

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230608

Docket: A-113-22

Citation: 2023 FCA 130

**CORAM: WEBB J.A.
MONAGHAN J.A.
GOYETTE J.A.**

BETWEEN:

RIVER CREE RESORT LIMITED PARTNERSHIP

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on February 22, 2023.

Judgment delivered at Ottawa, Ontario, on June 8, 2023.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**MONAGHAN J.A.
GOYETTE J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] River Cree Resort Limited Partnership (River Cree) received payments totalling in excess of \$8 million between September 1, 2011 and May 31, 2015. These payments arose as a result of individuals (referred to herein as cardholders) withdrawing cash from their bank accounts by using automated teller machines (ATMs) located on River Cree's premises. River Cree's position is that, for the purposes of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA), these were

payments for financial services provided by River Cree. If River Cree was providing financial services, they would be exempt supplies under the ETA and no GST would be payable. River Cree was reassessed for GST on the basis that the payments were received as consideration for taxable supplies made by River Cree.

[2] The Tax Court of Canada found that these payments were consideration for taxable supplies made by River Cree. The Tax Court therefore, subject to certain adjustments to reflect concessions made by the Crown, dismissed River Cree's appeal from the reassessments imposing GST (2022 TCC 45, *per* Graham J.).

[3] For the reasons that follow, I would dismiss this appeal.

I. Background and the Tax Court Decision

[4] River Cree operates a resort in Alberta. The resort includes a casino, a hotel, a conference centre and two arenas. In order to allow the patrons of the casino (and the other resort facilities) to access cash, River Cree arranged to have ATMs located throughout the premises. Initially, the ATMs were supplied by Cash' N Go Ltd., which was later acquired by Access Cash General Partnership (Access Cash). Since nothing turns on whether it was Cash' N Go Ltd. or Access Cash who was involved, for ease of reference, the supplier of the ATMs will be referred to herein as Access Cash.

[5] The casino was an attractive location for Access Cash to place its ATMs. Mr. Wilson was the individual at Access Cash who was responsible for River Cree's account. The Tax Court summarized the evidence related to why the casino was an attractive location for Access Cash's ATMs and found that the compensation system was established by Access Cash to reward River Cree based on the volume of transactions:

[115] Mr. Wilson made it clear that the most important thing in the ATM business is the volume of transactions. Companies like Access [Cash] earn fees for each transaction processed. Because casino patrons need cash to gamble, casinos offer a particularly high volume of transactions. Ms. Brodhecker [the slot-cage manager at River Cree's resort] testified that there were between 50,000 and 60,000 ATM transactions per month at the Resort. I find that it was precisely this potential volume that made the Resort a desirable location for Access [Cash] to place its ATMs. Access [Cash] wanted to ensure that it would not face any competition for that volume so it negotiated exclusivity. To reinforce its goals, Access [Cash] established a compensation system that rewarded [River Cree] based on the volume of transactions.

[6] The Tax Court Judge, in paragraphs 7 to 13 of his reasons, set out the transactions that are executed in order for a particular cardholder to withdraw money from his or her bank account when using an ATM that is not an ATM of that person's bank (which are referred to as white label ATMs). When a cardholder withdraws cash from a white label ATM, a surcharge fee and an interchange fee are imposed.

[7] The surcharge fee is imposed on the cardholder when the cardholder starts the transaction. The cardholder must agree to pay this fee to withdraw money. The cardholder's bank is also required to pay an interchange fee to the Interac network member who is operating the particular network that is used to complete the transaction. The network member pays a portion of this fee to the person who provides the ATM that is used to withdraw the money.

[8] The Tax Court Judge examined the transactions by separating the reporting periods into two different periods – September 1, 2011 to May 31, 2014 (the Initial Periods) and June 1, 2014 to May 31, 2015 (the Subsequent Periods). The Tax Court Judge made a number of factual findings for the Initial Periods and the Subsequent Periods.

A. *Initial Periods*

[9] During the Initial Periods, the relevant agreement between River Cree and Access Cash was the “ATM Purchase Agreement” (the “2010 Agreement”). The agreement included a “Free use discount” equal to the purchase price for the ATMs. Although this agreement contemplated the purchase of 12 ATMs by River Cree, the ATMs were not purchased by River Cree (paragraph 26 a of River Cree’s Notice of Appeal to the Tax Court and paragraph 48 of the Tax Court Judge’s reasons). Access Cash continued to own the ATMs throughout the Initial Periods.

