Docket: 2004-3697(EI)

BETWEEN:

KULWINDER KAUR MALHI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 3 and April 18, 2005 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant: Avtar Dhinsa

Counsel for the Respondent: Pavanjit Mahil

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 16th day of May 2005.

D.W. Rowe

Rowe, D.J.

Citation: 2005TCC333
Date: 20050516
Docket: 2004-3697(EI)

BETWEEN:

KULWINDER KAUR MALHI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant (Malhi and/or worker) appeals from a decision issued by the Minister of National Revenue (the "Minister") on July 23, 2004 wherein the Minister decided her employment with Jagdish S. Malhi (JSM and/or payor) from June 18 to October 6, 2001 was not insurable pursuant to the relevant provisions of the *Employment Insurance Act* (the "*Act*") because she was not providing services pursuant to a contract of service.

[2] The Respondent's Book of Documents – tabbed 1-39, inclusive – was filed as Exhibit R-1.

[3] Kulwinder Kaur Malhi testified in Punjabi and the questions and answers and other aspects of the proceedings were interpreted and/or translated from English to Punjabi and from Punjabi to English by Russell Gill, interpreter.

[4] The appellant testified she is not related to the payor. On June 18, 2001, she started working as a labourer on the orchard operated by JSM and his wife, Daljit Malhi. The appellant stated her rate of pay was $8.50 per hour for the first two weeks but was raised to $9.00 for each hour worked thereafter. Her first task was to thin the fruit and later she began picking cherries, apples and peaches. The fruit had

to be packed into boxes. The cherry crop was harvested by July 15th and she also did some thinning in July. The orchard comprised about 10 acres and there were apple and peach trees thereon. Malhi stated that after the cherry crop had been picked, she picked peaches until the end of July and then picked the early-maturing apples – Sunrise and Transparent - followed by those species that matured later and picked the late-maturing apples until her employment ended on October 6, 2001. The appellant stated her working hours were from 7:00 a.m. to 6:30 or 7:00 p.m., every day except Sunday, and that her hours were recorded on a time sheet maintained by the payor. Apart from her hourly rate, she received no further payments or benefits except for vacation pay - 7.6% - in accordance with provincial law. The appellant stated she worked alone on the JSM property except for those times when workers from Québec were picking cherries, although the payor would also work in the orchard from time to time. In 2001, her two children were aged 5 and 7 and were cared for by her husband and her mother-in-law during working hours. The appellant identified – at tab 2 – her application for unemployment benefits dated October 29, 2001. She also identified – at tab 3 - her Record of Employment (ROE) dated October 25, 2001 in which the payor reported she had worked 841 hours and had insurable earnings in the sum of $8,086.07. The appellant was referred – at tab 7 - to various sheets – each with the heading Daily Time Sheet – which she identified as those used to record her hours of work during the relevant period. She pointed to an area on the right side of the sheets where she had signed her name in order to verify the accuracy of the information entered in the spaces to the left. Counsel for the appellant referred Malhi to photocopies of various cheques at tab 9. The appellant stated she received those cheques from the payor and deposited them to her account in the Valley First Credit Union (Credit Union). The first cheque – in the sum of $709.30 – was dated July 6, 2001 and the final wage payment was by cheque – in the sum of $406.93 – dated October 25, 2001. The appellant stated she also received two payments in cash for her wages, one in the sum of $500 – perhaps in July or August – and another in the sum of $125. Counsel referred Malhi to two receipts – at tab 24 – and she agreed those represented the cash payments she had received from JSM. The appellant acknowledged her signature on the last page of the Questionnaire – tab 21 – and stated the contents of that document were true to the best of her knowledge. However, she agreed with counsel's observation that there seemed to be an error on the fourth Daily Time Sheet - within tab 7 – in that it appears the hours – 45 - worked for the first week and the hours – 44 – worked for the second week of that pay period were incorrectly totalled as 99 rather than 89 and payment of her wages – at $9 per hour - was based on the higher number. The appellant acknowledged her signature on the Questionnaire – tab 30 – dated June 23, 2003 and while she could not recall specifically who helped her to complete this form, stated it would have been done either by her husband or by Susan Kassian, who performed bookkeeping services for

her husband's orchard business. Counsel for the appellant advised the appellant that the position of the respondent – as set forth in subparagraph 5(h) of the Reply to the Notice of Appeal (Reply) - was that when an Human Resources Development Canada (HRDC) investigator had visited the JSM orchard on 3 occasions, she was never present. The appellant stated the entry on the Daily Time Sheet was accurate and that she had worked 9 hours on July 10, 2001, picking cherries on the payor's orchard. She recalled working at the orchard on September 11 – the day of the attack on the World Trade Centre in New York – and stated the entry on the time sheet was correct because she had worked only from 8:00 a.m. until 11:30 a.m. – a total of 3 hours – because she was so upset at hearing the news that she went home to her family. As for another day - September 25, 2001 – when an HRDC investigator was at the JSM orchard, the appellant stated the entry on the Daily Time Sheet was correct and that she worked 10 hours that day and had been picking Spartan apples. The appellant estimated the cherry trees were up to 15 feet tall and the apple trees were between 10 to 12 feet high. The cherry trees were located in 3 separate places on the 10-acre parcel but the majority of the parcel was occupied by apple trees. The appellant was referred by her counsel to a document – at tab 11 – entitled Orchard Operating Agreement and dated January 10, 2001. She stated that although she cannot read English, she was aware the purpose of the document was to permit her to lease her one-half interest in their orchard property - in Oliver B.C. - to her husband in return for receiving the sum of $500 per year and upon further terms that her husband pay all costs associated with the operation of said orchard and that he would indemnify her from all costs, charges and expenses resulting from his failure to pay said operating costs. The appellant stated she entered into said lease because of the amount of paperwork associated with operating the orchard business and because she and her husband tended to argue when working together and/or operating the business jointly. In response to questions from the Bench, the appellant explained only a small portion of the JSM orchard was devoted to peaches and they were picked at three different times during the season but the picking was done along with other work being performed so that she might pick apples and peaches the same day. In addition to picking, she graded apples and peaches for quality before packing them into boxes. The payor used a tractor to haul the boxes to large bins where the fruit would be stored until delivered to the customer.

