Docket: 2005-580(EI)

BETWEEN:

3588718 CANADA INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DARREN DUBROVSKY,
GARY DUBROVSKY,
FAYGIE DUBROVSKY,

Intervenors.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard June 29, 2005, at Montréal, Quebec

Before: The Honourable S.J. Savoie, Deputy Judge

Appearances:

Representative of the Appellant:	Alain Savoie
Counsel for the Respondent:	Susan Shaughnessy
Representative of the Intervenors:	Alain Savoie

JUDGMENT

The appeal is allowed and the decision rendered by the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 4th day of October 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 24th day of October 2005

Elizabeth Tan, Translator

Citation: 2005TCC628
Date: 20051004
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REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard at Montréal, Quebec, on June 29, 2005.

[2] On December 30, 2003, the Appellant asked the Minister of National Revenue (the "Minister") to rule on whether Earl, Darren, Gary and Faygie Dubrovsky, the workers, performed insurable employment when working for the Appellant from January 1 to October 8, 2003, the period in question.

[3] On November 5, 2004, the Minister informed the Appellant that his decision was that the workers Darren, Faygie and Gary held insurable employment during the period in question. The Minister also decided that Earl did not hold insurable employment during the period in question.

[4] This is an appeal of the Minister's decision regarding the employment of Darren, Faygie and Gary.

[5] The Minister relied on the following presumptions of fact when rendering his decision:

[TRANSLATION]

(a) the Appellant was incorporated on June 3, 1999; (admitted)

(b) the Appellant operated a jewellery factory; (admitted)

(c) the Appellant usually hired around 20 full-time employees and between 30 to 36 employees during peak periods; (admitted)

(d) Darren, Gary and Faygie Dubrovsky worked for the Appellant; (admitted)

(e) the workers worked in the Appellant's place of business or on the road; (denied)

(f) the workers worked all year for the Appellant; (admitted)

(g) the workers earned a set weekly salary; (admitted)

(h) the workers were paid by check every two weeks; (admitted)

(i) the workers incurred no expenses when carrying out their duties; (denied)

(j) the workers did not have any financial risk in carrying out their duties for the Appellant; (denied)

(k) all the material and equipment used by the workers belonged to the Appellant; (denied)

(l) the workers' duties were an integral part of the Appellant's activities (admitted)

DARREN DUBROVSKY

(m) Darren Dubrovsky had been employed by the Appellant since 1999; (admitted)

(n) Darren Dubrovsky was the director of the sales and finance service; (denied)

(o) Darren Dubrovsky's duties were to take care of marketing, supplier relations, and various financial responsibilities; (admitted with specifications)

(p) Darren Dubrovsky worked between 40 and 70 hours per week; (denied)

(q) Darren Dubrovsky had a car supplied by the Appellant; (admitted)

(r) in 2003, Darren Dubrovsky was paid $59,300; (admitted)

(s) Darren Dubrovsky was paid by check every two weeks; (admitted)

(t) Darren Dubrovsky regularly provided the Appellant with written and oral reports; (denied)

FAYGIE DUBROVSKY

(u) Faygie Dubrovsky had been employed by the Appellant since 1999; (admitted)

(v) Faygie Dubrovsky was responsible for the Appellant's accounting service; (denied)

(w) Faygie Dubrovsky's duties were to direct and supervise three accounting clerks; (admitted with specifications)

(x) Faygie Dubrovsky worked between 20 and 55 hours per week; (denied)

(y) in 2003, Faygie Dubrovsky was paid $36,456; (admitted)

(z) Faygie Dubrovsky was paid by check every two weeks; (admitted)

(aa) Faygie Dubrovsky regularly provided the Appellant with written and oral reports; (denied)

GARY DUBROVSKY

(bb) Gary Dubrovsky had been employed by the Appellant since 1999; (admitted)

(cc) Gary Dubrovsky was the director of operations; (denied)

(dd) Gary Dubrovsky's duties were to manage the Appellant's production operations and human resources; (admitted)

(ee) Gary Dubrovsky worked between 40 and 70 hours per week; (denied)

(ff) Gary Dubrovsky had a car provided by the Appellant; (admitted)

(gg) in 2003, Gary Dubrovsky was paid $59,084; (admitted)

(hh) Gary Dubrovsky was paid by check every two weeks; (admitted)

(ii) Gary Dubrovsky regularly provided the Appellant with written and oral reports; (denied)