[10] Access Cash paid River Cree certain amounts calculated by reference to the surcharge fee and the interchange fee (reasons at paragraph 100). During the Initial Periods, the surcharge fee for each transaction was \$3 and the amount paid to River Cree for each transaction, based on the surcharge fee, was \$3. The interchange fee paid by the bank was \$0.75 per transaction. Access Cash received \$0.71 of each interchange fee and the additional payment to River Cree based on the interchange fee was \$0.10 to \$0.14 per transaction. The total amount received by River Cree during the Initial Periods for each transaction was \$3.10 to \$3.14.

[11] The Tax Court Judge found that Access Cash borrowed cash from River Cree and loaded it into the ATMs. Therefore, it was Access Cash's cash that was loaded into the ATMs.

[12] In determining who operated the ATMs, the Tax Court Judge considered a number of factors.

[13] He found that Access Cash connected the ATMs to the Interac network and was responsible for loading the cassettes (that contained the cash) into the ATMs. The Tax Court Judge found that, while River Cree provided the utilities, security, routine maintenance and customer support necessary to operate the ATMs, Access Cash retained River Cree to provide these services.

[14] The 2010 Agreement specified where the ATMs were to be placed at the resort. River Cree could not remove the ATMs and Access Cash's permission was required to relocate the ATMs. The public had to be allowed to access the ATMs during River Cree's normal business hours. The restrictions imposed on River Cree with respect to relocating the ATMs and in not obstructing access to the ATMs led the Tax Court Judge to conclude that "[t]his level of control strongly suggests that Access [Cash] was the operator, that the Appellant was merely providing a location and that Access [Cash] wanted to ensure that the Appellant did not interfere with the ATMs' operations" (reasons at paragraph 62).

[15] River Cree had the right to apply stickers to the outside of the ATMs, to determine the wording for the opening greeting and to choose the denomination of bills to be loaded into the

ATMs. On the other hand, Access Cash could change the wording, branding, design or appearance of the ATMs without the consent of River Cree. The ATMs could only be connected to the network chosen by Access Cash. Paragraph 1.8 of the 2010 Agreement specified that any changes to the surcharge fee required the consent of Access Cash. However, if Access Cash determined that the operation of the ATMs was not commercially viable, it could either, in its sole discretion, terminate the agreement, or change the amount of the surcharge fee and/or the transaction fees or Access Cash's share of such fees (this provision is in paragraph 1.2 of the 2010 Agreement).

[16] The Tax Court Judge noted, in paragraph 67 of his reasons, that:

Most importantly, Access [Cash] had the ability to terminate the agreement and take the ATMs back if [River Cree] did not comply with any of these conditions or any other term of the 2010 Agreement.

[17] The Tax Court Judge concluded, in paragraph 70, by finding that Access Cash operated the ATMs during the Initial Periods.

[18] The Tax Court Judge, in paragraph 82, set out his conclusion with respect to whether River Cree arranged for the transfer of money from Access Cash to the cardholders who used the ATMs:

[82] Access [Cash] gave ATMs that it owned to [River Cree] for free on the condition that [River Cree] would place them in specific locations at the Resort and allow cardholders to access them. Access [Cash] then loaded the ATMs with cash, connected them to a network and processed the cardholders' transactions. In the circumstances, I have no difficulty in concluding that [River Cree] did nothing

to arrange for the transfer of money to the cardholders. Accordingly, I find that Access [Cash] was the ATM provider in the Initial Periods.

[footnote reference omitted]

[19] The Tax Court Judge found that the cardholders paid the surcharge fee to Access Cash for services provided by Access Cash and that Access Cash paid River Cree for supplies made outside the series of supplies that allowed the cardholders to withdraw money from their bank accounts by using the ATMs.

[20] The Tax Court Judge then considered whether there was a single compound supply or multiple supplies of separate goods and services made by River Cree to Access Cash. Since the parties did not raise the possibility that there could be multiple supplies, the parties were asked to provide written submissions on this issue. The Tax Court Judge agreed with the Crown's submission that it would not be appropriate to consider whether there were multiple supplies, as the parties had not pled this issue and there was no evidence on which an appropriate allocation of the consideration among multiple supplies could be made.

[21] Therefore, the Tax Court Judge restricted his decision to finding the predominant element of a single compound supply. The predominant element was found to be "the exclusive right to place and operate ATMs at the Resort and to process all transactions arising therefrom" (paragraph 114 of his reasons). Since this was a taxable supply, GST was exigible.

B. *Subsequent Periods*

[22] For the Subsequent Periods, the 2010 Agreement was replaced by the “ATM Placement & Processing Agreement” (the “2014 Agreement”). Although the “agreement date” identified in the 2014 Agreement is October 1, 2014, this agreement also refers to “14 New NH2700 ATMs to be installed on May 31, 2014” – 4 months earlier than the identified agreement date. In any event, the Tax Court Judge found that the applicable agreement for the Subsequent Periods (which began June 1, 2014) was the 2014 Agreement.

