counsel for the Appellant that this question does not arise out of the response to the undertaking. The Appellant does not have to answer it.

inspection of the house by the Respondent's appraiser

[10] Mr. Morga's opposition to my giving a direction for inspection, as I understood him, was based primarily upon the fact that there was no affidavit evidence put forward by the Respondent in support of that aspect of the motion. His contention was that the Rules require an affidavit in support of any motion, and if there is none, as here, then the Court cannot make the Order. He relied for this proposition on *Shaw Industries Ltd v. The Queen*,[3] where it is said that "affidavits should be filed" in support of a motion. No doubt that is so in cases where it is necessary to establish a fact that is not otherwise susceptible of being established for purposes of the motion in question. Subsection (1) of Rule 67 says:

> The notice of motion together with the affidavits or other documentary material to be used at the hearing of the motion shall be served …

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[3] 2000 DTC 2317.

[11] Clearly, it does not require that an affidavit be served if the nature of the motion does not require proof of facts. The issue is the fair market value to be placed upon a residence at the time of its first occupancy, one month after the date of substantial completion. The Appellant contends for a value that is less than half of the value arrived at by the Minister using the cost approach. The Appellant in its Notice of Appeal alleges that:

> 12. In the instant case, the Appellant has included in the construction of the residence numerous super adequacies which are not normally included in the construction of residential housing. The subject residence is unique and has many amenities which an informed buyer would not be willing to pay for.
>
> 13. The Appellant contends that the direct comparison approach produces the only means of determining fair market value as it represents the actual sum a perspective [*sic*] purchaser would be willing to pay for this property as opposed to what it would cost for a perspective [*sic*] purchaser to construct same.

[12] The authority for the Court to make a direction of the kind the Respondent seeks is Rule 77.

> 77(1) The Court may, by direction, authorize the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.
>
> (2) For the purpose of the inspection, the Court may,
>
> (*a*) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party,
>
> (*b*) permit the measuring, surveying or photographing of the property or of any particular object or operation on the property, and
>
> (*c*) permit the taking of samples, the making of observations or the conducting of tests or experiments.
>
> (3) The direction shall specify the time, place and manner of the inspection and may impose such other terms, including the payment of compensation, as are just.

> (4) A direction for inspection shall not be made without notice to the person in possession of the property unless,
>
> (*a*) service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party, or
>
> (*b*) the Court dispenses with service of notice for any other sufficient reason.

It is clear to me from the nature of the dispute that it is necessary for the proper determination of the issue in this case that the Respondent's appraisal witness have the opportunity to see the property in question, not just from the street or the river, but inside as well. He is entitled to inspect the "numerous super adequacies". Other than the absence of an affidavit, Mr. Morga's objections to permitting the inspection were that it is too late for that as the trial is scheduled to begin July 14, 2003, and it would constitute an intrusion on the privacy of Mr. Tregaskiss. Counsel for the Respondent requested that the Minister's appraiser be given access to inspect the property during the examination for discovery of the Appellant's representative on February 3, 2003. The response was to take it under advisement. No further response was given by the Appellant's counsel until the very belated response to undertakings delivered on May 20 some two weeks after the returnable date of this motion. The response was a bald refusal, unadorned by any reason. Mr. Morga offered no evidence of any circumstances related to Mr. Tregaskiss's personal life that need to be taken into account. My direction under Rule 77 is that the Appellant shall, within 21 days of the date of my Order, permit the appraiser designated by the Minister to have access to the residence at 5656 Riverside Drive East, Windsor, Ontario, both inside and outside the house and any other buildings, for the purpose of inspecting the property and taking such measurements and photographs as he deems necessary. If the parties are unable to agree as to the date and time for the inspection, the motion may be brought back before me by teleconference.

amendment of the Reply to the Notice of Appeal

[13] The Respondent moves to add the following two paragraphs to the Reply, in PART D - GROUNDS RELIED ON AND RELIEF SOUGHT:

> 16. In the alternative it is submitted that the Appellant is estopped from claiming that the FMV of the Property is $1.5 million. The Appellant claimed ITCs on the goods and services used to improve the property. However, subsection 170(2) of the *Act* only allows ITCs to be claimed to the extent that the quality, nature, and cost of goods and services used is reasonable having regard to the

