Docket: 2008-64(EI)

BETWEEN:

CALDWELL INDUSTRIES CO. LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 20, 2008, at Vancouver, British Columbia

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

Appearances:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Matthew W. Turnell

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated October 3, 2007 is varied to find that:

- the employment of Brett Caldwell with Caldwell Industries Co. Ltd. from February 5, 2005 to December 31, 2006 was not insurable.

Signed at Sidney, British Columbia, this 12th day of February, 2009.

"D.W. Rowe"

Rowe D.J.

Citation: 2009TCC59
Date: 20090212
Docket: 2008-64(EI)

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CALDWELL INDUSTRIES CO. LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant appealed from a decision issued by the Minister of National Revenue (the "Minister") - on October 3, 2007 - pursuant to subsection 93(3) of the *Employment Insurance Act* (the "*Act*") based on paragraphs 5(1)(*a*) and 5(3)(*b*) of said *Act*, wherein the employment of Brett Caldwell ("Brett") with Caldwell Industries Co. Ltd. ("Industries") from February 5, 2005 to December 31, 2006 was found to be insurable employment. The Minister was satisfied the contract of employment between Brett and Industries would have been substantially similar if they had been dealing with each other at arm's length.

[2] Robert Caldwell ("Caldwell") testified he is 68 years of age and resides in North Vancouver, British Columbia. He owns 100% of the shares in Industries, a business that manufactures clay pigeons and sells shooting supplies and was started by his father in 1946. Industries was incorporated in 1960 and the shareholders were Caldwell and his father but Caldwell's brother later acquired some shares. Caldwell stated he and his father designed the equipment to produce the clay pigeons which are not clay but are composed of asphalt and limestone. Caldwell's father participated in the 1956 Olympics as a member of the Canadian shooting team. The clay pigeons

are used for skeet shooting and trap shooting by organizers of tournaments in many countries. Caldwell is an experienced shooter and explained that although trap shooters and skeet shooters use the same clay pigeons as targets, for skeet shooting the pigeons come out of two stations while the shooter stands inside a circle and for trap shooting, the pigeons are propelled from 5 different stations. In 2001, Caldwell purchased the shares held by his brother and became the sole owner. His wife – Diane – is employed by Industries together with their son – Brett – but a daughter – Debbie – is not involved with the business. Apart from manufacturing and distributing the clay pigeons, Industries sells guns, ammunitions, targets and related supplies. The business employs 9 non-related workers and is closed for 7 to 10 days each Christmas season. The manufacturing of the target pigeons is undertaken during the spring and summer months during a 12-hour day between 6:00 a.m. and 6:00 p.m. but the normal working day is from 7:00 a.m. to 4:30 p.m.. Caldwell stated that during 2005 and 2006, a wholesale division within Industries employed two salesmen, two office assistants and one product buyer. The manufacturing division employed one machine operator, two labourers and one truck driver. The office assistants who performed all secretarial duties provided services to both divisions. Caldwell stated that although annual sales of Industries during this period were approximately $3 million, business was somewhat "lean" due to revisions in federal legislation pertaining to the purchase, use and storage of guns and the increased value of the Canadian dollar had an adverse impact on exports which amounted to 65% of total sales. The revenue of both divisions within Industries is combined for purposes of financial statements and corporate income tax returns. Caldwell stated that both components of the business are managed equally by him and Brett and when he is absent for a total of 3 months a year on sales trips, Brett manages the day-to-day operations. On some occasions, Caldwell is absent for 6 weeks and was away for approximately 25% of the relevant period. Brett is 47 years of age and started working at Industries – during the summer - while still in high school and began working full time at age 18 after he finished school with the result that Industries has been his only employer. Caldwell's plan is to semi-retire within the next two or three years and to retire completely within five years and during that interim period, Brett will take over total management of the business. Caldwell stated Brett was "treated as a son, more than anything." Caldwell stated that when he and Brett are both at Industries' workplace they share daily management and Brett has full authority to hire and fire workers. Caldwell described Brett as a "jack-of-all-trades" whose range of duties required him to arrive at 7:00 a.m. to ensure the machinery and equipment was functioning properly. Brett remained on the premises until 4:30 or 5:00 p.m. during which he also supervised the trucking requirements, customer relations and other matters arising in the course of the day. Caldwell stated that during the relevant period there was no aspect of the overall business in which Brett did not participate

