Docket: 2001-640(EI)

BETWEEN:

LOUIS-PAUL BÉLANGER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 1 and 3, 2004, at Quebec City, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant: Marc-André Gravel

Counsel for the respondent: Agathe Cavanagh

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is upheld in accordance with the attached reasons for judgment.

Signed at Toronto, Ontario, this 11th day of January 2005.

"Pierre Archambault"

Archambault J.

Citation: 2005TCC36
Date: 20050111
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REASONS FOR JUDGMENT

Archambault J.

[1] Louis-Paul Bélanger is appealing from a decision rendered by the Minister of National Revenue (**Minister**) pursuant to the *Employment Insurance Act* (**Act**). The Minister decided that Mr. Bélanger was not employed in insurable employment at Plancher Idéal L.P.B. Inc. (**payer**) during the periods from April 20, 1998, to October 9, 1998, and April 26, 1999, to October 9, 1999 (**relevant periods**). The Minister held that this employment was excluded because Mr. Bélanger and the payer would not have entered into a similar contract of employment if they had been dealing with each other at arm's length.

[2] This is a second hearing of the appeal for the parties, because the Federal Court of Appeal set aside the decision rendered by this Court.[1]

Facts

[3] At the start of the hearing, counsel for Mr. Bélanger admitted, with a few exceptions, the following facts, set out at paragraph 5 of the Reply to the Notice of Appeal:

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[1] Docket A-516-02, decision dated November 26, 2003.

(a) The payer was incorporated on July 26, 1983; (**admitted**)

(b) The appellant was a shareholder of the payer until December 20, 1994; (**admitted**)

(c) Since December 1994, the shareholders of the payer, who held voting shares, were:

Carl Bélanger	50% of the shares
Lucille Labbé	50% of the shares;

(**admitted**)

(d) The appellant was Carl Bélanger's father and Lucille Labbé's spouse[2]; (**admitted**)

(e) The payer operated a flooring installation and sanding business;[3] (**admitted**)

(f) The appellant was hired as a floor sander; (**admitted**)

(g) The payer hired three employees: the appellant and the two shareholders;[4] (**admitted**)

(h) On October 10, 2000, the payer owed the appellant $7,287 on a $25,000 loan made in 1994; (**admitted**)

(i) The appellant was paid $500 a week in 1998[5] and $520 a week in 1999 for a 40-hour work week, i.e., a $12.50 hourly rate for the first year and a $13.00 hourly rate for the second year; (**admitted**)

(j) Pursuant to the Construction Decree, a floor sander's wage was approximately $23.00 an hour; (**denied**)

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[2] The parties agreed that paragraph 5(d) should be amended by replacing "the spouse" with "the former spouse".

[3] The parties agreed that the company did not install flooring. However, the evidence showed that the payer subcontracted flooring installation work.

[4] The evidence revealed that Louis-Paul Bélanger's daughter also worked for the payer.

[5] The parties agreed that the remuneration paid in 1998 was $520, and therefore the rate was $13 an hour for that year.

(k) The appellant had accepted a remuneration lower than the amount stipulated in the Decree in order not to jeopardize the payer's financial situation; (**denied**)

(l) The appellant received a fixed salary regardless of the number of hours actually worked; (**admitted**)

(m) The appellant could work 65 hours per week but accepted only 40 hours of pay; (**admitted**)

(n) On October 23, 1998, the payer issued the appellant a record of employment for the period April 20, 1998, to October 9, 1998, that indicated 1,000 insurable hours and a total of $13,000.00 of insurable earnings; (**admitted**)

(o) On October 12, 1999, the payer issued the appellant a record of employment for the period April 26, 1999, to October 9, 1999, that indicated 960 insurable hours and insurable earnings of $520 per week; (**admitted**)

(p) The appellant provided services to the payer, without any reported remuneration, outside the periods indicated by the records of employment; (**admitted**)

(q) According to the payer's September 26, 2000, statement, the appellant provided services to the payer without pay before and after the periods indicated on his records of employment; (**admitted**)

(r) The periods allegedly worked by the appellant were not the same as the periods actually worked; (**denied**)

(s) The payer and the appellant entered into an arrangement to allow the appellant to qualify for employment insurance benefits while continuing to provide services to the payer; (**denied**)

[4] Also, the evidence adduced by the parties at the hearing also revealed that the statements in paragraphs 5(j) and (r) were proven facts. The evidence also highlighted the following additional facts.

[5] First of all, according to Jean-Yves Légaré, the peak period (**peak season**) for sandblasting companies normally starts in March or April and ends about in

October[6]. Mr. Légaré, Mr. Bélanger's nephew, has been a hardwood sanding and varnishing contractor since 1976. In 2003, he acquired some assets of the payer's business, i.e., vehicles and machinery. According to him, the customers had followed him on their own. Mr. Légaré subsequently hired Mr. Bélanger at $16 an hour[7] when he was working outside the Construction Decree, i.e., when his work was not subject to the standards set out in the Decree. This hourly wage was the same as the wage that Mr. Légaré paid Roger Trépanier during the relevant periods and in 2003. Mr. Trépanier was a sandblaster with about 20 years of experience. Mr. Trépanier is also Mr. Légaré's brother-in-law. In Mr. Trépanier's case, this was the wage paid for work not performed pursuant to the Construction Decree. When his work was subject to the Decree, his hourly wage was $23 or $24.

[6] Benoît Carbonneau, information officer at the Commission de la construction du Québec, testified to confirm that under subsection 19(9) of the *Act Respecting labour relations, vocational training and workforce management in the construction industry* (**Construction Act**), the provisions of the Construction Decree do not apply to work carried out on an inhabited single-family dwelling. Therefore, work carried out on a new single-family dwelling and any multi-family dwelling is subject to the provisions of the Decree.

[7] Mr. Légaré said it was relatively easy to find good employees at $13 an hour. However, when I asked him why he did not hire other employees to meet the demand during the peak season, he said he could not find any during the peak season because everyone was busy. I concluded that it was during the low season that he could easily find people at $13 an hour. In fact, Mr. Légaré admitted that he could find people at an even lower hourly rate during the low season, but did not hire them because there was no work!

[8] Mr. Légaré also admitted that he did not pay his employees by the week. They were all paid by the hour. Both Mr. Légaré and Mr. Bélanger admitted that they did not know of any companies that dealt with their manual labourers at arm's length and paid them by the week.

[9] Mr. Légaré said none of his employees worked for his company without any remuneration, including Mr. Bélanger as of June 2003. He also said he did not pay his employees for their overtime. The employees banked their overtime and took

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6 The rest of the year is the low season.

7 This $16 an hour wage was not a condition of sale required by the payer.

time off the following week. Seventy-five percent of the work done by Mr. Légaré was not subject to the Decree. The rest of the work was subject to the Decree.

[10] During the relevant periods, Mr. Bélanger's only jobs for the payer involved manual labour. This situation had existed since 1994, when he sold his shares to his son Carl and his former spouse, Lucille Labbé.[8] Ms. Labbé said about 90 to 95% of the work performed by the payer was not subject to the Construction Decree. Ms. Labbé said she did finishing work for the payer during the same periods. She generally worked 40 hours a week and was paid $500 per week. She said she stopped working for the payer in 2002. According to Exhibit I-2, she received a salary for 28 weeks in 1998. In 1999, she received a single $5,656.53 wage payment made during the week of December 12, 1999. No salary was shown for 2000.

[11] Carl Bélanger was primarily responsible for managing the payer's business, including soliciting work and bidding on contracts. According to Exhibit I-2, Carl generally earned $500 a week from March 29, 1998, until October 10, 1998.[9] His salary for the week of November 1, 1998, was $924. There were only two other $528 pay cheques for the remainder of the year, for the period from December 6 to December 19, 1998. He worked about 30 weeks in all. In 1999, Carl received an intermittent salary ranging from $211 to $1,077. In 2000, he was paid between $403 (for seven weeks from January 2 to March 11) and $1,098 (for two weeks from July 30 to August 12, 2000), and he worked a total of 26 weeks that year. The only person who received stable remuneration during the period from 1998 to 2000 was Louis-Paul Bélanger. His $520 weekly earnings were paid to him regularly from 1998 to 2000, for 25 consecutive weeks in 1998, 24 in 1999 and 21 in 2000.