[6] The Appellant and each of the workers are related persons within the meaning of the *Income Tax Act* because:

[TRANSLATION]
(a) the Appellant's shareholders with voting shares were:

Eldubro Holdings Inc.	33.3% of the shares
Dubro Holdings Inc.	33.3% of the shares
TN Princess Holdings Inc.	33.3% of the shares

(admitted)

(b) the sole shareholder of Eldubro Holdings Inc is Darren Dubrovsky,
the sole shareholder of Dubro Holdings Inc is Earl Dubrovsky,
the sole shareholder of TN Holdings Inc is Gary Dubrovsky;
(admitted with specifications)

(c) Earl Dubrovsky is the father of Darren and Gary Dubrovsky, Faygie is the spouse of Earl Dubrovsky and the mother of Darren and Gary Dubrovsky; (admitted)

(d) Darren and Gary Dubrovsky are part of a related group that controlled the Appellant; (admitted)

(e) Faygie Dubrovsky is related to a member of the group that controlled the Appellant. (admitted)

[7] The Minister also determined that the Appellant was deemed to have an arm's length relationship with each of the workers regarding their employment because he was convinced that it was reasonable to conclude that the Appellant and each of the workers would have concluded a substantially similar contract of employment if they had been dealing at arm's length, considering the following:

[TRANSLATION]

(a) the Appellant had an active corporate life; (ignored)

(b) the Appellant's board of directors met regularly to discuss, plan and revise the Appellant's operations; (denied)

(c) Earl Dubrovsky worked as a consultant for the Appellant 20 hours per week and he fully participated in the decisions of the Appellant's board of directors; (denied)

(d) according to the Institut de la statistique du Québec, the salary of procurement professionals varied between $46,907 and $62,203 and that of a financial management professional between $47,013 and $62,334; (ignored)

(e) according to Human Resources Canada statistics for the Montréal region, the salary for a financial director varied between $32,750 and $82,250, that of a purchasing director varied between $30,250 and $74,750, that of a finance clerk varied between $22,500 and $53,250; (ignored)

(f) the workers' salaries were reasonable considering the salaries in the industry and each one's years of seniority; (denied)

(g) the workers had permanent jobs with a company that operated all year and their duties were directly related to the Appellant's activities (admitted)

(h) each worker's employment period corresponded to the Appellant's activities; (admitted)

(i) the conditions, duration, nature and importance of the work of each of the workers were reasonable. (denied)

[8] The evidence showed that the three workers started their employment with the Appellant in 1999. Darren Dubrovsky, when accepting this job for the Appellant, experienced a drop in salary of around $25,000.00 per year. The same happened to his brother, Gary Dubrovsky. As for Faygie Dubrovsky, she started in 1999 with a $36,000.00 salary, which she herself adjusted to $52,000.00 per year in January 2005. The evidence showed that Faygie Dubrovsky received a job offer through the Appellant's accountant for a fixed salary of between $70,000.00 and $80,000.00 per year, which she turned down. However, the conditions of this job were not revealed. All the workers accepted a reduced salary because they chose to spend more time with their families, operate their own company, enjoy more freedom and have no boss.

[9] The evidence established that Darren and Gary Dubrovsky were both shareholders and signatories of the Appellant. Both provided funds to the Appellant through their lines of credit, for which the Appellant pays the interest. Darren Dubrovsky is the Appellant's president, Gary Dubrovsky is its vice president and Faygie Dubrovsky is its auditor and accountant.

[10] The three workers held management positions for the Appellant. Their work schedule is completely open to their discretion. They each have the freedom to come and go; they go to work and take time off as they please. Their work is not supervised in any way. The evidence showed that their work schedule was set according to their family's needs. Each determined their salary, the number of days of leave and their vacation periods, which were sometimes very long. None of the workers is required to provide reports or account for their activities to the Appellant.

[11] It was established that the working hours of Darren and Gary Dubrovsky could vary between 0 and 80 hours per week, while Faygie Dubrovsky's varied between 8 and 35 hours per week. When asked at the hearing why they accepted working for the Appellant for a salary that was lower than what they earned on the job market, they stated, unanimously, that they chose a better quality life, an improved family life, the possibility of investing their time and energy working for a company they would eventually own. This is why, according to Darren and Gary Dubrovsky in particular, they agreed to be on call 24 hours a day, seven days a week, when they were not on vacation abroad and they agreed to take care of emergencies on their days off, as well as the Appellant's other needs or to replace each other during each others' vacations.

