

Docket: 2008-693(EI)

BETWEEN:

ANICK GIROUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LONDON LIFE INSURANCE COMPANY,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on September 23 and 24, 2008, at Montréal, Quebec

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: The Appellant herself

Agent for the Respondent: Simon-Olivier de Launière (student-at-law)

Counsel for the Intervener: Yves Turgeon  
Caroline Tamraz

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**JUDGMENT**

The appeal is dismissed and the decision made by the Minister of National Revenue on January 24, 2008, is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of November 2008.

"Robert J. Hogan"

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Hogan J.

Translation certified true  
on this 23rd day of January 2009.

Brian McCordick, Translator

Citation: 2008 TCC 653  
Date: 20081128  
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### **REASONS FOR JUDGMENT**

#### **Hogan J.**

[1] This is an appeal from a decision of the Minister of National Revenue finding that the Appellant's employment during the period from July 8, 2005, to November 2, 2006, was not insurable because she was self-employed and had not been hired under a contract of service. The payor corporation, the London Life Insurance Company, intervened in the appeal to support the Minister's position.

[2] In concluding that the Appellant did not hold insurable employment, the Respondent relied on the following assumptions of fact:

[TRANSLATION]

5.(a) The payor was incorporated on March 24, 1874.

(b) The payor is an insurance company that sells life, accident and health insurance policies.

- (c) The Appellant was hired as a financial advisor and sales and service representative.
- (d) The worker's tasks involved contacting and visiting clients and selling them insurance policies from the payor or insurance companies associated with the payor;
- (e) The Appellant and the payor do not agree on whether the Appellant was a self-employed worker or salaried employee.
- (f) The Appellant began working for the payor on May 9, 2005.
- (g) From May 9 to July 1, 2005, the Appellant was in training at the payor's premises on University Street in Montréal.
- (h) While she was in training, the Appellant received fixed remuneration of \$500.00 a week.
- (i) On January 4, 2008, Caroline Tamraz, a representative of the payor, told one of the Respondent's officers that during her training period, the Appellant was considered an employee and employment insurance premiums were deducted from her paycheques.
- (j) On July 8, 2005, the Appellant signed a sales agreement with the payor.
- (k) According to paragraph 2(f) of that agreement, the Appellant's relationship with the payor and the payor's partners was that of a self-employed worker.
- (l) As of July 8, 2005, the payor considered the Appellant self-employed.
- (m) At her own expense, the Appellant held a licence to sell life insurance and a licence to sell mutual funds.
- (n) The Appellant had to keep her licences valid to work for the payor.
- (o) The Appellant was not subject to direct control by the payor.
- (p) The Appellant did not have to follow a work schedule set by the payor.
- (q) The Appellant had no sales quota to meet.
- (r) The Appellant had no vacation or sick leave with the payor.
- (s) The Appellant had no fringe benefits.

- (t) The Appellant was paid only on commission or through advances.
- (u) The commission rate varied depending on the products sold.
- (v) The Appellant was liable for losses resulting from her clients' bad debts.
- (w) If the Appellant wanted to lease an office on the payor's premises, she had to pay \$75.00 every two weeks.
- (x) The Appellant was responsible for her travel and operating expenses.
- (y) The Appellant provided her own car, laptop computer, cellular telephone and photocopier without compensation from the payor.
- (z) The relationship between the Appellant and the payor ended because the Appellant no longer held a valid licence.

[3] The Appellant called two witnesses, Jean-François Thiffault and Jean-Stéphane Bourgeois. She also testified on her own behalf.

[4] Jean-François Thiffault explained to the Court that he worked as an investment advisor in London Life's Freedom 55 Financial division ("Freedom 55 Financial") at the same time as the Appellant.

[5] He already had an investment broker's licence when he joined London Life. He had to take training to obtain his insurance agent's licence.

[6] After his initial training and after obtaining his insurance agent's licence, Mr. Thiffault signed a self-employment contract with London Life.

[7] He explained that he was paid mainly on commission and that a very complex formula was used to calculate his commissions. He also had to pay for the cost of services provided to him by London Life, such as the use of a computer.