including performing mundane tasks such as sweeping or making deliveries to customers and estimated the manufacturing component of the business occupied about 60% of Brett's time. Both Caldwell and Brett did the banking and each of them had single signing authority on the corporate bank account. The non-related employees of Industries were not unionized and Industries established their pay according to a schedule. Caldwell stated the truck driver was paid an annual salary of $58,000 and the machinist - paid an hourly rate - earned about $40,000 per year. The sales people and the buyer earned about $50,000 per year and the office assistants were paid an hourly rate. Brett earned $58,000 a year as a base salary. The sales people worked 8 hours a day in the sales area and were not required to make outside sales. The truck driver had to work longer hours when hauling product to customers in regions or provinces. All employees at Industries took lunch breaks. Caldwell stated Brett worked between 55 and 60 hours a week including some workdays of 12 hours and there were occasions when he worked on weekends to attain a weekly total of 65 hours. In Caldwell's opinion, Brett was underpaid during 2005 and 2006 but Brett's salary – as well as his own - was reduced because of a decline in corporate revenue and profit. Caldwell's assessment of the situation – based on 51 years experience – is that it would be necessary for Industries to pay about $100,000 per year to replace Brett. The alternative would be to divide Brett's duties into two parts, hire two people and pay each of them nearly the same as he was earning. The process of hiring would require advertising to attract applicants followed by the interviewing of potential candidates. Caldwell stated that if Brett decided to leave his employment, he would – probably – shut down the business even though the only other manufacturer of clay pigeons was located in Hamilton, Ontario. Industries also carried on a wholesale operation to sell shotguns and ammunition and related supplies to retail stores. Caldwell stated that although Industries issued an extra pay cheque – in the usual bi-weekly amount - to Brett once or twice during the relevant period, it did not compensate him fully for the amount of work performed and that the supplemental remuneration was paid only when the company had sufficient funds. Although it was not necessary for Brett to do so during 2005 and 2006, there were other occasions when he did not cash his pay cheque for a short period until the cash flow of Industries had improved. Pay cheques were issued to all employees on the 15th and 30th of each month, except for February. Caldwell stated Brett was free to come and go as he chose and that he was completely able to "call his own shots" during the relevant period. Brett was provided with a cellular telephone ("cell phone") and a company credit card which he was at liberty to use at his discretion for all company purposes. The Industries' truck driver was provided with a credit card to purchase fuel while on the road hauling product to customers. In terms of sick leave, hourly-paid employees were not compensated when absent but salaried workers were paid if absent due to illness. Caldwell stated Brett rarely missed a day of work and

attended even if he was not feeling well due to a cold or other ailment. Although he and Brett discussed the matter of vacation time, Brett was free to take holidays or days off whenever he chose. Brett lived about 15 minutes away from the business and was the person nominated to respond to all emergency calls and alarms. Unless away from the city on holidays, Brett was available during weekends and on holidays to respond to any problem at Industries which often pertained to the operation of the machinery. Caldwell had a cell phone and could be contacted by Brett, if required. If necessary, electricians were engaged to undertake certain work but both Caldwell and Brett could weld and operate a lathe. The hours of work by non-related employees and their vacation time were recorded but no record was maintained of Brett's hours of work and holidays. The truck driver – Pye - was granted time off in lieu of overtime pay. Caldwell stated he had not transferred any shares in Industries to Brett but he and his sister – Debbie – had shares in a holding company that owned two buildings which housed the business and received rent from Industries. In Caldwell's opinion, a non-related person performing similar duties to those provided by Brett during the relevant period would have been compensated at or near $100,000 per year. He also stated that a non-related person fulfilling that role would not have been granted sole signing authority on the corporate bank account. Caldwell stated he could not imagine a situation where he would either fire Brett or lay him off.

[3] Caldwell was cross-examined by counsel for the Respondent. Caldwell recalled a telephone conversation with a Rulings Officer in June, 2007 and that he had spoken with a representative of Canada Revenue Agency ("CRA") on September 27, 2007. He also remembered signing a Questionnaire – Exhibit R-1 – which was sent to an Appeals Officer. Caldwell stated that document was completed on his behalf by Grants International Inc., an entity that defines itself as "The Employment Insurance Refund Specialists." Caldwell stated the Questionnaire contained a lot of details and he is not certain of the extent to which he paid attention to its contents before signing it nor does he have a specific recollection of having read the portion – page 8 – of the Questionnaire below the heading "Certification Form". Caldwell stated that although Brett's title was described as "Foreman" at number 3 of the Questionnaire, he was the General Manager of Industries during the relevant period. Caldwell stated Brett hired and fired labourers and hired employees to fill vacant positions without consulting him. In his view, it was purely hypothetical to consider a scenario where Brett would make a material change in the operation of the business without discussing it. Brett often picked up parts when required – either daily or several times in the course of a week – in locations in Vancouver or in Langley, a municipality in the Lower Mainland. Caldwell acknowledged that all employees were expected to keep the premises clean whether in the manufacturing, sales or office area. Caldwell stated Industries had paid Brett a monthly salary for 25 years

