Docket: 2007-702(EI)

BETWEEN:

JOSEPH CAMPBELL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NATALIE NUSSEY,

Intervenor.

Appeal heard on January 22, 2008, at London, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Ted Wernham
Counsel for the Respondent:	Pascal Tétrault
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal is allowed and the Minister's decision is varied to reflect that the Intervenor was employed in insurable employment.

Signed at Ottawa, Canada, this 28th day of March 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC170
Date: 20080328
Docket: 2007-702(EI)

BETWEEN:

JOSEPH CAMPBELL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NATALIE NUSSEY,

Intervenor.

REASONS FOR JUDGMENT

Boyle, J.

[1] This is an appeal from a ruling determination made by Canada Revenue Agency under the *Employment Insurance Act* that (i) the Appellant's adult daughter was an employee of the Appellant but (ii) was not engaged in insurable employment because (a) she does not deal at arm's length with her employer and (b) the terms of her employment are not considered to be arm's length terms for purposes of paragraph 5(3)(*b*) of the *Employment Insurance Act*.

[2] The Reply filed by the Minister sought to raise the issue of whether the worker was an employee in addition to the issue of whether the employment was non-arm's length. It was not entirely clear to me that this could be properly before the Court since the Minister would effectively be appealing against his own ruling. I do not need to decide this as Crown counsel conceded in argument that the worker was an employee. Given the way the pleadings and assumptions were drafted, and the evidence entered, including the cross-examination of the Appellant and the evidence-in-chief of the CRA Appeals Officer, I would have had to

conclude that the Crown had not shown its ruling that the daughter was an employee was not correct.

[3] Thus the only issue to be addressed is whether the employment of the daughter was on arm's length terms as described in paragraph 5(3)(*b*).

I. Legislation

[4] Paragraph 5(3)(*b*) provides as follows:

> (*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.

II. Standard of review

[5] The standard of review in such a case is whether the Minister's conclusion was properly arrived at and is reasonable in light of the evidence before him as supplemented before the Court. See, for example, the decisions of the Federal Court of Appeal in *Légaré v. Canada*, [1999] F.C.J. No. 878 and in *Pérusse v. Canada*, [2000] F.C.J. No. 310 as well as this Court's 2005 decision in *Birkland v. Canada*, [2005] F.C.J. No. 195.

III. Facts/Evidence

[6] There were three witnesses at trial: the Appellant employer Reverend Campbell, the employer's daughter Nathalie Nussey, and the CRA Appeals Officer. Each of the witnesses provided clear, understandable and credible testimony. There was no serious suggestion in cross-examination by either side that the other side's witnesses were not credible. While the Appellant's agent may have said one of his cross-examination questions went to the Appeals Officer's credibility, it really only went to the completeness of one of her earlier answers in cross-examination. I accept as correct the testimony of each of the witnesses; the witnesses' testimony did not conflict on any material point.

[7] The Appellant Reverend Campbell is a religious Minister and before the period in question had been pastor at a church. In January 2006, he took on a

contract position with a Canadian religious charity as its National Director of Development. One of the charity's programs he oversaw was the sale to churches across Canada of an eight-week Christian Education program. This was a new program for the charity. Its promotion involved the charity's personnel initially contacting churches across Canada to introduce them to the program, determine their level of potential interest in the program, and offer to send a promotional information package to the church.

[8] There were initially two callers retained by the charity. Reverend Campbell supervised and oversaw those callers. They reported in writing to him on the outcome of their calls in order that he could personally follow up with the Pastor or Director of Christian Education at a church that expressed a degree of interest in the program. The callers also reported to him on their hours and their progress in calling all of the Canadian churches identified on their database.

[9] One of the charity's callers was the Appellant's daughter and the other was an unrelated person. There is no suggestion that the charity was not an entirely arm's length organisation to the Appellant and the Intervenor. The work was not full-time but ranged from ten to twenty hours per week. The work was not well paying at less than $10 per hour. The callers worked from their own homes. They were paid by the charity bimonthly after submitting their time sheets.