[12] Each of the workers has an office at home, equipped at their expense, where they carry out many duties for the Appellant. Each of the workers has an expense account to use as they please.

[13] The issue in question is whether the workers held insurable employment for the purposes of the *Employment Insurance Act* (the "Act"). The relevant provision is paragraph 5(1)(*a*) of the Act, which states:

> 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;
>
> [Emphasis added]

[14] This provision contains the definition of an insurable contract. It is one held under a contract of service, namely an employment contract. However, the Act does not define such a contract. In the case at bar, there is no written contract, but at the hearing, testimony was given as to the parties' intention, which became clear during the period in question. Upon analysis of the facts presented at the hearing, the Court will be able to establish the type of contract to which the parties are tied.

[15] The contract of service is a civil law concept found in the *Civil Code of Quebec*. It is therefore under the relevant provisions of the Civil Code that the nature of this contract will be determined.

[16] In the publication, "Contrat de travail: Pourquoi *Wiebe Door Services Ltd*. ne s'applique pas au Québec et par quoi on doit le remplacer?" [Contract of employment: Why *Wiebe Door Services Ltd.* does not apply in Quebec and with what should it be replaced?] to be published during the fourth quarter of 2005 by the Fiscal and Financial Planning Association (APFF) and the Department of Justice in the *Second Collection of Studies in Tax Law* in the Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism collection, Justice Pierre Archambault of this Court explains the steps courts are to take for any period of employment post May 30, 2001, since the coming into force of section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, amended, when faced with a case such as the one at bar. This is what the legislator stated:

> *Property and Civil Rights*
>
> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> [Emphasis added]

[18] The relevant provisions of the *Civil Code of Quebec* should be reproduced to help determine whether there is a contract of employment in Quebec to distinguish it from a contract of enterprise:

> Contract of employment
>
> 2085 A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 2086 A contract of employment is for a fixed term or an indeterminate term.
>
> Contract of enterprise or for services
>
> 2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099 The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.
> [Emphasis added]

[19] The provisions of the *Civil Code of Quebec* reproduced above establish three essential conditions for a contract of employment to exist: (1) provision in the form of work provided by the worker; (2) remuneration for this work by the employer, and (3) the relationship of subordination. The significant distinction between a contract for services and a contract of employment is this relationship of subordination, meaning the employer has a power of direction or control over the worker.

[20] Scholars have considered the concept of "power of direction or control" and its flip side, the relationship of subordination. In *Le droit du travail du Québec*, 5th ed. (Cowansville: Les Éditions Yvon Blais Inc., 2003), author Robert P. Gagnon states:

> [TRANSLATION]

(c) Subordination

90 – *A distinguishing factor* – The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 et seq. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.

. . .

92 – *Concept* – Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.

[21] It must be noted that the characteristic of a contract of employment is not the fact that the direction or control was effectively performed by the employer, but the fact that the employer had the power to do so. This is what the Federal Court of Appeal found in *Gallant v. M.N.R.*, [1986] F.C.J. No. 330.

[22] This Court, which has the duty to determine the type of contract in Quebec to which the parties were tied, must consider and follow the approach advocated by Archambault J. of this Court, in the above-mentioned publication. He addressed this issue again in *Vaillancourt v. Canada (Minister of National Revenue - M.N.R.)*, [2004] T.C.J. No. 685, where he stated:

> [15] In my opinion, the rules governing a contract of employment in Quebec law are not the same as those in common law, and as a result, it is not appropriate to apply common law decisions such as *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C 553 (F.C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59 [For a thorough discussion of the reasons justifying this conclusion, see the *Wiebe Door* article mentioned above]. In Quebec, a court has no other choice but to decide whether of a relationship of subordination exists or not to decide whether a contract is a contract of employment or a contract for service.
>
> [16] The approach to take is the one adopted by, among others, Létourneau J. of the Federal Court of Appeal [see also *Sauvé* v. *Canada*, [1995] F.C.J. No. 1378 (Q.L.), *Lagacé v. Canada*, [1994] F.C.J. No. 885 (Q.L.) (F.C.A.), confirming the Tax Court of Canada decision, [1991] T.C.J. No. 945 (Q.L.) and *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.). It must be noted, however, that the Federal Court of Appeal, in *D & J Driveway* and *Charbonneau* did not explicitly dismiss application of *Wiebe Door*], who, in *D & J Driveway Inc. v. Canada*, (2003), 322 N.R. 381, 2003 FCA 453, found that there was no contract of employment by using the provisions of the *Civil Code* as a basis and, in particular, by noting the absence of a relationship of subordination, a relationship that "is the essential feature of the contract of employment" [Para. 16 of the decision].