[5] In cross-examination by counsel for the respondent, the appellant - Kulwinder Kaur Malhi – stated the 10.9-acre orchard – in Oliver – owned by herself and her husband was acquired in 1996. Their family home is located on that property. In 2001, that orchard grew 2 or 3 acres of cherries, 6 acres of apples and 1.5 acres of peaches. There were two acres of Spartan apples, one acre of McIntosh and smaller parcels devoted to Golden Delicious and Red Fuji. In 2001, Param Malhi operated

the Oliver orchard by himself and the appellant stated one person could operate a 10-acre orchard provided extra help was available during certain peak picking periods. Except for 2004, the appellant had never worked on the home orchard property but was employed by her husband in 2003 on an orchard property leased by him from a third party. The appellant maintained an account in the Credit Union and stated she had no knowledge of the transactions occurring in her husband's bank account at the Royal Bank of Canada (Royal) in Oliver. The appellant agreed she had worked for JSM in 2000 and that HRDC had obtained a ruling with respect to that employment in which it had been determined she had not been employed under a contract of service. Malhi acknowledged she was required to repay unemployment insurance (UI) benefits already paid and that she had not appealed that ruling. The appellant agreed this inability to receive UI benefits motivated her and her husband to enter into the lease at tab 11. She denied knowing she could not receive said benefits if she worked on their jointly-owned property and stated her decision to lease her interest to her husband was based on the fact new planting had to be done. She stated she was not aware of the technical requirements for receiving UI benefits and believed if the work was done she should qualify for UI benefits whether or not she had an interest in the Oliver property. Because Oliver is a small town, she discovered JSM owned an orchard and after leaving the Sikh temple – in 2000 - she approached JSM and inquired about availability of work. Malhi denied that her husband was involved in arranging for her to work for JSM even though she agreed he operated their orchard property and paid all household bills and handled all the banking and other financial matters for both the household and the orchard. Malhi stated she did not know Daljit Malhi – wife of JSM – even though she lived in the house on the JSM orchard and confirmed that Daljit Malhi had never worked with her on that property. The appellant stated she was not aware that her husband had employed Parmjit Sidhu to work on the Oliver orchard in 2001 even though her time sheet indicates she returned home – sometimes - in early afternoon. The JSM property was a 10-minute drive from the appellant's home. The appellant stated she could not recall any other workers picking apples, neither Québecois nor Indo-Canadians although 4 or 5 young men – from Québec – picked cherries in June and/or July. The appellant described a typical working day in which she arrived between 7:00 a.m. and 8:00 a.m. and sometimes drove her car into the field to a spot near her worksite. JSM would come to the area and give her instructions for the day. Counsel referred Malhi to a diagram – within tab 34 – that had been included in a letter sent by Malhi to C. Amber – Appeals Division – Revenue Canada, Vancouver. The appellant agreed there is a driveway next to JSM's house but added there are two other ways to enter the orchard once a person has exited Highway 97. The appellant stated she recorded her hours each day and reported for work at a time set by JSM the previous evening. Her hours were recorded on sheets that were available in an area near a shed at the end of

the driveway. The appellant stated that sometimes she recorded her start time in the morning but on other occasions wrote it down at the end of the day and sometimes JSM brought the time sheet to her work location and wrote in the hours worked for the day prior to her signing the sheet. Counsel referred to a summary of earnings – tab 8 – the appellant had provided to HRDC in which the entry for the period July 30th to August 12th, 2001, stated her net pay was $765.94. The appellant agreed she could not produce a cheque in that amount but stated she had received two sums of cash totalling $625, as evidenced by the two receipts dated August 20 and August 25, respectively at tab 24. The appellant stated she was working on the JSM orchard on July 10, 2001 and was working there on September 11th until 11:30 a.m. when she went home after being informed by JSM about the terrorist attack in New York. Malhi stated she was picking apples on September 25th and worked until 6:30 p.m. that day. Counsel referred the appellant to the Daily Time Sheet for the period commencing July 3 and to the absence of start times on that entire sheet covering the period up to July 16, 2001. The appellant replied that she remembered those start times because she always started at 7:00 a.m. and worked until 4:00 or 4:30 p.m. throughout that period. The appellant acknowledged that when interviewed by Jim Rusk, an employee of Canada Customs and Revenue Agency (CCRA) (as it then was) she denied receiving any cash payments from JSM but later checked with Susan Kassian – bookkeeper – and discovered JSM had made two cash payments of wages to her. The appellant denied counsel's suggestion that she had never worked for JSM and that the entire arrangement was a sham to permit her to qualify for UI benefits.

[6] Jagdish Singh Malhi (JSM) was called to the stand by counsel for the respondent. He testified in Punjabi and the questions and answers and other aspects of the proceedings were interpreted and/or translated from English to Punjabi and from Punjabi to English by Russell Gill, interpreter. JSM stated he and his wife - Daljit Malhi – owned and operated a 10.2-acre orchard in Oliver between 1995 and 2002. He recalled that – in 2001 – the orchard grew cherries, apples, prunes, apricots and peaches. The cherry and prune crops each occupied one acre and a similar area was allotted to growing each of the apple varieties, namely, Transparent, McIntosh and Golden Delicious. The Spartan apple crop was located on 1.75 acres and peaches were grown on a small parcel comprising .25 of an acre. JSM was referred to a document – at tab 12 – dated December 1, 1997 and described as Orchard Operating Agreement. He identified his signature and that of his wife - Daljit Malhi – on the last page and explained that he and his wife had entered into the agreement because she was not capable of managing the orchard and could not drive a tractor or operate the spraying equipment. The term of the agreement extended until December 31, 2002 and did not require JSM to make any payment to Daljit Malhi for any profits flowing from her 50% interest in the orchard. Instead, JSM was responsible for paying all