and it was supposedly based on a 40-hour week but Brett had always worked more than that, particularly during 2005 and 2006. The hours of work of other salaried employees were not recorded and sometimes the truck driver started his delivery trip by leaving in the middle of the night. There was no written employment contract between Brett and Industries. Caldwell agreed that as stated at number 5(a) of the Questionnaire, Brett's salary was $4,800 per month – equivalent to $57,600 per year – but thought it had been somewhat less during the relevant period for reasons stated earlier in his testimony. When Brett started working for Industries, Caldwell and his brother established his pay which had been increased over subsequent years and he was paid regularly together with other employees. When Brett began acting as General Manager, his pay was established by Caldwell in consultation with his brother who was still a shareholder in Industries until some point in 2001. The extra pay cheques issued to Brett in 2005 and 2006 were to recognize his acceptance of an exceptional burden arising from various management duties. Industries had an employee benefit plan in which all employees participated. In answering the question – number 6(b) – in the Questionnaire - pertaining to hours of work, Caldwell acknowledged the answer stated therein was "Brett usually works Monday through Friday starting at 10:00 AM and generally staying until approximately 8:00 PM although the time that he leaves work depends on the work that needs to be completed. In addition, sometimes Brett will go into work on Saturday if the volume of work requires additional work hours." Caldwell stated the answer is accurate as it pertained to those busy manufacturing periods when he is also at Industries and is available to arrive at 7:00 a.m. so he and Brett can run split shifts. In that circumstance, Brett would arrive later. At all times, when the machinery was operating, either he or Brett remained on site and would have lunch together away from the workplace only when no manufacturing was taking place. During the busy season, Brett worked most Saturdays and the hourly-paid machine operators and labourers worked a 4-hour shift. Occasionally, the product buyer came to work on Saturday and was granted time off in lieu of receiving overtime. Caldwell agreed with the statement in number 5(e) of the Questionnaire that Brett received three weeks of paid vacation time and that there were some years when he took additional time which was not recorded and for which he was paid his regular salary. Caldwell stated he hoped Brett would take over the business and retain it in the Caldwell family. In his opinion, it would be very difficult to find a buyer since he had attempted to do so - in 2001 – when his brother decided to retire and there were no serious interested parties who responded to his efforts. Caldwell stated he is aware of the probable cost to Industries to replace Brett and considers his estimate of a probable salary of $100,000 per year plus a company car, credit card for expenses and similar perks is reasonable. In his view, the replacement would not be granted the same level of trust as that enjoyed by Brett and either would have to work as hard as

Brett or distribute some duties among other employees. Caldwell stated he regarded Brett as a son and a business partner even though Brett did not hold any shares in Industries nor did he have any share-option agreement as part of his remuneration package.

[4] The Appellant closed its case.

[5] Eleonor Sausa-Gofredo ("Sausa-Gofredo") testified she has been employed by CRA for 18 years and for the last 10 has been an EI/CPP Appeals Officer. She stated the Industries' file was assigned to her on September 25, 2007 and that her duty required her to examine the facts, analyze the situation and prepare a recommendation to the Minister. After reviewing the Questionnaire – Exhibit R-1, she conducted telephone interviews with Brett – on September 26 – and with Caldwell the next day and had that document at hand during those interviews. She had written out the questions in advance and made notes of the conversations and entered this information into her CPT 110 - Report On An Appeal ("Report") – Exhibit R-2 – in which she concluded Brett was in insurable employment with Industries during the relevant period. Sausa-Gofredo stated she was aware Caldwell was the sole shareholder in Industries and during the interview with Brett, he had described himself as a Manager. In the Questionnaire, he had been described as a Foreman who was not supervised, had authority to hire and fire employees and had a single signing authority on the Industries' bank account. During the relevant period, Brett's salary was $4,800 per month and he did not have any investment in Industries nor had he loaned Industries any money or assumed any personal liability for any corporate debts arising from the operation of the business. Sausa-Gofredo stated there was no need to compare Brett's salary in relation to other non-related employees beyond that stated in the Questionnaire which ranged from $11 per hour to $5,000 a month. According to information on a print-out – Exhibit R-3 – Brett was paid the sum of $63,607 in 2005 and $63,645 in 2007 – more than Caldwell – and was the highest-paid employee at Industries. As noted in the Report, the T-4 records provided by Industries to CRA indicated Brett earned $83,590 in 2003 and $77,341 in 2004. Sausa-Gofredo did not consider the reduction in pay during the relevant period as a significant factor when preparing her Report but accessed a website which provided information about the labour market. In undertaking her comparison of remuneration, she assumed a 40-hour week was standard and calculated Brett had earned $28.70 per hour. In her assessment of the information obtained from the website, the average pay for Manufacturing Managers ranged from $16.00 to $37.50 per hour and the average was $24.31. Sausa-Gofredo stated she took into account that Brett received 3 weeks vacation and was able to take 3 or 4 extra days with pay. She considered the bonus payments of about $4,000 were for working additional hours and was aware

non-related employees did not receive any pay other than their regular wages or salary. Sausa-Gofredo considered it was reasonable for Brett to have been supplied with a company vehicle, cell phone and credit card in view of his responsibilities as a Manager, particularly since Brett had stated during the telephone interview that these were used only for business purposes. In her assessment of the circumstances, the amount of remuneration, method, and frequency of payment were reasonably comparable to those which would be accepted by persons dealing with Industries at arm's length. Sausa-Gofredo stated she was aware Brett worked during some weekends. In her view, Brett had been employed by Industries since 1979 and working long hours while carrying out various responsibilities was normal for someone in a managerial position and that – as stated in the Questionnaire - he had been given pay raises based on increased responsibilities. The work performed by Brett was integral to the business which operated year-round and would be required regardless of the relationship between the parties.