[12] While admitting that he did not count his hours, Mr. Bélanger said he worked approximately 40 hours a week. In 2004, he had 45 years of experience in the sanding industry. Mr. Bélanger said he accepted the equivalent of $13 an hour because the company was unable to pay more.[10]

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8 Ms. Labbé and Mr. Bélanger lived together as a couple from 1960 to 1992. They were divorced in May 1999.

9 His salary was approximately $528 for seven of the weeks included in this period.

10 The fact that the payer paid his former wife, Carl's mother, a wage, could also explain that the company did not have the necessary resources to pay a $16 an hour wage like Mr. Légaré did. An analysis of the payer's financial statements for the year ending May 31, 1999, showed a $28,981 deficit on the balance sheet. The income statement and the statement of deficit for the same fiscal year showed a $4,484 loss (before taxes) for 1998 and a $5,965 profit (before taxes) for 1999. The payer funded his operations with loans

[13] Regarding the issue of services rendered outside Louis-Paul Bélanger's official employment periods (**unpaid periods**), the evidence revealed the following. When the Human Resources Development Canada (**HRDC**) investigator interviewed him, Louis-Paul Bélanger said he did not work for the payer after October 9, 1998. The record of employment issued on October 23, 1998, indicated "lack of work" as the reason for the separation from employment. When the investigator showed him supplier invoices addressed to him, Louis-Paul Bélanger admitted that he had worked, but without pay.[11]

[14] In an affidavit dated January 27, 2000, Carl Bélanger indicated that [TRANSLATION] *"[m]y father has not worked for the company since October 10, 1999, because there are not enough contracts at the moment. I help my mother do finishing work."* On April 14, 2000, Carl amended this statement (Exhibit I-9) as follows[12]:

> [TRANSLATION] I did not state that he had been working on contracts since October 10, 1999, because I did not want to cause him any employment insurance problems, and I wanted to avoid insurance problems as well, but I was not aware of the implications. <u>I was vaguely aware that he could work a little while he was unemployed</u>. Regarding my father's participation in the contracts, one part was <u>75%</u> complete (helping with the sanding and applying the first coat of varnish). Another part was <u>50%</u> complete, which means (doing a little sanding and/or delivering some materials). Out of all the contracts completed since October 10, 1999, there were eight that he did not work on. . . . His October 1998 claim for benefits involved

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granted by the directors and a loan from Mr. Bélanger himself. As at May 31, 1999, the respective amounts of $21,549 and $7,287 had yet to be repaid on these loans. For the previous year, the amount owed to Mr. Bélanger was $12,539. Finally, we should add that the payer's turnover was not very high. It was $100,397 in 1998, and $120,714 in 1999. Mr. Bélanger testified that some of the work performed by the payer was subcontracted, including flooring installations. If part of the turnover was from work that was outsourced, it follows that the payer received relatively little remuneration for his sanding services. If so, was the payer in a position to employ three or four people, the father, son, daughter and mother?

11 See supplier invoices in Exhibit I-3. See Exhibit I-6 for confirmation of Mr. Bélanger's attendance at work during the unpaid period from October 1999 to January 2000.

12 Mr. Bélanger's counsel explained that Carl Bélanger could not attend the hearing because he was working in Alberta.

> the same issue: whether he worked on the contracts between October 1998 and April 25, 1999. He was not remunerated from October 10, 1999, to April 2, 2000, and from October 10, 1998, to April 25, 1999.
>
> [Emphasis added.]

[15] Louis-Paul Bélanger indicated the following in his February 17, 2000, statement (Exhibit I-7):

> [TRANSLATION] Since I stopped working for this company on October 9, 1999, I have occasionally helped my son Carl perform unpaid contracts. I bring materials to the contract sites. I pick up materials from suppliers. I help with sanding and finishing work. However, I do not complete the whole contract, for example, when I am working during the peak summer season. . . . From now on, I intend to stop working on contracts with my son Carl. I will suggest that he work with an apprentice instead, because I do not want to have any employment insurance problems. . . . I proceeded the same way for my October 23, 1998, claim for benefits. I occasionally helped my son work on contracts without pay. I did not report that work because I was not paid for it, and I just did it to help him out.

[16] During his testimony, Louis-Paul Bélanger downplayed his contribution during unpaid periods. He said he did not work more than two or three hours a week. He said he worked this way because it was his son's company, and it had limited funds.

[17] When I asked the HRDC investigator, Pierre Nadeau[13], to tell me how many contracts could have been performed during the unpaid period from October 1999 to January 2000, he replied that he had 31 invoices in his case file, but that he had not checked all of them. These invoices covered a period from October 11, 1999, to January 20, 2000. Invoices for 1998 and 1999 could not be obtained. He randomly selected four of the 31 invoices that he had, and called the customers to whom those invoices had been issued. These customers provided him with confirmation that Carl's mother and father helped him perform the work shown on the four invoices. Occasionally, a fourth person helped, Louis-Paul Bélanger's daughter. Because the

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13 Mr. Nadeau testified that a claimant was entitled to earn 25% of the amount of his employment insurance benefits and still qualify for the full benefit.

first four customers who were called confirmed that Louis-Paul Bélanger had worked, Mr. Nadeau stopped his investigation.[14]

[18] Michel Gosselin, the appeals officer who ruled on the application of paragraph 5(2)(i) and subsection 5(3) of the Act, testified at the hearing. His report was filed as Exhibit I-1. After stating the facts, Mr. Gosselin provided this analysis of the application of paragraph 5(2)(i) of the Act:

> **(VI) SUMMARY**
>
> Louis-Paul Bélanger worked for Plancher Idéal L.B.P. inc. from April 20, 1998, to October 9, 1998, and from April 26, 1999, to October 9, 1999.
>
> The payer has been incorporated since July 26, 1983.
>
> It does flooring installation and sanding work.
>
> Originally, the shareholders were the appellant and his spouse, Lucille Labbé. Each had 50% of the voting shares. In December 1994, the appellant sold his shares to his son Carl, but remained the payer's employee.
>
> Every year, the payer hires the appellant as a floor sander.
>
> These three people are the only employees who work for the payer.
>
> The shareholders are responsible for all decisions and financial implications.
>
> Pursuant to subparagraph 251(2)(b)(iii) of the *Income Tax Act* (ITA), the appellant and the payer are related persons. Related persons are deemed not to deal at arm's length with each other pursuant to paragraph 251(1)(a) of the ITA.
>
> Let us examine the tests for the arm's length relationship.

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14 Mr. Nadeau did not question Mr. Bélanger regarding the testimony provided by these four customers.

Compensation

The appellant is paid $500 for a 40-hour week, or $12.50 an hour. The payer was supposed to remunerate the appellant at the rate listed in the Construction Decree, approximately $23.00 an hour. The appellant accepted this remuneration because the payer still owed him money on the $25,000 that he loaned the payer in 1994, and he did not want to "kill the goose that laid the golden egg." A stranger would not have agreed to this and would have demanded to be paid the rate set out in the Decree, especially considering the appellant's years of experience. The appellant intends to demand that the payer remunerate him for the coming year (2001) at the rate set out in the Construction Decree.

Conditions of employment

Carl Bélanger sets the schedule and determines the worksites.

All work tools belong to the payer.

The appellant is paid for a 40-hour work week. Both parties interviewed confirmed that the time worked can easily reach 60 hours during the summer period. However, the appellant is still paid for a 40-hour work week. We do not believe that a stranger would have agreed to such conditions of employment. Only the father not dealing at arm's length with his son creates this situation.

Moreover, the appellant told us that there was a written agreement between him and his son, according to which the payer undertook to rehire him every year, rather than a stranger, as long as the appellant was able to work. This exclusive service clause was made solely because of the non-arm's length relationship, and we believe that the payer would not have entered into such an arrangement with a complete stranger.

Duration of work

The payer and the appellant admitted that the appellant provided services outside the periods indicated on the records of employment. The appellant insisted on downplaying these tasks, which he estimated took a maximum of two hours a week to complete. The payer already admitted that pro bono services were rendered in approximately 50% to 75% of the contracts not listed on the records of employment.

The analysis of the payer's monthly turnover indicated that the payer's income for April 1998, March, April and November 1999 (periods not shown on the records of employment) are similar to other periods when the appellant was employed.

When the payer hired him for 40 hours a week, we can only wonder how he could do without the appellant's services and achieve a similar turnover. This confirms that the appellant was working more than two hours a week outside the periods shown on his record of employment.

Nature and importance of the work

The appellant is a professional floor sander. He does his job for a flooring company. The appellant's duties are related to the company's operations, and they are necessary.