costs associated with the operation of the orchard, including mortgage payments on the family home situate thereon. JSM stated that if his wife wanted money for some purpose she could ask him at any time or just take it from their resources. He had not leased land in the Oliver area from anyone else and did not lease out any portion of his own orchard. JSM was referred to a Statement of Farming Activities for Individuals (Statement) - tab 26 - which he recognized as part of his income tax return for the 2001 taxation year. He agreed that no income from the sale of peaches was reported on said Statement and that all income from sale of produce was attributable to apples and by-products and cherries. JSM was referred to a table reproduced within subparagraph 5(d) of the Reply pertaining to the years from 1999 to 2002, inclusive. JSM stated the figures accurately represented the state of affairs of the orchard operation and that in 1999 he had gross income of $34,697 but sustained a net loss in the sum of $19,905. In that year, he employed 5 workers and paid out $23,202 in wages. In 2000, the gross income rose to $61,347 and net profit was $8,642, probably due in part to the reduction in wages to $8,050. He stated he thought one of his employees that year was Kulwinder Kaur Malhi, the appellant in the within appeal. In 2001, the orchard grossed $54,008 and showed a net profit of $11,546. Wages that year were $8,086.07. In 2002, gross income rose to $88,832 and produced net income of $14,997 after paying operating costs including wages in the sum of $2,551. JSM could not remember whether he had also employed a person identified in documents as B. Grewal during the 2002 season and stated he had been afflicted with a fever in 1989 while visiting India and that it had affected his ability to remember. JSM stated he met the appellant at the Sikh temple in Oliver and that she had approached him outside and inquired if there was work available and he had agreed to hire her to perform services on his orchard. The conversation was held between the two of them and he did not see the appellant’s husband in the immediate vicinity. JSM acknowledged that he knew Param Malhi was the appellant’s husband since he had met him at the local packing house and on occasion they had loaned each other sprays and/or farm equipment because they each operated an orchard about 3 kilometers apart. Counsel asked JSM whether he knew Jatinderpal Singh Sidhu, the employer of Daljit Malhi in 2001. JSM replied that he "had nothing to do with that. That’s her dealings. I had my own problems and my own tensions". In response to a question from the Bench as to why his wife would not work on her own land, thereby saving them up to $8,000 a season is wages, JSM stated that when he attempted to give his wife instructions it would create tension and they would begin arguing and that caused an ongoing problem. He related one occasion during which he was telling her to do something and she became so confused she fell off a ladder. In relation to the large amount of gross income in 2002, JSM explained that there had been a hailstorm which damaged the apples and a large amount of reported revenue that year had been the result of proceeds received pursuant to his hail insurance

policy. As a result, he was paid for the value of the damaged fruit but did not have to pay labour costs for any picking. JSM stated the appellant arrived to work in her own car or – sometimes – was dropped off by someone. He described her duties as picking cherries, thinning of apples, picking and grading fruit and other casual work associated with the orchard. Each day he gave her instructions as to the work to be carried out the following day but she chose her own start and end times. JSM acknowledged his signature on the appellant's ROE – tab 3 – that had been prepared by his accountant, Susan Kassian. He stated the information therein was correct and that the appellant had worked 841 hours between June 18 and October 6, 2001 for which she had been paid the sum of $8,086.07. His policy was to maintain a time sheet for all employees and he instructed workers to write down their hours on the sheets which were kept in the garage where tractors were stored. When the time sheets were full, he took them to his accountant. In the event he was not present at quitting time, he trusted his employees to enter the correct departure time on the sheet. The accountant used the time sheets to prepare cheques which he would sign but – sometimes – he was short of funds and could not pay wages every two weeks. On the property, apart from the residence, there was a cabin that was rented sometimes and another small building - basically attached to the house - and a building where tractors were parked. JSM confirmed the diagram – at tab 34 – was otherwise accurate. Counsel pointed out that the payroll summary – tab 8 – indicated the appellant had net earnings of $765.94 during the period from July 30 to August 12 but there was no cheque issued to her for that amount. JSM replied that there had been a couple of cash payments to the appellant and referred to some receipts. When shown those receipts – tab 24 – and advised the two added up to only $625, JSM stated he permitted his accountant to handle the figures and merely signed cheques and documents when requested. Counsel advised JSM that there had been a visit to his orchard by Brian Lundgren - HRDC investigator - on July 10, 2001, a day when 4 or 5 workers from Québec were picking cherries. JSM stated he did not have a specific recollection of that event but recalled Lundgren's visit on September 11th, when Lundgren was accompanied by Bill Harrington. JSM had been picking apples at the rear of the property and was being helped by his wife, his father and his father-in-law. JSM stated the appellant was working that day on the other side of the orchard doing some thinning of apples. He recalled she worked only for a short period of time even though he had to fill an urgent order for apples and had requested that she abandon her other work and come over and help him fill that order. When the appellant did not comply, he asked his relatives to help him pick the apples. JSM stated he received a phone call at about 9:00 a.m. requesting that a certain amount of apples be ready for pick-up within two hours. As a result, he telephoned the appellant and told her he needed her to help to pick those apples and was advised that she could not attend right away but would try and come later and that if she did not

arrive, he should look after the picking himself. JSM was referred to the entry on the Daily Time Sheet – tab 7 – for September 11, 2001 indicating the appellant worked 3.5 hours between 8:00 a.m. and 11:30 a.m. to which he responded by stating that if she was working during that time she definitely did not help him pick apples. He was not able to explain the confusion surrounding the sequence of events except he recalled the appellant's husband had answered the phone when he called to tell her about the customer's order for the apples. He confirmed his wife – Daljit Malhi – was working with him on September 11 even though her ROE includes hours that she was supposedly working for Jatinderpal Sidhu. JSM recalled a visit to his residence – on September 25, 2001 – by Brian Lundgren and Norinder Bansal, a Punjabi-speaking CCRA employee. Daljit Malhi was also present and JSM identified his signature on the last page of the interview notes at tab 6. JSM had stated during this interview that he did not know the appellant was the wife of Param Malhi, a man whom he knew to be another orchard operator and with whom he had traded equipment and materials back and forth, as required. He explained that even though the appellant had worked for him during the entire summer seasons of 2000 and 2001, he did not know she was Param's wife and even when he called the appellant's house on September 11, 2001, the person responding merely said, "I am her husband, speak your order and I will pass on the message." JSM was referred to a Questionnaire - tab 22 – that was returned to the Appeals Officer. He recalled it had been completed by Susan Kassian but could not recall meeting with John Mahler and Sekunder Malik on December 16, 2002 at the CCRA office in Penticton. He stated that when Questionnaires were completed by Kassian, he signed them because he believed the information contained therein was correct. He denied that he ever paid employees for hours not worked just to "keep them happy."