> commercial activity of the registrant. In this case, the only commercial activity of the Registrant was the supply by way of sale of the Property at FMV pursuant to section 191 of the *Act*. By claiming ITCs, the Appellant represented to the Minister that it was commercially reasonable to use goods and services of extremely high quality, nature, and cost to build a residential complex that would be deemed to be sold at its fair market value. By remaining silent and not amending or correcting its GST return the Appellant again represented that it was commercially reasonable to spend $3.3 million to construct a residential complex that would be deemed to be sold at fair market value. The Minister relied on these representations and allowed the Appellant full ITCs up to the time of substantial completion and beyond. It is therefore not open to the Appellant to now argue that the FMV of the Property bears no relation to the cost of construction or that the FMV of the Property represents less than 50% of the cost of the Property and less than 35% of the FMV of the building.
>
> 17. In the further alternative it is submitted that the assessment of Net Tax by the Minister was correct for reasons other than those set out in the Notice of Assessment. Any claim for ITCs by the Appellant in excess of $105,000, claimed during the assessment period of January 15, 1997 to September 30, 1999 is unreasonable having regard to the nature of the Appellant's commercial activities and is not payable to the Appellant by virtue of subsection 170(2) of the *Act*. As a result, the Net Tax of the Appellant remains unchanged from the amount assessed by the Minister.

[14] The Appellant opposes the proposed amendment on the basis of the decision of the Supreme Court of Canada in *The Queen v. Continental Bank of Canada*.[4] There the Court held that the Minister may not assert a new basis for an assessment for income tax after the limitation period has expired. That case was followed by amendments to both the *Income Tax Act* and the *Excise Tax Act*, which were clearly intended to overcome the Court's decision. The amendment to the *Excise Tax Act* added subsection 298(6.1):

> The Minister may advance an alternative argument in support of an assessment of a person at any time after the period otherwise limited by subsection (1) or (2) for making the assessment unless, on an appeal under this Part,
>
> (*a*) there is relevant evidence that the person is no longer able to adduce without leave of the court; and
>
> (*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[4] 98 DTC 6501.

Mr. Morga opposes the proposed amendment in this case on the basis that the amendment "seeks to advance a new basis for an assessment [and is] tantamount to the Respondent appealing its own assessment after the statutory barred period". This, he submitted, goes beyond the alternative argument in support of an assessment that subsection 298(6.1) sanctions.

[15] In *Smith Kline Beecham Animal Health Inc. v. The Queen*,[5] Bonner J. had to consider a proposed amendment to the Reply filed in an appeal under the *Income Tax Act*. The objection was raised in that case, as here, that the proposed amendment was one that in effect raised a new assessment after the limitation period had expired, and that this was foreclosed by the Supreme Court's decision in C*ontinental Bank*. In permitting the amendment, Judge Bonner said:

> [14] In my view *Continental Bank* was never authority for the proposition that the Minister is, when defending an appeal from an assessment after the expiry of the subsection 152(4) period, confined within a conceptual prison called "basis of assessment" comprising only the facts and statutory provisions relied upon by the assessor. In my view Continental Bank is an application of the long-standing rule governing litigation in appellate courts which rule prevents litigants from raising points on appeal which were not pleaded and argued in the trial court. Appellate courts cannot be expected to deal with a new issue on appeal resting on an evidentiary record which is deficient by reason of the failure to plead and direct evidence to that issue. Here the Respondent seeks leave to amend well before the commencement of the trial. The situation is in no way analogous to *Continental Bank*.
>
> [15] Furthermore, nothing said in *Continental Bank* suggests that subsection 152(4) has a bearing on the amendment which the Respondent seeks. Subsection 152(4) restricts the right of the Minister to "... reassess or make additional assessments, or assess tax, interest or penalties ... ". The amendment now in question would not effect a reassessment of tax. Rather it is an attempt to defend the existing assessment of tax by asserting that, on the facts already pleaded, liability is imposed by a provision of the *Act* other than that relied on by the assessor.
>
> [16] It is long-settled law that the validity of an assessment depends on the application of the statute to the facts and not on the assessor's analysis. It is, I believe, unlikely that it was the intention of the Court in *Continental Bank (supra)* to overrule decisions such as *Minden (supra)* and *Riendeau (supra)* without referring to them. Accordingly, I am of the opinion that nothing said in

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5 2000 DTC 1526.