[6] In cross-examination by counsel for the Appellant, Sausa-Gofredo acknowledged she had not addressed the issue pertaining to the reductions in salary paid to Brett between 2004 and 2008, inclusive, compared to his 2003 remuneration of $83,590. The investigation into the circumstances of his employment had been triggered by the application – on behalf of Industries - for a refund of Employment Insurance (EI) premiums paid in respect of Brett's employment. The Questionnaire had been sent out as a matter of routine prior to the file having been assigned to her. Sausa-Gofredo stated she reviewed the file prepared by the Rulings Officer but conducted her own investigation and analysis and as an Appeals Officer is at liberty to arrive at a contrary conclusion in the course of making a recommendation to the Minister. She recalled telephoning Brett during the work day at the telephone number shown in the Questionnaire and stated the conversation was fairly brief because there had been sufficient detail provided in that document. She estimated her conversations with Caldwell and Brett – in total – did not exceed more than 15 or 20 minutes. She stated that as a matter of practice, Appeals Officers do not attend at a payor's place of business. She was aware of the change in working hours depending on circumstances and Brett had informed her that he managed the entire Industries' operation including during those times when Caldwell was away, although she did not know the extent of those absences. Sausa-Gofredo acknowledged she had not discussed with either Caldwell or Brett whether they considered the remuneration paid to Brett was reasonable nor the reason why it had been reduced by almost $6,000 in 2004 and by nearly $20,000 in 2005 and also in 2006. During the telephone interview, Caldwell informed her that if Brett ceased working for Industries, he would need to hire two people to perform the same work but there was no discussion about the cost of those salaries to Industries. Sausa-Gofredo stated she was not aware of the financial

situation of Industries during the relevant period but had been informed that Brett worked about 50 hours a week. However, she based her calculations – for purposes of comparison – on a 40-hour week and had not been told that non-related salaried employees at Industries could take time off in lieu of receiving overtime pay. She acknowledged that during the relevant period, Brett may have worked as many as 1000 hours more than an employee who adhered to a 40-hour week. Sausa-Gofredo stated she was not aware of the details nor extent of the work done by Brett on weekends and took into account the information in that respect as provided in the Questionnaire but did not inquire further. She was aware Brett could come and go as he pleased and was not under any supervision. She had not asked Caldwell if an unrelated worker performing Brett's job would have been provided with a company vehicle, cell phone and credit card. She had been informed that either Caldwell or Brett – or both – had to be present at Industries, at all times, but did not know that when Brett was in North Vancouver and not away on holidays, he acted as the permanent stand-by responder in the event certain calls, alarms or events required his attendance at the Industries' worksite.

[7] Counsel for the Appellant submitted that in view of the facts which emerged at trial, the circumstances of Brett's employment with Industries was put into sharper focus. Some of the significant factors not considered by the Minister were the reasons behind the substantial reduction - almost $20,000 per year - in Brett's salary during the relevant period compared with his remuneration in 2003 and 2004. The reduced remuneration was attributable to the decline in the annual revenue of Industries and Brett had accepted a lower salary in the best interests of the family-owned company where he had been employed full-time for 27 years. Counsel submitted the evidence demonstrated the Minister did not fully appreciate the extent of the duties performed by Brett and the range of responsibilities assumed by him not only during his work week - that exceeded the norm by nearly 50% - but also on all weekends and official holidays when he was not away. Counsel pointed to the salary paid to the truck driver – Pye - which was slightly under $58,374 in both 2005 and 2006 and to the evidence that he and other non-related salaried employees were granted time off in lieu of overtime pay. Counsel submitted the duration of employment was exceptional and that it was unlikely to have endured so long if the relationship had been between non-related parties, particularly in light of the special role played by Brett which was integral to the ongoing existence of the Industries business. Counsel submitted that even though the Minister did not have the full facts prior to issuing the decision, the evidence required the Court to intervene and to conduct an analysis of the evidence subsequent to which it would become apparent the Minister's decision should not be confirmed.

[8] Counsel for the Respondent submitted the Appeals Officer properly considered the facts and weighed correctly the various indicia arising from the overall circumstances. Counsel referred to several instances in the evidence where Brett was treated like all other employees including the method and regularity of his pay and his participation in an employee medical and dental insurance plan. Counsel submitted it was not unusual for a non-related employee who had provided many years of good service to be promoted to a responsible managerial position and to be provided with a company vehicle, cell phone and credit card. In counsel's view of the circumstances, the extra hours of work were not abnormal and the acceptance of a cut in salary when Industries was dealing with a reduced annual cash flow was not extraordinary when viewed in the context of that unique business. Brett had no investment in Industries and was not at risk for any loans or debts. Counsel submitted that the estate planning undertaken by Caldwell was not connected to the working relationship between Brett and Industries because both Brett and his sister had received shares in the holding company - formed by Caldwell - which owned the business property rented to Industries but Brett's sister had never been employed by Industries. Counsel submitted the decision of the Minister should be confirmed and the appeal dismissed.