Conclusion

Given the remuneration paid, the terms and conditions and the duration of the work performed, we are of the view that the appellant and the payer would not have entered into a substantially similar contract of employment, if they had been dealing with each other at arm's length. Therefore, this employment is excluded pursuant to paragraph 5(2)(i) of the *Employment Insurance Act*.

(VII) PRECEDENT, LEGAL OPINION, ETC.:

Montreal v. Montreal Locomotive Works Ltd. [1947], 1 D.L.R. 161
Wiebe Door Services Ltd. v. M.N.R. [1986] 3 FC 553 (FCA)).
Canada (Attorney General) v. Jencan Ltd. FCA A-599-96
Canada v. Bayside Drive-In Ltd., FCA A-626-96
René Beauchamps, NR-1182: the first statement is the most persuasive

> **(VIII) RECOMMENDATION:**
>
> We recommend that ministerial notifications be issued indicating that when Louis-Paul Bélanger was working for Plancher Idéal L.P.B. inc. from April 20, 1998, to October 9, 1998, and from April 26, 1999, to October 9, 1999, he was employed in employment that was excluded from insurable employment under paragraph 5(2)(i) of the *Employment Insurance Act* because the employer and employee were not dealing with each other at arm's length.

[19] It is also useful to reproduce the table in paragraph 65 of this report that lists the amount of the payer's monthly sales[15]:

Month	Sales ($)	Month	Sales ($)	Month	Sales ($)
1998		1999		2000	
January	3,835	January	4,196	January	3,010
February	1,527	February	4,084	February	3,634
March	6,204	March	11,786	March	6,186
April	10,072	April	9,150	April	15,559
May	**13,896**	**May**	**15,314**	**May**	**13,776**
June	**19,216**	**June**	**17,557**	(n/a)	
July	**20,807**	**July**	**20,206**		
August	**8,516**	**August**	**12,947**		
September	**10,377**	**September**	**8,970**		
October	**7,559**	**October**	**9,325**		
November	4,252	**November**	13,595		
December	5,563	**December**	5,857		

[20] In rebuttal, Mr. Bélanger provided testimony on the 31 invoices to which Mr. Nadeau referred. In fact, there were only 30 invoices,[16] dated October 11, 1999, to January 20, 2000, 25 of which were for sanding and finishing work. The other documents were either quotes or invoices relating to the sale of products or services that the payer did not provide himself, in particular outsourced floor installations. Louis-Paul Bélanger admitted that he helped perform the work described in six of these 25 invoices. He said that, generally, he only helped his son carry a heavy sander and could occasionally help him finish his work. On average, he did not spend more

[15] These data come from the payer's General Ledger. An extract from this General Ledger has been filed as Exhibit I-10.

[16] These are invoices 149 to 179, filed as Exhibits A-5 and I-6. Invoice 150 was omitted, and invoice 173 was filed twice.

than two to three hours a week on these tasks. He denied performing any work on 10 of the invoices.

[21] Mr. Bélanger said he had participated in only one of these contracts with the four customers who were interviewed by the HRDC investigator. He admitted that he spent between an hour and an hour and a half transporting materials and helping to complete the work described in invoice 161 for $1,750 issued by the payer. He did not provide any of the services shown on invoices 179 and 159. He said that based on the value of these contracts, there was not enough work for four people. The labour cost on these invoices were $478, or $0.70 per square foot (sanding only) and $325. According to Mr. Bélanger, "it really doesn't make any sense" that four people would have worked on performing these contracts.[17] Nevertheless, it must be recognized that this answer contradicted the one provided by Mr. Bélanger when he commented on invoice 157. He admitted that, in that case, he had helped his son do some work and spent an hour working on this contract. However, the invoice was for $275.

[22] Regarding invoice 173, the last of the four invoices, Mr. Bélanger said he did not remember if he was involved in performing the work. In fact, he could not recall whether he was involved in the work shown on nine of the invoices.

[23] Another curious assertion in Mr. Bélanger's testimony is that he did not work in buildings listed as multi-unit buildings,[18] because in these cases, the contracts were subject to the standards of the Decree. However, the payer charged $1.05 per square foot for most of this work, while he charged a higher rate for almost all the other work. Note the work shown on invoices 156 ($2.25 per square foot), 160 ($2.75 per square foot) and 166 ($2.85 per square foot). It should be mentioned that other work was performed at less attractive rates, for example the jobs where he probably delivered materials, i.e. the jobs listed on invoice 151 ($1.75 per square foot). He also worked on the contracts covered by invoices 161, 167 and 278 where the quoted rates were $2.25 or $2.30 per square foot. However, there was no indication that this work

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[17] With regard to invoice number 159, he said the customer may have confused the November 1999 contract with another contract that would have been performed during the relevant periods.

[18] This assertion was made with respect to the work described in invoices 168 to 171 and 177. It should be noted that, in all likelihood, other work was also performed in multi-unit buildings, in particular the work covered by invoices 152 and 176 at a rate of $1.10 per square foot. See the following note.

was subject to the Decree.[19] How is it that the rates charged for work subject to the Decree on invoices 168, 169 and 170 were the lowest, while the invoices for almost all the work not subject to the Decree were higher. We would have expected the opposite!

Analysis

[24] As mentioned above, the Federal Court of Appeal set aside the decision of the deputy judge who first heard Louis-Paul Bélanger's appeal. In its five-paragraph decision, the Court of Appeal provided the following reasons at paragraphs 2 to 4, [2003] F.C.J. No. 1774 (QL):

> 2 The judge did not assume the role assigned to him by the *Employment Insurance Act* and redefined in the case law by our Court in *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2002] 261 N.R. 150, application for leave to appeal to the Supreme Court of Canada [2000] C.S.C.R. No. 158, denied, and *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] 246 N.R. 176. These judgments were later followed in *Valente v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 418, [2003] FCA 132 and *Massignani v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 542, [2003] FCA 172.
>
> 3 As this Court stated in *Massignani, supra*, at paragraph 2, "This role does not allow the judge to substitute his discretion for that of the Minister, but it does encompass the duty to 'verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, . . . decide whether the conclusion with which the Minister was "satisfied" still seems reasonable'".
>
> 4 At paragraph 20 of his decision, the judge recognized that he had the right to examine the facts that were before the Minister in order to "decide if these facts are proven to be correct". But he did not carry out this assessment. He merely stated that "[i]n view of all the circumstances, I am convinced that the appellant did not succeed in establishing, on a preponderance of the evidence, that the Minister acted in a wilful or arbitrary manner". Clearly, he relied on the case

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19 It should be mentioned that the rate for the work shown on invoice 160 was $2.75, and Mr. Bélanger said the work was done in a multi-unit building. However, nothing on the invoice confirmed this; i.e. there was no apartment number shown on the invoice.

> law before *Pérusse* and *Légaré*, earlier cases which he in fact cited: see paragraph 17 of the decision.

[25] Here is paragraph 17 of the deputy judge's decision, referred to in paragraph 4 of the Court of Appeal's decision:

> In *Ferme Émile Richard et Fils Inc. v. Canada (Department of National Revenue)*, [1994] F.C.J. No. A-172-94, December 1, 1994 (178 N.R. 361), a case dealing with subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act* (now paragraph 5(3)(b) of the *Employment Insurance Act*), Décary J.A. of the Federal Court of Appeal clearly indicated that the Court must ask itself if the Minister's decision "results from the proper exercise of his discretionary authority". The Appellant must "present evidence of wilful or arbitrary conduct by the Minister, evidence which is generally not easy to obtain".

[26] The deputy judge's reasons did not reveal that he substituted his discretion for that of the Minister. Because he held that the Minister had not acted in a wilful or arbitrary manner, I find that the Federal Court of Appeal's main criticism of the deputy judge's decision was that he did not provide sufficient reasons to show that he fulfilled his obligation to "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed . . . and after doing so, ... decide whether the conclusion with which the Minister was 'satisfied' still seems reasonable", to use the words cited in *Massignani*.