> *Continental Bank* can apply to prevent the Minister from relying on section 245 in the present case.

An appeal from his decision was dismissed by the Federal Court of Appeal.[6]

[16] An assessment for GST for any given period is the computation by the Minister of the net amount that the taxpayer is liable to pay under the *Act*, or in some cases to receive, made up of the tax imposed for transactions taking place during the period, net of the entitlement to receive input tax credits (ITCs) in respect of the same period: see subsections 225(1) and 296(1). It is from this quantification that an appeal lies (after objection). The Minister's proposed amendment does not seek to change that amount. Proposed paragraph 16 would raise an argument that the taxpayer's conduct in claiming certain ITCs gives rise to an estoppel as to the value of the residence based upon facts that are a component of the assessment appealed from (the ITCs claimed and allowed), and a provision of the *Act* (subsection 170(2)). Proposed paragraph 17 simply argues that if the Appellant is correct in its position as to the fair market value of the residence, then the net tax is nevertheless correct, because that same subsection 170(2) has effect to limit the Appellant's entitlement for ITCs to 7% of that fair market value, which is $105,000. Neither of these arguments involves a new basis for the assessment. Counsel for the Appellant argued that the matter of entitlement to ITCs in respect of the period covered by the assessment has long since been closed, because the claimed ITCs were approved and paid. However, this argument ignores the fact that the "net tax" that is the subject of the assessment appealed from consists of two elements. It is defined in subsection 225(1) as A - B. Omitting that which is not relevant for present purposes, A is the GST collectible during the assessment period, and B is the aggregate entitlement to ITCs. Proposed new paragraph 17 adds nothing to the factual issues between the parties.

[17] The Appellant relied on the decision of this Court in *Rogic v The Queen*.[7] That was a much different case, however, as the Minister there sought to resile from facts that had been established in earlier litigation between the Minister and a corporation whose shares were wholly owned by the taxpayers, and which had been pleaded by the Crown. In any event, the *Smith Kline* decision has been specifically approved by the Court of Appeal. If there were any inconsistency between it and *Rogic*, I would be bound to follow *Smith Kline*.

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6 2000 DTC 6142.

7 2001 DTC 855

[18] Mr. Morga also argued that it was too late for the Respondent to amend the Reply as the trial is scheduled to begin in July. He did not, however, point to any prejudice that the Appellant would suffer by reason of such a belated amendment. If that argument had any validity at the time it was made, it no longer does as the trial has since been adjourned at the request of the Appellant. The Respondent will have leave to amend the Reply to add the two paragraphs proposed.

[19] The need for the present motion was largely occasioned by the Appellant's total disregard of its obligation to respond to undertakings within the time fixed by Judge O'Connor's Order of October 30, 2002, and its unreasoned refusal to permit an inspection of the property. The filing of affidavits by counsel and their partner's and associates should be discouraged. The same may be said of the other deficiencies in the affidavit to which I have referred. The Respondent will have costs of the motion in any event of the cause, payable forthwith.

Signed at Ottawa, Canada, this 10th day of June, 2003.

"E.A. Bowie"

J.T.C.C.

CITATION:	2003TCC398
COURT FILE NO.:	2001-746(GST)G
STYLE OF CAUSE:	Clive Tregaskiss Investment Inc. and Her Majesty the Queen
PLACE OF HEARING:	Windsor, Ontario
DATE OF HEARING:	May 29, 2003
REASONS FOR JUDGMENT BY:	The Honourable Judge E.A. Bowie
DATE OF JUDGMENT:	June 10, 2003

APPEARANCES:

Counsel for the Appellant:	Gino Morga, Q.C.
Counsel for the Respondent:	Michael Ezri

COUNSEL OF RECORD:

For the Appellant:

Name:	Gino Morga, Q.C.
Firm:	Wilson, Walker, Hockberg & Slopen
For the Respondent:	Morris Rosenberg Deputy Attorney General of Canada Ottawa, Canada