[7] In cross-examination by counsel for the appellant, the witness – JSM – agreed that whenever Brian Lundgren had visited the orchard, he had not been looking for the appellant nor was he making any inquiries whatsoever in respect of her employment with JSM. He confirmed the appellant's estimate of the height of various trees as ranging from 10 to 15 feet. He added it is not possible to view the entire orchard from any particular place and it is sometimes necessary to walk around the property in order to locate someone who is working at a particular task.

[8] Brian Lundgren testified that until his retirement in November, 2004, he had been employed as an investigator for HRDC for 22 years after having served with the RCMP for 13 years as both a uniformed and plainclothes officer. His most recent posting with HRDC was as an Investigation Control Officer (ICO) at the Penticton office where he worked for 4 and one-half years. As an ICO, he responded to files referred to him including those of the appellant and two other related files which

became the subject of an investigation. As part of his work in this regard, Lundgren prepared a chart – tab 1 – in which he depicted the relationship between six persons – 3 married couples – and included information as to the dates used in the relevant ROE issued by the purported employer to the alleged employee. The first box in the chart indicated the appellant is the wife of Param Malhi and that Param issued an ROE to Parmjit Sidhu, wife of Jatinder (Jatinderpal) Sidhu. Jatinder Sidhu issued an ROE to Daljit Malhi, wife of JSM who issued an ROE to the appellant. The ROE for Daljit Malhi – within tab 3 – indicates she worked for Jatinder Sidhu from June 18 to October 6, 2001, the exact time frame used in the ROE issued by Daljit Malhi's husband – JSM – the purported employer of the appellant. However, within that period, the insurable hours worked – 820 - by Daljit Malhi was less than those – 841- shown on the appellant's ROE and the insurable earnings - $7,547.84 – of Daljit Malhi were less than those of the appellant which were stated to be in the sum of $8,086.07. Again - within tab 3 - Lundgren referred to an ROE issued by Param Malhi – husband of the appellant – to Parmjit K. Sidhu, wife of Jatinder Sidhu. According to that document, Parmjit K. Sidhu started working on June 18 and worked until October 13, 2001 and during said period worked 867 hours for which she was paid the sum of $8,345.07. Lundgren stated he requested payroll records from these three employers and spoke to the workers in the course of his investigation. He stated he received certain records from Susan Kassian that had been requested from JSM, including cancelled cheques, time sheets and a copy of a lease between the appellant and her husband. Lundgren was permitted to refer to his notes – tab 4 – and confirmed he had visited the JSM orchard at 8:30 a.m. on July 10, 2001. That day, he knocked on the door of the residence and it was opened by a female who identified herself as Daljit Malhi and it appeared as though she was caring for some small children in the house. JSM came out of the orchard to the house and identified himself. Lundgren served him with a requirement to provide certain listed documents as authorized by subsection 126(14) of the *Act.* Lundgren stated he observed 5 or 6 people picking cherries at the front right-hand side of the orchard near the highway. He looked around the property and did not see any other worker. Based on his experience, it was reasonable to assume that the only type of work to be performed at that time of year would have been picking cherries since it was too early for any other crops to be harvested and most thinning is done during May and June. On September 11, he and Bill Harrington visited the JSM property in order to interview JSM concerning a worker named Sandhu. However, because JSM's ability to speak English was not sufficient, Lundgren and Harrington advised they would return at a later date with a Punjabi-speaking officer. Lundgren referred to his notes and refreshed his recollection that they had driven up to a shed from which point they observed 4 people picking apples. One was JSM, another was his wife – Daljit Malhi – and they were being helped by two Indo-Canadian males. He and Harrington

walked to the picking area and did not observe the appellant nor any other persons other than those already identified. In Lundgren's opinion, he would have been able to see the appellant had she been present because he was at the back of the orchard and could see the remainder of the property. There were no other vehicles in the driveway. In Lundgren's experience, although there are different types of apples that mature at different times, he would expect September 25 to be near the end of the picking season. Lundgren stated that in the four and one-half years that he travelled around the south Okanagan area he visited several farms on a regular basis and in his opinion - based on his experience - most mixed orchards of 10 acres are operated by one individual or a couple and outside help will be required only during certain peak picking periods. In his experience, the pruning, spraying, fertilizing, thinning is done almost all of the time by the owner/operator. When cherries are ready for picking, it is common to hire young people – usually from Québec – to harvest the crop and groups of young workers travel from farm to farm working between one and three days at each place. In the course of his work, Lundgren stated he obtained a report – tab 16 – concerning the tree fruit industry in the Okanagan because he wanted to know the amount of time required to operate a mixed orchard and searched for information about various types of crops and varieties of apples, 9 in total - because he was interested in the different maturing dates. At page 7 of said report, there is a comment that "One person working full-time off the orchard with occasional help could operate about up to a 12-acre mixed orchard". The report went on to note that "[P]ast 15 acres, it would be very difficult for an orchardist to work full-time off the orchard unless there was another family member who could work full-time on the orchard." Lundgren stated that although he requested the report be prepared, he had no involvement whatsoever in the content thereof. In the course of his work at the HRDC Penticton office, Lundgren estimated he conducted about 200 investigations per year. After completing his investigation of the appellant's file, he formed the opinion that she had been part of an artificial arrangement to create the illusion of employment and as a result referred her file to CCRA for a ruling on insurability. Lundgren stated – in response to a question from the Bench – that in his opinion 5 or 6 pickers working with JSM could pick one acre of cherries per day and agreed with the comment in the industry report that a top picker could pick 8 or 10 bins per day and that 40 to 42 bins per acre would be required over the course of 5 days for one person to pick an acre of apples. Lundgren stated that 841 hours – the amount shown on the appellant's ROE – seemed to be excessive because his experience led him to conclude that the majority of orchardists did most of the work themselves other than picking cherries and/or other crops during peak periods. Apples were an easier crop to pick and different varieties matured at different times, unlike cherries which were ripe more or less at the same time. Lundgren agreed that between 300 and 400 hours of hired labour per season would be reasonable for a 10-acre mixed orchard.

