

Docket: 2006-3036(GST)G

BETWEEN:

ROCKPORT DEVELOPMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3037(GST)G

BETWEEN:

PINE GLEN SUPPLY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3038(GST)G

BETWEEN:

GOLDSBORO CONTRACTING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3039(GST)G

BETWEEN:

C M J STORAGE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.



Docket: 2006-3040(GST)G

BETWEEN:

ASA CONSTRUCTION COMPANY LTD. ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**M R Martin Construction Inc.(2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3041(GST)G

BETWEEN:

M R MARTIN CONSTRUCTION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3042(GST)G

BETWEEN:

THE BEND ELECTRIC LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**Asa Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G) and**  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Docket: 2006-3043(GST)G

BETWEEN:

CODIAC DRILLING & BORING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**ASA Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G),** and  
**Robinson Construction Company Ltd. (2006-3044(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.



Docket: 2006-3044(GST)G

BETWEEN:

ROBINSON CONSTRUCTION COMPANY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on common evidence with the motions of  
**Rockport Developments Inc. (2006-3036(GST)G),**  
**Pine Glen Supply Ltd. (2006-3037(GST)G),**  
**Goldsboro Contracting Ltd. (2006-3038(GST)G),**  
**C M J Storage Ltd. (2006-3039(GST)G),**  
**Asa Construction Company Ltd. (2006-3040(GST)G),**  
**M R Martin Construction Inc. (2006-3041(GST)G),**  
**The Bend Electric Ltd. (2006-3042(GST)G) and**  
**Codiac Drilling & Boring Ltd. (2006-3043(GST)G)**  
on September 26, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellants: Edward J. McGrath

Counsel for the Respondent: John Bodurtha

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**ORDER**

UPON motion by the appellant for an order to reopen the hearing pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*,

AND UPON reading the affidavit of David Ross;

AND UPON hearing the parties;

The motion is dismissed without cost in accordance with the attached Reasons for Order.

The appellant will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellant must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

Citation: 2008 TCC 619

Date: 20081114

Dockets: 2006-3036(GST)G,  
2006-3037(GST)G, 2006-3038(GST)G,  
2006-3039(GST)G, 2006-3040(GST)G,  
2006-3041(GST)G, 2006-3042(GST)G,  
2006-3043(GST)G, 2006-3044(GST)G

BETWEEN:

ROCKPORT DEVELOPMENTS INC.,  
PINE GLEN SUPPLY LTD.,  
GOLDSBORO CONTRACTING LTD.,  
C M J STORAGE LTD.,  
ASA CONSTRUCTION COMPANY LTD.,  
M R MARTIN CONSTRUCTION INC.,  
THE BEND ELECTRIC LTD.,  
CODIAC DRILLING & BORING LTD.,  
ROBINSON CONSTRUCTION COMPANY LTD.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Angers J.

[1] This is a motion by the appellants for an order to reopen the hearing before judgment has been pronounced for such purposes and upon such terms as are just, pursuant to section 138 of the *Tax Court of Canada Rules (General Procedure)*. The appeals in the above matters were heard in Moncton, New Brunswick on May 12 and 13, 2008. The Court reserved judgment pending the submission of written briefs, the last of which was to be submitted on September 12, 2008.

[2] The motion and the affidavit in support thereof were filed with the Court on June 25, 2008. The appellants now have further evidence that they wish to introduce with respect to the above matters. That evidence consists of a series of transactions regarding the ownership of shares in the appellant corporations that occurred on June 25, 2008, and of the fact that some of the appellant corporations adopted corporate resolutions on June 18, 2008 to permit them to make an election pursuant to the provisions of paragraphs 156(2) and (4) of the *Excise Tax Act* (the *Act*), which they in fact made on June 25, 2008, approximately a month after the trial had terminated.

[3] The above appeals concern the assessment of tax by the Minister of National Revenue for the periods from January 1, 2001 to December 2003 or March 31, 2004, as the case may be. The appellants are appealing the Minister's decision to assess by making adjustments to the amounts reported as goods and services tax (GST) and harmonized sales tax (HST) for the aforementioned periods. Amongst the issues is whether the appellants Goldsboro Contracting Ltd., M R Martin Construction Inc., Pine Glen Supply Ltd., Rockport Developments Inc., The Bend Electric Ltd., C M J Storage Ltd. and Codiac Drilling & Boring Ltd. can rely on section 156 of the *Act* since, according to the Minister, those appellants cannot be regarded as "specified members" of a "qualifying group" because they cannot be considered "closely related" corporations pursuant to section 128 of the *Act*.

[4] The facts may be briefly summarized by simply stating that Robinson Construction Company Ltd. (Robinson) entered into a contract with the MRM Technical Group (MRM), an American firm which had contracts with Enbridge Gas New Brunswick Inc. (Enbridge) for the development of a natural gas distribution system in New Brunswick. Robinson subcontracted the performance of some of the work and services to its affiliated companies. There were delays of four months beyond the required start date due to the inability of Enbridge to obtain the necessary permits and there were also late changes in design, all of which resulted in extra costs. Robinson submitted these extra costs to MRM, which in turn submitted them to Enbridge, but for many of these costs, there was no payment authorization. The end result was that Robinson brought an action against MRM and Enbridge, claiming \$3.5 million for unpaid extra costs. The action was settled in 2005 for \$545,000.