[23] In this case, was there a relationship of subordination between the workers and the Appellant that would allow us to conclude that there was a contract of employment? In carrying out the mandate of determining the presence or absence of a relationship of subordination, many indicia can be considered. The case law has developed a series of indicia that will be useful in this exercise, including the following:

(1) mandatory presence at a workplace;
(2) compliance with the work schedule;
(3) control over employee's vacations;
(4) submission of activity reports;
(5) control over quantity and quality of work;
(6) imposition of methods for performing the work;
(7) power to sanction employee's performance;

(8) source deductions;
(9) benefits;
(10) employee status on income tax returns; and
(11) exclusivity of services to employer.

[24] However, a word of caution is necessary: the analysis cannot stop merely because certain indicia support a finding that a relationship of subordination exists. The exercise, which is based on the distinction drawn in the *Civil Code of Quebec*, is to determine the overall relationship between the parties. Thus, one must establish the extent to which the indicia pointing to a relationship of subordination predominate over the other indicia.

[25] In his analysis, the Minister relied mainly on the "two hats" theory to find that the workers, as the Appellant's shareholders, had the power of control over them within the meaning of the Federal Court judgment *Gallant, supra.*

[26] Tardif, J. of this Court, in *Roxboro Excavation Inc. v. Canada (M.N.R.)*, [1999] T.C.J. No. 32, in circumstances similar to those in the case in question, concluded that the workers were subject to a relationship of subordination with regard to the Appellant. These are a few relevant paragraphs from this judgment:

> [27] The evidence showed that each of the Théorêt brothers had authority and independence and even had carte blanche in performing the work for which he was responsible. The evidence also showed that decisions were made informally, collegially and by consensus.
>
> [28] Was there a relationship of subordination between the interveners and the company in and as regards the performance of the work they did within the scope of their respective roles? I believe that the company, which oversaw the work done by the Théorêt brothers, had the full right and power to influence that work. The fact that the company did not exercise that power to control and that those who performed the work did not think they were subject to such a power or feel they were subordinate in performing their work does not have the effect of eliminating, reducing or limiting the power to influence their work.
>
> [29] Admittedly, certain rather vague facts, such as the delay in paying the two young Théorêt brothers their salaries, suggest that there was special treatment because of the family situation. However, I do not consider this sufficient to disqualify the persons in question. They were being generously co-operative because of their interest as shareholders.

> [30] I do not think that it is objectively reasonable to require a total, absolute separation between the responsibilities that result from shareholder status and those that result from worker status. The wearing of both hats normally--and this is perfectly legitimate--creates greater tolerance and flexibility in the relations arising out of the two roles. However, combining the two roles produces effects that are often contrary to the requirements of a genuine contract of service.
>
> [31] In the case at bar, the fact that authority did not seem to be exercisable against the Théorêt brothers and that decisions concerning the company were made by consensus and collegially does not mean that the company was deprived of its authority over the work done by the interveners. The evidence did not show that the company had waived its power to influence their work or that its right to do so was reduced, limited or revoked.

[27] It must be noted that this decision was appealed, and was confirmed by the Federal Court of Appeal [2000] F.C.J. No. 799.

[28] This court is bound by *Roxboro*, *supra*, and many others that do not need to be listed, which lead me to conclude that in this case, the indicia shown by the evidence established the relationship of subordination, the required element for any contract of employment.

[29] It was found that the workers and the Appellant were tied by a contract of employment; it must now be determined whether their employment is excluded under subsection 5(2) of the Act since they are related persons within the meaning of the *Income Tax Act*, from the description in paragraph 6 of the Response to the Notice of Appeal.

[30] These are the relevant provisions of the Act on this subject:

> 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*)** :
>
> > *(b)* if the employer is, within the meaning of that 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.

[31] At the hearing, the Appellant claimed that even if a genuine contract for services or contract of employment existed between the workers and the Appellant, a contract of employment similar to those of Faygie Dubrovsky, Darren Dubrovsky and Gary Dubrovsky would not have been entered into by the Appellant and the workers if they had been dealing with each other at arm's length.