[10] This was a new business venture for the Appellant. Upon becoming a self-employed contract business person, he obtained some professional business and financial advice. This included registering his sole proprietorship as a business with CRA which he did. He also understood it may be advantageous for a business person to employ others, including family members, to do work they were capable of, that was needed, and that was paid at market rates and on market terms.

[11] As this was a new venture for the Appellant and a new program for the charity, the Appellant and the charity were both ambitious and conservative, hopeful for great success but careful to take steps incrementally. At the outset it was decided to begin with two callers. They began with the charity in February 2006 shortly after the Appellant's contract with the charity began.

[12] Based on the knowledge the Appellant and the charity have of church schedules, they anticipated that their busy times to focus on promoting such a project would be January to June and September to November. The summer months of July and August were expected to be quiet times at churches with staff on holidays, and the Christmas focus at churches during Advent meant they would

not try to promote the project directly to churches in December. Similarly, the callers were encouraged to attend to their work in the mornings, when they knew church offices were more likely to be staffed.

[13] The charity had both callers do the same things and paid both the same amount on the same terms.

[14] In April or May 2006, the Appellant offered both callers employed positions with his business. They would be doing the same caller work on behalf of the charity and all of their terms and conditions of employment including those relating to control and direction and reporting, etc. would remain the same. It was not entirely clear whether it was intended that the hourly rate would decrease to $8 per hour but it did, perhaps inadvertently. In any event the CRA Appeals Officer testified that either rate was considered a reasonable arm's length rate for the work done. According to a document filed, the charity was charged back the cost of its worker outsourced to the Appellant.

[15] The Appellant's daughter, who is the Intervenor in this matter, accepted the offer of employment. Her co-worker did not. The other caller was then collecting EI benefits and preferred to receive contract wages for her part-time work as is permitted to some extent. Also, she planned to give up the charity work and return to full-time employment by October 1st when her EI benefits ended.

[16] The Intervenor worked for the Appellant until the end of June. Similarly, the other caller's work ended with the charity at the end of June. During his employment of the Intervenor, the Appellant made the appropriate employer withholdings and issued and filed a T4 and a Record of Earnings.

[17] In mid-July, a new caller was hired to support the program in the summer months and continued thereafter. She was not related to the Appellant or the charity. She was also offered an opportunity to become an employee of the Appellant or to work under a contract with the charity. She chose to work directly under contract for the charity. The Appellant later again offered this caller the chance to be an employee of his business but she again turned it down. While there was no evidence of why the new caller chose to work under contract with the charity instead of as an employee, there are many considerations relevant to Canadian workers faced with such a choice including whether she has other contract work clients, the different basis of deducting work-related expenses for tax purposes, and paying EI and CPP balanced against the likelihood of collecting meaningful amounts in their own personal circumstances.

[18] The success of the program and the Appellant's business venture have not warranted the hiring of any further callers by the charity or the Appellant.

[19] At the time in May 2006 that the Appellant offered employment to the Intervenor, each was aware that it was possible that the daughter, who was expecting at the time, could be a few hours short of qualifying for EI when her baby was expected to be born based on her other principal work as a youth social worker. This would depend in part on when she had to stop working as a result of her pregnancy. Also, since the work she was already doing for the charity was set up on contract basis, it was not expected to provide insurable hours for this purpose. The daughter was advised of this risk of being approximately 30 hours short of the 600 insurable hours needed by an EI officer and recommended to find additional part-time employment to ensure she qualified. Both the Appellant and the Intervenor were aware that, provided her new employment status to work on the project was on arm's length terms, the part-time work should be sufficient to remove this risk. As it turned out, the daughter was offered sufficient shifts at her social worker employment that, had she worked them all, she would not have needed the few additional hours in order to qualify for EI benefits upon the birth of her baby. The Intervenor also testified that for the few hours needed she could just as easily have taken new part-time employment instead of changing contract work she was already doing to employment.

[20] The Appellant testified that over his working career he had previously offered workers the choice of employment or contract work depending upon what the workers' expressed preferences for EI purposes were. This was consistent with what the CRA Appeals Officer said he had told her and is corroborated by her notes.