[27] Before stating the principles that must guide me here in ruling on Mr. Bélanger's appeal, some preliminary observations are in order. There is some confusion in the Federal Court of Appeal's decisions regarding the role that this Court should play in appeals like Mr. Bélanger's. Some of my colleagues believe that the Federal Court of Appeal's decisions in *Pérusse v. Canada (Minister of National Revenue – M.N.R.),* [2000] F.C.J. No. 310 (QL), *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878 (QL), (1999), 246 N.R. 176, *Valente v. Canada (Minister of National Revenue – M.N.R.)*, F.C.J. No. 418 (QL), 2003 FCA 132 (March 12, 2003) and *Massignani v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 542 (QL), 2003 FCA 172 (April 1, 2003), set aside earlier decisions of the same court, i.e., *Tignish Auto Parts Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1994] F.C.J. 1130 (QL), *Ferme Émile Richard et Fils Inc. v. Canada (Department of National Revenue)*, [1994] F.C.J. No. 1859 (QL) and *Canada (Attorney General) v. Jencan Ltd.*, [1998] 1 F.C. 187, [1997] F.C.J No. 876). This is what my colleague Mr. Justice Bowie wrote in *Glacier*

Raft Co. v. Canada (Minister of National Revenue – M.N.R.), [2003] T.C.J. No. 450 (QL). At paragraph 2 of his decision, he referred to the words of Madam Justice Sharlow who, in *Valente*, mentioned above, described recent case law (*Légaré* and *Pérusse*) as:

> . . . a departure from earlier decisions in defining the role of the Tax Court in considering appeals from ministerial determinations under paragraph 5(3)(b) of the. . . Act.

[28] Further on in the same paragraph, Judge Bowie added:

> It is surprising that the Federal Court of Appeal would overrule its several earlier decisions [See *Tignish Auto Parts Inc. v.* Canada 1994, 185 N.R. 73 (F.C.A.); *Canada v. Jencan Ltd.*, [1998] 1 F.C. 187 (F.C.A.); *Bayside Drive-In Ltd. v. Canada*, [1997] F.C.J. 1019 (F.C.A.)] dealing with the nature of the review by this Court of the Minister's decision under paragraph 5(3)(b) without specific reference to them, but that appears to be the result.
>
> [Emphasis added.]

[29] However, another group of colleagues to which I belong believe that the Court of Appeal did not set aside *Tignish Auto Parts*, *Jencan* and *Bayside Drive-In Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 1019 (QL). Rather, the Court wanted to clarify the scope of these decisions. First, in support of this interpretation, there are Mr. Justice Marceau's comments at paragraphs 3 and 4 of *Légaré* (above):

> [3] While the applicable principles for resolving these problems have frequently been discussed, judging by the number of disputes raised and opinions expressed, the statement of these principles has apparently not always been completely understood. For the purposes of the applications before us, we wish to restate the guidelines which can be drawn from this long line of authority, in terms which may perhaps make our findings more meaningful.
>
> [4] The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's

> determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.[20]
>
> [Emphasis added.]

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[20] In fact, the ambiguity and confusion are rooted in the following words of Judge Marceau in *Pérusse*, at paragraphs 14 and 15:

> [14] In fact, the judge was acting in the manner apparently prescribed by several previous decisions. However, in a recent judgment this Court undertook to reject that approach, and I take the liberty of citing what I then wrote in this connection in the reasons submitted for the Court. [See *Francine Légaré v. M.N.R.*, case No. A-392-98, and *Johanne Morin v. M.N.R.*, [1999] F.C.J. No. 878, case No. A-393-98, dated May 28, 1999, not reported, at para. 4]
>
> The Act requires the Minister to make . . .
>
> [15] The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.
>
> [Emphasis added.]

[30] It appears that the Court of Appeal still considers that *Jencan* correctly described the role to be assumed by this Court in applying paragraph 5(2)(i) and subsection 5(3) of the Act, since, in a judgment subsequent to *Légaré*, *Pérusse*, *Valente* and *Massignani*, i.e., *Quigley Electric Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 1789 (QL), 2003 FCA 461, delivered on November 28, 2003, Mr. Justice Malone stated the following at paragraphs 7 and 8 of his reasons:

> [7] A legal error of law is also said to have been committed when the Judge failed to apply the legal test outlined by this Court in *Légaré v. Canada (Minister of National Revenue)* (1999) 246 N.R. 176 (F.C.A.) and *Pérusse v. Canada* (2000) 261 N.R. 150 (F.C.A.). That test is whether, considering all of the evidence, the Minister's decision was reasonable.
>
> [8] Specifically, it is argued that the Judge circumscribed the scope of his review function when, after finding that the Minister clearly did not have all the facts before him he stated:
>
>> . . . That is not to say that on reviewing new information, I am then precluded from finding that the Minister did not have, after all, sufficient information to exercise his mandate as he did without my interference. This would simply mean that I have found that the new factors not considered were not relevant.
>
> [Emphasis added.]

[31] This was Judge Malone's finding in this matter:

> [10] In my analysis, the Judge correctly followed the approach advanced by this Court in *Canada (A.G.) v. Jencan Ltd.* [1998] 1 F.C. 187 (C.A.), namely, that the Minister's exercise of discretion under paragraph 5(3)(b) can only be interfered with if she acted in bad faith, failed to take into account all relevant circumstances or took into account an irrelevant factor.
>
> [Emphasis added.]

[32] In my view, the following questions deserve an answer: does the Court of Appeal believe that the decisions that it rendered in *Jencan*, *Ferme Émile Richard* and *Tignish Auto Parts* have been set aside, and if so, what are the reasons? What principles established by these decisions does the Court of Appeal no longer accept? Or was it the Court's intention to clarify the scope of its previous decisions?

[33] In my opinion, there is no inconsistency between the position taken in *Quigley Electric Ltd.* and the position taken in *Légaré*, *Pérusse*, *Valente* and *Massignani*. First, we must return to the actual wording of the Act which stipulates the following at paragraph 5(2)(i) and subsection 5(3):

> 5(2) Insurable employment does not include:
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5(3) For the purposes of paragraph 2(i):
>
> (a) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> (b) if the employer is, within the meaning of the Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.
>
> [Emphasis added.]

[34] Insurable employment does not include employment if the employer and employee are not dealing with each other at arm's length. Where an employer and an employee are related within the meaning of the *Income Tax Act* (**ITA**), they are deemed not to deal with each other at arm's length for the purposes of the Act, notwithstanding the provisions of the ITA, if the Minister is satisfied that, having regard to all the circumstances, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. The Minister is therefore responsible for making this determination.

[35] The role assigned to this Court is to undertake a two-stage inquiry. It must first verify whether the Minister used his discretion appropriately. As was stated in *Jencan*, to which Judge Malone referred in *Quigley Electric*, a discretionary determination made by the Minister can only be changed if the Minister acted in bad faith, failed to take into account all of the relevant circumstances, or took into account an irrelevant factor.[21] If such a situation exists, the Court may decide that "the conclusion with which the Minister was 'satisfied' [no longer seems] reasonable"[22] and interfere by ruling on the application of subsection 5(3) of the Act. This is how the Federal Court of Appeal put it in *Jencan*:

> 31 The decision of this Court in *Tignish, supra*, requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(c)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. If, and only if, the Tax Court finds that one of the grounds for interference are established can it then consider the merits of the Minister's decision. As will be more fully developed below, it is by restricting the threshold inquiry that the Minister is granted judicial deference by the Tax Court when his discretionary determinations under subparagraph 3(2)(c)(ii) are reviewed on appeal. Desjardins J.A., speaking for this Court in *Tignish, supra*, described the Tax Court's circumscribed jurisdiction at the first stage of the inquiry as follows:
>
>> Subsection 71(1) of the Act provides that the Tax Court has authority to decide questions of fact and law. The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister. The respondent submits, however, that since the present determination is a discretionary one, the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the

21 It is interesting to note the comments of Chief Justice Isaac at paragraph 30, where he stated that "[t]he sheer number of appeals from ministerial determinations made pursuant to subparagraph 3(2)(c)(ii) since the *Tignish* decision suggests that the law requires further clarification." (Emphasis added.) These comments are similar to those of Judge Marceau in *Légaré*.

22 As Judge Marceau put it in *Légaré*, above, at paragraph 4.

> terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(*c*)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere. Moreover, the court is entitled to examine the facts which are shown by evidence to have been before the Minister when he reached his conclusion so as to determine if these facts are proven. But if there is sufficient material to support the Minister's conclusion, the court is not at liberty to overrule it merely because it would have come to a different conclusion. If, however, those facts are, in the opinion of the court, insufficient in law to support the conclusion arrived at by the Minister, his determination cannot stand and the court is justified in intervening.
>
> In my view, the respondent's position is correct in law . . . [*Tignish, supra*, note 10, at pp. 8-9].