[9] In cross-examination by counsel for the appellant, the witness - Brian Lundgren – acknowledged there is one type of apple that is harvested in October. He recalled the JSM orchard was rectangular - more deep than wide - and that the trees were older which meant they were taller than the newer varieties. He confirmed that during his visits he had not been searching for the appellant but was merely noting what he observed and/or did not see during the times spent there. Counsel referred Lundgren to his notes – tab 6 – of the interview with JSM conducted by himself and Norinder Bansal on September 25, 2001 and to the recorded responses of JSM where he stated he had one employee - Kulwinder Malhi – and that she also did some "thinning and farm work." In response to the question posed by Lundgren, "Where is she right now?", the recorded response of JSM was "She's out working". Lundgren stated he did not follow up with any more questions in relation to the appellant because she was not the subject of any investigation at that time and was not particularly concerned with her whereabouts.

[10] John Herman Mahler testified he is a Rulings Officer employed by CCRA and has been so employed since August, 1997. He was assigned to issue the ruling in respect of the appellant's alleged employment with the payor. He reviewed a case report and the worker's application for UI benefits as well as her ROE and certain other documents including the lease agreement between the appellant and her husband. He spoke with Brian Lundgren and examined time sheets. He sent a Questionnaire – tab 21 - to the appellant and it was returned to him by Susan Kassian who completed it on her behalf. On December 16, 2001, with Sekunder Malik - a Punjabi-speaking employee of CCRA - he interviewed the appellant in the presence of her husband, Param. Notes of the interview are included in the typed sheets at tab 20. Mahler stated he confronted the appellant with the information that Lundgren and Harrington had been at the JSM property on September 11 but had not seen her there. The appellant responded that she did not recall any visitors but remembered nothing of that day. With respect to the missing amount of $725.94 for the pay period - July 30 to August 12 - Mahler noted that the appellant initially stated she had not received any cash but thereafter added she did not recall receiving $625 in cash. The Questionnaire sent by Mahler to JSM was never returned but he did interview JSM on December 16, 2001. According to Mahler's typed notes – within tab 20 – JSM stated he paid the appellant $10 per hour and that she had signed receipts for cash he had paid her, although he did not provide any copies at that time for examination. When asked about the appellant's work on September 11, Mahler noted JSM stated that the appellant had worked "for a while" but went home sick and added he may have given her an extra hour "bonus time", something he did for workers from time to time in order to "keep them happy." Mahler stated that when Susan Kassian was

informed there was no cheque to match the amount of $765.94 within a particular pay period, her response was that she would attempt to find the cheque and there was no mention – by her – of any payment of wages in cash. On March 28, 2003, Mahler and Tar Deol – a Punjabi-speaking colleague – visited the home of JSM and Daljit Malhi. An interview was conducted with JSM and he was asked about his answer to question 12 on the Questionnaire – tab 23 – received by CCRA on January 6, 2003 – wherein the written response regarding method of payment to the appellant was "cheque." Mahler stated when asked to confirm that answer, JSM stated the appellant had been paid between $500 and $700 in cash and produced a receipt book which was unused except for two non-numbered receipts – tab 24 - dated August 20, 2001 and August 25, 2001, in the sums of $500 and $125, respectively. In Mahler's opinion from having visited the JSM orchard, the configuration was U-shaped and as one drove down a lengthy driveway, parts of the orchard were clearly visible in a manner that would allow one to see if someone was working there.

[11] In cross-examination by counsel for the appellant, the witness - John Mahler – agreed he had not looked behind the shed nor did he recall a cabin located on the orchard. Mahler stated that the process he followed during his interviews with the appellant was to ask the question and wait for it to be interpreted in Punjabi and for the interpreter to receive the answer in Punjabi and interpret it in English so he could write it down. Later, he typed his handwritten notes.

[12] Carin Amber testified she has been employed by CCRA for 20 years and has been an Appeals Officer for 14 years. She was assigned the appellant's file and prepared the CPT 110 – Report On An Appeal - at tab 29. In arriving at her decision, she reviewed documents forwarded to her by HRDC together with the application for appeal and correspondence as well as information accessed from the CCRA computer system. She reviewed the Questionnaires - tabs 30 and 31 – and examined summaries of income tax information filed by JSM with respect to his orchard income. She accessed information and obtained a printout – tab 36 – of amounts paid by JSM to employees for the years 1999 to 2002, inclusive. In 2001, the appellant was the only employee that JSM provided with a T4. Amber reviewed the printout – tab 37 – of the information provided by JSM in his tax returns for those years. Amber noted that as farm income rose, wages were reduced. She also considered that the appellant was unable to prove she had been paid for the amount of insurable earnings stated in her ROE. She also considered it unusual that Lundgren had not seen the appellant working on the JSM farm even though he visited the property on three separate occasions. She noted that the circumstances relevant to the appellant included the fact there were three spouses, all of whom had leased their interest in their own orchards to their respective husbands, who purported to work for another of

the husbands in a circular arrangement with the result they could qualify for UI benefits whereas if they had worked – instead - on their own land, they would not have been eligible because they were owners. Having regard to all the facts, Amber decided the appellant had not performed work for JSM – as alleged – and that if any work had been done, it was performed within the context of an exchange of work or services which does not constitute insurable employment within the meaning of the *Act.*

[13] In cross-examination by counsel for the appellant, the witness - Carin Amber – stated she had not been aware that when Brian Lundgren had attended at the JSM orchard on three separate occasions, he had not been looking for the appellant but had been investigating an unrelated matter. Amber stated that even if she had been able to conclude that the appellant had worked on the JSM farm, she would have considered the whole arrangement involving the three husbands and three spouses as nothing more than an exchange of work or services. She also took into account that during an interview, the payor stated all work had been finished by September 25, yet the appellant's ROE stated her last day of work was October 6, 2001. Amber agreed orchard work is seasonal and that start and end times could vary within the Osoyoos/Oliver area. Amber also noted that on two occasions when Lundgren visited the JSM orchard, Daljit Malhi was present even though she was supposed to have been working for Jatinder Sidhu.

[14] In re-examination, Carin Amber referred to the printout – tab 36 – indicating JSM had issued a T4 to his wife – Daljit Malhi – in 1999.