[21] There are some minor inconsistencies between the detailed testimony given in Court and the answers given by the Appellant and the Intervenor in their respective CRA Arm's Length and Worker Questionnaires. This is typically the case and I conclude nothing follows from that.

[22] The uncontradicted and unchallenged evidence is that the Appellant paid the Intervenor by cheque bimonthly and this is the same as when the Intervenor worked under contract directly for the charity. The Crown put the cheques into evidence and observed that they were written on a joint account of the Appellant's, they were sequentially numbered although dated over a two-month period, and all four were deposited by the Intervenor to her bank at the same time.

[23] An interesting issue rose when CRA Appeals Officer began to testify. Her testimony went in orally after referring to her notes on a couple of occasions. However, it became apparent that she had no recollection of what was recorded in the notes and the Crown had not sought to introduce the Officer's notes into evidence. While the Appellant's agent did not raise an objection, since he was not a lawyer and the proceeding was governed by the Court's Informal Procedure, I raised with the Crown its apparent difficulty of having a witness whose review of her notes did not revive a present recollection she could testify to. The Crown wisely chose to introduce her notes into evidence and she testified that she always made written notes of what was said right after any phone call or conversation.

[24] It is important for counsel to remember there is a difference between the use of file notes to revive or refresh a past recollection and the use of file notes as evidence of a past recollection recorded. Most notably, in the former case the testimony is the evidence whereas with past recollection recorded the document will be the evidence.

[25] A leading case on past recollection recorded is *Fleming v. Toronto R.W. Co.* (1911), 25 O.L.R. 317 especially at paragraphs 25 and 31.

[26] The four criteria set out in Wigmore on Evidence ((Chadbourn rev. 1970), vol. 3, c. 28 s. 744 et seq.) were recently adopted by the Supreme Court of Canada in *R. v. Fliss*, [2002] 1 S.C.R. 535, paragraph 63. These are:

1. The past recollection, must have been recorded in some reliable way.

2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.

3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".

4. The original record itself must be used, if it is procurable.

[27] The CRA Appeals Officer's evidence was that, in considering what the Minister's opinion would be for purposes of paragraph 5(3)(*b*), she considered:

(i) the remuneration paid;
(ii) the terms and conditions of employment;

(iii) the duration of the employment; and
(iv) the importance and nature of the work.

In addition to the cheques and CRA Questionnaires, she reviewed the employee's time sheets.

[28] With respect to remuneration, the CRA Officer was satisfied that it was on reasonable arm's length terms for the work done. That it may have been one dollar per hour less than the charity had been paying for whatever reason did not make it unreasonable. In her words, it was fine with CRA.

[29] With respect to the terms and conditions, she noted that the employee worked at home and used her own equipment. That was not considered unreasonable — she said that is consistent with her own work for CRA.

[30] The areas of concerns which left her of the opinion that the terms were not arm's length as described in paragraph 5(3)(*b*) were:

(i) the pay cheques were on a personal joint account, were sequentially numbered, and were all cashed by the employee at once; and

(ii) she felt it was "created employment" of short duration for the purpose of getting EI benefits since the Intervenor was already doing the same work directly for the charity and simply wanted to get 32 more hours of insurable employment to attain the 600 hours required for her EI parental benefits.

IV. Analysis

[31] The CRA Ruling concluded that the Intervenor was an employee engaged in a contract of service not an independent contract under a contract for services for EI purposes. The Crown acknowledged this was an employment relationship.

[32] With certain specific exceptions I will turn to next, all of the terms and conditions and working arrangements applicable to the employment are the same as they were when the daughter did the same work for the charity immediately prior to the employment in question. All of those terms were set between the charity and the Intervenor who dealt at arm's length. Even though the worker

reported to her father while working directly for the charity, the work terms and conditions were the same as those of her arm's length co-worker.

[33] One exception is that for some reason she was paid only $8 an hour as an employee while it was $9 an hour with the charity. However, the CRA witness testified the Minister was of the opinion that was nonetheless an arm's length rate for the work done. This difference is not material.

