Date: 20080916

Docket: T-1909-07

Citation: 2008 FC 1036

Ottawa, Ontario, September 16, 2008

PRESENT: Mr. Justice Lemieux

BETWEEN:

GHYSLAIN LAPLANTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application by Ghyslain Laplante, a former customs inspector with the Canada Border Services Agency (the applicant or the customs officer), for judicial review of a decision by adjudicator Georges Nadeau of the Public Service Labour Relations Board (the Board) dated October 4, 2007, dismissing two grievances filed by the applicant: one against his employer's decision of June 21, 2004, to suspend him for an indefinite period without pay during an investigation, and the other against the decision to dismiss him for misconduct on April 21, 2005.

[2] His employer, the Canada Border Services Agency (the CBSA), alleges in its letter of dismissal that Ghyslain Laplante was involved in a plot to traffic cocaine in Canada in which he assisted his brother, Serge Laplante, and his brother's associates by facilitating the importation of this narcotic from the United States to Canada.

Context

[3] For some time, the RCMP and the Drug Enforcement Agency (DEA) had been conducting a coordinated investigation into the importation of narcotics from the United States into Canada.

[4] As part of "Project Busted Manatee", the DEA used an American agent who posed as a cocaine supplier, whom brothers Daniel and Tony Roy, from the Valleyfield area, contacted in early 2004 to supply them with cocaine. A first transaction took place on April 23, 2004, but it fell through when a trucker who took possession of 200 kilograms for delivery to Quebec was stopped soon after in a DEA operation.

[5] A wiretap showed that on May 6, 2004, Tony Roy told the agent, for the purposes of conducting a second transaction, he had put together a new team made up of a "driver", a contact for a "door" and a "door". Wiretaps enabled RCMP and DEA investigators to decode the details of this second operation.

[6] Alain Charron, the driver, met with the agent to give him the money for the drugs. He was arrested by the DEA on June 17, 2004, while taking delivery of the cocaine; he agreed to cooperate with the investigation. At the DEA's direction, he contacted Serge Laplante that same day to get instructions for crossing the border. Serge Laplante told him which route to take to get to the Frelighsburg border crossing, and to get there on June 20, 2004, after 12:30 at night.

[7] Ghyslain Laplante's work schedule, of which his brother Serge had a copy, confirms that he was working the night of June 20, 2004, at Frelighsburg and that his shift started at 11:30 p.m. on June 20, but most of it would be worked on June 21, 2004, after midnight. At this border crossing on the night shift, there is generally only one inspector on duty.

[8] The driver, Alain Charron, was replaced by an RCMP undercover officer identified by the initials "AI". He took possession of the pickup truck that had been used by Alain Charron and arrived at the Frelighsburg border crossing on the night of June 20 to 21, 2004, when the applicant was on duty. AI posed as Alain Charron. His role was to determine whether Ghyslain Laplante was involved in the plot to import cocaine; in other words, whether Ghyslain Laplante was the "door".

[9] AI and the applicant had a conversation. Ghyslain Laplante then gave AI a road map with yellow highlighting showing the way to the town of Dunham. AI went to Dunham, where Serge Laplante signalled his location. The RCMP then proceeded to arrest Serge Laplante, and the applicant was arrested some time later.

Decision of the Board

[10] The Board's reasons are very detailed and in two parts: a summary of the evidence followed by an analysis of that evidence. First, the Board summarized the evidence of the witnesses for the employer, the CBSA, which had the burden of establishing that the suspension and dismissal were justified. The only witness for the defence was Ghyslain Laplante.

a) Evidence

[11] The CBSA's main witnesses were:

- Corporal Denis Turcotte, an RCMP officer for 25 years. He supervised the investigation into the importation of narcotics via a Canadian border crossing. He adduced all of the documents related to the investigation in four volumes, including four compact discs and one DVD containing recordings of conversations and transcripts of those conversations. He confirmed the context surrounding the operation leading to the arrest of Serge and Ghyslain Laplante on June 21, 2004. He also produced the videotaped recording of the questioning of Ghyslain Laplante on June 21, 2004, and highlighted the parts he considered important. He indicated that after considering all of the evidence, he was convinced of the applicant's involvement.