[8] He testified that he could lease an office at a branch or work at home or elsewhere. He chose to have an office at London Life's branch in Longueuil.

[9] He also testified that any insurance agent or investment broker affiliated with Freedom 55 Financial had to take continuing training for the first 24 months of service. London Life organized a day of training every Tuesday at the branch with which Mr. Thiffault was affiliated.

[10] Mr. Thiffault testified that his team manager followed up on his solicitation activities and that he had to report on the number of telephone calls or meetings he had with potential clients. He also explained that he was not been entitled to any fringe benefits before the end of the two-year period.

[11] Lastly, he testified that he had to submit a quarterly evaluation and explain any decrease in sales that might have occurred during that period.

[12] He used a computer leased from London Life. The software on the computer was London Life's, and it included all data relevant to the range of insurance policies and investments offered by London Life.

[13] Finally, he explained that he had to keep his files in order and that they were subject to control by London Life.

[14] Counsel for the Intervener cross-examined Mr. Thiffault, who explained that he had previously worked for the National Bank. At that time, he received a salary payable every two weeks and a performance bonus. While working at the National Bank, he acquired a licence to sell mutual funds. He confirmed that provincial regulations required him to be affiliated with an insurance company to maintain his licence to sell insurance and mutual funds.

[15] He also admitted on cross-examination that insurance brokers could sell their clients when they left London Life. However, in practice, only insurance brokers with more than 24 months of training had this option.

[16] He explained that he did not have a fixed work schedule. He could determine the hours during which he sold insurance products or investment and mutual fund products. He said that he could hire his own administrative staff and did not have to use the services offered by London Life. Finally, he explained that his legal relationship with London Life could be terminated if he did not achieve a minimum sales figure.

[17] The second witness was Jean-Stéphane Bourgeois. He was the executive director of training and development for insurance and mutual fund advisors. He managed the Appellant's training. He had to help new advisors who joined Freedom 55 Financial to draw up a business plan. He also explained that he was responsible for giving training courses to newcomers, including training in the software and products offered by London Life. He was also responsible for sales techniques.

[18] He testified that London Life's Spectra software allowed insurance agents to produce a report for clients. Using data gathered by the agent from potential clients, the software identified the products that might help the clients achieve their financial objectives or meet their insurance or investment needs. Every week, he organized a meeting with insurance agents who had fewer than 24 months of training. During the meetings on Monday, he checked whether the agents had done follow-up with clients. He explained that the Monday meetings were mandatory for new agents. After six months, agents could be exempted from that obligation, depending on their performance.

[19] He confirmed that he had to meet with an agent each quarter to make sure that the agent was meeting London Life's minimum standards.

[20] He testified that the Appellant participated voluntarily in a mentoring program while she was affiliated with London Life. Her mentor was Jocelyn Latulippe, an insurance agent who was very successful with Freedom 55 Financial. On cross-examination, he told the Court that the Appellant had previously been a self-employed worker under Mr. Latulippe. At that time, she did administrative work for Mr. Latulippe and another insurance agent affiliated with London Life. As he recalled, Mr. Latulippe encouraged the Appellant to obtain her insurance agent's licence because he was considering transferring some of his inactive clients to her.

[21] The Appellant testified that Mr. Latulippe encouraged her to become a marketing trainee at Freedom 55 Financial. Mr. Latulippe agreed to act as her mentor if she was able to obtain her insurance agent's licence at the end of the training and if London Life offered her a sales agreement.

[22] The Appellant filed Exhibit A-2, an agreement inviting her to participate in London Life's training program, which she signed on April 12, 2005. The agreement provided that, if the Appellant passed the training program and obtained her insurance agent's licence, London Life would enter into a contract with her as a financial security advisor for Freedom 55 Financial. Since the Appellant was paid during her training period, the contract contained a clause preventing her from joining another financial services provider as an agent, advisor or representative in Canada for a period of one year after the end of the training program.

[23] The agreement also contained a confidentiality undertaking for the seven-week training program. The undertaking covered confidential information or trade secrets

related to the business, business practices, training methods and sales practices of London Life and its affiliated companies.

[24] The Appellant filed Exhibit A-3, the sales agreement she signed with London Life on July 8, 2005.