32 In *Ferme Émile Richard et Fils Inc. v. Canada (M.N.R.)*, this Court confirmed its position. In *obiter dictum*, Décary J.A. stated the following:

> As this Court recently noted in *Tignish Auto Parts Inc. v. Minister of National Revenue* , July 25, 1994, A-555-93, F.C.A unreported, an appeal to the Tax Court of Canada in a case involving the application of s. 3(2)(c)(ii) is not an appeal in the strict sense of the word and more closely resembles an application for judicial review. In other words, the court does not have to consider whether the Minister's decision was correct: what it must consider is whether the Minister's decision resulted from the proper exercise of his discretionary authority. It is only where the court concludes that the Minister made an improper use of his discretion that the discussion before it is transformed into an appeal *de novo* and the court is empowered to decide whether, taking all the circumstances into account, such a contract of

> employment would have been concluded between the employer and employee if they had been dealing at arm's length [(1994), 178 N.R. 361 (F.C.A.), at pp. 362 and 363].

33 Section 70 provides a statutory right of appeal to the Tax Court from any determination made by the Minister under section 61, including a determination made under subparagraph 3(2)(c)(ii). The jurisdiction of the Tax Court to review a determination by the Minister under subparagraph 3(2)(c)(ii) is circumscribed because Parliament, by the language of this provision, clearly intended to confer upon the Minister a discretionary power to make these determinations. The words "if the Minister of National Revenue is satisfied" contained in subparagraph 3(2)(c)(ii) confer upon the Minister the authority to exercise an administrative discretion to make the type of decision contemplated by the subparagraph. Because it is a decision made pursuant to a discretionary power, as opposed to a quasi-judicial decision, it follows that the Tax Court must show judicial deference to the Minister's determination when he exercises that power. Thus, when Décary J.A. stated in *Ferme Émile, supra*, that such an appeal to the Tax Court "more closely resembles an application for judicial review", he merely intended, in my respectful view, to emphasize that judicial deference must be accorded to a determination by the Minister under this provision unless and until the Tax Court finds that the Minister has exercised his discretion in a manner contrary to law.

. . .

37 On the basis of the foregoing, the Deputy Tax Court Judge was justified in interfering with the Minister's determination under subparagraph 3(2)(c)(ii) only if it was established that the Minister exercised his discretion in a manner that was contrary to law. And, as I already said, there are specific grounds for interference implied by the requirement to exercise a discretion judicially. The Tax Court is justified in interfering with the Minister's determination under subparagraph 3(2)(c)(ii) - by proceeding to review the merits of the Minister's determination - where it is established that the Minister: (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(c)(ii); (iii) took into account an irrelevant factor.

. . .

41 . . . Although the claimant, who is the party appealing the Minister's determination, has the burden of proving its case [See *Aubut v. Minister of National Revenue* (1990), 126 N.R. 381 (F.C.A.) and *Borsellino and Salvo v. Minister of National Revenue* (1990), 120 N.R. 77 (F.C.A.)], this Court has held unequivocally that the claimant is entitled to bring new evidence at the Tax Court hearing to challenge the assumptions of fact relied upon by the Minister [*Tignish, supra*, note 10, at p. 9].

42 Thus, while the Tax Court must exhibit judicial deference with respect to a determination by the Minister under subparagraph 3(2)(c)(ii) "by restricting the threshold inquiry to a review of the legality of the Minister's determination" this judicial deference does not extend to the Minister's findings of fact. To say that the Deputy Tax Court Judge is not limited to the facts as relied upon by the Minister in making his determination is not to betray the intention of Parliament in vesting a discretionary power in the Minister. [See *Canada (Attorney General) v. Dunham*, [1997] 1 F.C. 462 (C.A.), at pp. 468-469, *per* Marceau J.A (in the context of the right of appeal to the Board of Referees from a decision of the Unemployment Insurance Commission)]. In assessing the manner in which the Minister has exercised his statutory discretion, the Tax Court may have regard to the facts that have come to its attention during the hearing of the appeal. . . .

50 The Deputy Tax Court Judge, however, erred in law in concluding that, because some of the assumptions of fact relied upon by the Minister had been disproved at trial, he was automatically entitled to review the merits of the determination made by the Minister. Having found that certain assumptions relied upon by the Minister were disproved at trial, the Deputy Tax Court Judge should have then asked whether the remaining facts which were proved at trial were sufficient in law to support the Minister's determination that the parties would not have entered into a substantially similar contract of service if they had been at arm's length. If there is sufficient material to support the Minister's determination, the Deputy Tax Court Judge is not at liberty to overrule the Minister merely because one or more of the Minister's assumptions were disproved at trial and the judge would have come to a different conclusion on the balance of probabilities. In other words, it is only where the Minister's determination lacks a reasonable evidentiary foundation that the Tax Court's intervention is warranted [See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at pp. 776-777, *per* Iacobucci J.]. An assumption of fact that is disproved at trial may, but does not

> necessarily, constitute a defect which renders a determination by the Minister contrary to law. It will depend on the strength or weakness of the remaining evidence. The Tax Court must, therefore, go one step further and ask itself whether, without the assumptions of fact which have been disproved, there is sufficient evidence remaining to support the determination made by the Minister. If that question is answered in the affirmative, the inquiry ends. But, if answered in the negative, the determination is contrary to law, and only then is the Tax Court justified in engaging in its own assessment of the balance of probabilities. Hugessen J.A. made this point most recently in *Hébert, supra.*[23] At paragraph 5 of his reasons for judgment, he stated:
>
> > In every appeal under section 70 the Minister's findings of fact, or "assumptions", will be set out in detail in the reply to the Notice of Appeal. If the Tax Court judge, who, unlike the Minister, is in a privileged position to assess the credibility of the witnesses she has seen and heard, comes to the conclusion that some or all of those assumptions of fact were wrong, she will then be required to determine whether the Minister could legally have concluded as he did on the facts that have been proven. That is clearly what happened here and we are quite unable to say that either the judge's findings of fact or the conclusion that the Minister's determination was not supportable, were wrong.
>
> [Emphasis added.]

[36] It goes without saying that if the Minister did not act in good faith, failed to take into account all of the relevant circumstances or took into account an irrelevant factor, his decision might not be deemed to still appear reasonable.

[37] Before turning to the analysis of the facts, it is important to note the nature of the provisions that must be applied here. In *Chrétien v. Canada (Minister of National Revenue – M.N.R.)*, [1993] T.C.J. No 750 (QL), I described them as anti-avoidance measures:

> [TRANSLATION]
> 29 This provision appears to me to be in the nature of an anti-avoidance measure to counter the abuses of certain people who take undue advantage of this socially significant Act. Parliament seems to

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[23] *Hébert v. Canada (Minister of National Revenue – M.N.R.),* [1997] F.C.J. No. 512 (QL).

> have assumed that relationships between non-arm's length persons are not conducive to the establishment of reasonable economic relationships for the purposes of the application of this Act. However, it gave the public administration a way out for cases where taxpayers are clearly acting in good faith. The courts have a duty to oversee this administrative power so that the Minister of National Revenue complies with the principles of natural justice.
>
> [Emphasis added.]

[38] In *Pérusse* (above), Madam Justice Desjardins and Judge Marceau made similar comments at paragraphs 43 and 29 respectively:

> 43 The Act assumes that persons so related by blood, marriage or adoption are more likely to be able, and to want, to abuse the *Unemployment Insurance Act*. Parliament therefore authorized the Minister to scrutinize contracts of employment signed by such persons, something which he does not do for other claimants, unless of course there are reasons to think that there has been a fraud against the Act. It is this additional burden of proof to which the appellant objects.
>
> 29 I do not think that persons connected by family ties, and so subject to natural and legal obligations to each other, could reasonably be surprised or upset that Parliament felt the need to determine, where a contract of service is concerned, whether such ties, perhaps even without their knowledge, could have influenced the working conditions laid down. . . .
>
> [Emphasis added.]

[39] In *Légaré* (above), Judge Marceau added the following at paragraph 12:

> . . . Under the *Unemployment Insurance Act*, excepted employment between related persons is clearly based on the idea that it is difficult to rely on the statements of interested parties and that the possibility that jobs may be invented or established with unreal conditions of employment is too great between people who can so easily act together. And the purpose of the 1990 exception was simply to reduce the impact of the presumption of fact by permitting an exception from the penalty (which is only just) in cases in which the fear of abuse is no longer justified. . . .
>
> [Emphasis added.]