- Undercover RCMP officer AI was the employer's second main witness. He identified the notes he took following the events of June 20/21, 2004. He has worked for the RCMP since 1990 in the special investigations section. He confirmed that the goal the night of June 20 was to determine whether Ghyslain Laplante was the "door". To that end, he was to engage the customs officer in conversation. His testimony was on the content of that conversation.

[12] The applicant testified. The key parts of his testimony had to do with his version of the conversation he had with AI, his 22 years working as a customs officer with a clean record, his family and his relationship with his brother Serge.

b) Analysis of the evidence

[13] Before analyzing the evidence, the adjudicator pointed out "that the burden was on the employer to show that the applicant was involved in a plot to assist his brother and his brother's associate in trafficking cocaine in Canada, and that this had to be shown by a preponderance of the evidence, not by a determination of criminal involvement beyond reasonable doubt". He also indicated: "Accordingly, if I find that in fact, the grievor was willingly involved in the plot, then dismissal would be the only logical conclusion." At paragraph 139 of his reasons, he wrote: "Unfortunately, after a careful examination of the evidence presented to me, I reach that conclusion".

[14] According to the adjudicator, the evidence showed that after their initial plot to import narcotics failed, the Roy brothers established contact with Serge Laplante to get a second large shipment of cocaine across the border, and the recorded telephone conversations between one of the Roy brothers and the DEA agent revealed that preparations were made to get the cocaine in Miami and bring it to Canada using a "door" at the border that had to be paid.

[15] The adjudicator noted that the evidence referred to a plan to have Alain Charron bring the cocaine across the border before midnight on Friday, June 11, 2004. The adjudicator acknowledged that the plan did not at all match Ghyslain Laplante's work schedule. He wrote:

> While this evidence might lead us to conclude that the grievor was not involved in the plot, the rest of the evidence adduced weighs in favour of his involvement.

[16] The adjudicator reviewed the evidence of the cocaine purchase by Alain Charron, his taking possession of the cocaine on June 17, 2004, and subsequent arrest by the DEA, and his contacting Serge Laplante, who informed him "to go ahead without any concern because the 'door' is open on the night of June 20 to 21 after midnight." He concluded: "The plan coincides with the grievor's work schedule

and tends to incriminate him." He added: "It should be noted that at the time of his arrest, Serge Laplante was in possession of a document containing information about the work schedule" of the applicant, who "admits giving him information about his schedule...on May 22, 2004, at his uncle's funeral, to facilitate delivery of a container that his brother Serge had promised him. He indicated to his brother the dates that he was working the night shift."

[17] The adjudicator wrote: "I am not convinced by this explanation." He went on to explain:

> The schedule as provided only shows the night shifts even though the grievor is also at home and able to receive the container on his rest days and when he works evenings. Moreover, information contained in the document includes the dates before May 22, 2004. I do not see any logical reason that Serge Laplante, on May 22, 2004, would have noted the night shifts from May 17 to 21, 2004. The fact that the grievor admitted that he gave the information to Serge Laplante, the fact that only the night shifts are noted on the document found in Serge Laplante's possession and the fact that likely, it was not the day of the funeral, May 22, 2004, that this information was provided leads me to believe that the grievor was involved in the plot.

[18] The adjudicator then addressed the conversation between AI and the applicant, noting that unfortunately no audio recording of the conversation was made when AI crossed the border. He found that "although the versions are different on certain points, they are nonetheless similar on certain key points":

- AI indicated that he was looking for someone called Steve, and it was Ghyslain Laplante who mentioned that he was perhaps looking for Serge. The adjudicator rejected the applicant's attempt to explain the fact that he did not ask AI any questions to verify his assumption other than "Do you mean Serge?" His explanation was that he had no need for a more thorough verification because AI had first asked if he had seen a red vehicle; he suddenly remembered that his brother Serge, who drives a red vehicle, spoke to him about a

friend who was to help him move a boat from the United States. The adjudicator rejected that explanation for two reasons: (1) AI's notes made no mention of his telling the applicant that he was looking for a red vehicle and (2) when questioned on June 21, 2004, after his arrest, Ghyslain Laplante denied suggesting the name of Serge to AI, who asked for Steve. According to the adjudicator, "He goes as far as to ask the investigator 'Who is this guy?'";

- the fact that at AI's request, Ghyslain Laplante "did not hesitate to try to contact his brother Serge in the middle of the night to inform him of the arrival of his friend." The adjudicator recognized that there was no conversation between the applicant and his brother because the applicant was only able to reach his brother's cellphone voicemail. The adjudicator found:

> It is difficult to attribute to tiredness the grievor forgetting to say to the investigator that he identified AI as a friend of Serge Laplante, who was supposed to help him tow a boat. That omission tends to incriminate him and at the very least makes his version less credible. Furthermore, that version is not corroborated by any evidence.