[34] Another possible exception is that after receiving her pay cheques from her father, the employee did not immediately cash them. I do not regard that as relevant even had anyone told me when the Intervenor was in the habit of cashing her cheques from the charity or others she worked for. Once an employer pays a related employee by a valid cheque that can be expected to be honoured, I do not see the relevance of when the employee chooses to deposit it to her bank account. Arm's length terms of employment normally expect regular payment. In this case the Intervenor said she chose to hold the few modest cheques for a particular anticipated expenditure. My view would not be any different if an employee chose not to cash pay cheques from a related employer out of concern for the payor's cash flow or other financial circumstances. Canadian business owners and their families often get paid last. Provided a valid cheque that would be honoured is received in payment for an appropriate amount and within an appropriate period of time, that ends the arm's length scrutiny period. Any non-arm's length decisions thereafter made on when to cash it cannot make the terms and conditions of employment any less arm's length. The non-arm's length decision to effectively "loan" the money to the related employer would be a personal one made after the arm's length work was done and paid for. It would be silly, even if these were the circumstances, to require a related employee to first cash a cheque and then separately make a personal loan of her earned income to her related employer.

[35] I am unable to find any relevance in the fact that the cheques were written on a joint account. The employer was one of the names on the joint account. There is certainly no magic in this context to an individual Canadian engaged in business for his own account having a so-called business account. Countless Canadians pay business-related expenses with personal cheques. Provided they are for legitimate business expenditures of a legitimate business, and can be and are accounted for as expenses of the business, this can be of no consequence. Similarly, business account cheques and credit cards are often used for personal expenditures and, provided they are accounted for as personal expenditures, this too will be no cause for concern. Cash, coin, cheque, plastic, barter, payment-in-kind, all matters not. The only question is: Were the payments made?

[36] I was intrigued initially by the observation that the cheques were all numbered sequentially even though they were dated, and said to have been written, over the two-month period of employment. However, based upon the evidence in this case, I cannot be satisfied that the fact of sequential numbering can be considered relevant. The unchallenged evidence is that these cheques were written over the course of the two months. The Crown did not put to either of the witnesses that they were not written when they were dated. The Crown did not ask how many other chequing accounts the Appellant had or how many cheques he and the joint account holder (presumably his wife) would normally write in a month. The Crown did not enter as evidence any of the Appellant's cheques that may have been used to remit the employee withholdings, etc. to CRA during that period to demonstrate any inconsistency in the dating of these sequentially numbered cheques. I note that many Canadians now write very few cheques. In short, no basis was laid for using this fact to challenge the credibility of the witnesses with respect to their testimony of when these cheques were drawn and delivered. In fairness, the Crown did not ask me to consider whether the evidence might not have been entirely truthful. In these circumstances, I cannot accept that the sequential numbering of itself could reasonably assist the Minister in forming an opinion as to whether the employment terms were arm's length.

[37] It is clear from all of the evidence that all of the terms and conditions of the daughter's employment were the same as the terms of her work with the charity. (I have already addressed the fact the rate of pay was a dollar an hour less.) Thus, it is clearly only reasonable to conclude that the terms are terms that arm's length parties could reasonably be expected to agree to. That necessary conclusion is mandated by the fact that arm's length parties had agreed on the very terms for this very work performed by the very same person and her unrelated co-worker. In argument, the Crown even acknowledged that each term by itself was reasonable.

[38] However, it is not clear that this conclusion necessarily leads to the further conclusion that the Minister's opinion under paragraph 5(3)(*b*) was not reasonable. Paragraph 5(3)(*b*) requires it be "reasonable to conclude that [the employer and the employee] would have entered into a substantially similar *contract of employment* if they had being dealing with each other at arm's length" (emphasis added). This raises the question whether arm's length persons would have entered into an employment/contract of service relationship instead of an independent contractor/contract for services relationship.