[40] I will therefore analyze the facts of this appeal, taking into account all the principles laid down by the Federal Court of Appeal, as described in *Tignish*, *Ferme Émile Richard*, *Jencan*, *Légaré*, *Pérusse*, *Valente*, *Massignani* and *Quigley Electric*.

[41] The first stage is to determine the legality of the Minister's decision. After having verified the facts adduced in evidence, does the Minister's decision still appear reasonable? First, there is nothing in the evidence to indicate that the Minister acted in bad faith in exercising his discretion.

[42] However, some of the facts that he took into account as relevant were not real. It is worth noting the comments that the appeals officer made in his analysis of the facts considered to be relevant for the purposes of the application of subsection 5(3) of the Act. According to the officer, Mr. Bélanger's work was to be remunerated in accordance with the rate listed in the Construction Decree, about $23 an hour. However, the evidence clearly established that the provisions of the Construction Act were not applicable to all or almost all the work performed by the payer. In fact, the evidence showed that companies in the construction industry operate under two very different contractual schemes. First, when the work is performed in inhabited single-family homes, the provisions of the Decree do not apply. (See subsection 19(9) of the Construction Act.) Ms. Labbé testified that 90% or 95% of the work performed by the payer was "not subject to the Decree". Consequently, in almost all cases, the employer was not required to pay Mr. Bélanger $23 an hour for his services. The appeals officer's analysis of the remuneration received by Mr. Bélanger was therefore groundless. However, this does not necessarily mean that the appeals officer erred in finding that this remuneration was less than what a stranger would have accepted. I will return to this later.

[43] With regard to the conditions of employment, the appeals officer made the following finding:

> The appellant is paid for a 40-hour work week. Both parties interviewed confirmed that the time worked can easily reach 60 hours during the summer period. However, the appellant is still paid for a 40-hour work week. We do not believe that a stranger would have agreed to such conditions of employment. Only the father not dealing at arm's length with his son creates this situation.
>
> Moreover, the appellant told us that there was a written agreement between him and his son, according to which the payer undertook to rehire him every year, rather than a stranger, as long as the appellant was able to work. This exclusive service clause was made solely

> because of the non arm's length relationship, and we believe that the payer would not have entered into such an arrangement with a complete stranger.

[44] I will start with the second paragraph. Contrary to what the appeals officer indicated, there was no written agreement between Mr. Bélanger and his son—in all likelihood acting on behalf of the payer—pursuant to which the payer undertook to rehire Mr. Bélanger rather than to hire a stranger. Ms. Labbé indicated that she was unaware of such an agreement. Mr. Bélanger said there was no agreement and that the payer's obligation to hire him was only a moral obligation. It is not unusual for an employer to want to rehire an employee who does good work. On the contrary, I am persuaded that any employer dealing at arm's length with employees would adopt this approach. Moreover, the payer's obligation in this case would most likely fall within the scope of the December 1994 agreement pursuant to which Louis-Paul Bélanger ceded his payer control to his son and ex-wife. It would have been normal for Louis-Paul Bélanger to have at least told the payer what his employment expectations were after such a change of control.

[45] The situation would be completely different if an employer kept on rehiring an employee who was doing a bad job or did not follow the employer's instructions, by not complying with the employer's schedule, for example. Agreeing to retain the services of such an employee, when other persons are available to perform the work could certainly constitute a relevant factor for the purposes of the analysis to be performed pursuant to subsection 5(3) of the Act. However, it was not proved that Mr. Bélanger was not providing the payer with adequate work. Therefore, it is either an irrelevant fact or a fact that has not been proved.

[46] Let us now turn to the first paragraph, the one dealing with Mr. Bélanger's weekly remuneration. I believe that his weekly remuneration is a real fact that constitutes a relevant factor that the Minister could and should have taken into account in exercising his discretion.

[47] I believe that this condition of employment constitutes a material fact in determining whether there was a contract of employment that should be deemed as providing insurable employment or whether this contract of employment provided employment that fell within the category of employment that could lend itself to abuse, a type of abuse that the exclusion described in paragraph 5(2)(i) of the Act is meant to counter. Is this a case where the parties to the contract could easily have acted together, to use the words of Judge Marceau, or, to use those of

Judge Desjardins, is this a case where the parties might have wanted to abuse the Act? By adopting a lump sum remuneration of $520 per week, regardless of the hours actually worked, it becomes almost impossible to ensure that the employee is reasonably remunerated by the employer. For example, an employee who works a 40-hour week for $640 earns $16 an hour. However, an employee who only works a 20-hour week for $640 earns $32 an hour.

[48] Obviously, paying an employee by the week rather than by the hour is not in itself a ground for excluding an employment from insurable employment. The nature of the work provided and existing industry work practices must be taken into account. For example, employees performing certain functions are typically paid by the week. This applies to managers who have to work and deal with management issues outside of normal working hours, i.e., evenings and often on weekends. Manual labourers are usually paid an hourly rate. Under this arrangement, an employer only has to pay for the hours actually worked, and the employee is entitled to be paid for each hour of overtime he has worked.

[49] When analyzing an employee's conditions of employment, The Minister must take these considerations into account when deciding whether a person dealing at arm's length with the employer would have entered into a substantially similar contract. If this employee performs administrative duties, similar jobs can be found for purposes of comparison.

[50] With respect to the sanding work involved here, neither Mr. Bélanger nor Mr. Légaré was able to indicate to the court that there were jobs similar to the one held by Mr. Bélanger that were paid by the week. However, based on my experience in hearing appeals brought under the Act, I can see that manual labourers are often paid by the week when they are not dealing at arm's length with the family business. However, this is obviously an arrangement that cannot be regarded as a valid point of comparison, because it does not involve conditions "*conducive to the establishment of reasonable economic relationships for the purposes of the application of [the] Act*" that give rise to a justified "fear of abuse". I am not saying a family business should never be used for purposes of comparison. However, the employees of such a business must deal at arm's length with that business.

[51] In this case, I have no qualms about finding that a worker dealing at arm's length with the employer would not have been hired by the week, i.e., paid a flat weekly rate, regardless of the hours worked. When a family business is involved, we generally find that this kind of arrangement is very conducive to abuse.

[52] These are the facts adduced in evidence. Mr. Bélanger was paid by the week. He received $520 a week regardless of the number of hours he worked. At the start of the trial, counsel for Mr. Bélanger admitted that the appellant could work 65 hours a week but that he agreed to be paid for only 40 hours (paragraph 5m of the Response to the Notice of Appeal). It is important to emphasize here that Mr. Bélanger did not keep track of his hours. According to Ms. Labbé, he seldom worked more than 40 hours a week and only provided manual labour. None of his duties involved managing the payer's business. His son, Carl Bélanger, performed all administrative duties. I asked Mr. Bélanger whether he knew of any companies that paid floor sanders by the week rather than by the hour. He said he did not know of any. I asked Mr. Légaré the same question, and he gave me the same answer. Mr. Légaré also said all his floor sanders were paid by the hour, including Mr. Bélanger since he started working for him.

[53] The appeals officer also considered the hours of work. This is what he had to say about it in his report:

> **Duration of work**
>
> The payer and the appellant admitted that the appellant provided the services outside the periods indicated on the records of employment. The appellant insisted on downplaying these tasks, which he estimated took a maximum of two hours a week to complete. The payer already admitted that pro bono services were rendered in approximately 50% to 75% of the contracts not listed on the records of employment.
>
> The analysis of the payer's monthly turnover indicated that the payer's income for April 1998, March, April and November 1999 (periods not shown on the records of employment) are similar to other periods when the appellant was employed.
>
> When the payer hired him for 40 hours a week, we can only wonder how he could do without the appellant's services and achieve a similar turnover. This confirms that the appellant was working more than two hours a week outside the periods shown on his record of employment.

[54] The evidence regarding the duration of work filed at the hearing was contradictory. First, Mr. Bélanger maintained that the time he worked on a volunteer basis during the unpaid period from October 1999 to January 2000 did not exceed two or three hours a week. When the appeals officer reviewed his file, he relied on

the statutory declaration made by Carl Bélanger, the payer's president, who told the Commission that his father had worked without pay during this period and that he had not previously reported the work that Mr. Bélanger had performed for the payer "*because [he] did not want to cause him any employment insurance problems*."