[9] The assumptions of the Minister stated in the Reply to the Notice of Appeal ("Reply") that were challenged – in whole or in part - by the Appellant are:

> …
>
> e) Robert Caldwell manages the Appellant's day to day business operations;
>
> …
>
> h) during the Period the Worker managed the Appellant's clay pigeon manufacturing plant;
>
> i) the Worker's duties included hiring, training, supervising and firing of employees (the "Duties") that worked in the Appellant's manufacturing plant;
>
> j) in addition to the Duties, the Worker performed the day to day managing of the Appellant's business during any absence of Robert Caldwell;
>
> …
>
> n) the Worker's rate of pay during the Period was similar to what the Appellant would have paid an unrelated employee performing similar management duties;
>
> o) in addition to his regular salary the Worker received bonuses from Appellant as compensation for additional hours worked;
>
> …
>
> r) the Appellant would have provided an unrelated employee performing similar management duties with a cell phone, a vehicle and a credit card;

…

t) the Worker had signing authority on the Appellant's bank account in order to fulfill his management duties during those times when Robert Caldwell was not available;

…

x) the Worker was required to notify the Appellant if he was going to be away from work.

[10] The relevant provisions of the *Act* are paragraphs 5(1)(*a*) and 5(2)(*i*) and subsection 5(3) which read as follows:

> 5. (1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> …
>
> (2) Insurable employment does not include
>
> …
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (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 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.

[11] In *Quigley Electric Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 1789; 2003 FCA 461 (F.C.A.), the Federal Court of Appeal heard an application for judicial review of a decision issued by a judge of the Tax Court of Canada confirming the decision of the Minister that the Appellant's employment with a related employer was not insurable. Malone J.A., writing for the Court - at paragraph 7 and following – stated:

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 *Perusse 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.

9 According to the applicant, the proper question was not whether the Minister had sufficient information to make a decision, notwithstanding the evidence of Mrs. Quigley; rather the question was whether, considering all the evidence, the Minister's decision still seemed reasonable. Instead, the applicant asserts that the Judge carried out an irrelevant examination of whether Mrs. Quigley was a "principal" or a "subordinate" of Quigley Electric Ltd.

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.

11 Bad faith on the part of the Minister is not an issue in this case.

12 While the reasons for decision are lengthy, it is clear that the Judge was analysing the oral evidence of Jean Quigley in conjunction with paragraph 5(3)(b); namely, whether having regard to all of 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. After reviewing other authorities in the Tax Court, the Judge rejected any suggestion that Mrs. Quigley could be termed a principal of Quigley Electric Ltd. and in turn dismissed her examples of special treatment within the company as arising from her personal relationship with the controlling shareholder and not to her employment contract.

> **13** He concluded by indicating that the factors considered by the Minister, as set out earlier in his reasons, were the relevant factors for his consideration. That, in the context of this case, can only mean that the Minister's decision was reasonable considering all of the evidence. I can discern no legal error in this analysis or conclusion.
>
> **14** I would dismiss the application for judicial review with costs.

[12] I turn now to the facts in the within appeal. The Minister was not entirely correct in assuming Caldwell managed the day-to-day business operations of Industries and that Brett performed those management functions during any absence of Caldwell. The evidence is clear that during the relevant period Caldwell and Brett were co-managers and that Brett had full authority over every aspect of the entire operation but was solely responsible when Caldwell was absent for up to 3 months a year. The Minister assumed the remuneration paid to Brett was similar to what Industries would have paid an unrelated employee performing similar management duties. The Appeals Officer proceeded on the basis that Brett was performing the role only of a Manufacturing Manager who worked a 40-hour week. She calculated a reasonable salary would be based on an average hourly rate of $28.70 in the manufacturing industry. The evidence established that Brett was working an average of 55 hours per week during the relevant period and assumed a substantial range of duties far beyond that performed by a manager of a manufacturing section or assembly operation. The manufacturing of the clay pigeons was a significant portion of Brett’s duties but he had other responsibilities within the entire scope of the business operation including dispatching the truck, supervising sales and office staff, making deliveries, picking up parts, handling the banking and dealing with all personnel issues. These additional duties were recognized by Sausa-Gofredo in her Report but she did not factor them properly into her calculation of a comparable pay rate and elected to use as a base for comparison, the position of a manufacturing manager. The evidence of Caldwell was that the remuneration paid to Brett in 2005 and 2006 was inadequate based on the amount of hours worked, duties performed and responsibilities discharged. In his opinion, based on 50 years experience in an uncommon business - with only one other Canadian competitor - Industries would either be compelled to hire two people to perform Brett’s duties or would have to offer a salary of about $100,000 plus some benefits to someone willing to assume his role. Caldwell acknowledged that Brett had received approximately $6,000 in extra pay each year in 2005 and 2006 but considered that as inadequate remuneration for the 1000 or more extra hours of work performed by him each year without taking into account he was on stand-by every weekend and holiday when not away from North Vancouver. Caldwell testified that an unrelated General Manager would not be granted sole signing authority on the Industries’ bank account and probably would

not have been issued a company credit card. The Minister assumed Brett had signing authority on the business bank account in order to fulfil his management duties during those times when Caldwell was not available. That is not correct and it illustrates the Minister's understanding that the management role carried out by Brett was supplemental or as an adjunct who was fixed with full management responsibilities only during Caldwell's absence. Caldwell described the working relationship between himself and Brett as that of father and son or as business partners – even though Brett had no direct interest in Industries – rather than as President of Industries and key senior employee. The Minister assumed Brett was required to notify Caldwell if he was going to be away from work. It is apparent from the evidence that the working relationship between Caldwell and Brett was such that notice was given by each to the other to accommodate the efficient operation of the business but Brett was free to choose his own holidays and could extend them by a few days or take time off at his discretion. The holidays for non-related employees – whether paid hourly or by salary – were set by either Caldwell or Brett.