[25] I consider the following clauses of that agreement relevant to the outcome of this appeal:

[TRANSLATION]

**1. Object and Scope of Agreement**

**(a) Object**

This agreement applies to representatives involved in sales representation, selling, service and other related activities (sales activities) for products established or offered by London Life or covered by agreements with London Life's Intercorporate Partners. I agree to devote all my efforts to fulfilling my obligations under this undertaking and this agreement.

...

**2. Powers and Obligations**

**(a) Solicitation and Service**

After obtaining the licences needed to sell the applicable product and the right to represent London Life and its Intercorporate Partners, I shall solicit contracts from clients, provide service under those contracts and collect premiums, contributions, deposits and funds to be invested on behalf of London Life and its Intercorporate Partners.

**(b) Licences**

For the entire term of this agreement, I shall at my own expense obtain the licences needed to sell, pursuant to the authority in effect, all products offered by London Life and its Intercorporate Partners.

**(c) Standards and Common Practices**

I acknowledge the interests and obligations of London Life and its Intercorporate Partners in complying with all legislative and regulatory requirements, meeting industry standards and preserving their image as solvent, responsible financial institutions. Those standards and common practices are set out in London Life's code



of professional conduct, as amended, and I agree to comply with its provisions. I acknowledge that London Life's code of professional conduct forms an integral part of this agreement as if set out in full herein.

**(d) Compensation Guide**

I acknowledge that I received a recent version of the compensation guide prepared by London Life before signing this agreement. That guide shall form an integral part of this agreement by reference.

I further agree that London Life may amend the compensation guide from time to time by sending me a notice to this effect.

...

**(f) Self-employed Workers**

The relationship between me and London Life and its Intercorporate Partners is and shall remain that of two self-employed workers. This agreement shall not create any employee/employer relationship between the parties. I may choose the time, place and method for soliciting sales and services under this agreement, the whole in accordance with legislative and regulatory requirements and industry standards.

...

**5. Commission and Other Payments**

**(a) Compensation Guide**

London Life shall pay me for selling its products and assuming responsibility for service. The compensation guide contains all details on payments and adjustments. Sales made following any amendment to London Life's compensation guide shall be subject to those changes.

...

**(d) Amounts Payable to London Life**

If at any time during the term of this agreement or after its termination, my account shows that I owe an amount to London Life, that amount shall be or shall remain payable to London Life immediately, whether London Life requests repayment or not and notwithstanding any termination of this agreement in the meantime.

London Life may deduct any amount owed to it as unearned commissions or other unearned payments from any amount that it owes me.

...

**9. Protection of Information, No Replacement and Inducement**

**(a) Information on the Business and Clients of London Life and its Intercorporate Partners**

...

During the entire term of the contract and for a period of two years after the termination of this agreement, I shall not for any reason, whether on my own behalf or on behalf of any person, use, disclose, provide or make accessible to anyone any information acquired during the term of this agreement concerning the business of London Life or its Intercorporate Partners.

...

**(b) No Inducement of the Clients of London Life and its Intercorporate Partners**

During the term of this agreement and for a period of two years after the termination of this agreement, I shall not for any reason, whether on my own behalf or on behalf of another person, directly or indirectly induce or attempt to induce a client of London Life or its Intercorporate Partners to do any of the following things in relation to an individual insurance, retirement income, savings or investment contract established by London Life or its Intercorporate Partners. . . .

**(c) No Inducement of the Members of London Life's Field Services**

During the term of this agreement and for a period of two years after the termination of this agreement, I shall not for any reason induce or attempt to induce a member of London Life's field services or administrative staff to leave London Life.

[Emphasis added.]

[26] The Appellant tried to explain clause 2(f) of the sales agreement, which provides that the legal relationship between her and London Life was that of a self-employed worker. She testified that she read the agreement but that changing a few of its clauses hardly seemed possible. She concluded that it was contract of adhesion.

[27] The Appellant explained that she enjoyed some success at Freedom 55 Financial from May to November 2006. However, at the end of 2006, she saw her family physician, who told her that she was suffering from exhaustion related to her work. She asked her sales director for sick leave.