[23] The 2014 Agreement did not contemplate a sale of the ATMs. Paragraph 3 of this agreement confirmed that Access Cash was the “sole and unconditional owner of the ATM”.

[24] During the Subsequent Periods, for each transaction the surcharge fee was \$3.99. River Cree received an amount equal to the surcharge fee for each transaction. The interchange fee paid by the bank and paid by the network provider to Access Cash for each transaction remained the same - \$0.75 and \$0.71, respectively. Since River Cree’s employees loaded the cassettes for the ATMs with cash, River Cree received an additional amount for each transaction, which was paid from the interchange fee. As a result, the total amount paid to River Cree was \$4.50 to \$4.62 per transaction during the Subsequent Periods.

[25] Although River Cree loaded the cassettes, the Tax Court Judge found that Access Cash was ultimately responsible for loading the ATMs with cash. The Tax Court Judge also found that Access Cash was responsible for connecting the ATMs to the network and processing the

resulting transactions. The Tax Court Judge found that Access Cash was the ATM provider during these periods.

[26] In determining who provided the services that gave rise to the surcharge fees, the Tax Court Judge noted that River Cree did not lead any evidence to support its position that the cardholders paid these fees to River Cree. The Tax Court Judge found it was more likely than not that the cardholders paid the surcharge fees to Access Cash:

[138] ...The cardholders had money in their bank accounts. It seems to me that, in their minds, the cardholders would not have been looking for someone to lend them money for a fee. They would have been looking for someone to help them get at their own money. To do that, they would have needed a means of connecting to the Interac network. Access [Cash] provided that means. Most likely, the cardholders would not have known who owned the ATMs, who operated the ATMs or who provided the cash that was sitting in the ATMs. I cannot imagine that they would even have cared about any of these things. All the cardholders would have known was that the ATMs offered a connection to a network that would allow them to withdraw money from their own accounts. I find that that is what the cardholders paid for—access to the network. In other words, I find that they paid the surcharge fee to Access [Cash] for arranging for the transfer of money, not to the Appellant for transferring the money. This is not to say that the Appellant was not paid for its role as cash provider. It is simply to say that it was not paid by the cardholders.

[27] The Tax Court Judge's conclusion is set out in paragraph 141 of his reasons:

I find that the cardholders paid the surcharge fees to Access [Cash] and that Access [Cash], in turn, paid amounts equal to the surcharge fees to the Appellant in return for some other supply.

[28] The Tax Court Judge again noted that the pleadings restricted him to finding a single compound supply and to determining the predominant element of that single supply. Although

River Cree provided the cash used to load the ATMs and loaded this cash into the cassettes that would be loaded into the ATMs for a fee, this supply of cash was not the predominant element of the supply. Rather, the predominant element of the single compound supply made by River Cree in the Subsequent Periods was “the exclusive right to place and operate ATMs at the Resort and to process all transactions arising therefrom” (paragraph 158). Since this was a taxable supply, GST was exigible.

C. *Joint Venture*

[29] The Tax Court Judge considered River Cree’s argument that it was in a joint venture with Access Cash. The Tax Court Judge found that “no joint venture existed during the Initial Periods” (paragraph 166). Although he only referred to the Initial Periods in paragraph 166, it is evident that he meant in either the Initial Periods or the Subsequent Periods, as the immediately preceding paragraphs of his reasons (which address the joint venture argument) refer to both the 2010 Agreement and the 2014 Agreement.

II. Issues and Standards of Review

[30] In its memorandum, River Cree identified three issues:

1. Whether the Tax Court Judge erred in interpreting the 2010 Agreement and the 2014 Agreement and finding that River Cree was not the operator of the ATMs;

2. Whether the Tax Court Judge failed to consider or apply the correct legal test applicable to determine if there was a joint venture between River Cree and Access Cash; and
3. Whether the Tax Court Judge erred in finding that the predominant element of the supply was “the exclusive right to place and operate ATMs”.

[31] River Cree did not raise as an issue whether the Tax Court Judge erred in finding that he could not characterize the goods and services provided by River Cree as multiple supplies of separate goods and services and that he was restricted to the issue of determining the predominant element of a single compound supply.

[32] Although River Cree identified the interpretation of the 2010 Agreement and the 2014 Agreement as an issue in its memorandum, at the hearing of this appeal River Cree submitted that there was no dispute concerning the interpretation of the words used in the applicable contracts. In any event, to the extent that the interpretation of the agreements is relevant, the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at paragraph 50, found that “[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix”.