[19] The adjudicator noted that "the evidence shows that the vehicle containing the drugs crossed the border without being searched and continued on its way until Serge Laplante signalled his presence."

[20] The adjudicator found a contradiction in the customs officer's testimony under questioning on June 21, 2004: Ghyslain Laplante denies on several occasions having spoken to his brother the previous day and denies on two occasions trying to reach him by telephone. According to the adjudicator:

> However, the record of telephone calls (Exhibit E-1, Vol. III) confirms that there were two calls between Serge Laplante's telephone and the grievor's home on June 20, 2004, and confirms that at 01:15 on June 21, a collect call was made from the border station to Serge Laplante's cellphone. Moreover, during his testimony, the grievor acknowledges

> making these calls and attributes the answers that he gave to the investigator to tiredness and to his lawyer's instructions.

[21] Last, the adjudicator mentioned the CBSA's internal investigation of the applicant and the summary of the interview in which Ghyslain Laplante stated: "I have no contact by telephone, mail, etc. with my brother Serge Laplante." The adjudicator pointed out: "However, the evidence shows through the telephone call records that he has quite frequent phone contact with his brother Serge." After summarizing the applicant's testimony on his conversations with his brother Serge about a container that his brother had promised him and various other reasons for their contact, the adjudicator found:

> All of this tends to confirm the existence of a closer relationship between the two brothers; a relationship that, apparently, the grievor took time to acknowledge.

[22] The adjudicator concluded his decision as follows:

> **149** Although the initial dates identified for crossing the border do not coincide with the grievor's work schedule, overall the evidence adduced leads me to conclude that there is a preponderance of evidence showing that the grievor was involved in the plot. The consequence of that involvement can only be dismissal of the grievance.

Analysis

1. Standard of review

[23] Before the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, three standards of review were available for tribunal decisions; after that decision there are only two: correctness and reasonableness. The standard of patent unreasonableness was subsumed under the reasonableness standard. Both parties, in their written submissions, discussed the impact of *Dunsmuir* on the standard of review in the case at bar. Counsel for the applicant, in his factum, conducted a formal analysis of the review standard in light of the factors identified by the Supreme Court in its previous decisions on this point. He argued that:

- the *Public Service Labour Relations Act* contains only a limited privative clause protecting the Board's decisions, and this points to lesser curial deference;

- when it comes to questions of fact and the relative expertise of the Board and the Court, greater curial deference should be shown because of the Board's expertise in labour relations;

- the third factor, the purpose of the legislation – to maintain effective and harmonious labour-management relations – is neutral;

- on the fourth factor, the nature of the question, because the issue before the Court is a question of fact, this points to greater curial deference.

[24] With respect to the standard of review, counsel for the applicant concluded:

> [TRANSLATION]
>
> Weighing all of these factors, the applicants [*sic*] submit that the standard of review applicable to the issue of whether the adjudicator erred in finding that the employer had established by a preponderance of the evidence that Mr. Laplante was involved in a plot to import cocaine is the reasonableness standard. [Emphasis added.]

[25] Although counsel for the Attorney General of Canada (AGC) advocated the same standard of review as the applicant, he reached that conclusion in a different way. He relied on the following paragraph from the reasons of Bastarache and LeBel JJ., writing for five of the nine judges (the other judges concurred):

> **62** In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [Emphasis added.]

[26] The two judges had previously pointed out at paragraph 51 of their reasons:

> **51** … As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness. [Emphasis added.]

[27] Counsel for the AGC submitted that on issues relating to dismissal, according to the Federal Court of Appeal in *Green v. Canada (Treasury Board)*, [2000] F.C.J. No. 379, and this Court in *Ayangma v. Canada (Treasury Board)*, 2007 FC 780, an adjudicator's expertise attracts the degree of curial deference associated with the standard of patent unreasonableness.