[13] In the case of *Birkland v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 195; 2005 TCC 291, Bowie, J. provided a summary of the state of the jurisprudence and commented as follows at the end of paragraph 4 of his Judgment:

> 4. … This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(*b*) accords to the Minister's opinion.

[14] In my assessment of the evidence, it is apparent the Minister would not have arrived at the same conclusion had the same facts been before him particularly with respect to the amount of hours worked by Brett during the usual work week, on weekends and due to his obligation to be on call to respond to calls, alarms or other

problems during statutory holidays and weekends. Further, the calculation of a similar salary was undertaken by using incorrect indicia because Brett was fulfilling a role much wider than that of a manufacturing manager. The Minister did not take into account the reasons underlying the substantial reduction in Brett's salary during 2005 and 2006 – compared to 2003 and 2004 – and failed to consider whether it would have been reasonable for a non-related party to have accepted such a reduction - even if corporate revenues had declined - particularly in the face of an increased workload. The Minister incorrectly viewed Brett not as an equal in the operation of the business but as someone who was called upon to increase his responsibilities – including exercising his bank signing authority - when Caldwell was absent.

[15] Taking into account all of the evidence, I conclude I must intervene in the decision of the Minister and examine the circumstances of the employment at issue to determine whether having regard to the remuneration paid, the terms and conditions of employment, the duration and nature and importance of the work performed, it is reasonable to conclude that Industries and Brett would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

Remuneration:

[16] During the relevant period, the remuneration paid to Brett was inadequate not only when compared with a salary required to be paid to a non-related person occupying a similar position with a manufacturing and wholesale business but also in relation to the salary he received in 2003 and 2004. Because of the drop in annual sales revenue, and following discussions with Brett, Caldwell – through Industries - reduced both of their salaries. In Brett's case, he earned 7.5% less in 2004 than in 2003 and 24% less in both 2005 and 2006 than in 2003. The evidence established that his workload and range of responsibilities were not reduced during the relevant period. Had Caldwell and Brett not been father and son with a long-standing relationship at the family business, it is difficult to accept Brett would have continued to work as hard – or harder – during the relevant period when his annual salary had been reduced by a significant percentage. It would be unusual for an arm's length employee to have accepted the link between salary and corporate profitability. Someone may have agreed to an interim, minor reduction in pay or have worked less hours and may have insisted the range of duties be scaled back and certain functions assigned to other employees. The extra pay cheques issued to Brett in 2005 and 2006 amounted to approximately $6,000 per year which, although paid in tribute for his extra efforts, did not properly compensate him for an additional 500 hours per year as a result of working 55-60 hour weeks and being on call every weekend and holiday

when not on vacation. The truck driver earned $58,374 each year during the relevant period and was able to take time off in lieu of overtime. While that service is an important function within Industries, one would expect the salary paid to a person discharging the responsibilities assigned to Brett to have been substantially more, perhaps nearly double.

Terms and Conditions:

[17] While there are many responsibilities assumed by someone who occupies a managerial position in a business such as Industries, it is somewhat unusual to find an individual who is willing to perform such a broad range of duties and to devote non-working hours to serving as a stand-by responder in the event attendance at the facility was required. Brett supervised the manufacturing component of the business and participated in every other aspect of the business while performing mundane or ordinary duties on a regular basis. A person fulfilling the role of a General Manager might be granted sole signing authority on the corporate bank account at some point but – as Caldwell stated in his testimony - it is more likely he would not have accepted that arrangement. Brett was able to take 3 or 4 days extra holiday time at his discretion and could take his regular 3-week vacation whenever he chose but ensured his father was aware of those plans.

Nature and Importance of the Work:

[18] The services performed by Brett were integral to Industries' business activity. Without Brett, the business would need to obtain the services of one or more persons who could carry out the range of duties performed by him. Caldwell – at age 68 – intends to enter a phase of semi-retirement with a view to retiring fully within 3 to 5 years. The business carried on by Industries was unusual - with only one other competitor in Canada - so its ability to replace Brett would be hampered when compared to other manufacturing enterprises. However, it was not unreasonable for the Minister to have considered that some non-related employee could have started working for Industries after leaving high school and gradually worked up to a position of General Manager where it is normal to work longer hours and to assume an array of responsibilities.

Duration:

[19] Counsel for the Appellant submitted it was unusual in this era for someone to work for the same company since 1979. He referred to the statement by Caldwell that he would not fire Brett nor lay him off so long as Industries continued to exist and

hoped Brett would carry on the family business. The Minister considered this element not to be of any relevance since the business operated on a year-round basis. I agree with that conclusion. The fact is few – if any – employees in today's workplace are going to receive a gold Blackberry for working 30 years for the same employer since the odds are it will have merged, submerged, disappeared - either offshore or in the Great Beyond - or if extant, may be hunkered down beneath a blanket of bankruptcy protection and therefore reluctant to emerge for purposes of the farewell gathering.