[15] Counsel for the appellant submitted the evidence established that the work was performed by the appellant for the payor. In counsel's view of the position taken by the respondent, there was too much reliance placed on the allegation – by Lundgren – that he did not see the appellant on the JSM property during any of the three visits. However, the appellant – during that time – was never the subject of any inquiry and Lundgren was asked one year later if he recalled having seen the appellant on that site. Counsel referred to the proof of payment by cheques issued to the appellant and submitted that is not consistent with some sort of barter system. Further, people are entitled to arrange their affairs in order to qualify for UI benefits or to minimize taxation provided they are acting pursuant to legal obligations within a legitimate framework. Counsel pointed out that there was no evidence capable of sustaining the conclusion that any of the money paid by JSM to the appellant had been repaid by her.

[16] Counsel for the respondent submitted the decision of the Minister should be confirmed. Having regard to an overview of the entire situation, counsel submitted the evidence permits one to draw the conclusion that there was a deliberate scheme concocted by the appellant and her husband, and Jatinderpal Sidhu and his wife, and JSM and his wife whereby one wife would be employed by another husband after having leased – to her own husband - her 50% interest in their home orchard. Counsel pointed to many inconsistencies in the appellant's case including details of alleged cash payments which appeared to be nothing more than an attempt to make the remuneration match the insurable earnings as stated in the ROE. The time sheets had discrepancies and there were unexplained anomalies concerning her hours of work and the method of recording her time. Counsel submitted the evidence concerning September 11 – a day seared in the memory of most people – was contradictory and while involving only a few working hours was indicative of the lack of consistency between the appellant and the payor about her supposed duties. Counsel submitted it was difficult to accept the proposition that JSM did not know the appellant was the wife of Param Malhi and/or that JSM was unaware his wife – Daljit – was working for Jatinder Sidhu and/or that Parmjit Sidhu was working for Param Malhi bearing in mind the small geographical area involved and the fact all were engaged in the same industry and attended the Sikh temple in Oliver.

[17] Insurable employment is defined by subsection 5(1) of the *Act* and reads as follows:

> 5.(1) Subject to subsection (2), insurable employment is:
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> (*b*) employment in Canada as described in paragraph (*a*) by Her Majesty in right of Canada;
>
> (*c*) service in the Canadian Forces or in a police force;
>
> (*d*) employment included by regulations made under subsection (4) or (5); and
>
> (*e*) employment in Canada of an individual as the sponsor or co-ordinator of an employment benefits project.

[18] The relevant provision concerning excluded employment is paragraph 5(2)(*g*) of the *Act* which reads:

> (*g*) employment that constitutes an exchange of work or services;

[19] In the case of *Lévesque v. Canada (Minister of National Revenue – M.N.R.)*, [1987] T.C.J. No. 430, Labelle, D.J.T.C. dealt with the case where two families operated two businesses, a farm and a butcher shop. The farmer worked in the butcher shop and the butcher worked on the farm for services of equal value. The two wives worked for each other's husband, for equal value. Judge Labelle found that the periods of work in question were the exact periods the employees needed in order to qualify for UI benefits and that the workers were not supervised by their alleged employers. After referring to earlier cases involving fact situations that had been found to constitute an exchange of work or services, he concluded – at p. 6 – by stating:

> Given the facts proved, namely, the same amounts for services rendered by Antoine and Omer Lévesque, that is, $3,850.00, the amounts for services rendered by Mona and Frances Lévesque, within $9.00, the periods of employment that were exactly those required for unemployment insurance benefits, the termination of the employment after these periods and no employment previously, it seems clear to me that this was a ruse by the appellants and not a contract of service. The services rendered were not hired out; they were exchanged and if there was employment, it was excepted employment under section 3(2)(i) of the Unemployment Insurance Act, 1971.

[20] In the case of *Bhatti v. Canada (Minister of National Revenue – M.N.R.)*, [1998] T.C.J. No. 290, Margeson T.C.J. considered the appeal of a seasonal farm worker who started her own labour contracting firm supplying workers to various farms, including the one where she was working for a salary of $500 per week. That worker purported to hire that particular farm owner as one of her employees of the labour contracting entity to work on his own farm. The relevant facts were set out in paragraph 52 of the judgment, as follows:

> There was some evidence given about the nature of the working arrangement, but there was no attempt made to address specifically the references in the Reply. Where they were not addressed, they certainly were not rebutted. Some of those presumptions in the Reply were:

(b) Sahota operates a farm on 250 acres, some of which she owned and some which she leased;

(c) in the Period and in the ten preceding years, the Appellant had been employed by Sahota as a supervisor of Sahota's farm workers;

(d) in 1995, the Appellant started a business called Bhatti Labourers;

(e) the nature of the Appellant's business was to provide labourers to various farms for a predetermined rate per each worker supplied;

(f) the Appellant engaged her spouse, Opinder Bhatti, to manage Bhatti Labourers

(g) Sahota was engaged by Bhatti Labourers on July 10, 1995 as a farm worker and was sent to work on her own farm.

That has been disputed and so to that extent the Court does not accept that presumption. The rest of it has fairly well been established.

(h) Sahota was paid $400.00 per week by Bhatti Labourers to work on her own farm under the supervision of the Appellant, who had been hired as a supervisor;

(i) the Appellant was engaged by Sahota on July 3, 1995 and was paid $500.00 per week by Sahota to supervise farm workers, one of whom was Sahota, who were supplied by the Appellant's own business; and

(j) the employment of the Appellant represented an exchange of work or services between the Appellant and Sahota.

There are some suspicious circumstances with respect to this alleged contract of service.

[21] At paragraph 54 and following, Judge Margeson continued:

The Court is satisfied that the remuneration paid to Ms. Sahota, the alleged worker and the Appellant who was the owner of "Sahota" was certainly very similar. There was only $100 difference between the two remunerations.

The time periods during which the two parties worked were very similar. There was only a week difference. The work period of Ms. Sahota certainly was completely included within the period of time during which the Appellant worked. That raises some suspicions.

The job description of the two parties was somewhat similar. It is true that there was some evidence that it was not exactly the same, that Ms. Bhatti did some different work than Ms. Sahota did, but nonetheless, the type of work they did was substantially the same. The evidence showed that the work was similar enough to raise suspicions.

Two businesses were operated, one by the Appellant and one by the party who was alleged to have been involved in a work exchange program. Those businesses were quite similar, at least the work provided was similar. One hired the other to work for the other business during the period in issue.

It is highly suspicious that this was a work exchange program and the Court has to look at the evidence "in toto" in order to decide whether that is the case. The total factual situation is highly suspicious.