[28] She explained that the sick leave continued and, as a result, she did not renew her insurance agent's licence or her mutual fund agent's licence.

[29] When cross-examined by the agent for the Respondent, the Appellant admitted asking her accountant to prepare her tax returns for the 2005, 2006 and 2007 taxation years as if she were self-employed. Since that status was shown on the record of employment received from the payor corporation, she did not think she could prepare her returns in any other way.

[30] The Appellant filed Exhibit A-11, the letter she had received from the payor corporation on June 11, 2007. In that letter, the payor told the Appellant that she had failed to renew her licence to sell life insurance when it expired on April 30, 2007, and had also failed to renew her licence to sell mutual funds on May 1, 2007. Since those two licences were essential for the Appellant to continue working as an insurance agent or mutual fund advisor, London Life was obliged to terminate the sales agreement it had entered into with the Appellant. In its letter, the payor corporation referred to the clause authorizing it to terminate the sales agreement for failure to renew a licence.

[31] The letter was signed by Sherry Marks, the director of field service relations. The Appellant asked the Court to read paragraph 3 on page 2, which states:

[TRANSLATION]

Please find enclosed a booklet entitled *Vos avantages sociaux à la cessation d'emploi* [your fringe benefits on termination of employment]. Unless otherwise specified, the date on which your fringe benefits end will be the date of termination of your agency agreement and your sales agreement with the London Life Insurance Company. Please read this document carefully, since it contains important information about your guarantees and the options for converting your group life insurance.

[Emphasis added.]

[32] The agent for the Respondent called only one witness, Elio Palladini, who testified that he was an officer in the Appeals Division of the Canada Revenue Agency (CRA). The Appellant's file was given to him by his team leader, Sylvain Gauvin.

[33] He explained to the Court that an initial determination had been made in the Appellant's file. In a letter written to the Appellant on August 21, 2007,

Mélanie Girard concluded that the Appellant was an employee and that her employment with the corporation was insurable under paragraph 5(1)(a) of the *Employment Insurance Act*. Mr. Palladini explained that he recommended to his team leader that Ms. Girard's determination be reversed. In a letter signed by team leader Sylvain Gauvin and dated January 24, 2008, the Appellant was informed that her employment with the payor corporation was not insurable because she had not been hired under a contract of service with that corporation.

[34] Mr. Palladini testified that he read a letter sent to the Intervener by the CRA's CPP/EI Eligibility Division (now the CPP/EI Rulings Division), which was filed as Exhibit INT-6. That letter was sent after the Intervener asked the CRA to rule on the status of its workers following a reorganization of its business that was to create a more autonomous legal relationship with its insurance and mutual fund agents. The letter explained in detail how the Intervener planned to change its legal relationship with its agents. The Court notes that the Appellant's terms and conditions with the payor corporation were similar if not identical to those described in the letter. The CRA concluded in the letter that, after the changes, the Intervener's agents would have the legal status of self-employed workers for tax purposes. The Intervener filed the letter with the CRA's Appeals Division for consideration, since it obviously did not agree with Ms. Girard's initial determination in the Appellant's file.

[35] Mr. Palladini testified that he applied the tests established by the courts to determine the Appellant's status. He concluded that there was no relationship of subordination between the payor corporation and the Appellant. He explained that the Appellant was responsible for her work tools and had had a real chance of profit and risk of loss, which depended on her success in recruiting new clients.

[36] The Intervener called H  l  ne Dor  , the payor corporation's executive director of market development in Quebec. She explained that she was responsible for 14 advisors, who could each hire their own administrative assistants and were free to determine when and where they worked. She admitted that new agents had to receive a great deal of training, but she said that the training was necessary so they could meet their regulatory obligations and those of the payor corporation.

[37] She testified that the Autorit   des march  s financiers (AMF) required all insurance agents' records to comply with a strict regulatory framework. The AMF audited insurance companies to determine whether their records included all the information provided to potential clients and to ensure that clients had signed certain essential documents.