[39] That question in turn raises the question of whether the Intervenor's contract with the charity was an employment relationship for EI purposes even though it was described in evidence as a contract for services. The charity was not a party to these proceedings, the contract was not put in evidence, and there was no evidence of such things as the intention of either the charity or its callers with respect to that contract. I certainly do not make any comments on what a proper characterization of the charity's contract might be for EI purposes or suggest that it may be other than a contract for services. However, for purposes of this proceeding, given that the CRA Ruling concluded the work relationship between the Appellant and the Intervenor was one of employment, and given that the evidence is that the contract terms were in all material respects the same, I must conclude that in considering the employment relationship in this proceeding for purposes of paragraph 5(3)(*b*) of the EI legislation, the Minister should have considered the Intervenor's work relationship with the charity to be of the same character as the work relationship between the Appellant and the Intervenor — one of employment. It would be quite exceptional for an agreement a worker has with one party to be in law employment while an identical agreement she has with another party to be other than employment. Thus, it appears that the Minister's opinion that the terms of the Appellant's employment of the Intervenor, or the employment itself, would not reasonably have been entered into had the parties been dealing at arm's length was not properly arrived at and was not reasonable in light of the evidence before him as supplemented before this Court.

[40] I am not persuaded that the Crown's position can be aided by the CRA's conclusion that this appeared to be "created employment". Real, *bona fide* and necessary work was done for value. The work, the need, and the reasonableness of the terms were settled by arm's length persons before the non-arm's length employment relationship existed. Created employment is not the test under paragraph 5(3)(*b*) that Parliament chose to address the potential mischief. It instead legislated a reasonable arm's length terms objective test.

[41] I cannot conclude that paragraph 5(3)(*b*) implicitly has a purpose test such that if one of the purposes of otherwise *bona fide* non-arm's length employment on arm's length terms is to access potential EI benefits in the future, the employment is excluded from "insurable employment". The words of paragraph 5(3)(*b*) are clear. They mandate a comparison of the terms of the non-arm's length and related employment to the terms that arm's length parties could be reasonably be expected to agree to. There is no mention of purpose and it would be most inappropriate to read the concept of purpose into the language of paragraph 5(3)(*b*) for public policy, social policy, tax policy or other policy reasons. The Supreme Court of

Canada in *65302 British Columbia Ltd. v. H.M.Q.*, 99 DTC 5799 and in *Shell Canada Limited v. H.M.Q.*, 99 DTC 5669 expressly cautions against courts, under the guise of statutory interpretation, relying on or developing unexpressed notions of policy or principle, especially where the legislation specifically addresses the concern in a clear way.

[42] In *65302 British Columbia*, Justice Iacobucci writing for the majority wrote regarding the *Income Tax Act*:

> 50 This Court has on many occasions endorsed Driedger's statement of the modern principle of statutory construction: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. This rule is no different for tax statutes: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578.
>
> 51 However, this Court has also often been cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language. In *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27, this Court held:
>
> > While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed.
>
> In discussing this case, P. W. Hogg and J. E. Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that "[i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76. This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex, and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.
>
> […]

57 This brings us to the crux of the issue. While fully alive to the need in general to harmonize the interpretation of different statutes, the question here arises in the specific context of a tax collection system based on self-assessment. Parliament designed the system and it is open to Parliament, as part of that design, to choose for itself to resolve any apparent conflicts between policies underlying tax provisions and other enactments. Parliament has indicated its intention to perform this role, not only in the design of the self-assessment system, which requires individuals without legal training to work through a complex series of provisions to calculate net income, for which maximum explicit guidance is necessary, but more specifically in its identification in the Act itself of certain outlays which the taxpayer is not permitted to deduct, as discussed below. Having recognized the problem of potentially conflicting legislative policies, Parliament has provided the solution, which is that in the absence of Parliamentary direction in the *Income Tax Act* itself, outlays and expenses are deductible if made for the purpose of gaining or producing income.

[…]

62 While various policy objectives are pursued through our tax system, and do violate the principles of neutrality and equity, it is my view that such public policy determinations are better left to Parliament. Particularly apposite is this Court's statement in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, that "a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation". This statement was approved of by the Court in *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, adding that "[t]he law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking. As a matter of policy, and out of respect for the proper role of the legislature, it is trite to say that the promulgation of new rules of tax law must be left to Parliament".