[33] At the hearing of this appeal, River Cree recast the main issues in this appeal as whether:

- (a) River Cree was carrying on the ATM business;
- (b) Access Cash was carrying on the ATM business; or

- (c) River Cree and Access Cash were carrying on the ATM business as a joint venture.

[34] However, this is an appeal from a judgment of the Tax Court of Canada. An appeal is not a trial *de novo*. The recharacterization of the issues as formulated by River Cree suggests that it is open to this Court to retry the case and make its own determination of the relevant facts. This recharacterization does not reflect the role of this Court on an appeal. Since this an appeal from a reassessment under the ETA, the issues should be framed by reference to what is relevant in this appeal to the reassessment of GST.

[35] To reflect the proper role of this Court in this appeal under the ETA, the recharacterized issues would be:

- (a) Did the Tax Court Judge err in finding that River Cree did not make supplies of a financial service, but rather that River Cree made taxable supplies to Access Cash; and
- (b) Did the Tax Court Judge err in finding that River Cree and Access Cash were not carrying on a joint venture in providing financial services?

[36] The standard of review for any question of fact is palpable and overriding error and the standard of review for any question of law (including any extricable question of law) is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

III. Analysis

A. *Finding that River Cree Made Taxable Supplies*

[37] There is no dispute that Access Cash owned the ATMs. The Tax Court Judge also found, in paragraph 70 of his reasons, that Access Cash was the operator of the ATMs during the Initial Periods. A similar finding was made for the Subsequent Periods in paragraph 133 when he found that Access Cash was the “ATM provider”. In paragraph 47, he explained that “[a]n ATM provider operates an ATM that it has either purchased or leased”.

[38] Having made these findings, the Tax Court Judge then determined who provided what supplies in relation to the withdrawal of money by a cardholder from their bank account, and concluded that River Cree played no role in these supplies during the Initial Periods (paragraph 100).

[39] The Tax Court Judge also found “that the predominant element of the single compound supply made in the Initial Periods was the exclusive right to place and operate ATMs at the Resort and to process all transactions arising therefrom” (paragraph 124).

[40] For the Subsequent Periods, River Cree provided the cash for the ATMs. For an increased payment from the interchange fee, River Cree also loaded the cash into the cassettes that were put into the ATMs. Even though River Cree provided the cash and loaded the cassettes, the Tax

Court Judge found that the predominant element of the single compound supply for the Subsequent Periods remained the same as it was during the Initial Periods (paragraph 158).

[41] The conclusion related to the predominant element of the supplies that were made by River Cree was based on a number of factual findings made by the Tax Court Judge. Absent a palpable and overriding error, the various factual findings (including the finding “that the predominant element of the single compound supply made [by River Cree] was the exclusive right to place and operate ATMs at the Resort and to process all transactions arising therefrom”) will stand.

[42] As noted by the Supreme Court in *Benhaim v. St-Germain*, 2016 SCC 48:

[38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:

Palpable and overriding error is a highly deferential standard of review "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[43] River Cree does not identify which particular factual finding that resulted in the conclusion that Access Cash was the operator of the ATMs is erroneous. Rather, River Cree

submits that based on all of the evidence (including the 2010 Agreement and the 2014 Agreement) it was the operator of the ATMs. In essence, River Cree is asking this Court to reweigh the evidence and come to a different conclusion. However, it is not the role of this Court to reweigh the evidence and arrive at a different conclusion than the Tax Court Judge (*Wall v. Canada*, 2021 FCA 132, at paragraph 28; *Barnwell v. Canada*, 2016 FCA 150, at para. 12).

[44] River Cree has also not established that the Tax Court Judge made a palpable and overriding error in finding that the predominant element of the single compound supplies made by River Cree during the Initial Periods and the Subsequent Periods were taxable supplies of “the exclusive right to place and operate ATMs at the Resort and to process all transactions arising therefrom”.

B. *Joint Venture Argument*

[45] River Cree submits that the Tax Court Judge erred in not properly determining whether the legal relationship between River Cree and Access Cash was a joint venture. The alleged error is the failure to cite the six factors identified in paragraph 65 of *Graham v. Central Mortgage and Housing Corporation and Bras D’Or Construction Ltd.*, 13 N.S.R. (2d) 183, 43 D.L.R. (3d) 686 (N.S.S.C.) (*Graham*) as relevant factors that must be present in order to find that there is a joint venture.