[38] The Appellant chose to cross-examine Ms. Doré. In answering the Appellant's questions, Ms. Doré stated that, although it was possible for an agent with less than 24 months of service to hire a subagent, in practice this rarely if ever occurred. The Appellant asked questions about the deductions made from the net income she received from the payor corporation, and Ms. Doré explained that those types of deductions were voluntary and that a self-employed worker could ask the payor corporation to make and remit deductions rather than waiting to make quarterly payments. The deductions were made for a self-employed worker.

[39] The Appellant asked Ms. Doré to explain how she could have been eligible for group insurance. Ms. Doré stated that the payor corporation's policy, under the group insurance rules, was such that several persons from the same group could take out group insurance. The Appellant asked how she could have met the group insurance requirements as a self-employed person working alone. Ms. Doré did not answer that question.

[40] The Intervener called Ms. Marks, the author of the termination letter of June 11, 2007, filed as Exhibit A-11. Ms. Marks testified in English, since she explained to the Court that she could neither speak nor write French. She said that a member of her translation department had prepared the letter based on an English version and had referred to a booklet entitled *Vos avantages sociaux à la cessation d'emploi* [your fringe benefits on termination of employment]. She testified that she did not understand the title and that it was a mistranslation. The title has since been corrected.

[41] Ms. Marks also testified that an independent agent could ask the payor corporation to make deductions as a self-employed worker. She told the Court that the Appellant had been dismissed for failing to renew her licences.

[42] Ms. Marks explained that the payor corporation is subject to an extensive regulatory framework and that, in the case of Quebec, the AMF requires reports and internal controls on a quarterly basis to verify whether agents are meeting their documentary obligations to their clients.

[43] She described the history of the payor corporation. She explained that it had been purchased by the Great-West Life Assurance Company, whose parent company is the Power Corporation of Canada. Following that acquisition, the payor corporation had to reformulate the way it did business in selling insurance and mutual fund products. The objective of the reform was to do business with independent agents rather than employees. She explained that the agents had

expressed a desire to be more independent so they could have the status of self-employed workers. Several of the payor corporation's former employees decided to leave the corporation after the reform.

[44] Finally, Ms. Marks said that several insurance agents were very successful after this new business plan was implemented. She explained that several of the big agents earned more than a million dollars.

### Positions of the Parties

[45] The Appellant argued that she was an employee of the payor corporation the entire time she worked for it. She told the Court that she worked exclusively for the corporation during that time. She noted that she received payslips like an employee and was paid her commissions and bonuses every two weeks. She argued that there was a strong relationship of subordination between the corporation and her. She explained to the Court that she had to attend meetings every week and training sessions that lasted six to ten hours. She was subject to performance monitoring and had to attend training sessions to enrich her knowledge or improve her weaknesses.

[46] She had to maintain her records in the manner required by the payor corporation. She had to use texts chosen in advance by the payor corporation when she called potential clients to set up appointments, and she had to meet with her first clients under her director's supervision. The sales programs and computer data were developed and designed by the payor corporation, and she had to use them as instructed.

[47] She argued that her client list did not belong to her and that she was obliged to save the list on the Intervener's drives. Finally, she argued that she had no say in calculating her commissions and bonuses and that she was not able to set the cost of products or services or her own profit margin.

[48] The agent for the Respondent argued that the contract set out both parties' clear intention that the Appellant's legal relationship with the payor corporation be that of a self-employed worker. He explained that the Appellant understood the difference between an employee and a self-employed worker.

[49] The agent for the Respondent submitted that control over records was imposed mainly by the regulatory framework that required the payor corporation to do internal controls and submit reports to regulatory agencies. He explained that the Appellant could hire her own administrative staff and could work at home rather than at the

payor corporation's offices. Her work schedule was not fixed. Finally, he explained that the Appellant could increase her net income by selling more products. She was free to determine how much her income grew.

[50] The agent for the Respondent admitted that certain tests used to identify an employment relationship were met in this case. For example, the Appellant was required to take training courses and to explain her sales figures when they did not meet the payor corporation's requirements. However, he explained to the Court that the control exercised by the payor corporation was largely imposed by the regulatory framework or was consistent with the monitoring done in the context of a contract of enterprise. He said that the Appellant always achieved the annual sales required by the payor corporation until very recently, that the way she made sales was never controlled and that she was not obliged to have her telephone conversations monitored by her sales director. Finally, he said that the Appellant was free to choose her sales territory. He therefore concluded that the Appellant's status was that of a self-employed worker.