63 This approach and conclusion are supported by the fact that Parliament has expressly disallowed the deduction of certain expenses on what appear to be public policy grounds…

[…]

65 Moreover, given that Parliament has expressly turned its mind to the deduction of expenses associated with certain activities that are offences under the *Criminal Code*, outlined in s. 67.5 of the Act, I do not find a legitimate role for judicial amendment on the general question of deductibility of fines and penalties. Since the Act is not silent on the issue of restricting the deduction of some expenses incurred for the purpose of gaining income, this is a strong indication that Parliament

> did direct its attention to the question and that where it wished to limit the deduction of expenses or payments of fines and penalties, it did so expressly…
>
> (Emphasis added)

[43] In *Shell* the Supreme Court of Canada wrote, again regarding the *Income Tax Act*:

> 43 […] The Act is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, *per* Iacobucci J.; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, *per* Iacobucci J.; *Antosko*, *supra*, at p. 328, *per* Iacobucci J. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.
>
> […]
>
> 46 Inquiring into the "economic realities" of a particular situation, instead of simply applying clear and unambiguous provisions of the Act to the taxpayer's legal transactions, has an unfortunate practical effect. This approach wrongly invites a rule that where there are two ways to structure a transaction with the same economic effect, the court must have regard only to the one without tax advantages. With respect, this approach fails to give appropriate weight to the jurisprudence of this Court providing that, in the absence of a specific statutory bar to the contrary, taxpayers are entitled to structure their affairs in a manner that reduces the tax payable: […]
>
> (Emphasis added)

[44] More recently, in *Canada Trustco Mortgage Co. v. Canada*, 2005 D.T.C. 5523, the Supreme Court of Canada was considering the general anti-avoidance rule in the *Income Tax Act*, which expressly requires a consideration of purpose. The Court wrote unanimously, at paragraph 11:

> Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

[45] While the Supreme Court in these cases was specifically addressing the interpretation of the *Income Tax Act*, they rightly always begin by reminding us that the interpretation of tax statutes is generally no different from the

interpretation of statutes generally. Hence, I am most comfortable applying their comments to address the interpretation of the *Employment Insurance Act*.

[46] Since paragraph 5(3)(*b*) as worded is clear having regard to both the text and context of the provision, and clearly does not address purpose, it is not open to this Court to introduce a purpose test into it. The effect of any such judicially developed purpose test would be an unwarranted encroachment by the judiciary into the realms of our elected Parliament. If such a "created employment" or purpose test represents sound policy, it is open to Parliament to enact it. It may however have significant implications for many Canadians' entitlement to EI benefits.

[47] I am very mindful of the fact that paragraph 5(2)(*i*) addresses a particular mischief and that paragraph 5(3)(*b*) is an exception to paragraph 5(2)(*i*). In *Légaré*, the Federal Court of Appeal discussed the purpose behind paragraph 5(3)(*b*) as follows, 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.

[48] I note that the feared abuse described by Justice Marceau in paragraph 12 is "the possibility that jobs may be invented or established with unreal conditions of employment" between non-arm's length parties. My comments above are also consistent with such a purposive consideration of paragraph 5(3)(*b*). The Federal Court of Appeal did not say that the mischief was one of doing real needed work for reasonable pay where one of the purposes for the employment relationship was to have insurable hours for EI purposes. Employment insurance is one of Canada's important social programs. It is offered to Canadians so that they may take advantage of it. A purpose test would seem to run contrary to that to a certain degree. The abuse or mischief that paragraph 5(3)(*b*) clearly addresses is insurable employment being created that is not what it seems — on terms where the actual work performed or wages paid did not meet an objective arm's length test. In this case, they not only meet such an objective test, they can prove that with subjective evidence.

[49] For these reasons, I conclude that the Minister's opinion was not reasonable in light of the fullness of the evidence. I will order that the Minister's decision be varied to reflect that the Intervenor was in insurable employment.

Signed at Ottawa, Canada, this 28th day of March 2008.

*

"Patrick Boyle"

Boyle, J.

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