On top of that, in this particular case there are some anomalies. For instance, the evidence indicated that the Appellant did indeed receive a considerable amount of her remuneration on November 17 and December 10, 1995. The work period was considerably different than that. There were only three cheques which were issued during the whole period of time although the manner of pay was described as being a weekly salary. The cheques indicated that the pay was received in lump sums, large amounts.

Another anomaly, of course, was the fact that the Appellant wrote a cheque to the purported employer on November 2, 1995 for $380.50. It is strange, first of all, that there would be an overpayment of wages. If a person was being paid $500 a week, one would expect that there would be no problem in deciding how much was owed at any particular point in time. It is even stranger that the Appellant would write a cheque back for what was purportedly an overpayment

> of her wages on November 2, when she did not even complete her employment until November 11, 1995.
>
> It would be even stranger, that the Appellant, if this was a normal employer/employee relationship, would have received a cheque for $1,035 on May 17, 1995, when her work was not even due to start until July 3, 1995 and she actually was not employed until then.
>
> The Court finds that under the circumstances disclosed by the evidence here, bearing in mind the cases that have been referred to, although the factual situation here is not exactly the same as in those cases, it is not on all fours, those cases and the present case are similar enough to lead the Court to conclude that those cases are quite applicable on the present facts.
>
> Even though the time periods here were not exactly the same and the amounts of pay were not exactly the same, when the Court looks at all of the evidence, gives to the evidence the weight that it deserves, looks at the anomalies which the Court has described, the Court is satisfied that what took place here was an exchange of work or service during the periods of the engagement.
>
> As in the cases referred to, this Court is satisfied that the Appellants entered into this arrangement in order to achieve unemployment insurance benefits for each other, which they could not have achieved had they been working for their own businesses or worked for their own husbands.
>
> In this particular case, of course, both of these workers were experienced workers, not inexperienced workers as they might have been in Allain, supra, but that is not a sufficient difference to find that that case is not applicable to the factual situation here.
>
> The Court finds that on the preponderance of the evidence there was an exchange of work and that the Appellant's employment is excepted under paragraph 3(2)(h) of the Act.
>
> The appeal is dismissed and the Minister's determination is confirmed.

[22] With respect to the issue of exchange of service, the respondent relied on the following assumptions of fact as set forth in subparagraphs 5(q) to 5(w), inclusive, of the Reply, as follows:

q) the Appellant and her spouse Param Ravinder Singh Malhi ("Param") own an 10.9 acre orchard of mixed fruit in Oliver of British Columbia;

r) the Appellant leased her interest in the family property to her husband Param for $500.00 per year plus payment of the mortgage and taxes;

s) a third couple, Jatinderpal Singh Sidhu ("Jatinderpal") and his spouse Parmjit Kaur Sidhu ("Parmjit"), also own a 6.5 acre mixed orchard in the Oliver area;

t) Parmjit leased her interest in the family property to her husband Jatinderpal for $500.00 per year plus payment of the mortgage and taxes;

u) the Appellant received a record of employment from the Payor covering the period from June 18 to October 6, 2001;

v) Daljit received a record of employment from Jatinderpal covering the period from June 18 to October 6, 2001 with 841 hours of employment and earnings of $7,547.00; and

w) Parmjit received a record of employment from Param covering the period from June 18 to October 13, 2001, with insurable earnings of $8,345.00.

[23] The evidence established that the lease agreement – tab 12 - between JSM and his wife – Daljit Malhi – was dated December 1, 1997 and had a 5-year term. The agreement was signed by both parties and witnessed by Susan Kassian, the accountant for JSM. The agreement did not require any payments to be made by JSM to his wife for leasing her interests in the home orchard property. The Minister erroneously assumed – at subparagraph 5(c) of the Reply - that said lease called for an annual payment of $500 per annum by JSM to his wife.

[24] The facts in the within appeal are different than those often encountered in this sort of appeal. Usually, an exchange of services involves only two parties who hire each other or the spouse of the other person under an arrangement where the remuneration is more or less equal and the periods of employment are identical – or nearly so – and are of sufficient duration to qualify – barely – for UI benefits. In this case, husband #1 hired the wife of husband #2 who employed the wife of husband #3 who hired the wife of husband #1 in order to complete the circle. Each of these women was a joint owner – with her husband - of the orchard property on which the family home was located and – without more – would have been a partner in the business being carried out on that land. By working as a farm labourer on their own property, the appellant and the other women would not have been eligible to receive UI benefits at the end of the season. Apparently, the position taken by HRDC with

respect to the appellant's eventual employment – by her husband – in 2002 and 2003 was that she had been engaged in insurable employment because she had provided her services wholly with respect to an orchard property leased by her husband from a third party and none of the insurable earnings flowed from work done on the home property in which she held a 50% interest. However, the Minister's decision in the within appeal was based on the belief that the three husbands and their wives hatched a scheme to give the appearance that work was being done on the other's farm in a rotational arrangement so as to avoid the appearance of a bilateral exchange of services and by so doing attempted to create a baffle or filter to camouflage the true nature and purpose of those employment transactions. However, the question remains, if the work was done, can it be said that this method of arranging one's personal affairs contravenes the letter of the law as found within the relevant provision of the *Act*? The key question to be answered is whether the appellant in the within appeal is able to establish that there was a genuine employer-employee relationship and that the employment was real and not merely a ruse or subterfuge.

[25] The evidence of the appellant is not particularly strong in many instances such as her description of the method of keeping a record of her hours or the tasks performed. Her explanation of events surrounding her alleged work performed on September 11 conflicts with that of her employer who offered up more than one version in the course of his interviews with HRDC investigators. In 2001, JSM earned the small sum of $444 in the form of employment income but had $11,546 net income from his orchard. The appellant stated that one person can operate a 10-acre orchard provided pickers are hired for certain crops and this view was bolstered by Lundgren, an ICO well-versed in farm labour in the south Okanagan area and by a technical report prepared for the benefit of the Agricultural Compliance Team (ACT) in May, 2002. The question then arises, why was it necessary for JSM to hire the appellant to work 841 hours - at a cost to him of $8,086.07 - if he could do the work himself except for hiring itinerant cherry pickers when the need arose. Similarly, why did Param Malhi – husband of the appellant – need to hire Jatinder Sidhu's wife – Parmjit - for the period from June 18 to October 13, 2001 in order to work on the 10.9 acre orchard owned jointly with his wife, the appellant. Further, it makes even less sense that Jatinder Sidhu would need hired labour to operate his smaller - 6.5-acre - mixed orchard, to the extent he had to employ Daljit Malhi – wife of JSM and employer of the appellant - for a period that coincided exactly with the one stated in the appellant's ROE, although she purported to have worked 21 less hours than the appellant. The evidence does not support the appellant's contention that she was still picking apples as late as October 6, 2001. In any event, it is reasonable to conclude on all of the evidence that the apple harvest was finished by September 25, 2001 with or without the assistance of the appellant.