[20] In *603709 Alberta Ltd. (c.o.b. Humpty's Family Restaurant) v. Canada (Minister of National Revenue – M.N.R.)*, [2004] T.C.J. No. 411; 2004 TCC 545, Rip, J. dealt with the appeal of a son – Turner - whose parents owned 100% of the shares of the employer corporation. Turner acted as General Manager, had full responsibility for the operation of the restaurant and in additional to a monthly salary, received a bonus determined by profits of the Appellant corporation and his own needs. He was replaced as Manager by a non-related person – Cleroux – who worked a 40-hour week but was entitled to monthly bonuses linked to food sales and labour costs. At paragraphs 22 and 23 of his judgment, Justice Rip stated:

> 22 The Minister's position in the appeal is that the circumstances of Christopher's employment were similar, if not identical, to that of Paul Cleroux. But, in arriving at this conclusion, the Minister ignored or did not give sufficient weight to at least two circumstances that are present in Christopher's employment and not in Paul Cleroux's. The first is that Christopher received an annual bonus that was dependent on the corporation's profit for the year and Christopher's personal needs. The latter, even more that the former, suggests that the annual bonus, was particular to Christopher as a child of the principal shareholders of the corporation.
>
> 23 The second circumstance of Christopher's employment is that he was on 24 hour call. Although Christopher was paid on the basis of a 44 hour week, his work responsibilities included time in excess of the 44 hours for which he was paid. In effect, the business carried on by the corporation was a family owned business and Christopher contributed his share of the work. A person dealing with the corporation at arm's length would not be interested in the working conditions undertaken by Christopher and the corporation would not be inclined to pay an annual bonus to a person with whom it dealt with at arm's length that was dependent not only on the business' profits but also, the needs of the party it was dealing with at arm's length.

[21] In the case of *C & B Woodcraft Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2004] T.C.J. No. 351; 2004 TCC 477, Woods, J. – following a review of the evidence – found the factors presented a different picture than that assumed by

the Minister and concluded the Minister's decision - that the employee was engaged in insurable employment – was not supportable. In analyzing whether the employment terms were at arm's length, Justice Woods – at paragraphs 18 to 21, inclusive, of her judgment stated:

> [18] The arm's length test in paragraph 5(3)(*b*) requires a comparison of the actual terms and conditions of employment to what they might be if Mr. Virga and C&B were dealing at arm's length. The employment terms of the arm's length employees are perhaps the most relevant evidence but this is of limited assistance here because there is no evidence that the arm's length employees were employed in a similar capacity to Mr. Virga. Mr. Virga was a responsible and trusted employee, capable of dealing with customers, providing estimates and potentially being the successor to his father.
>
> [19] Another arm's length comparison that was made at the hearing was whether Mr. Virga would work under similar terms and conditions if he were working for The Home Depot. This comparison similarly is of little assistance because the working conditions at a large retail chain such as The Home Depot are bound to be much different than the conditions at a small family run business. The essential question is whether Mr. Virga would have similar employment terms if he and C&B were dealing at arm's length, not if Mr. Virga was employed by a hypothetical employer.
>
> [20] There is therefore little evidence to assist with the arm's length comparison and the comparison must largely be determined based on common sense. The appellants argue that Mr. Virga was given more responsibility than an arm's length employee. I think that it is a reasonable assumption that in a small business a father would have more trust in a son and give him more responsibility in dealing with the business affairs, especially financial matters such as estimating, than an arm's length employee. The appellants also argue that Mr. Virga would not have worked overtime without pay and used his own tools and cell phone without reimbursement. I also think that this is a fair argument. Mr. Virga was paid as if he worked regular hours whereas in fact there was considerable work to be done outside those hours for which Mr. Virga was not paid. If he had been dealing at arm's length with C&B, he would not have been as willing to contribute to the business as he did without sufficient compensation.
>
> [21] For these reasons, I conclude that Mr. Virga's terms and conditions of employment are not substantially similar to what they would be if he had been dealing at arm's length with his employer.

[22] The case of *Neeralta Welding & Sales Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2004] T.C.J. No. 350; 2004 TCC 475, was heard by Woods, J. two days following *C & B Woodcraft*, *supra*, and concerned appeals by two brothers who worked for a corporation owned by their parents. Subsequent to a review of the

evidence, Justice Woods did not confirm the decision of the Minister that the employment of the brothers was insurable. In deciding otherwise, Justice Woods – at paragraphs 10 and 11 – commented as follows:

> [10] The arm's length test in paragraph 5(3)(b) requires a comparison of the actual terms and conditions of employment to what they might be if the Wierenga brothers were dealing at arm's length with Neeralta Welding. This appeal is similar to others that I heard the same week involving businesses managed by the fathers of the appellants where the employment relationship was substantially affected by this relationship. It would be surprising if this were not the case. Generally, children working in a small family business tend to put in extra hours for which they are not paid, they tend to be less rigorous in requesting reimbursement of employment related expenses and they tend to blur the distinctions between ownership of equipment by the employer and the family personally. The fathers, on the other hand, tend to show more trust of family members and give them greater responsibilities than they would assign to arm's length employees and involve them more in important business decisions and financial matters. The fathers might also be more lenient with taking time off for personal matters and the compensation paid to the children might be affected by their personal situation.
>
> [11] The terms and conditions of employment of John and Robert Wierenga were certainly influenced by a number of these factors that are not typical of arm's length employment. These factors are listed above and it is not necessary to repeat them. For these reasons, I conclude that John and Robert Wierenga's terms and conditions of employment are not substantially similar to what they would be if they had been dealing at arm's length with their employer.