[32] The Appellant presented evidence with many elements in its favour. Some of these were ignored by the Minister and many were not granted the importance they warranted.

[33] The following is a list the Appellant qualified as "non-exhaustive" and which it presented at the hearing:

[TRANSLATION]

1. The three workers determined their own salaries;
2. The three workers' salaries are not related to the work performed for the Appellant;
3. The three workers' salaries were the same from the beginning of the Appellant's activities in 1999 when all the employees were entitled to periodic salary increases;
4. The three workers could change their salaries if they wanted and could do so based on their personal financial needs or any other reason they felt was appropriate;
5. All the Appellant's employees were entitled to bonuses during the period in question, but the three workers did not grant themselves any;
6. The salaries the three workers received during the period in question were lower than what they would have received for similar work elsewhere in their industry;
7. The salaries the three workers received during the period in question were lower than what would have been offered to a person with an arm's length relationship with the Appellant to carry out any one of the three work descriptions;
8. The three workers set their own working hours and did not have any work schedule to follow, contrary to the Appellant's other workers;
9. The three workers set their own work descriptions and could delegate some portions when they felt it was appropriate, contrary to the Appellant's other workers;
10. The three workers are not supervised in any way in carrying out their duties, contrary to the Appellant's other workers;
11. The three workers' hours of work are not monitored or accounted for, contrary to the Appellant's other workers;
12. The three workers do not have any reports to submit to anyone with the Appellant and are independent when carrying out their duties;
13. The three workers could vary their working hours as they wished and could take time off work for personal reasons at any time, regardless of the Appellant's needs, since in those cases, they could leave responsibility of the company's operations with the employees who were there;

14. The three workers receive their full salary in case of absences, extended or not, for illness, contrary to the Appellant's other employees;
15. The three workers determined the frequency and duration of their vacations themselves, contrary to the Appellant's other employees;
16. When the company closed during the summer (two weeks) or during the holiday season (two weeks) during the period in question, on occasion, Darren, Gary or Faygie Dubrovsky decided to go work anyway without any additional pay;
17. Darren and Gary Dubrovsky both provided loans to the Appellant, something a person with an arm's length relationship with the Appellant would not likely have done;
18. Darren and Gary Dubrovsky personally guaranteed the Appellant's line of credit, something a person with an arm's length relationship with the Appellant would not likely have done;
19. Darren and Gary Dubrovsky could sometimes work up to six or seven days a week, or from 0 to 15 hours per week, and this was left to their personal discretion;
20. Darren and Gary Dubrovsky took time off work on many occasions, for periods of one to many days, during the period in question, to practise a hobby or attend to family obligations; a privilege that would definitely not have been granted to a person not related to the company;
21. Darren and Gary Dubrovsky could submit expense accounts to the Appellant with conditions left entirely to their discretion, which would certainly not have been possible for an employee with an arm's length relationship to the Payer;
22. During the period in question, Faygie Dubrovsky could decide to carry out her work from her residence when she wanted to, or she could decide to work 3, 4 or 5 days a week;
23. As supervisor and director of personnel, Faygie Dubrovsky could have gotten twice the salary in a comparable company and actually refused such a job offer, given by the Appellant's external accountant;
24. No one with an arm's length relationship to the company would have had the same responsibilities or the same freedom to act as the three workers in question.

[34] Faced with this exercise, the Court is guided in its duty by the instruction stated by Marceau J. in the Federal Court of Appeal decision *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878, as follows:

> 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.

[35] The rule prescribed by the Federal Court of Appeal in *Légaré*, *supra*, and a review of the facts in this case lead me to find that the facts inferred or relied on by the Minister were not correctly assessed, considering the context in which they occurred, and the conclusion with which the Minister was "satisfied" no longer seems reasonable.

[36] The Court must therefore find that the Appellant and the workers would not have entered into a substantially similar contract of employment had they been dealing with each other at arm's length.

[37] As a result, the appeal is allowed and the decision rendered by the Minister is vacated.

Signed at Grand-Barachois, New Brunswick, this 4th day of October 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 24th day of October 2005

Elizabeth Tan, Translator

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APPEARANCES:

Representative of the Appellant:	Alain Savoie
Counsel for the Respondent:	Susan Shaughnessy
Representative of the Intervenors:	Alain Savoie

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario
For the Intervenors:	
Name:	
Firm:	