[26] There is the matter of the discrepancy in the appellant's pay. Her cheques do not match the payroll summary – tab 8 - produced by JSM to HRDC. There is no cheque to match the pay period from July 30 to August 12, 2001, although other cheques do conform to the amounts set forth in said summary and – twice – one cheque was issued to cover two pay periods. In order to explain the missing money, the appellant and JSM offered up the story about her receiving two payments in cash, totalling $625. The receipts produced later are purely an afterthought in order to create some paper to back up their story but those efforts are not worthy of belief, particularly when one considers the evidence of Lundgren that the so-called receipts were produced from an otherwise empty receipt book and JSM's own accountant had sent him a fax indicating she was attempting to find the missing $765.94 cheque to cover the missing pay period.

[27] In order to find that the unusual arrangement in the within appeal is genuine, one has to accept that each of these three wives chose not to work on her own orchard and that each of three husbands found it reasonable from a business perspective to hire labour rather than utilize the services of his own wife - and joint owner - of that very orchard. The reason given by both the appellant and JSM was that the former did not like working with her husband and the latter explained that his wife would not take instructions from him and could not do certain types of work in any event. That sort of explanation is not unreasonable and I must keep in mind the appellant had never worked on their home orchard from the time it was purchased in 1996 and that even when she worked for her husband in 2002, 2003 and 2004, it was not on their own orchard but on a separate property leased by her husband. Another point to consider is that the lease agreement between JSM and his wife was dated December 1, 1997 and in the absence of any evidence to the contrary that date must be presumed correct. However, the critical issue to be determined is whether the appellant has established that she performed services for JSM, as alleged or at all. One circumstance needs to be considered in the overall context of the scheme alleged by the Minister. It is more than a bit odd that on two occasions when Lundgren visited the JSM farm in the morning, Daljit Malhi was present instead of being at her job at the Sidhu orchard. As for Lundgren not seeing the appellant at the JSM orchard on any of the three occasions he visited, that evidence must be weighed by keeping in mind the fact he was not there on any of those occasions for the purpose of searching for the appellant or to note her presence or absence. At best, his testimony in that regard was his recollection of an event upon being asked a year later for his opinion whether the appellant was present.

[28] There is an issue arising concerning the meaning of "exchange". The Canadian Oxford Paperback Dictionary, Oxford University Press, 2000 edition, defines it this way:

> 1. the act or an instance of giving one thing and receiving another in its place.

[29] In the context of the *Act* and bearing in mind the purpose of the provision barring an exchange of work or services from insurable employment, it is reasonable to conclude that an exchange does not have to be bilateral when the evidence demonstrates the existence of an arrangement between two or more parties, the purpose of which is to create the illusion of legitimate employment between parties who are not related in accordance with relevant provisions of the *Income Tax Act.* The testimony of JSM that he did not know the appellant was the wife of Param Malhi is not believable. He and Malhi are engaged in the same industry, knew each other, occasionally exchanged materials and equipment and went to the same temple in Oliver, a small town. To believe that JSM did not know his wife was working for Jatinder Sidhu is extremely difficult when one considers these three orchards were within 6-10 km. of each other. The lease agreement - tab 11 – between the appellant and her husband was entered into because she encountered difficulty with her UI benefits arising from her joint ownership of their orchard land and/or business and believed it would be easier for her to qualify if she no longer participated in their orchard except to receive an annual payment in the sum of $500. Although there was no direct evidence in this regard, that seems like a small amount to pay in order to lease a one-half interest in a 10.9-acre orchard even if the husband/lessor was required to bear all the costs of maintaining the overall property including mortgage payments.

[30] The issue boils down to this. Has the appellant demonstrated on a balance of probabilities that she was engaged in insurable employment with JSM during the relevant period? Taking into account all of the evidence, I find she has failed to do so. The overall circumstances relevant to her appeal are such that it is highly unlikely that she performed the work as alleged or at all. She had the burden of proving her employment was real and that she performed the work and received payment for services rendered in accordance with the ROE issued by her employer, upon which she based her entitlement to claim UI benefits. Even if some work was performed by the appellant for JSM, those services were part of an arrangement constituting an exchange of work or services and were thereby disqualified from the category of insurable employment. The mere fact that a person receives – and deposits into a

personal account - cheques from a purported employer does not prove that the money paid was pursuant to a genuine employer-employee relationship.

[31] I am satisfied the decision of the Minister is correct and it is hereby confirmed.

[32] In the event I am wrong in concluding the appellant's employment with JSM was not insurable because it constituted excluded employment on the basis said employment was an inextricable component of a scheme to create an exchange of work or services between three purported employees and three purported employers, I would have found the appellant's insurable earnings were in the sum of $6,997.02 even if I had decided that she actually performed work for JSM. Since there was no credible evidence that she received cash or any payments other than as represented by the copies of cheques - tab 9 - I would have reduced her insurable hours – from 841 to 828 due to a combination of an addition error – 10 hours - in her time sheet and by an additional 3.5 hours because there was no reliable proof she worked at all on September 11, 2001 and that reduction of 13.5 insurable hours - at $9 per hour plus holiday pay – has been taken into account in determining the amount of insurable earnings.

[33] In accordance with these reasons, the appellant's appeal is dismissed.

Signed at Sidney, British Columbia, this 16th day of May 2005.

D.W. Rowe

Rowe, D.J.

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COURT FILE NO.:	2004-3697(EI)
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REASONS FOR JUDGEMENT BY:	The Honourable D.W. Rowe, Deputy Judge
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APPEARANCES:

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