[55] However, I believe that in his testimony the appeals officer misunderstood the scope of Carl Bélanger's statement. I do not believe that the passage from this statement referred to above indicated that Louis-Paul Bélanger worked on approximately 50 to 75% of the contracts performed during the unpaid periods. Rather, I believe that the passage should be interpreted literally. Carl Bélanger only indicated the extent of his father's participation in the performance of a given contract. Louis-Paul Bélanger provided 75% of the work on some of the contracts, because he sanded the floors and applied a first coat of varnish. On other contracts, Mr. Bélanger only contributed 50% of the work: he did a little sanding or brought materials. However, Carl's statement was vague regarding the number of contracts during the unpaid period from October 1999 to January 2000 where his father performed 75% of the work and the number of contracts where he performed 50% of the work. It would certainly have been very helpful at the hearing to have been able to rely on Carl's testimony. Carl could not attend the hearing because he was working in Alberta. However, his statutory declaration to the Commission indicated that there were only eight contracts in which Mr. Bélanger had not participated. This suggests that Mr. Bélanger performed 75% or 50% of the work on the other contracts. The evidence revealed that at least 25 payer contracts were invoiced during the unpaid period from October 1999 to January 2000. If 25 is the correct number, Louis-Paul Bélanger apparently participated in two-thirds of these contracts, i.e., 17. He would have performed 75% of the work on some of these 17 contracts and 50% of the work on the others. If this version of the facts provided by Carl Bélanger is correct, and I believe it is, it would imply that Mr. Bélanger worked much more than the two or three hours that he is willing to acknowledge.

[56] In rebuttal, Mr. Bélanger's counsel asked him about each of the 25 invoices, and Mr. Bélanger commented on them. Mr. Bélanger denied having worked on 10 (i.e., 40%) of the contracts related to these 25 invoices. He said he worked less than two hours on six (i.e., 24%) of the contracts. If we add these last contracts to the contracts—also covered by invoices—that Mr. Bélanger could not recall, we arrive at a total of 60%, which is not far from the two-thirds indicated in Carl's affidavit.

[57] Two other facts cast serious doubt on the veracity of the number of hours that Louis-Paul Bélanger claimed that he worked during the low season. The first fact was that the company had a fairly large turnover during the unpaid periods. Even if we

subtract $9,325 for the month of October 1999 and $13,595 for the month of November 1999 from the amounts attributable to the work performed by subcontractors, we arrive at the following results: $8,347 for the month of October 1999 and $13,195 for the month of November. The figure for the month of December 1999 is $277. The adjusted figures for October and November compare favourably with the data for the peak season. For example, the $13,195 figure for November 1999 is higher than the figures for August ($12,947) and September ($8,970)1999, and August ($8,516) and September ($10,377) 1998 and almost as high as the figure for May ($13,896) 1998. How is it that Mr. Bélanger was not working for the payer in March 1999, when the $11,786 turnover was higher than the turnovers for April and September 1999? This figure is also higher than the figures for April, August and September 1998.

[58] It should be noted that Louis-Paul Bélanger's second relevant period ended on October 9, 1999. The claim that "lack of work" was the reason for his separation from employment cannot be taken seriously! Compared to the other months, there was a lot of work in November 1999, and it is plausible that Louis-Paul Bélanger worked a lot more than he was willing to admit. Finally, Mr. Bélanger could have asked the payer's customers to come and testify to confirm that he had only spent about an hour on performing the contracts at their homes.

[59] In summary, the evidence submitted at the hearing was contradictory. On the one hand, Carl's statutory declaration indicated that there were only eight contracts in which his father did not participate during the unpaid period from October 1999 to January 2000. This means that he was involved in at least two-thirds of the contracts during this period. Given the payer's turnover in October, and more particularly in November, it is hard to believe that Mr. Bélanger would not have been hired to provide services to the company for these two months. Because this was not corroborated by independent witnesses, including the customers themselves, I am not prepared to accept Mr. Bélanger's testimony in this regard. Rather, on the balance of probabilities, I believe that Mr. Bélanger worked a lot more than the three hours a week that he is prepared to admit to for the unpaid period at issue.

[60] Under these circumstances, I believe that the Minister could take this fact into account when assessing the terms and conditions of Mr. Bélanger's contract of employment. As the Federal Court of Appeal's decision in *Jencan* instructs us, although some of the assumptions of fact relied upon by the Minister were disproved at trial, this Court is not automatically entitled to review the merits of the determination made by the Minister. We first have to ask whether the remaining facts proved at trial are sufficient in law to support the Minister's determination that the

parties would not have entered into a substantially similar contract of service if they had been at arm's length. If there is sufficient material to support the Minister's determination, a judge of this Court is not at liberty to set aside that decision merely because "one or more of the Minister's assumptions [of fact] were rebutted at trial and the judge would have come to a different conclusion on the balance of probabilities."

[61] Not only do I believe that the facts as proven before me are sufficient to enable me to find that the Minister's decision still appears reasonable, but personally, if I had had to rule on the application of paragraph 5(3) of the Act, I would have found that Mr. Bélanger would not have entered into a substantially similar contract of employment with the payer if they had been at arm's length. In my opinion, two important factors support this finding. First, I do not believe that an employer operating a floor sanding business would have hired a floor sander by the week, without taking into account the hours of work actually provided. I think he would have hired him on an hourly basis. An employer dealing at arm's length with such a worker would have insisted that the worker be remunerated for the hours that he actually worked for the company, and he would have kept track of the number of hours worked. Also, an employee dealing at arm's length with an employer would have insisted on being paid for each overtime hour that he worked for his employer or would have at least insisted on banking those hours.

[62] I believe that the remuneration paid by the payer was below the rate of pay that an arm's length employee would have accepted. It seems that an employee with Mr. Bélanger's experience, who was dealing at arm's length with the payer, would have been paid $16 or $17 an hour. The following factors support this conclusion. First of all, Mr. Bélanger's application for unemployment benefits indicated that he was looking for employment as a floor sander and that the minimum acceptable base wage was $17. I do not believe that Mr. Bélanger would have entered an unreasonable amount for hourly wages on the application because it would have indicated that he was not interested in finding a job during the period of unemployment.

[63] A second factor that supports this conclusion is that during the relevant periods Jean-Yves Légaré paid Mr. Trépanier, a floor sander with about 20 years of experience, an hourly wage of $16. Strictly speaking, it is true that Mr. Trépanier was related to Mr. Légaré because he was his brother-in-law. However, it must be recognized that because they were in-laws, their relationship was not as close as the one between spouses or between a mother and father and their children. In any case, it should also be noted that Mr. Légaré continued to pay Mr. Trépanier the same $16 salary in 2003 when Mr. Bélanger started working for him. Also, it goes without

saying that Mr. Bélanger and Mr. Légaré were not related persons within the meaning of the ITA, because they were only uncle and nephew. As a result, it is reasonable to conclude that the $16 an hour wage that Mr. Légaré paid for work not subject to the Decree was a reliable and probative indicator of a wage that persons dealing at arm's length would have agreed to.

[64] However, the payer paid Mr. Bélanger $13 an hour. Mr. Bélanger admitted that this $13 an hour wage included vacation pay. Therefore, the real hourly wage was $12.50. On the other hand, because the wage that Mr. Légaré paid Mr. Trépanier probably included vacation pay, we must compare the $13 wage to a $16 wage. It is not clear whether the $17 wage shown in Mr. Bélanger's application for unemployment benefits included the 4% vacation pay. The difference between $17 and $13 is $4, which is 23.5% of $17. If we use $3 instead of $4, i.e., the difference between $16 and $13, the difference is still very close to 19%. These differences are large enough to support the Minister's decision.

[65] In my view, the analysis should not end there. We should also consider the fact that Mr. Bélanger worked without any remuneration during the unpaid periods. Louis-Paul Bélanger described the work that he performed for the payer as volunteer work, because he apparently worked without pay. Obviously, this is a possible interpretation. However, in my view, a fairer and more appropriate interpretation of the facts here is to consider the work provided by Mr. Bélanger during the unpaid periods as part of the work that was remunerated under the terms of the contract of employment. A contract of employment is described as follows in section 2085 of the *Civil Code of Québec*:

> 2085 A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and <u>for remuneration</u>, to do work under the direction or control of another person, the employer.

(Emphasis added.)