[23] The case with a fact situation very similar to the one in the within appeal is *Devries v. Canada (Minister of National Revenue – M.N.R.)*, [2002] T.C.J. No. 179. I decided that appeal and confirmed the decision of the Minister that Devries was engaged in insurable employment. The circumstances of the employment at issue are contained within my comments at paragraph 12 of the judgment:

> [12] In the within appeal, the Minister found the appellant to have been under the control of the Management Committee and that his salary and authority to negotiate leases - and set rental rates - had been established by that group. He worked regular hours and was paid a fair and reasonable compensation package - including vacation pay, company vehicle, medical and dental benefits, that appears to have been normal within that industry. The appellant was required to perform the service personally and did so within the context of a normal working week, barring exceptional circumstances when extra work was required. The appellant was paid regularly and was not required to incur any expenses related to the discharge of his duties. His remuneration was not linked to the profitability of Holdings as a result of its participation in Omniplex. His mother and father controlled 100% of the voting shares in Holdings, a corporation that was a 50-50

> partner in the business being operated as Omniplex. The Unger family held the other equal interest through their corporation, BCL and in the event there had been issues arising concerning the performance of the appellant, the shareholding structure would not have protected him from discharge since he held none of the voting shares of Holdings, although he was a Director. When he signed leases on behalf of Holdings, he did so as a Director and any liabilities arising from that role were created by statute - or derived from common law - and did not flow from his employment as Property Manager. When one looks at the overall circumstances of the appellant's employment, the picture that emerges is of a hard-working, responsible, reliable individual who was paid a reasonable salary to carry out an important function. He may have been underpaid - somewhat - but he also had an interest in the welfare of Holdings both as a family member and as a holder of non-voting shares. During the course of a 30-year working life, he had chosen to work for businesses owned and operated by his family. His parents had established a method - following their death - for devolution of their property interest - in Omniplex - unto the appellant and his siblings. Those factors - while relevant - do not detract from the overall analysis of various indicia of employment considered by the Minister in the course of discharging the duty required by paragraph 5(3)(*b*) of the *Act*. When one regards the manner in which the appellant carried out his duties - as directed by the Management Committee - it is difficult to identify any advantages or benefits accruing to him that would not have been available to another - non-related - person fulfilling the executive position of Property Manager. Certainly, there is no evidence to suggest that the appellant's right to any inheritance from his parents is dependent on his continuing employment with Holdings and its participation in the Omniplex joint venture. The appellant's prediction that no non-family member would ever be hired for that position may prove to be accurate but that is not the point. The question is whether or not it is reasonable to conclude that the parties would have entered into a substantially similar contract of employment *if* they had been dealing with each other at arm's length. In the within appeal, there was evidence of sufficient separation between the appellant's function as Property Manager and his personal circumstances - as one of the elder DeVries children - for the Minister to have answered that inquiry in the affirmative.

[24] There are some significant differences between the facts in *Devries* and in the within appeal. First, the employee – Devries – was answerable to a Management Committee composed of representatives from the entity that was a 50-50 partner with the corporation wholly owned by his parents. His authority to negotiate and set rates was fixed by that committee. Devries worked a normal work week unless exceptional circumstances intervened. His remuneration was not linked to the profitability of his employer and although I found he may have been underpaid “somewhat”, noted that he held non-voting shares in the family corporation. The overall package of remuneration was normal within the property management industry. In *Devries*, as in

the within appeal, the right to inheritance was not dependent on the employee's continued employment with the related corporation.

[25] There is a substantial body of jurisprudence arising from appeals by the Commission or a person affected by a decision made by the Minister pursuant to paragraph 5(3)(*b*) of the *Act*. The results vary depending on the finding of particular facts by the judge and it can appear odd to many readers that even though there is not a marked difference between some of the employment situations under review, one decision will be opposite to another. There are cases where the employment circumstances point clearly in one direction. However, there are others like those in the within appeal where some factors tend towards one conclusion and others run counter to that flow. The onus is on the Appellant to prove on a balance of probabilities that the decision of the Minister was incorrect and having regard to all the evidence, I find it has discharged that burden.

[26] The appeal is allowed and the decision of the Minister is varied to find that:

> the employment of Brett Caldwell with Caldwell Industries Co. Ltd. from February 5, 2005 to December 31, 2006 was not insurable.

Signed at Sidney, British Columbia, this 12th day of February, 2009.

"D.W. Rowe"

Rowe D.J.

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