[46] In *Graham*, the Nova Scotia Supreme Court cited several excerpts from Volume 2 of *Williston on Contracts*, Third Edition, including the following excerpt:

[65] As the author points out at p. 553, a joint adventure is founded entirely on an agreement between the parties. At p. 554, the author refers to the following definitions:

"The joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture. Stated in somewhat greater detail:

'It can be said that a joint adventure contemplates an enterprise jointly undertaken, that it is an association of such joint undertakers to carry out a single project for profit; that the profits are to be shared, as well as the losses, though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract. There must be a contribution by the parties to a common undertaking to constitute a joint adventure; and a community of interest as well as some control over the subject matter or property right of the contract.

Whether the parties to a particular contract have thereby created as between themselves, the relation of joint adventurers or some other relation depends upon their actual intention, and such relationship arises only when they intend to associate themselves as such. This intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts."

...

At p. 563 the author states:

"Besides the requirement that a joint venture must have a contractual basis, the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:

- (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
- (b) A joint property interest in the subject matter of the venture;
- (c) A right of mutual control or management of the enterprise;
- (d) Expectation of profit, or the presence of 'adventure', as it is sometimes called;
- (e) A right to participate in the profits;
- (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise."

[emphasis added]

[47] The six factors listed above are in addition to the requirement that a joint venture has a contractual basis. An essential element of a contract is the parties' intention to enter into the agreement. Therefore, a joint venture between two persons does not exist unless both parties intend to conduct a particular activity as a joint venture. Since the intention to create a joint venture is to be determined based on the contracts between the parties, it is a question of mixed fact and law. As a result, the standard of review for a finding that the parties did not intend to create a joint venture relationship is palpable and overriding error.

[48] In paragraphs 160 to 165 of his reasons the Tax Court Judge rejected River Cree's argument that it and Access Cash were carrying on a joint venture. The Tax Court Judge referred to the testimony of the witnesses, the pleadings in the lawsuit between River Cree and Access

Cash related to dispute concerning who supplied the \$580,000 in cash that was used to load the ATMs the first time that they were loaded and the provisions of the 2010 Agreement and the 2014 Agreement. The Tax Court Judge placed particular emphasis on the 2010 Agreement and the 2014 Agreement. A fair reading of these paragraphs leads to the conclusion that the Tax Court Judge found that the parties did not intend to carry on the operation of the ATMs as a joint venture, particularly in light of the provisions of the 2010 Agreement and the 2014 Agreement.

[49] Absent the intention to create a joint venture (and hence an agreement to create a joint venture), there is no need to consider any of the other factors cited in *Graham*. The Tax Court Judge therefore did not err by not referring to all of the factors identified in *Graham* to determine if there was a joint venture between River Cree and Access Cash. River Cree has also not established that the Tax Court made any palpable and overriding error in finding that River Cree and Access Cash did not intend to operate the ATMs as a joint venture. As a result, I would dismiss River Cree's appeal on this issue.

[50] Although it is not necessary to do so, it should be noted that there are other factual findings made by the Tax Court Judge that, unless successfully challenged, support a finding that the parties did not intend to operate the ATMs as a joint venture.

[51] The Tax Court Judge found that Access Cash wanted to place its ATMs in the resort because Access Cash earned its fees based on the volume of transactions and there was a large number of monthly transactions (50,000 to 60,000) at the resort. This evidence indicates that Access Cash was carrying on its own business in operating the ATMs as the motivation of

Access Cash to enter into the agreements with River Cree was the fees that Access Cash would earn from the high volume of transactions. This is inconsistent with an intention to create a “common undertaking” between Access Cash and River Cree to operate the ATMs.

[52] As well, the Tax Court Judge found, in paragraph 99, that Access Cash “was the only person who supplied a service to the cardholder” and also found, in paragraph 100, that River Cree “played no role in the series of supplies” that resulted in a cardholder being able to withdraw money from their bank account. These factual findings, made with respect to the Initial Periods, would preclude a finding that River Cree and Access Cash jointly provided a service to the cardholder during the Initial Periods.

[53] River Cree has not established that the Tax Court Judge made any palpable and overriding error in any of these other factual findings.

IV. Conclusion

[54] I would dismiss the appeal with costs.

“Wyman W. Webb”

J.A.

“I agree.
K. A. Siobhan Monaghan J.A.”

“I agree.
Nathalie Goyette J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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THE KING

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GOYETTE J.A.

DATED: JUNE 8, 2023

APPEARANCES:

David Douglas Robertson FOR THE APPELLANT
Maude Lussier-Bourque
Laura Jochimski

Wendy Bridges FOR THE RESPONDENT

SOLICITORS OF RECORD:

EY Law LLP FOR THE APPELLANT
Toronto, Ontario

Shalene Curtis-Micallef FOR THE RESPONDENT
Deputy Attorney General of Canada