[66] The terms of a contract of employment can vary greatly, in particular the terms of remuneration. For example, nothing prevents an employee from agreeing with his employer that he will receive his wages six months later. This is what Ms. Labbé claims happened in her case in 1999, when she received her wage as a single payment at the end of the year. Many business owners do not pay themselves a salary until the end of the year. Similarly, nothing prevents an employee from agreeing with his employer that he will receive his remuneration in advance. Commission

salespersons enter into these types of agreements. They often receive a salary in advance. The amount of this advance is deducted from the commission calculated at the end of the year. Finally, nothing prevents an employee from agreeing to work for 12 months and asking his employer to pay him 100% of his annual remuneration during the first six months of the year. This can be considered to have occurred here.[24]

[67] In my view, it is more reasonable to conclude that the work performed by Louis-Paul Bélanger during the unpaid periods was not volunteer work. Rather, these services were provided under his contract of employment. He received all his remuneration during the peak season. Consequently, it seems more reasonable to me to consider all the hours that Mr. Bélanger worked in order to calculate what his real wages were when converted to an hourly rate. In 1999, Mr. Bélanger worked 24 weeks. This means that he would have worked 960 hours during the peak season. If we assume that he worked 15 hours a week (about a third of a standard 40-hour week)[25] during 23 additional weeks,[26] Mr. Bélanger would have worked 345 additional hours, for a total of 1,305 (960 + 345) hours in 1999. He received $12,480 ($13 x 960 hours), which works out to an effective hourly rate of $9.56, which is 40.25% ((16 - 9.56)/16) less than the $16 hourly rate.

[68] Even if we were to accept Mr. Bélanger's testimony that he did not work more than three hours a week during the unpaid period from October 1999 to January 2000, that would represent 69 hours of overtime during this unpaid period, which would work out to a total of 1,029 hours for the year. So the $12,480 annual remuneration for 1,029 hours would work out to a $12.13 hourly rate. That would be 24.2% ((16 - 12.13)/16) less than the $16 hourly rate. Whether the effective hourly wage is $9.56 or $12.13, it is substantially lower than the $16 or $17 rates referred to as a reasonable wage for persons dealing at arm's length with the employer who would negotiate a contract of employment.

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[24] It should be noted that there are also deferred remuneration arrangements, in particular in the public education sector. Under these arrangements, employees receive less remuneration than they would otherwise be entitled to and take paid sabbatical leave later on.

[25] This assumption seems very reasonable to me given that he could work 75% or 50% of the time required to complete two-thirds of the contracts.

[26] This would represent 47 weeks (24 + 23) of work per year, leaving five weeks of annual vacation.

[69] Therefore, I believe that an employer and an employee dealing at arm's length would not have agreed to a wage ranging from $9.56 to $12.13 an hour. Rather, they would have agreed on a minimum $16 hourly wage, the wage that Mr. Légaré paid Mr. Bélanger in 2003 and Mr. Trépanier during the relevant periods.

[70] In his written argument, counsel for Mr. Bélanger referred to the following passages from the Federal Court of Appeal's decision in *Théberge v. Canada (National Revenue)*, [2002] F.C.J. No. 464 (QL), 2002 FCA 123 and some decisions of this Court that followed the approach taken in *Théberge*. Below are the passages from *Théberge* to which he referred:

> 19 . . . However, for the purposes of the exception provided in paragraph 3(2)(c) of the Act, what a claimant does outside of his or her period of employment will be of little relevance when, as in this case, it is not alleged that the salary paid during the period of employment took into account the work performed outside of that period, that the applicant had included, in the hours spent on his or her insurable employment, hours worked outside of the period, or that work performed outside of his or her period of employment had been included in the work performed during his or her period of employment. It seems to me to be self-evident, and this is confirmed by the evidence, that in the case of family businesses engaged in seasonal work, the minimal amount of work that remains to be done outside the active season is usually performed by family members, without pay. Excepting seasonal employment, in a family farm business, on the ground that cows are milked year-round amounts, for all practical purposes, to depriving family members who qualify by working during the active season of unemployment insurance and to overlooking the two main characteristics of such a business: that it is a family business and a seasonal business.
>
> 20 . . . It is moreover settled law that work that is truly unpaid does not affect a claimant's status as unemployed . . .
>
> 21 Getting back to this particular case, the fact that the applicant worked without pay for ten to fifteen hours each week outside the active season and while he was receiving benefits may indicate that he would not have performed that unpaid work if he had not been his employer's son. However, that is not the work we are concerned with, and the judge erred by taking it into account in the absence of any indication that the insurable employment at issue was subject to special terms and conditions that were attributable services being rendered outside the period of employment.

[71] In my view, the *Théberge* case should be considered on its particular facts and circumstances. In addition, it should be mentioned that, in this case, the work provided by the appellant was considered volunteer work. Here, the work provided by Mr. Bélanger was not volunteer work. The approach taken in *Théberge*, dated March 28, 2002, was not followed in the Federal Court of Appeal's more recent case *Denis v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 400 (QL). In his reasons, delivered orally, Chief Justice Richard referred to the trial judge's findings of fact, including the following:

> 12 . . .
>
> > [34] As indicated by the documentary evidence, the appellant made up the books by hand throughout the year: accordingly, she worked for the payer outside the period at issue without charge. The appellant also ran errands for the payer outside the periods at issue without being paid.

[72] However, the Federal Court of Appeal held that at the end of his hearing, the judge had not erred in finding that the Minister's determination was reasonable. There was no mention in *Denis v. Canada (Minister of National Revenue)* that, when affirming the Minister's decision, the trial judge erred in taking into account the volunteer work that was done.

[73] I do not believe that this approach is unfair to workers in agricultural or other family businesses. Nor do I believe that it deprives such workers of the protection provided by employment insurance. As the HRDC investigator said, employment insurance claimants are entitled to earn up to 25% of the amount of their employment insurance benefits without any reduction in their benefits.[27] This allows family

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[27] This is true for periods of unemployment (except during the waiting period) if the weekly benefit rate is $200 or more. Subsection 19(2) of the Act stipulates the following:

> Earnings in periods of unemployment
>
> 19(2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds (a) $50, if the claimant's rate of weekly benefits is less than $200; or (b) 25% of the claimant's rate of weekly benefits, if that rate is $200 or more.
>
> [Emphasis added.]

members to work for a family business that does not require as much work in the low season as in the high season. So there is no need to cheat, as was the case here. Obviously, if a claimant earns more than 25% of the amount of their employment insurance benefits, the benefits will be reduced, but not necessarily eliminated. That is what the Act stipulates. If this result is unfair, it is up to Parliament to correct the situation. The role of the courts is not to amend the Act but to ensure that it has been enforced.

[74] In my view, failing to consider the fact that an employee is working without pay for his employer is an open invitation to abuse. A good illustration can be found in the decision that I rendered in *Massignani* (([2004] T.C.J. No. 127 (QL), 2004 TCC 75). In this case, the family members were not the only ones who abused the Act. Employees dealing at arm's length with the employer were encouraged to participate in the scheme. Not taking into account unpaid hours worked would essentially allow employees to receive employment insurance benefits while working for their employer. This is certainly not the goal pursued by Parliament in the case of the employment insurance plan.

[75] There is a simple way for family members to work for a family business while retaining their entitlement to the protection afforded by the plan established by the Act. All the parties have to do is adopt terms of employment that a stranger would have accepted under the circumstances. In this case, if Mr. Bélanger had been paid $16 an hour for the hours actually worked and not by the week without anyone keeping track of the hours, he would have been employed in insurable employment. He could have worked during his unpaid periods and earned up to 25% of the amount of his employment insurance benefits and still have been entitled to his full benefit. He could therefore have worked legally for the payer while receiving employment insurance benefits. When Mr. Bélanger and his son Carl were asked about unpaid work, they both lied, saying Louis-Paul Bélanger had not provided any work outside the relevant periods. If they had not wanted to abuse the system, they would have given the investigator an honest answer. Consequently, I see nothing unfair in finding that Mr. Bélanger was not employed in insurable employment during the relevant periods.

[76] For all these reasons, the "*conclusion with which the Minister was "satisfied" still seems reasonable*" (as the Federal Court of Appeal stated in *Légaré*, *Pérusse* and *Massignani*); it "*results from the proper exercise of his discretionary authority*" (to use the Federal Court of Appeal's words in *Ferme Émile Richard et Fils Inc.*); and there was "*sufficient material to support the Minister's conclusion*" (to again use the words of the Federal Court of Appeal in *Jencan* and *Tignish Auto Parts*).

[77] Mr. Bélanger's appeal must therefore be dismissed and the Minister's decision affirmed.

Signed at Toronto, Ontario, this 11th day of January 2005.

"Pierre Archambault"

Archambault J.

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