[28] Counsel for the AGC concluded:

> [TRANSLATION]
>
> Based on these decisions, and in keeping with the Supreme Court's instructions in *Dunsmuir*, we submit that on a question of fact decided by an adjudicator in a dismissal case, this Court must show greater deference and apply the reasonableness standard. [Emphasis added.]

[29] It should be noted that the review in *Dunsmuir* involved a provincial adjudicator, and in the case at bar, it is a federal board; under section 18 of the *Federal Courts Act*, and in particular section 18.1(4)(*d*), this Court is authorized to intervene if the federal board "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[30] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, the Supreme Court of Canada did not have to establish the standard of review at first instance because it had before it a decision of the Federal Court of Appeal quashing a decision of Nadon J. of the Trial Division, as he then was. For the purposes of the case at bar, it is worth reproducing paragraphs 36, 37 and 38 of *Mugesera*:

> **36** In the case at bar, we find that the FCA exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact. It set aside those findings and made its own evaluation of the evidence even though it had not been demonstrated that the IAD had made a reviewable error on the applicable standard of reasonableness. Based on its own improper findings of fact, it then made errors of law in respect of legal issues which should have been decided on a standard of correctness.
>
> **37** Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (*c*) and (*d*) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.
>
> **38** On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4. [Emphasis added.]

[31] The Court would also refer to two other decisions, the first being the Federal Court of Appeal decision in *Aguebor v. Canada (Minister of Employment and Immigration)*, (1993) 160 N.R. 315, at paragraph 4; the Supreme Court of Canada endorsed the reasons of Décary J.A. on credibility:

> **4** There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden. [Emphasis added.]

[32] The Court would also reproduce paragraph 85 of the reasons of L'Heureux-Dubé J., on behalf of the Supreme Court of Canada, in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793:

> [85] We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, *per* La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see *Toronto Board of Education*, *supra*, at para. 48, *per* Cory J.; *Lester*, *supra*, at p. 669, *per* McLachlin J. Such a determination may well be made without an in-depth examination of the record: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, *per* Gonthier J., at p. 1370. [Emphasis added.]

2. Arguments

a) Applicant's

[33] Counsel for the applicant argued that the adjudicator erred in finding that the employer established, by a preponderance of the evidence, that Ghyslain Laplante was involved in a plot to import cocaine by allowing a shipment to cross the border on the night of June 20/21, 2004. He relied on the following:

- the RCMP investigation, the night the shipment crossed the border, when the applicant was on duty, was defective in that the evidence was based on the testimony of AI and the applicant, whereas the RCMP could have used recording equipment. Furthermore, the sound of the RCMP video recording that night was poor;

- there was no direct evidence of Ghyslain Laplante's involvement in the plot: no contact between him and the Roy brothers, between him and Alain Charron or between him and the DEA. He submitted that the evidence of his involvement was purely circumstantial and speculative;

- it was implausible that Ghyslain Laplante would have been involved in this kind of plot because he had been informed by his CBSA supervisor that his brother Serge was suspected of involvement in this kind of plot, and this would reasonably have suggested to the applicant that he himself might be under surveillance;

- in his testimony, Corporal Turcotte admitted that the RCMP had never considered that the "door" simply did not exist and that his brother had lied to the Roy brothers for greater gain, especially when it was not disputed that his brother knew inspectors worked alone and therefore did not usually search cars;

- the plan for the shipment's first crossing was for Friday, June 11, 2004, when the applicant would not be on duty;

- the applicant's behaviour on the night of June 20/21, 2004, was inconsistent with that of a customs officer who had been paid to let a drug shipment go through. This claim was based on the fact that Ghyslain Laplante apparently asked AI the usual questions;

- the RCMP admitted that in spite of their efforts, they found no evidence of any payment into the bank accounts of Mr. and Mrs. Ghyslain Laplante.

b) Respondent's

[34] First, counsel for the respondent outlined how American and Canadian authorities, using an American agent and wiretapping, discovered a plot to buy cocaine in the United States for the drug-trafficking Roy brothers of Valleyfield, Quebec; how an initial attempt to import failed and one of the Roy brothers, on May 6, 2004, told the American agent that they had set up a second team, made up of a driver, a contact for a "door" and a "door".

[35] Second, after driver Alain Charron was arrested while picking up the cocaine in the United States on May 17, 2004, wiretaps revealed that Alain Charron, at the DEA's direction, called Serge Laplante that same day for instructions on when and where to cross the Canadian border and was told by him how to get to the Frelighsburg border crossing and to cross the border there on June 20, 2004, after 12:30 at night. Serge Laplante knew his brother was on duty that night, starting his shift at 11 o'clock on the evening of June 20.