[51] Counsel for the Intervener argued that the parties' intention must be respected. He argued that the Appellant understood the difference between an employee and a self-employed worker and even benefited from the latter status when she worked for Mr. Latulippe. The Appellant knew that Mr. Latulippe had that status with the payor corporation. She thought that she could repeat his success by completing her training with the payor corporation and obtaining her insurance agent's licence and mutual fund broker's licence.

[52] Counsel for the Intervener also explained that control over records was a requirement imposed by the regulatory authorities. Each independent insurance agent had to be affiliated with an insurance company regulated by the provincial authorities. He therefore concluded that the Chief of Appeals correctly decided the appeal in the Appellant's case by finding that she was a self-employed worker when she was affiliated with the payor corporation.

### Analysis

[53] In my opinion, the facts established in this case are very similar to those considered by the Federal Court of Appeal in *Combined Insurance Company of America v. Canada (Minister of National Revenue)*, 2007 FCA 60. In that case, the insurance company appealed the decision of the Tax Court of Canada that the worker was its employee. The worker in that case had to sell insurance policies for the appellant. The sales contract entered into by the appellant and the worker stated that

the worker was self-employed. The worker had to provide her own work tools and was free to choose to whom she tried to sell insurance policies. The worker had been recruited by a district manager, himself a self-employed worker with the insurance company, to join the company.

[54] In rendering the unanimous judgment of the Court of Appeal, Nadon J.A. found that the decision of the Tax Court of Canada was incorrect because Justice McArthur of this Court had failed to attach enough importance to the test of the parties' intention. After making those findings, he applied the test established by the courts to the facts of the case and concluded that the control exercised by the appellant in that case was based more on regulatory obligations. Nadon J.A. also concluded that the worker had a great deal of freedom in deciding how to conduct her activities. She could work in an office leased by the appellant or at home. She had to pay her own promotional and sales costs. She could hire administrative staff or delegate some of her activities to subagents.

[55] While the same conditions exist in the Appellant's case, I find that the Appellant had greater freedom in some respects. Unlike the worker in *Combined Insurance Company of America*, she could define her own sales territory and target clientele. She was free to participate or not participate in trade shows and professional events. Indeed, the Appellant testified that she rented a booth at the parents' fair in Montréal on her own initiative and made some good sales as a result.

[56] I find that the Appellant in this case clearly understood the difference between an employee and a self-employed worker. She chose to report that she was a self-employed worker because the nature of her work was appropriate to that legal relationship.

[57] I also find that the payor corporation exercised control for the sole purpose of complying with regulatory obligations imposed on it and of determining whether the Appellant was meeting her obligations under a contract of enterprise.

[58] I find that the Appellant had a great deal of freedom in performing her work. She could determine where she worked, and she could also hire her own administrative staff.

[59] As can be seen from the sales agreements signed by the Appellant, she was entitled to be paid commissions on the policies or mutual fund products she sold. She had control over her hours of work and the effort she devoted to increasing her net income. I conclude that she was a self-employed worker while she was affiliated with



the payor corporation and that her work was not insurable employment for the purposes of the *Employment Insurance Act* during the period in issue. For all these reasons, I dismiss the Appellant's appeal.

Signed at Ottawa, Canada, this 28th day of November 2008.

"Robert J. Hogan"

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Hogan J.

Translation certified true  
on this 23rd day of January 2009.

Brian McCordick, Translator

CITATION: 2008 TCC 653

COURT FILE NO.: 2008-693(EI)

STYLE OF CAUSE: ANICK GIROUX v. M.N.R. and LONDON LIFE INSURANCE COMPANY

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 23 and 24, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: November 28, 2008

APPEARANCES:

For the Appellant: The Appellant herself

Agent for the Respondent: Simon-Olivier de Launière (student-at-law)

Counsel for the Intervener: Yves Turgeon  
Caroline Tamraz

COUNSEL OF RECORD:

For the Appellant:

    Name:

    Firm:

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