[5] As a result of the settlement, the affiliated appellants were unable to receive payment for their services and claimed input tax credits (ITCs) on what had become bad debts. Goldsboro Contracting Ltd., Robinson, Rockport Developments Inc., ASA Construction Company Ltd. and The Bend Electric Ltd.'s claims for a deduction for these bad debts pursuant to section 231 of the *Act* were refused by the Minister as they were related persons within the meaning of subparagraph 251(2)(c)(ii) of the

*Income Tax Act* and as such were not dealing at arm's length as required by section 231 of the *Act*. In addition and as already alluded to, the Minister argues that the appellants Goldsboro, Martin, Pine Glen, Rockport, Bend, C M J and Codiac cannot rely on section 156 of the *Act* since none of those corporations can be regarded as "specified members" of a "qualifying group" because they cannot be considered "closely related" corporations pursuant to section 128 of the *Act*.

[6] It is this last argument that prompted the appellants, after the trial was over, to change their corporate ownership and to have some of them make an election pursuant to subsections 156(2) and (4) of the *Act*. That is the further evidence that they wish to introduce, as it is their position that this new evidence is relevant to determining whether taxes were owed by the appellants during the relevant periods. It is also their position that the *Act* contains no provision that prevents making a retroactive election with an effective date which the appellants have stipulated to be December 15, 2000. The appellants finally argue that they are merely exercising their right to make their tax treatment consistent with the intent of the *Act*.

[7] The respondent's position is that there is no mention in any of the notices of appeal of the fact that the appellants had reached an agreement with each other or had made an election covering the periods under appeal. This therefore raises a new issue of whether the elections are valid for the periods under appeal, and that issue may in itself require additional evidence and arguments with respect to the change in ownership of the shares. The respondent also submits that the appellants' new evidence was non-existent at the time of the trial and is not simply new evidence that existed prior to the trial and that for some reason was not available. The respondent submits that the creation of new evidence pertaining to a new issue is an abuse of the process of this Court.

[8] Subsection 138(1) of the *Tax Court of Canada Rules (General Procedure)* reads as follows :

The judge may reopen a hearing before judgment has been pronounced for such purposes and upon such terms as are just.

[9] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada endorsed the two-part test from *Scott v. Cook*, [1970] 2 O.R. 769 (Ont. H.C.), that a trial judge must apply in considering a motion to reopen a trial before judgment. The two questions that must be answered are whether the new evidence changes the outcome of the hearing and whether this evidence could have been obtained prior to the trial through the exercise of reasonable diligence.

[10] It is clear that the evidence the appellants now seek to introduce was non-existent at the time of the trial. The acquisition of shares, the resolutions and the elections to treat certain taxable supplies as having been made for nil consideration all occurred after the trial was completed. The possibility of doing all this may have been available to the appellants well before the trial was held, but they did not act; this is, therefore, not a case in which the evidence could have been obtained or produced through the exercise of reasonable diligence.

[11] The evidence the appellants now seek to introduce is of events that occurred after the fact. The admission of that evidence raises new issues that concern not only the matter of the election and whether it is retroactive and how far back it must go if it is to cover the years in issue, but also the questions of whether the share transactions and resolutions are valid and whether the appellants satisfy the requirements of the definitions found in the *Act*. All of the above would need to be addressed. In addition, had these share transactions, resolutions and elections been existent at the time of the audit, the outcome may possibly have been different, the basis of the assessment may have been different, as may also have been the pleadings and the issues before this Court. Since the evidence was non-existent at the time of the audit and the trial, I conclude that it cannot change the outcome of the trial.

[12] To allow the motion would, in my opinion, constitute an abuse of process and would be procedurally unfair to the respondent. The appellants will have until December 19, 2008 to submit an additional post-trial brief if necessary, the respondent will have until January 23, 2009, and the appellants must submit a reply by February 6, 2009.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

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Angers J.

CITATION: 2008 TCC 619

COURT FILE NOS.: 2006-3036(GST)G, 2006-3037(GST)G,  
2006-3038(GST)G, 2006-3039(GST)G,  
2006-3040(GST)G, 2006-3041(GST)G,  
2006-3042(GST)G, 2006-3043(GST)G,  
2006-3044(GST)G

STYLES OF CAUSE: Rockport Developments Inc. v. HMQ  
Pine Glen Supply Ltd. v. HMQ  
Goldsboro Contracting Ltd. v. HMQ  
C M J Storage Ltd. v. HMQ  
ASA Construction Company Ltd. v. HMQ  
M R Martin Construction Inc. v. HMQ  
The Bend Electric Ltd. v. HMQ  
Codiac Drilling & Boring Ltd. v. HMQ  
Robinson Construction Company Ltd. v.  
HMQ

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: September 26, 2008

REASONS FOR ORDER: The Honourable Justice François Angers

DATE OF ORDER: November 14, 2008

APPEARANCES:

Counsel for the Appellant: Edward J. McGrath  
Counsel for the Respondent: John Bodurtha

COUNSEL OF RECORD:

For the Appellant:

Name: Edward J. McGrath  
Firm: Anderson Sinclair  
Moncton, New Brunswick

For the Respondent:

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Canada