[36] Third, counsel for the respondent described the main parts of the undercover officer's conversation with the customs officer as he crossed the border:

- when the customs officer asked him his name, he just said “Alain”;

- Ghyslain Laplante asked him only one other question: how long had he been in the United States?;

- AI asked him a trick question – whether “Steve” was around – to which the customs officer spontaneously replied: “Do you mean Serge?”;

- AI asked him to call Serge and tell him his “buddy” had arrived. Despite saying that he did not like using the office telephone for that kind of business, Ghyslain Laplante called his brother at 1:15 in the morning;

- AI was not questioned on what he was transporting after telling the customs officer that he did not like driving around with it in the back of the truck;

- without being asked, the customs officer gave AI a road map showing the way to the town of Dunham, where his brother Serge was waiting for him;

- on June 22, 2004, in a recorded conversation, Tony Roy told the American agent that the driver, the “door” and the contact for the door had all been arrested.

[37] Finally, counsel for the applicant summarized the main parts of Ghyslain Laplante's questioning by a member of the RCMP, on June 21, 2004, in which he denied having contacted his brother from the border crossing on June 21, 2004.

3. Discussion and conclusions

[38] It is important to point out that the adjudicator's role was to hear the witnesses and receive the documentary evidence (such as wiretaps), assess the weight and credibility of that evidence, and then decide based on all of the evidence before him whether it was more likely than not that the applicant was involved in a plot to facilitate the importation of a shipment of cocaine into Canada.

[39] According to his counsel, the evidence that Ghyslain Laplante was involved in this kind of plot was not direct; it was indirect or circumstantial. The purpose of indirect evidence is to establish relevant facts from which a contentious fact can be inferred, i.e. this kind of evidence establishes the facts that make the contentious fact probable, in this case, the applicant's involvement in the plot.

[40] Mr. Cameron, for the applicant, acknowledged that the key issue before the Court was a question of fact: whether there was sufficient evidence. The case law is quite clear on this; a question of this kind requires the reviewing court to be highly deferential, as Parliament indicated when it enacted section 18.1(4) of the *Federal Courts Act*.

[41] The Court also notes that the adjudicator, in a number of places in his decision, rejected the applicant's testimony for various reasons: (1) inconsistency of that testimony with the documentary evidence (the wiretaps), (2) contradictions between his testimony and what he said either when questioned

on June 21, 2004, or during the internal investigation conducted by his employer, (3) plausibility of that testimony based on evidence before the adjudicator, for example, the fact that he gave his brother his work schedule, the fact that he called his brother at 1:30 in the morning on June 21, 2004, among other things.

[42] In his submissions, counsel for Ghyslain Laplante did not argue that the Board erred in its findings on Mr. Laplante's credibility. The crux of his argument was that the Board erred in its assessment of the evidence before it. He gave as an example the fact that the plan for the second operation was initially to cross the border on Friday, June 11, 2004, when the applicant was not on duty. The Court cannot accept that argument. The adjudicator was well aware of that fact; he mentioned it twice in his decision. However, having reviewed all of the evidence, he was of the view that "the rest of the evidence adduced weighs in favour of his involvement."

[43] He also argued, based on the applicant's testimony, that his brother had tricked the Roy brothers by saying that a "door" had been arranged. The adjudicator was aware of that theory. He found that the evidence before him established, on the balance of probabilities, that he was involved in the plot. Counsel for the applicant failed to satisfy the Court, on the evidence as a whole, that this finding was unreasonable.

[44] The Court is of the view that the other arguments that counsel for the applicant put forward were merely an invitation to reweigh the evidence; the Court is not entitled to do that. The Court is also of the view that although it might find in favour of the applicant on one or two points, those points would be of marginal importance and would have no effect on the result, since the evidence before the adjudicator, on the whole, enabled him to make a reasonable finding on the preponderance of the evidence that neither of the applicant's grievances was well founded.

[45] For these reasons, the Court must dismiss this application for judicial review.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review be dismissed with costs.

"François Lemieux"

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Judge

Certified true translation

Peter Douglas

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

James Cameron	FOR THE APPLICANT
Simon Kamel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT