Docket: 2004-4005(EI)

BETWEEN:

JACINTHE GARNEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Denise Bellefeuille (2004-4008(EI))
June 1, 3, 8, 9 and 10 and October 6, 2005, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant: Roch Guertin

Counsel for the Respondent: Benoît Mandeville

JUDGMENT

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

Signed at Ottawa, Canada, this 29th day of May 2006.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 15th day of March 2007.
Monica F. Chamberlain, Reviser

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Citation: 2006TCC160
Date: 20060529
Dockets: 2004-4005(EI)
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BETWEEN:

JACINTHE GARNEAU,
DENISE BELLEFEUILLE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Archambault J.

[1] The Appellants, Jacinthe Garneau and Denise Bellefeuille, appeal from decisions handed down by the Minister of National Revenue (the **Minister**) concerning the insurability of their employment with Boiserie Dubé & Associés Inc. (the **Payer**), a company controlled by Joseph Dubé. The material times relating to Ms. Garneau's work (the **Garneau periods**) are the following:

- May 5, 1997 to December 12, 1997
- May 31, 1998 to November 7, 1998
- June 7, 1999 to October 22, 1999
- May 22, 2000 to October 6, 2000
- March 4, 2001 to June 22, 2001.

[2] Those germane to Ms. Bellefeuille's work (the **Bellefeuille periods**) are:

- June 8, 1997 to September 12, 1997
- June 21, 1998 to October 15, 1999
- April 17, 2000 to September 1, 2000
- April 16, 2001 to August 31, 2001.

[3] Concerning Ms. Garneau, the Minister stated in his Amended Reply to the Notice of Appeal that she [TRANSLATION] “was not employed in insurable employment...because...there was no genuine contract of service” between her and the payer (paragraph 11).[1] [TRANSLATION] “In the alternative, he submitted that the Appellant did not deal at arm’s length with the payer during the periods at issue pursuant to paragraph 5(3)(*a*) of the *Employment Insurance Act* [**EIA**] and paragraph 251(1)(*c*) of the *Income Tax Act* [**ITA**] and, consequently, the Appellant’s employment, if employment it was, was excluded pursuant to paragraph 5(2)(*i*) of the [EIA] (paragraph 12).” Finally, according to the Minister, paragraph 5(3)(*b*) of the EIA was not applicable in the case at bar.[2]

[4] Concerning Ms. Bellefeuille, the Minister submitted in his Amended Reply to the Notice of Appeal that she was not employed in insurable employment because there [TRANSLATION] “was no employment” (paragraph 10). [TRANSLATION] “In the alternative, should the Court find that the Appellant was an employee of the payer..., he submitted that there was no genuine contract of employment” (paragraph 11). Finally, the Minister maintained that, even if there were a genuine contract of employment, it would be excluded from insurable employment because of the non-arm’s length relationship between Ms. Bellefeuille and the payer “under paragraphs 251(1)(*a*) and 251(2)(*a*) of the [ITA]” (paragraph 12), and he [TRANSLATION] “submitted that persons dealing at arm’s length would not have entered into a contract of employment substantially similar to the one between the Appellant and the payer” (paragraph 13). Ms. Bellefeuille was a person related to the payer because she was the wife of Mr. Dubé.[3]

Factual background

[5] The Appellants are represented by the same counsel and they have agreed to have their appeals heard on common evidence. The hearing of these appeals,

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1 This is a new ground raised by the Minister before the Court at the appeal stage. The appeals officer relied only on the alternative ground (Exhibit I-18) to support his decision, having concluded that the worker and the payor were not dealing with each other at arm’s length because they were related persons to whom paragraph 251(1)(*a*) applied (and not 251(1)(*c*) as counsel for the Minister maintains).

2 Having found that Ms. Garneau and the payor were related persons, the appeals officer was satisfied that they [TRANSLATION] “would not have entered into such a contract of employment if they had been dealing with each other at arm’s length” (Exhibit I-18, p. 7).

3 Both with regard to Ms. Garneau and Ms. Bellefeuille, counsel for the Minister raised new arguments in his written submissions or clarified his arguments. The arguments will be described below under the heading “Analysis”.

initially scheduled for one day, lasted six days: five days in June 2005 to hear the evidence and one day for argument on October 6, 2005. Counsel for the Minister, who had undertaken to file written submissions on September 30, 2005, submitted a 227-page document. Counsel for the Appellants made oral submissions. For a better understanding of the scope taken on by these appeals, it is helpful to describe the circumstances surrounding the progress of the two cases.

- *The HRDC investigation*

[6] The request that the Employment Insurance Commission of Canada (the **Commission**) made to an employee (**insurance officer**) of the Canada Revenue Agency (**Agency**) concerning the insurability of the Appellants' employment followed an investigation by the Department of Human Resources Development Canada (**HRDC**). Following an anonymous tip in September 2001, HRDC conducted an investigation of the payer that continued until the summer of 2003.[4] The following is an excerpt from HRDC's "Investigation Report – penalty on the employer" (Exhibit I-27, page 2):

> [TRANSLATION]
>
> The investigation revealed that some employees worked full time for the business while receiving employment insurance benefits, that the employer had issued false or deceptive Records of Employment not reflective of reality and that there were employees who unabashedly worked under the table.
>
> We especially noted that Boiserie Dubé & Associés Inc. had used employment insurance funds to pay the salaries of employees and family members, doing so in an ongoing and repetitive manner, following an "established pattern", since the start of the business early in 1997. The investigation also showed that the employer began this conduct in 1996 when the two shareholders were working for another business as employees (Boiserie D.C.).
>
> [Emphasis added.]

[7] It is apparent that the facts of this case are very similar to those in *Massignani v. Canada*, 2004 TCC 75 and *Pourvoirie au pays de Réal Massé Inc. et al. v. Canada*, 2004 TCC 582. As Létourneau J. wrote in *Desaulniers v. Canada*, 2006 FCA 15 [5] paragraph 1, it was "a scheme by which the Employment/Unemployment Insurance benefits they received financed to a large extent the salaries their employer paid them" (**scheme**).

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4 Exhibit I-18, page 3, para. 3.

5 This is the appeal of one of the Appellants in *Pourvoirie au pays de Réal Massé Inc.*

[8] In her investigation report, the HRDC investigator recommended the imposition of penalties and that warning letters be sent to the payer for committing offences against the EIA, [TRANSLATION] "namely, [for] issuing a false Record of Employment, issuing 11 erroneous Records of Employment, and helping and participating with a worker to receive benefits while working full time" (Exhibit I-27, last page). The total amount of benefits [6] overpaid to eight employees, including Ms. Garneau, Ms. Bellefeuille and Guylaine Dubé, was $73,015 and the total amount of the penalties imposed on these recipients was $18,144. The investigator went on to say:

> [TRANSLATION]
>
> It is important to note that the total amount of the overpayments and penalties for the claimants would have been far greater but for the delays that we experienced in meeting with the employer and obtaining the documents needed to conduct our investigation and make decisions, while complying with the limitation periods in the workers' cases.
>
> There would also have been a greater number of offences against the Act by the employer for the same reasons.

[9] The investigator wrote in her report that Ms. Garneau had completed a number of Records of Employment containing false or misleading information. For example, when she was an employee of Boiserie D.C. Inc. (**BDC**), she prepared her own Record of Employment, which was signed by Mr. Dubé when he was no longer an employee of BDC; she gave as the reason for the termination of employment a lack of work, whereas she had left BDC to join the payer's company as a shareholder and employee (Exhibit I-27, pages 3, 4 and 5). Ms. Garneau also filed a claim for unemployment benefits on January 14, 1997 containing the same misleading information, that is, that a lack of work was the reason for the termination of her employment with BDC (Exhibit I-2). For the employees or alleged employees of BDC, Ms. Garneau completed Records of Employment on which Marcel Maltais' signature was forged. This is true, *inter alia,* of the Records of Employment for Guylaine Dubé, the daughter of Mr. Dubé, Stéphane Laferrière and Gaston Dubuc (Exhibit I-14). Ms. Dubé's Record of Employment is also misleading since she never worked for BDC. As for Mr. Laferrière, the reason given for the termination of employment was a lack of work and the last day of

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6 In these reasons, the term "benefits" designates employment insurance benefits, unless the context indicates otherwise.

work was given as December 21, 1996 (Exhibit I-14), whereas Mr. Laferrière worked for BDC until February 22, 1997, if one is to go by the Record of Employment signed by Monique Dugas (Exhibit I-27, page 4 and Exhibit I-17). On the Record of Employment for Mr. Dubuc, Ms. Garneau indicated the reason for the termination of employment as a lack of work, whereas Mr. Dubuc had voluntarily quit his job in order to work for the payer (Exhibit I-27, pages 4 and 5, and Exhibit I-30 (statutory declaration by Mr. Dubuc)).

[10] The investigation report describes a number of misleading and erroneous Records of Employment submitted to HRDC by the payer. At a meeting with the investigator on May 10, 2002, Ms. Garneau admitted that she had prepared all of them (Exhibit I-32, page 4). With regard to Mr. Dubuc's Record of Employment, the investigator said that this worker had admitted that he began his employment in February 1997, and not on April 20, 1997, as the Record of Employment indicates. Furthermore, she reported that he did not stop working for the payer because of a lack of work but because he had decided instead to quit his job. She adds [TRANSLATION] "that there was an agreement with the employer so that the worker would not have any trouble with Employment Insurance if he indicated a lack of work" (Exhibit I-27, page 5, and Exhibit I-30 (statutory declaration by Mr. Dubuc)). The payer's version is contained in the investigator's report (Exhibit I-27, page 5): [TRANSLATION] "The employer confirms that Gaston Dubuc began to work for him as of February 1997, but only after reading the documents in evidence. He stated, however, that Gaston Dubuc worked as a subcontractor from February 1997 to 19-04-97, as a self-employed employee. This statement cannot be considered credible."

[11] The investigator wrote with regard to Stéphane Laferrière:[7]

> [TRANSLATION]
>
> This worker acknowledges that he began his employment with this company on 24-02-97 instead of on 13-04-97, as recorded on the Record of Employment. He stated <u>that he received Employment Insurance benefits while working full time, that he knew it was illegal, but that Joseph Dubé had told him there was no risk</u> because the cheques that he gave him were for his expenses.

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[7] At page 5 of the report (Exhibit I-27). See also the statutory declaration of Mr. Laferrière (Exhibit I-30).

> For his part, the employer stated that he knew that Stéphane Laferrière was receiving Employment Insurance benefits, but that the worker wanted him to write the cheques for him in his spouse's name.
>
> We have in evidence cheques dated from before 13-04-97, either made out to the worker, and not to his spouse, or to Réno-Dépôt, and countersigned by the worker.
>
> [Emphasis added.]

[12] The investigator's report contains many cases like that of Mr. Laferrière. The report also describes other kinds of arrangements in which Mr. Dubé was involved, *inter alia*, the arrangement with Nancy Ménard described at page 8:

> [TRANSLATION]
>
> The worker stated that she had definitely worked for Boiserie Dubé & Associés Inc. from 19-03-01 to 25-09-01. However, she said that she had an arrangement with the boss, Joseph Dubé, that, <u>instead of a raise, he would pay her for an hour or more on her pay cheque.</u>
>
> [Emphasis added.

- *<u>Decisions by the insurance officer</u>*

[13] When he received the requests for decision concerning the insurability of the Appellants' employment in the summer of 2003, the insurance officer consulted the voluminous documentary evidence assembled by the HRDC investigator. Among the documents were numerous summaries of the investigator's interviews with the payer's shareholders, Mr. Dubé's spouse, his children and the employer's employees and former employees. He later interviewed all of them and they confirmed to him what they had already told the investigator. Relying in part on the statement of Guylaine Dubé that Ms. Bellefeuille had not worked for the payer, the insurance officer found that she had not been employed with the payer in insurable employment. With regard to Ms. Garneau, the insurance officer found that her employment was excluded from insurable employment because she and the payer were not dealing at arm's length.[8]

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[8] Exhibits I-38 and A-26.

- *The admissions*

[14] In making his decision concerning Ms. Garneau, the Minister assumed the following facts, which are set out in his Amended Reply to the Notice of Appeal:

[TRANSLATION]

8. ...

(a) the payer was incorporated on November 7, 1996; [admitted]

(b) the payer operated a business manufacturing wooden stairs and various kinds of wood trim; [admitted]

(c) the payer's shareholders with voting shares were

Joseph Dubé	75% of the shares	
The Appellant	25% of the shares;	[admitted]

(d) Until 2002, according to the constitution of the payer, the Appellant was director of the payer; [admitted]

(e) on December 4, 1999, the Appellant and Joseph Dubé began a conjugal relationship; [admitted]

(f) the Appellant had been hired by the payer as a secretary-bookkeeper; [admitted]

(g) the Appellant's duties were billing, bookkeeping, doing the payroll and acting as receptionist for the payer; [admitted]

(h) the Appellant worked year-round for the payer on the premises of the business; [denied]

(i) on May 10, 2002, in a statement to an HRDC representative, the Appellant stated that, when she was receiving unemployment benefits, she may have worked fewer hours, maybe half-days instead of full days; [denied]

(j) the Appellant continued to work for the employer after her alleged layoffs; [denied]

(k) the Appellant had been the mistress of Joseph Dubé, the payer's other shareholder, since 1996.[denied]

9. The Deputy Attorney General of Canada adds that:

(a) on December 19, the payer gave the Appellant a Record of Employment that indicated the first day of work as May 5, 1997, and the last day of work as December 12, 1997, and indicated 1,085 insurable hours and insurable earnings of $16,275.00; [admitted]

(b) on November 12, 1998, the payer gave the Appellant a Record of Employment that indicated the first day of work as May 31, 1998, and the last day of work as November 7, 1998, and indicated 1,130 insurable hours and insurable earnings of $17,500.00; [admitted]

(c) on November 3, 1999, the payer gave the Appellant a Record of Employment that indicated the first day of work as June 7, 1999, and the last day of work as October 22, 1999, and indicated 795 insurable hours and insurable earnings of $15,900.00; [admitted]

(d) on October 12, 2000, the payer gave the Appellant a Record of Employment that indicated the first day of work as May 22, 2000, and the last day of work as October 6, 2000, and indicated 800 insurable hours and the insurable earnings of $16,000.00; [admitted]

(e) on July 4, 2001, the payer gave the Appellant a Record of Employment that indicated the first day of work as March 4, 2001, and the last day of work as June 22, 2001, and indicated 640 insurable hours and insurable earnings of $11,400.00; [admitted]

(f) the Records of Employment do not reflect reality with respect to the periods worked or the number of hours worked by the Appellant; [denied]

(g) the payer and the Appellant entered into an arrangement to qualify the Appellant to receive unemployment benefits while she continued to work for the payer. [denied]

(h) The Appellant, Joseph Dubé and the payer acted in concert in the context of the Appellant's contract of employment for the payer. [denied]

[15] In rendering his decision concerning Ms. Bellefeuille, the Minister assumed the following facts, which are set out in his Amended Reply to the Notice of Appeal:

[TRANSLATION]

8. ...

(a) the payer was incorporated on November 7, 1996; [admitted]

(b) the payer operated a business manufacturing wooden stairs and various kinds of wood trim; [admitted]

(c) the majority shareholder, with 75% of the voting shares of the payer, was Joseph Dubé; [admitted]

(d) the Appellant is the wife of Joseph Dubé; [admitted]

(e) the Appellant is a legal secretary and she worked for notaries' offices at the same time she claims to have worked for the payer; [denied]

(f) the Appellant was allegedly hired by the payer as a secretary; [denied]

(g) the Appellant's duties for the payer involved typing letters, preparing cases for small claims court and delivering files to the payer's lawyer, whereas in reality the Appellant rendered little or no services to the payer; [denied]

(h) on September 29, 1997, the payer gave the Appellant a Record of Employment showing the first day of work as June 8, 1997, and the last day of work as September 12, 1997, and indicated 224 insurable hours and insurable earnings of $3,360.00; [admitted]

(i) on October 20, 1999, the payer gave the Appellant a Record of Employment that indicated the first day of work as June 8, 1997 (corrected to June 21, 1998) and the last day of work as October 15, 1999, and indicated 1,180 insurable hours and insurable earnings of $12,800.00; [admitted]

(j) on September 8, 2000, the payer gave the Appellant a Record of Employment that indicated the first day of work as April 17, 2000, and the last day of work as September 1, 2000, and indicated 450 insurable hours and insurable earnings of $8,110.00; [admitted]

(k) on September 7, 2001, the payer gave the Appellant a Record of Employment that indicated the first day of work as April 16, 2001, and the last day of work as August 31, 2001, and indicated 400 insurable hours and insurable earnings of $5,620.00; [admitted]

(l) the Records of Employment do not reflect reality with respect to the dates the Appellant worked or her hours or earnings. [denied]

- *Work prior to 1997*

Jacinthe Garneau with Quincaillerie

[16] Ms. Garneau worked for Dragon et Chapdelaine inc. (**Quincaillerie**) from June 1979 to October 20, 1995. The termination of this employment was due to the closing of the business. Ms. Garneau described herself as a bookkeeper on the Record of Employment that she had prepared.[9] Quincaillerie belonged to a group of building contractors, including a certain Mr. Maltais. The latter considered Ms. Garneau as his number two. At one time, Quincaillerie had a division that manufactured wooden stairs and various kinds of wood trim. The division was known as Boiserie D.C. [10] At some unspecified time, but probably when Quincaillerie[11] closed down, the woodwork division was transferred to BDC. The shop foreman of this division was Joseph Dubé who had been employed in the division since 1993 (Exhibit I-14).

[17] Quincaillerie operated a larger company than BDC or the payer. It had between 15 and 20 employees, one of whom was a bookkeeper.[12] Quincaillerie's sales were $15,000,000; the payer's fluctuated around $1 million. For the 2000, 2001 and 2002 calendar years, the payer's sales were as follows:[13]

Table 1
Payer's sales

	2000	2001	2002
January	26,300	61,470	54,819
February	35,560	39,310	0
March	40,970	82,520	161,490
April	79,930	125,450	29,020
May	100,960	166,170	161,630
June	108,890	129,050	190,900
July	48,900	31,760	143,000
August	93,440	118,900	124,000
September	200,660	67,780	122,850
October	3,990	52,310	144,773
November	75,160	42,360	37,100
December	83,715	85,710	N/A
	898,475	1,002,790	1,169,582

9 Exhibit I-12.
10 D.C. stands for Dragon and Chapdelaine.
11 See Exhibit A-8, page 2.
12 According to the version of Mr. Maltais. According to Ms. Garneau's version, there were two of them.
13 These figures were provided by counsel for the Appellants and appear in the report on an appeal of each of the Appellants (see Exhibits I-18 and I-40).

[18] According to the payer's financial statements for the 1998 to 2000 fiscal years, sales and profits (losses) were as follows:[14]

Table 2
Payer's sales and profits

	31/03/98	31/3/99	31/12/00
Sales	529,745	977,653	898,593
Profits (losses)	(67,467)	4,395	21,141

[19] When she was employed by Quincaillerie, Ms. Garneau said, she earned $550 to $575 per week. In addition, she said, she received a year-end bonus, which allegedly increased her weekly salary to $800. In his testimony, Mr. Maltais stated that Quincaillerie had established a bonus plan for its two managers. He doubted that such a plan had been set up for Ms. Garneau. If it had, she would have had to receive a bonus of $11,700, representing 39% of her base salary in order for Ms. Garneau's statement to be accurate, which is unlikely.[15] Moreover, the Record of Employment does not mention any other form of compensation, such as a bonus (Exhibit I-12).

[20] Ms. Garneau said that she had been paid by the week by Quincaillerie and not by the hour. However, on her October 24, 1995, claim for unemployment insurance benefits, filed after this business closed, Ms. Garneau wrote [TRANSLATION] "*$12 an hour*" in answer to the question [TRANSLATION] "*What were your normal earnings before deductions?*" In answer to the question [TRANSLATION] "*Minimum acceptable base salary*", she wrote [TRANSLATION] "*$10 to $12*" (see Exhibit I-13). In addition, according to the Record of Employment (Exhibit I-12) dated October 20, 1995, that Ms. Garneau herself prepared and signed, her weekly earnings during the 20 weeks preceding the termination of her employment fluctuated between $384 and $528. The longest period without a variation was four weeks. Assuming that her hourly wage was $12, the results are as follows:

---

14 Exhibit I-8. The financial statements for 2001 and 2002 were not in evidence.

15 (800 x 52) − (575 x 52) = 11,700. The amount of the bonus was allegedly $14,144, representing 51.5% of her base salary, using a salary of $528, i.e., the highest appearing on her Record of Employment (Exhibit I-12). See table 3 below.

Table 3
Ms. Garneau's earnings at Quincaillerie

Number of weeks	Weekly wage	Number of hours
1	815[16]	?
9	528	44
4	504	42
1	456	38
3	432	36
1	408	34
1	384	32
Total 20		

These facts show, then, that Ms. Garneau was paid by Quincaillerie on the basis of the hours that she actually worked.

[16] Corresponds to the last week of work and could include the vacation pay of $460.44 shown in box 17A. See notes 18, 20, 21 and 22 for similar examples.

Jacinthe Garneau at BDC

[21] After a little over two months of being unemployed following the closing of Quincaillerie, Ms. Garneau was hired by BDC on January 8, 1996, to perform duties similar to those she had performed at Quincaillerie. On her claim for unemployment benefits dated January 14, 1997 (Exhibit I-2), Ms. Garneau indicated $525 as the earnings paid by BDC for 35 hours of work, which corresponds to an hourly rate of $15. However, it must be emphasized that the weekly earnings correspond to what she received at Quincaillerie. Wages of $525 at an hourly rate of $12 yields close to 44 hours a week. In addition, the minimum acceptable salary indicated on her claim for benefit is $12 an hour for employment as an accountant or secretary. It is more likely that BDC hired Ms. Garneau on conditions similar to those she had had at Quincaillerie before her layoff and that her hourly rate at BDC was $12 (and not $15), then. According to her Record of Employment (Exhibit I-2), which was prepared by her, signed by Mr. Dubé and dated December 20, 1996,[17] her weekly salary fluctuated between $450 and $525 in the 20 weeks preceding her departure on December 20, 1996. On the assumption that her hourly salary was $12, the following result is obtained:

Table 4
Salary of Ms. Garneau
at BDC

Number of weeks	Weekly salary	Number of hours
4	450	37.5
15	525	43.75
1	750[18]	?
Total 20		

The facts also reveal that Ms. Garneau was probably paid by the hour instead of by the week.

Joseph Dubé, Denise Bellefeuille and Guylaine Dubé at BDC

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17 Whereas he supposedly quit his job, according to Ms. Garneau, two months earlier. At the hearing, Mr. Dubé explained the situation saying that he had signed blank Records of Employment! See also other explanations at para. 27 of these Reasons.

18 Corresponds to the last week of work. The amount shown as vacation pay in box 17A is $643.50.

[22] According to Mr. Dubé's claim for benefits dated January 14, 1997,[19] his weekly salary at BDC was $250[20] for 37 hours of work as "Director", which makes for an hourly wage of $6.76! Is it not surprising, incidentally, to learn that the names of his wife, Ms. Bellefeuille, and his daughter, Guylaine, were entered in the payroll journal of BDC and that they each received an amount of $250 per week? If the weekly salaries of these two individuals were attributed to Mr. Dubé, he would have received a salary of $750, which would correspond to an hourly wage of $20.27. This looks more reasonable than $6.76.

[23] According to the Record of Employment of July 29, 1996, prepared and signed by Ms. Garneau, Ms. Bellefeuille allegedly worked at BDC from April 9, 1996, to July 12, 1996 (Exhibits A-17 and I-33). Her weekly salary was $250 for the last 14 weeks before the termination of her employment, except for the very last week in which it rose to $380.[21] In addition, according to her Record of Employment (Exhibit I-14), Guylaine Dubé worked at BDC from August 12, 1996, to December 20, 1996.[22] The last day of her alleged employment matches that of her father. The name of the contact person appearing on this Record of Employment is Ms. Vachon, i.e., the married name of Ms. Garneau, and it was she who completed the form.

[24] Oddly enough, Mr. Dubé's justification for his low salary was his desire to show his bosses that he had the ability to properly manage BDC. However, he said he told BDC that he might need help to do his work and that BDC should pay the people he might use. This would explain the remuneration paid to his daughter and his wife. Moreover, he acknowledged that he received a pension from CSST for a permanent partial disability and that, by agreeing to work for $250 a week, his monthly pension went from $2,400 to $1,068. Surprisingly, he maintained that he

---

19 Exhibit I-16. Note that the date is the same as the date on Ms. Garneau's claim for benefit. When HRDC informed Mr. Dubé that he was ineligible for benefits (probably because he was in the process of setting up the payor's new business), he quickly dropped his claim.

20 According to his Record of Employment (Exhibit I-14), Mr. Dubé received $250 for each of the last 20 weeks before his departure, with the exception of the last week for which Ms. Garneau wrote $500. On the other hand, it is probable that this figure includes the vacation pay of $250 shown in box 17A.

21 This amount seems to include the vacation pay of $130 shown in box 17A on the form.

22 Ms. Garneau wrote as pay for her last 19 weeks $250, with the exception of the very last one for which the amount of $410 seems to also include the vacation pay of $160 ($250 + $160 = $410) shown in box 17A of the form.

could have received a weekly salary of $600 without having this pension reduced.[23]

[25] However, in her testimony at the hearing and in a statutory declaration (Exhibit I-15), Guylaine Dubé acknowledged that she had not worked for BDC and that all the cheques that she had received from BDC had been endorsed and given to her mother. Mr. Dubé acknowledged in his testimony that his daughter Guylaine had never actually worked for the business. As for Ms. Bellefeuille, Mr. Dubé claimed that she did legal research and prepared small claims cases for BDC. However, she was not the person who took the documentation for the claims and lawsuits to BDC's lawyer.[24]

Incorporation of the payer and the departure of Mr. Dubé and Ms. Garneau from BDC

[26] The payer was incorporated on November 7, 1996 (Exhibit I-3). The founder and first director of the company was Joseph Dubé. According to his testimony, the company was incorporated to acquire the assets of BDC, because they were for sale. Mr. Dubé's negotiations with Mr. Maltais, one of the shareholders of BDC, had turned out badly, he said, because the latter thought that some of the company stocks had disappeared and, although he could not prove it, he held Mr. Dubé responsible for this situation. Mr. Dubé claimed that Mr. Maltais agreed to sell the assets of BDC if he were given $50,000 without the other shareholders' knowledge, which Mr. Maltais denied in his testimony.

[27] In any event, Mr. Dubé was dismissed and then decided to start his own business through the payer. The evidence is contradictory as to the timing of Mr. Dubé's departure. According to Ms. Garneau, Mr. Dubé left BDC at the end of October or the beginning of November 1996, or two months before her own departure. On his claim for benefit of January 14, 1997 (Exhibit I-16), Mr. Dubé gave as his "last day of work" December 16, 1996 (a Monday). The Record of Employment prepared by Ms. Garneau and signed by Mr. Maltais shows the last day of work as December 20, 1996, i.e., the Friday of that week. According to Mr. Maltais, Mr. Dubé and Ms. Garneau had left their employment at BDC together, which corresponds with the dates on their respective Records of Employment.[25]

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23 In his submissions, counsel for the Respondent referred to sections 49, 52, 63 and 67 of the *Act respecting industrial accidents and occupational diseases* (R.S.Q., c. A-3.001) to argue that this was not the case.

24 According to the testimony of Pierre Lessard (vol. 3, p. 81, Q. 94, of the transcript).

25 Exhibits I-14 and I-2.

[28] Although Ms. Garneau indicated on her Record of Employment [26] of December 20, 1996, that the reason for the termination of her employment with BDC was a lack of work, Mr. Maltais stated at the hearing that he had tried to keep Ms. Garneau. Mr. Maltais had hired another chief executive officer for BDC and was counting on Ms. Garneau to continue to be — to use his expression — [TRANSLATION] "my eyes" in the management of BDC. On her claim for benefit, Ms. Garneau also indicated a "lack of work" as the reason for the termination of her employment (Exhibit I-2). Therefore, she stated the facts incorrectly on her Record of Employment and on her claim for benefit and this enabled her to obtain more benefit than she was entitled to.

[29] Testifying at the Minister's request, Mr. Maltais said that he later better understood the reason for Ms. Garneau's departure in December 1996 when Gaston Dubuc, a former BDC employee who joined the payer, told him three to five months after her departure that he had surprised Ms. Garneau and Mr. Dubé engaged in sexual activity in an office. According to Mr. Dubuc, Mr. Dubé and Ms. Garneau were living together at the time. According to the report of the appeals officer, counsel for the Appellants had stated in the presence of Mr. Dubé, at the meeting on May 19, 2004 in the Agency office, that Ms. Garneau had been the latter's mistress since 1996 (Exhibit I-18, paragraph 39).

[30] In testimony-in-chief, Mr. Dubé and Ms. Garneau denied that they had been lovers since 1996. On cross-examination, only Mr. Dubé denied having intimate relations with Ms. Garneau at BDC. Ms. Garneau did not testify again. According to Mr. Dubé, he only began to court Ms. Garneau in May or June 1997, when each of them was married. Their intimate relationship did not start until late in 1998. However, this version of the facts does not accord with the statements in the Amended Motion for Interim Relief, signed on October 6, 1998, by Ms. Garneau's counsel. According to this motion, the separation of Ms. Garneau and her husband took place around August 21, 1998, and there are six separate statements concerning Mr. Dubé, Ms. Garneau's "new spouse".[27] The motion is accompanied by a sworn statement by Ms. Garneau attesting to the truth of the facts set out in the motion (Exhibit A-2). According to Mr. Dubé's version, his cohabitation with Ms. Garneau did not begin until the end of December 1999, when he separated from Ms. Bellefeuille, [28] whereas Ms. Garneau puts the beginning of their

26 Exhibit I-2.
27 Ms. Garneau's divorce decree was dated February 15, 2000 (Exhibit A-2).
28 Ms. Bellefeuille and Mr. Dubé's divorce decree was not issued until 2005.

cohabitation in January 2000. However, counsel for Ms. Garneau admitted that the cohabitation began on December 4, 1999.[29]

- *Work with the payer from 1997 to 2001*

Joseph Dubé

[31] After the failure of the negotiations to purchase BDC's business and following his dismissal, Mr. Dubé looked for premises for the payer and also took steps to obtain financing. Mr. Dubé hoped to obtain government aid, but apparently had little success. The new premises were available as of February 1997 and some BDC employees came to work for the payer, including Jacinthe Garneau, Stéphane Laferrière and Gaston Dubuc.

[32] Once he was employed by the payer, Mr. Dubé continued to receive $250 a week, from 1997 to 2001;[30] Denise Bellefeuille and Guylaine Dubé continued to be paid by the payer just as they had been paid at BDC.

Jacinthe Garneau

[33] Ms. Garneau stated that she had left BDC to join the payer because she saw little future in that company and she wanted to invest in her own business.[31] She said that she had invested between $10,000 and $20,000 to start up the payer and her investment later rose to about $30 thousand.[32] According to Mr. Dubé's testimony, she did not invest the money directly in the payer, but made a loan to it instead. Although it is admitted that Ms. Garneau held 25% of the company's shares, she did not know what class of shares she held. According to the payer's financial statements, there were two kinds of shares in circulation, 400 class A

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29 No request to retract the admission was made to the Court.

30 See vol. 3, p. 292, Q. 896, of the transcript.

31 This confirms that it was not because of a lack of work that she left BDC. It was in fact a voluntary departure. Conflicting versions are related below under the heading "Credibility of the witnesses".

32 At a meeting with the HRDC investigator on May 10, 2002, Ms. Garneau stated that she had invested money in the payor, but did not recall the amount. In her meeting on July 14, 2003, with the insurance officer, Ms. Garneau said that she owned 20% of the shares of the payor, and that she did not know how much she had paid for these shares or how much she had received when she sold them (in 2001) to Mr. Dubé. Furthermore, in her claim for benefit of February 3, 1998, for her first period of unemployment with the payor, she indicated that she held 20% of the payor's shares whereas in reality she held 25%. (See page 29 of Exhibit I-38.)

voting shares, with a paid-up capital of $40 (or $0.10 per share) and class B non-voting shares, having a paid-up capital of $26,500 in 1997 and $55,600 as at March 31, 1998. According to the payer's shareholders' register, Ms. Garneau's shares were subscribed on November 20, 1996.

[34] However, according to Exhibit I-16, Mr. Dubé, on February 11, 1997, told an HRDC officer that he was the sole shareholder of the payer, that he had invested $20,000, that he had already leased premises in St-Hubert and planned to begin operating on March 1, 1997. In a statutory declaration to the Commission dated November 24, 1999, Mr. Dubé indicated that Ms. Garneau had purchased [TRANSLATION] "25% of the shares in April or March 1997" (Exhibit I-23). In his testimony at the hearing, he offered another version: it seems that it was either in June or July 1997 that it was decided to issue 100 class A shares to Ms. Garneau. A "unanimous shareholders' agreement" was allegedly signed by Mr. Dubé and Ms. Garneau on September 15, 1997 (Exhibit A-9). According to Mr. Dubé, the shareholders' register was crafted on February 18, 2002,[33] i.e., it had been backdated.

[35] Mr. Dubé, furthermore, tried to explain Ms. Garneau's presence as a shareholder and director of the payer as due to the advice he had received from a certain lawyer to the effect that he had to provide the names of three directors. Now, the articles of incorporation of the payer indicate that the number of directors could vary between one and ten. Moreover, as counsel for the Minister noted, only two directors are entered on the list of directors (Exhibit I-3), as at November 20, 1996, and they are Mr. Dubé and Ms. Garneau.

[36] The following table shows Ms. Garneau's salary with the payer according to the payroll journal:[34]

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[33] According to the statutory declaration of Gaston Dubuc (Exhibit I-30), Mr. Dubé had also promised him that he would be a shareholder of the payor, but Mr. Dubé apparently changed his mind later, which allegedly prompted Mr. Dubuc to leave his position as foreman for the payer in June 1997. However, Mr. Dubé had agreed to indicate "lack of work" as the reason for leaving.

[34] Exhibits A-10 to A-14.

Table 5
Ms. Garneau's salary with the payer according to the payroll journal

Periods		Weekly salary	Number of hours	Hypothetical hourly rate	Hourly rate (37.5) [35]
1997	May 4 – Dec. 12	525	35	15	14.00
1998	May 31 – June 20	600	40	15	16.00
	June 21 – Nov. 7	800	40	20	21.33
1999	June 6 – 12	700	35	20	18.66
	June 13 – Oct. 23	800	40	20	21.33
2000	May 22 – June 2[36]	700	35	20	18.66
	June 11 – July 15[37]	700	35	20	18.66
	July 16. – Oct. 7	800	40	20	21.33
2001	March 4 – 17	800	40	20	21.33
	March 18 – April 28	700	40	17.50	18.66
	April 29 – May 5	600	40	15	16.00
	May 6 – June 23	700	40	17.50	18.66

Although the payroll journal shows the number of hours for the weekly salary that was paid, Mr. Dubé stated that he did not keep track of Ms. Garneau's hours of work and that her salary did not reflect them. Consequently, the number of hours shown in the journal does not necessarily correspond to reality. Furthermore, according to Ms. Garneau, she generally worked from 35 to 40 hours per week.

[37] The following table provides information concerning Ms. Garneau's salary based on her claims for benefit:

[35] The hourly rates in this column were calculated on the basis of the number of weekly hours stated by Ms. Garneau at the hearing: from 35 to 40 hours, or 37.5 on average.

[36] In all probability, for only the net salary cheque is available. In addition, the net cheques for $512.22 were replaced by cheques with a higher amount, i.e., $605.92, but no explanation was provided (according to my recollection). The cheque for the week of June 4 is not available (Exhibit A-13).

[37] Some cheques are not available (Exhibit A-13).

Table 6
Ms. Garneau's salary with the payer based on the claims for benefit

Periods of work	Weekly salary	Number of hours	Hypothetical hourly rate	Salary requested
May 5 – Dec. 12, 97[38]	525	35	15	10-12[39]
May 4 – Nov. 13, 98[40]	800	40	20	600
June 7 – Oct. 22, 99[41]	800	40	20	N/A
May 22, – Oct. 6, 00[42]	800	40	20	700
March 4 – June 22, 01[43]	800	40	20	n/a (sick)

[38] After June 22, 2001, Ms. Garneau obtained from her physician medical certificates stating that she was unfit to work on account of depression for the period from June 26 to October 28, 2001 (Exhibit A-3). After that, she continued to receive benefits (supposedly because of a lack of work) until February 2002 (Exhibit I-29).

[39] Ms. Garneau said that she returned to work at the payer in about March or April 2002. After that, she filed no more claims for benefit. It should be noted that, as of December 2001, Ms. Garneau knew that HRDC was investigating the payer and some of its employees. At the time of the first meeting,[44] the investigation was not specifically focusing on Ms. Garneau or Ms. Bellefeuille, but rather on other employees of the payer. As long as the investigation dealt with the other employees, said the investigator, she received excellent cooperation. After she said that the investigation was focusing on all of the employees, including Ms. Garneau, the latter's attitude and that of Mr. Dubé changed. The investigator received less cooperation from them.

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[38] Exhibit I-5.

[39] $12 for the office work, $10 for the receptionist work.

[40] Exhibit I-7. It should be noted that the period stated by Ms. Garneau does not match the dates on the payroll journal appearing in table 5 or those on the Record of Employment (Exhibit I-7).

[41] Exhibit I-9.

[42] Exhibit I-10. Ms. Garneau replied that she was not related to the majority shareholder by reason of a common-law relationship whereas she had cohabited with Mr. Dubé since December 1999 (or January 2000). (Question 35.)

[43] Exhibit I-11. Ms. Garneau replied that she was not related to the majority shareholder by reason of a common-law relationship, whereas she had cohabited with Mr. Dubé since December 1999 (or January 2000). (Question 35.)

[44] At the meeting with the HRDC investigator in December 2001, Ms. Garneau was present on site when she was supposedly unemployed.

[40] According to the analysis by the HRDC investigator, the benefits received by Ms. Garneau in 1999, 2000 and 2001 represented the maximum weeks of benefits to which they were entitled, based on the Records of Employment that had been prepared (see Exhibit I-34). Ms. Garneau was again listed in the payer's payroll journal after receiving the maximum employment insurance benefits. For 1998, Ms. Garneau would have been entitled to 29 weeks of benefits whereas she received benefits for 25 weeks. That information is not available for 1997. Ms. Garneau's periods of employment and benefit periods for 1996 to 2001 are as follows:

Table 7
Ms. Garneau's periods of employment with BDC and the payer and her benefit periods

Work	Unemployment benefits[45]
Jan. 8, 1996 — Dec. 20, 1996*	Dec. 23, 1996 — May 3, 1997
May 5, 1997 — Dec. 12, 1997	Feb. 1, 1998 — May 29, 1998[46]
May 31, 1998 — Nov. 7, 1998	Nov. 8, 1998 —June 5, 1999
June 7, 1999 — Oct. 22, 1999	Oct. 24, 1999 — May 20, 2000
May 22, 2000 — Oct. 6, 2000	Oct. 8, 2000 — March 3, 2001
March 4, 2001 — June 22, 2001	June 24, 2001 — Oct. 20, 2001 (sick) Oct. 28, 2001 — Feb. 23, 2002

* Employment with BDC

[41] Because of financial problems, the payer negotiated for a compromise in April 2004, which negotiations were allegedly broken off in October 2004. It was at that time that the payer's business was allegedly sold to a new company controlled by a Mr. Pinsonneault. Ms. Garneau signed a five-year contract of employment with this company; she was to perform bookkeeping and receptionist duties. Her salary was $575 for a 38-hour workweek (or $15.13 per hour), to which was added a 5% commission on sales made by her, the sales work bearing [TRANSLATION] "no relationship, direct or indirect, with the employer's development and promotion efforts" (Exhibit A-5, Art. 2). This contract contained non-competition and non-solicitation clauses. Ms. Garneau was entitled to just two weeks' vacation per year.

Denise Bellefeuille with the notaries and the payer

[42] During the Bellefeuille periods, Ms. Bellefeuille had been employed as a legal secretary with some notaries since 1995 at least, as shown in the following

45 May include the two-week waiting period for which benefits are not paid.
46 The gap between December 12, 1997, and February 1, 1998, was not explained.

table compiled from the Records of Employment prepared by the notaries. For the purposes of comparison, Ms. Bellefeuille's periods of employment at BDC and the payer and those of Ms. Garneau have been added:

Table 8
Periods of employment of Ms. Garneau and Ms. Bellefeuille

	Ms. Garneau	Ms. Bellefeuille	
Year	**Payer/BDC**	**Payer/BDC**	**Notaries[47]**
1995			Nov. 4 − Dec. 31
1996	Jan. 8 − Dec. 20	April 9 − July 12	Jan. 1 − July 19
1997	May 5 − Dec. 12	June 8 − Sept. 12	April 7 − Oct. 17
1998	May 31 − Nov. 7	June 21 − Dec. 31	March 13 − Dec. 31
1999	June 7 − Oct. 22	Jan. 1− Oct. 15	Jan. 1 − Feb. 26 April 19 − July 30
2000	May 22 − Oct. 6	April 17 − Sept. 1	April 3 − July 21
2001	March 4 − June 22	April 16 − August 31	April 2 − Sept. 7

[43] According to the report of the meeting held by the HRDC investigator with Notary Aubertin, on April 24, 2002, Ms. Bellefeuille worked five days a week and often more (Exhibits I-36 and I-37). She even worked overtime on some Saturdays. The notaries, Ms. Gélinas and Mr. Aubertin, both said that Ms. Bellefeuille was not in good enough health to hold two jobs at once since a legal secretary's workload for a notary is very heavy in spring and summer, i.e., the periods that to a great extent correspond to the periods of her alleged employment with the payer, as shown in table 8.

[44] The pay summaries concerning Ms. Bellefeuille's employment at the payer (Exhibit I-25) provide the following information:

47 Exhibit A-23: Notary Francine Gélinas (November 1995 - February 1999) and Notary Michel Aubertin (April 1999 – July 2001).

Table 9
Ms. Bellefeuille's salary with the payer according to the pay summaries

Periods		Weekly earnings	Number of hours	Rate
1997	June 8 – Sept. 13	240	16	15
1998	June 21, 1998 – Jan. 2, 1999	240	16	15
1999	N/A			
2000	April 16 – July 15	250	N/A	N/A
	July 16 – July 22	360	N/A	N/A
	July 23 – August 19[48]	750	N/A	N/A
	August 27 – Sept. 2	750	N/A	N/A
2001	April 15 – August 11	260	N/A	N/A
	August 12 – Sept. 1	400	N/A	N/A

[45] Although Ms. Bellefeuille's Record of Employment of October 20, 1999, covers the period from June 21, 1998 to October 15, 1999, the payer's payroll journal ends on January 2, 1999, in the case of Ms. Bellefeuille (Exhibits I-25 and A-22). No explanation was provided to justify this. However, no probative value can be attached to the Record of Employment because it is obviously erroneous. Ms. Bellefeuille denied working continuously during the 17 months from June 1998 to October 1999. She also contradicts her statutory declaration, which was provided to the Commission on November 14, 1999, in which she confirmed that [TRANSLATION] "the hours given on the Record of Employment dated October 20, 1999, were definitely worked" (Exhibit A-25). She stated at the hearing that she only worked in the spring, which for her meant March or April to August. According to the Records of Employment, this version would be accurate for 2000 and 2001. In 1997, she did not start until June and allegedly ended her work in September. There is no data for 1998.

[46] The duties performed by Ms. Bellefeuille, included, according to her and Mr. Dubé, preparations for collecting the payer's debts. According to Mr. Dubé, it was Ms. Bellefeuille who obtained the cadastral lot numbers for the registration of legal mortgages. She would take some documents to a lawyer, Pierre Lessard. In his testimony at the hearing, Mr. Lessard estimated the number of visits by Ms. Bellefeuille to his office at 10 to 15 times a year, up until the beginning of 2000. He acknowledged that she may have come a little more often since she could

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[48] There is no pay summary for the period from August 20 to August 26, 2000, which could indicate that she did not work that week.

have simply handed the documents to his secretary without his seeing her. It is strange that Ms. Bellefeuille's services with respect to the lawsuits were only required in the "spring" — to use Ms. Bellefeuille's expression — namely, during the high season, whereas there does not appear to have been such activity during the rest of the year, during her periods of absence from the payer.

[47] Mr. Dubé acknowledged on several occasions that Ms. Bellefeuille was paid by the week and not on the basis of the hours actually worked. In any event, he did not know how many hours she worked for the payer.[49] In his statutory declaration of October 30, 2002, Mr. Dubé acknowledged that Ms. Bellefeuille was not subject to any schedule since she worked at home (Exhibit I-26). In the same statement, Mr. Dubé explained that Ms. Bellefeuille's remuneration had been changed for September and October 1999 because her hours had increased, but he could not say by how much. He claimed that the salary paid to Ms. Bellefeuille was established based on her skills and her salary at the notaries.

[48] Ms. Bellefeuille stated that she worked, on average, from 7 to 15 hours a week for the payer. But sometimes it was more: about twenty hours once in 1999 or 2000.[50] According to these figures, if we assume that she received $250 per week, Ms. Bellefeuille received an hourly wage equivalent to $16.66 based on 15 hours a week, $25 based on 10 hours and $35.71 based on 7 hours. A comparative analysis of Ms. Bellefeuille hourly rates with the payer, with BDC and with the notaries is presented below. It was prepared based on data collected by the HRDC investigator and from the payer's pay summaries and what was identified from the testimony at the hearing:

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49 When questioned at the hearing, Mr. Dubé was unable to evaluate the time required to prepare a small claims file and to conduct research at the registry office. When Mr. Dubé was asked to evaluate the number of hours that Ms. Bellefeuille devoted to the payor when she was paid $800 during summer 1999, Mr. Dubé provided two answers. In his first answer, he estimated it at 25 to 30 hours, and in his second answer, he was unable to provide an estimate. Using the most favourable assumption, or 30 hours, we obtain an hourly rate of $26.66 whereas, for 25 hours, the same pay would give an hourly rate of $32.

50 See pp. 239 and 240, volume 4 of the transcript.

Table 10
Ms. Bellefeuille's salary with the payer/BDC and the notaries according to the claims for benefit/investigation

	Payer/BDC			Notaries [51]		
Year	**Salary**[52]	**Hours**[53]	**Hourly rate**	**Salary**	**Hours**	**Hourly rate**
1996	250	11	22.72	335	35	9.57
1997	240	11	21.82	335	35	9.57
1998	240	11	21.82	335	35	9.57
1999	800[54]	40	20.00[55]	335[56]	35	9.57
				425[57]	35	12.14
2000	250 360 750	11 11 35[58]	22.72 32.72 21.42	425	35	12,14
2001	260 400	11 11	23.63 36.36	425	35	12.14

[49] To prove that the salary of $800 per week for September and October 1999 was in fact paid to Ms. Bellefeuille, Mr. Dubé indicated in his statutory declaration of November 24, 1999 (Exhibit I-23) that he would provide the cheques. However, the

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51 According to the information gathered by the HRDC investigator from Ms. Bellefeuille, in her claims for benefit and in the Records of Employment prepared by the notaries (Exhibits I-35, A-23 and A-26).

52 According to the information in table 9 and some statements of Ms. Bellefeuille.

53 According to Ms. Bellefeuille's testimony at the hearing, she worked from 7 to 15 hours a week. Unless otherwise indicated, I used the average figure of 11 hours in the table.

54 In a declaration to the Commission dated May 8, 2002, which she refused to sign (Exhibit I-35), summarized by the insurance officer (Exhibit A-26, page 2), Ms. Bellefeuille acknowledged filing a claim for benefit on October 21, 1999; [TRANSLATION] "she held a position as a secretary [with the payor], at a salary of $800.00 for 40 hours per week..." However, the pay summary for that pay was not produced in evidence. According to Ms. Bellefeuille, she worked for 6 or 7 weeks at $800 (Exhibit I-35, page 6).

55 Using the figure of 20 hours of work mentioned by Ms. Bellefeuille at the hearing yields an hourly rate of $40!

56 With Notary Gélinas, from January 1, 1999, to February 26, 1999 (Record of Employment of March 5, 1999, Exhibit A-23).

57 With Notary Aubertin, from April 19, 1999, to July 30, 1999 (Record of Employment of August 5, 1999, Exhibit A-23). In the beginning, her salary with Notary Aubertin was $400 (Exhibit I-35, page 3).

58 In a declaration to the Commission dated May 8, 2002 (Exhibit A-26), Ms. Bellefeuille acknowledged filing a claim for benefit on October 17, 2000: [TRANSLATION] "She stated that she worked there approximately 15 hours a week, but that in the last four weeks she worked 35 hours full time.

copies of the cheques that he sent to HRDC were forged: he replaced the $276.08 figure on six cheques by $476.08 and replaced the word "two" before the "hundred" by the word "four" (Exhibit I-24). When counsel for the Respondent described the forgery as the [TRANSLATION] "work of an artist", Mr. Dubé answered that it was the [TRANSLATION] "work of an imbecile".

Decisions of the appeals officer

[50] As for Ms. Bellefeuille, the appeals officer found that she was not employed in insurable employment during the Bellefeuille periods because she did not employed in "genuine employment". The reasons justifying this finding (Exhibit I-40, page 8) are set out below:

> [TRANSLATION]
>
> In this case, only one of the payer's lawyers, Mr. Lessard, said that he met with the worker on several occasions so that she could give him documents relating to the payer's receivables.
>
> A number of people were interviewed, including the worker's daughter who stated that the worker did not work for the payer whereas she allegedly replaced the secretary, Jacinthe Garneau.
>
> The HRDC investigation revealed several conflicting pieces of information (place of work, duties).
>
> The worker could not recollect her co-workers or customers when she was interviewed by HRDC in 2002.

[51] The impression given by the report is that there was no "genuine employment" because, like the insurance officer, the appeals officer was not satisfied that Ms. Bellefeuille had actually been employed. In the alternative, he concluded that, if there were employment, it would still not be insurable because of the non-arm's length relationship.

[52] As for Ms. Garneau, the insurance officer did not conclude that there was no genuine employment. Instead he found that there was no "insurable employment", and this was because of the exclusion mandated by paragraph 5(2)(*i*) EIA on account of the non-arm's length relationship between the payer and Ms. Garneau (Exhibit I-18).

Analysis

- *Void contracts of employment and absence of genuine employment*

Void contracts

[53] In his submissions, counsel for the Respondent raised two new arguments applicable to the Appellants. According to the first argument, there was no insurable employment because there was no valid contract of employment for the purposes of the *Civil Code of Québec* (**Civil Code**); the contracts were void owing to absolute nullity. According to the second argument, even if the contracts were valid under the Civil Code, the Appellants' employment was not "genuine employment" for the purposes of the EIA. Let us look at each of these arguments. First, the Appellants' contracts of employment were invalid because there was an unlawful cause. Counsel for the Respondent stated in his written submissions reproduced below:

> [TRANSLATION]
>
> 394. As the Respondent indicated above, the point of departure for interpreting the term "employment" for the purposes of the application of the EIA in the province of Quebec is Quebec civil law.
>
> 395. Article 2085 of the *Civil Code of Québec* provides that:
>
> > A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 396. As this Court has stated before,[3] a contract of employment in Quebec exists if the three essential elements of such a contract are proved: (a) the performance of work for a person, (2) for remuneration and (3) according to the instructions and under the direction or control of another person.
>
> 397. Where there are no instructions or direction or control, the work done for another person can be carried out under a contract of enterprise or for services. Articles 2098 and 2099 of the *Civil Code of Québec* provide that
>
> > 2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another

> person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

398. The Quebec Court of Appeal in *97980 Canada inc. v. Quebec (Deputy Minister of Revenue),*[4] recently held that, in determining the status of a worker, it is necessary to look at other elements besides subordination and it referred to the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*.[5]

399. This Court recently considered the tests stated by the Supreme Court in *Sagaz* in an employment insurance decsion.[6] ...

400. For work to be carried out under a contract of employment or a contract of enterprise (or for services), there must be (1) a contract, and (2) the work must be remunerated. What distinguishes one from the other is the existence or absence of subordination.

401. The concept of contract is defined in articles 1377 et seq. of the *Civil Code of Québec*.

402. Article 1378 of the *Civil Code of Québec* provides that

> 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a service.
>
> Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.

...

404. A person who provides services to another person other than in the context of a contract can therefore not be considered as being an employee within the meaning of the *Civil Code of Québec*. In other words, a person who wants to be considered the employee of another person will have to prove the existence of a contract between himself and the other person.

405. Article 1411 of the *Civil Code of Québec* provides that "A contract whose cause is prohibited by law or contrary to public order is null."

406. The cause of a contract is defined in article 1410 of the *Civil Code of Québec* as the reason that determines each of the parties to enter into the contract. In the case of a contract of employment, the cause of the contract for the employee will be the remuneration.

407. The nullity of a contract may be absolute or relative. Where the nullity is absolute, it may be invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion (article 1418 of the *Civil Code of Québec*). There are grounds for the absolute nullity of a contract where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest (article 1417 of the *Civil Code of Québec*). Article 1418 of the *Civil Code of Québec* provides that a contract that is absolutely null may not be confirmed.

...

409. The Respondent submits that the EIA and the contributions paid to the employment insurance fund by all Canadian employers and employees are for the benefit of all of these employees and that any contract of employment under which the parties have made an agreement for the purposes of enabling a person to receive employment insurance benefits unjustly would be contrary to public order (article 1411 of the *Civil Code of Québec*) and null by absolute nullity since this nullity is necessary for the protection of the general interest.

410. The Respondent submits that this should especially be the case where a contract of employment is entered into between an employee and an employer and where the parties agree that the employee will work year-round for the employer but will be paid by the latter for a part of the year and where a Record of Employment will be issued to the employee to enable him to obtain employment insurance benefits during the other part of the year.

411. The Respondent submits that the work performed in the second part of the year, i.e., that in respect of which employment insurance benefits are paid out with the help of the Record of Employment issued, cannot be considered volunteer work. It is clear that the worker works during this period while still considering himself employed by the payer. Moreover, the worker certainly works because he has no choice if he wants to keep his job.

412. In such a case, the Respondent submits that the remuneration agreed on by the employee and the employer consists of two elements: (1) the consideration, generally in cash, paid by the employer; and (2) the issuance of a Record of Employment. It seems clear in the situation described in paragraph 410 that an

employee would not agree to work for the employer if the latter did not promise to issue a Record of Employment to the employee to enable this employee to claim employment insurance benefits.

413. Consequently, in such a situation, the Respondent submits, the issuance of the Record of Employment is an integral part of the remuneration promised to the employee.

414. In such a case, the Respondent submits that a portion of the remuneration, the cause of the contract for the employee (article 1410 of the *Civil Code of Québec*) is contrary to public order. The contract of employment would be therefore null (article 1411 of the *Civil Code of Québec*) by absolute nullity because the nullity is necessary for the protection of the general interest (article 1417 of the *Civil Code of Québec*) and the court must invoke it of its own motion (article 1418 of the *Civil Code of Québec*).

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[3] For example, recently in *Jean-Yves Vaillancourt v. M.N.R.*, 2005 TCC 328 (Archambault T.C.J.).
[4] [2005] J.Q. no. 995.
[5] [2001] 2 S.C.R. 983.
[6] *Gilles Pellerin v. M.N.R.*, 2005 TCC 361

[Emphasis added.]

[54] I believe that the analysis of the law by counsel for the Minister is excellent, with the exception of the statement that other aspects besides subordination must be examined — as is done in the common law provinces— in order to find that there is a contract of employment in Quebec. I think that the position described by counsel in paragraphs 398 and 399 of his written submissions and applied in past by some judges is inconsistent with a recent decision of the Federal Court of Appeal on October 17, 2005 in *9041-6868 Québec Inc. v. M.N.R.*, 2005 FCA 334. In that case, Décary J.A. found that the judge of this Court (the same as in the *Pellerin* case), who had referred to the common law rules set out in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 3 F.C. 533 (F.C.A.) and *Sagaz* (*supra*) had reached the right solution, but in the wrong way (paragraph 2 of the decision). According to Décary J.A., the relevant source of law in determining whether or not a contract of employment in Quebec exists is the Civil Code and not the common law. In paragraph 7 of his reasons, he writes: “In other words, it is the *Civil Code of Québec* that determines what rules apply to a contract entered into in Quebec. Those rules are found in, *inter alia*, the provisions of the Code dealing with contracts in general (arts. 1377 C.C.Q. *et seq.*) and the provisions dealing with the "contract of employment"

(arts. 2085 to 2097 C.C.Q.) and the "contract of enterprise or for services" (arts. 2098 to 2129 C.C.Q.) To exclude the common law rules, he wrote as follows:[59]

> 6 It is possible, and in most cases even probable, that where contracts are similar they would be characterized similarly, whether the civil law or common law rules are applied. The exercise, however, is not a matter of comparative law, and the ultimate objective is not to achieve a uniform result. On the contrary, the exercise, as was in fact intended by the Parliament of Canada, is one of ensuring that the approach taken by the court is the approach that applies in the applicable system, and the ultimate objective is to preserve the integrity of each legal system. On that point, what was said by Mr. Justice Mignault in *Curly v. Latreille*, (1920) 60 S.C.R. 131, at page 177 applies as well now as it did then:
>
>> [TRANSLATION] It is sometimes dangerous to go outside a legal system in search of precedents in another system, based on the fact that the two systems contain similar rules, except, of course, where one system has borrowed a rule from the other that was previously foreign to it. Even when the rule is similar in the two systems, it may be that it has not been understood or interpreted in the same way in each of them, and because the legal interpretation--I am of course referring to interpretation that is binding on us--is in fact part of the law that it interprets, it may in fact happen that despite their apparent similarity, the two rules are not at all identical.
>>
>> I would therefore not base the conclusions that I think must be adopted in this case on any precedent taken from English law...
>
> [Emphasis added.]

[55] However, I totally disagree with counsel for the Minister's manner of applying these rules to the facts of these appeals, particularly when he states that the Records of Employment were a part of the consideration for which the Appellants had undertaken to provide their work to the payer. In my opinion, the only consideration the contract refers to was the money that the payer promised to pay them. To maintain that workers might work for a Record of Employment

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59 The Federal Court of Appeal adopted in this way the position that I advocated in an article entitled "Contract of Employment: Why Wiebe Door Services Ltd. Does Not apply in Quebec and What Should Replace It", from the collection: *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Second Collection of Studies in Tax Law (2005)*, Montréal, Fiscal and Financial Planning Association and Department of Justice of Canada. Paragraph 62 et seq. of this article contains a discussion of the differences between the common law rules and the civil law rules and why, in my opinion, the approach taken in *Sagaz* and in *Wiebe Door* is incompatible with the relevant provisions of the *Civil Code*.

seems rather strange to me.[60] Moreover, it is not the Records of Employment that give entitlement to benefits, it is the provisions of the EIA to the extent that the requirements of this Act have been met. The Records of Employment are only monitoring mechanisms used by the administration to verify whether some of the EIA requirements have been fulfilled. Moreover, HRDC was not even a party to the contract of employment with the payer and no contractual relationship bound it to the payer or to the employees. Furthermore, counsel for the Minister did not cite any case law decision in support of his position.

[56] In my opinion, it is more accurate to state that the payer and his employees agreed in their contract of employment that the latter would receive from the payer less remuneration for their work while hoping that they could receive benefits while they worked for the payer. The benefits paid by HRDC during the alleged periods of unemployment cannot be considered as remuneration for services provided to the payer because they were paid by HRDC as unemployment compensation.[61]

[57] It is obvious that the payer tried to use the benefits from the employment insurance fund as a sort of government subsidy. He hoped in this way to fund indirectly the salaries of his employees. Not only was this an illegal operation, but it was an operation that was doomed to failure. To be entitled to benefits, there must be a termination of employment and termination of the remuneration. Such a situation is therefore inconsistent with a contract of employment. Furthermore, a similar argument had been made in *Massignani* (*supra*). This is how I summarized the argument and my ruling:

> 35 Finally, counsel maintains that <u>one of the requisites to the validity of a contract of employment was not present, because there was an unlawful cause or consideration</u>. She relied specifically on section 984 of the Civil Code of Lower Canada ("C.C.L.C."). Moreover, under section 990 of the C.C.L.C., the consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order. the new *Civil Code of Québec* ("C.C.Q.") (in effect since January 1,

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60 This argument is similar to the contention that a taxpayer cannot deduct a tax credit for a gift to a charity because he was alleged to have done so in order to obtain a tax receipt. I dealt with that issue in *Paradis* v. *R.*, 1996 CarswellNat 2262, [1997] 2 C.T.C. 2557, at paras. 38 et seq. The Minister argued that the transfer of a painting could not be a gift, namely, a donation, because the taxpayer had received as consideration, a tax receipt. In rejecting this argument, I relied, *inter alia*, on a decision of the Federal Court of Appeal, *Friedberg* v. Canada, [1991] F.C.J. No. 1255 (QL), 92 DTC 6031, 6032.

61 See *Bélanger v. M.N.R.*, 2005 TCC 36, a decision that I delivered on January 11, 2005, at paras. 65 to 68.

1994), article 1411 states that a contract whose cause is prohibited by law or contrary to public order is null. Article 1417 of the C.C.Q. stipulates that a contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest. Under article 1418 of the C.C.Q., "The absolute nullity of a contract may be invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion. A contract that is absolutely null may not be confirmed."

...

54 It must now be determined whether the essential conditions applicable to all contracts have also been met, that is, it must be determined specifically whether the parties were legally capable of contracting, whether consent was given lawfully, whether the contract had a purpose, and whether a lawful cause or consideration existed. In this case, counsel for the Respondent maintains that only the last condition was not met, because an unlawful cause or consideration existed with respect to the Appellants' contracts of employment. In my view, there was no such consideration in these contracts of employment. Contrary to the belief of counsel for the Respondent, the cause or consideration of the contracts was not to unlawfully obtain employment insurance benefits. The consideration, in this case, was the provision of services for Tiva, and wages for the Appellants. The goal of the parties, namely, to operate a business and earn money to support themselves, was lawful.

55 To quote my colleague, Tardif J., in *Thibeault*, a genuine contract exists in this case because a contribution was made "in a real and positive way to the advancement and development of the business." In the case where wages had been paid to someone who had nothing to do for the business [See Note 16 below] or who was asked to perform work that had no benefit for the business, for the sole purpose of enabling him to receive unemployment insurance benefits, the conclusion would have to be that a genuine contract of employment did not exist. The fact of providing a service that benefits a business, without remuneration, as was the case in *Municipalité de Paspébiac*, prevents the creation of a genuine contract of employment, because one of the conditions essential to the existence of such a contract, namely, remuneration, has not been met. Volunteer work cannot be the subject of a contract of employment, because, by definition, a contract of employment requires that a remuneration be paid. In this case, I repeat, there was never any doubt that Tiva benefited from services that contributed to the development of its business or that the Appellants received wages for their services during the relevant periods.

56 It is true that Tiva was involved in an unlawful scheme in which it would be subsidized by unemployment insurance benefits for a portion of the remuneration it owed to its employees. As recalled by the Supreme Court of Canada in *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 S.C.R. 29, at page 37, the primary and essential purpose of the Act is to provide persons

> who are involuntarily unemployed with a means of supporting themselves until they become reintegrated in the labour market. Consequently, it is clear that the purpose of the Act is not to provide a subsidy to cover a portion of the wages paid for services provided.
>
> 57 Tiva's goal was obviously unlawful, but it was neither the cause of nor the consideration for the contract of employment that it entered into with the Appellants. If Tiva had robbed a bank to pay its employees, it would not have changed the fact that they were bound by a contract of employment. In my view, a court could not deny these employees the right to recover their wages if the employer had not paid them.[62] Obviously, the situation would be completely different if the services provided by these employees had included their participation in the bank robbery. In this case, the work of Tiva's employees consisted of manufacturing clothing, not obtaining unemployment insurance benefits from HRDC unlawfully. All of the independent witnesses acknowledged that they had not remitted the funds they received from HRDC to Tiva. The scheme, therefore, is independent of the contractual rights of the contract of employment; it is an arrangement made independently of the contract of employment. Consequently, the contracts that exist between the Appellants and Tiva are genuine contracts of employment.
>
> 16 I hasten to add that it is not because a worker who is bound by a genuine contract of employment receives a remuneration while he is not providing services that it must be concluded that a contract of employment does not exist. During his yearly vacation, a worker continues to receive wages, even though he is not providing any services. The same is true where a worker is away on sick leave or suspended, and continues to receive his wages. In all of these cases, the contract of employment subsists, because a genuine contract of employment, in which all of the conditions necessary to such a contract have been met, exists from the outset.

[58] It should be added, moreover, that the courts are reluctant to void contracts of employment for reasons of public order. The decision of Lamarre J. of this Court in *Luzolo v. Canada (M.N.R.)*, [1999] T.C.J. No. 822 (QL)[63] may be cited on this point. Concerning a contract of employment governed by the Civil Code, she adopted the same approach as in *Still v. M.N.R.*, [1998] 1 F.C. 549, a decision of the Federal Court of Appeal on a contract of employment governed by the common law. Now, in the case at bar, if counsel for the Minister were correct, it would mean that none of the payer's employees who participated in the scheme could claim his unpaid salary from the payer; he would not qualify for protection under

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[62] It is interesting to note that in the case at bar HRD did not contest the eligibility of the employment of the payor's employees who participated in the payor's illegal scheme.

[63] In this case, the Minister argued that the contract of employment was an absolute nullity because of the worker had not obtained a work permit as required by section 18 of the *Immigration Regulations, 1978*, (SOR/78-172, am. by SOR/89-80, s. 1, and SOR/95-353, s. 6).

the CSST, the EIA and the *Act respecting Labour Standards* (R.S.Q., c. N-1.1). Furthermore, the payer could claim that he was not liable for the actions of his employees when they injure another in the performance of their duties for the payer. This result appears quite anomalous and was not the Minister's interpretation in respect of the payer's other employees.

Non-existence of genuine employment

[59] Even if, for the purposes of the Civil Code, the employment was governed by a contract of employment, counsel for the Respondent submits, as the Respondent did in *Massignani*, that the employment created by this contract would not be "insurable employment" because it would not be "genuine employment" for the purposes of the EIA. In his written submissions, counsel for the Respondent wrote as follows concerning this issue:

> [TRANSLATION]
>
> 488. The Respondent submits that the determination that a contractual relationship between two people is a contract of employment under provincial private law does not necessarily make this relationship "employment" for the purposes of the EIA.
>
> 489. As mentioned earlier, section 8.1 of the *Interpretation Act* provides that where a private law concept is not defined in a federal enactment, it is necessary to refer to the private law of the province to interpret the enactment. This is what was done in the preceding portion of these written submissions.
>
> ...
>
> 491. For the interpretation of a concept such as "employment" in relation to the EIA, the Respondent submits that recourse should also be had to other rules of interpretation such as the purposive method of interpretation, one should interpret an enactment in terms of the intent of the lawmaker, the object and spirit of the Act, the context and previous case law on the issue.
>
> ...
>
> 496. Therefore, the Respondent submits, if this Court finds that the contractual relationship between the Appellants, Jacinthe Garneau and Denise Bellefeuille, and the payer, during the periods at issue, was a contract of employment not void under the *Civil Code of Québec*, this Court must continue its analysis in order to determine whether Parliament intended that this contractual relationship be considered

"employment" for the purposes of the application of the EIA. For this exercise, this Court must take into account the presumed intent of the lawmaker in the light of the spirit and object of the EIA, the context and precedents on the subject.

497. The Respondent submits that this further exercise does not depart from the principle of the complementarity of provincial private law with federal legislation and section 8.1 of the *Interpretation Act*.

498. The effect of the enactment of section 8.1 of the *Interpretation Act* was not to make this concept of genuine contract of employment inapplicable. This section was enacted to ensure that the courts would use the private law of the province of application when the enactment refers to a private law concept without defining it. One must not hide from the fact that, more often than not, the courts that interpret and apply federal statutes tend to do so from a common law perspective to the detriment of the civil law even where the province of application is Quebec.[64]

499. Once it has been determined that the contractual relationship between a worker and a payer is a contract of employment within the meaning of the applicable provincial private law, it is not recourse to the common law to interpret a concept in the EIA in the light of the intention of Parliament, the spirit and object of the EIA, the context and previous case law on the issue.

...

501. In the case at bar, the private law of the province of Quebec is applicable to determine whether or not the Appellants, Jacinthe Garneau and Denise Bellefeuille, were employees of the payer. Once Quebec private law has been applied and it has been determined, if in fact there was, that there was employment, there is nothing to stop this Court from finding a supplementary condition for the employment to be insurable for the purposes of the EIA.

...

6.2 Previous decisions concerning the concept of a genuine contract of employment

505. The Respondent submits, without concluding that the contract of employment is void from a civil law perspective, that some decisions of this Court, which will be analysed below, have at the very least held that some arrangements put in place by the parties in order to unjustly benefit from the EIA could not be considered genuine contracts of employment for the purposes of the EIA.

...

[64] The emphasis in this paragraph is that of the Minister's counsel.

508. According to the Respondent, these decisions do in fact take the intent of Parliament into account. The Respondent submits that this Court has seen in the intention of the legislature an implied condition that only genuine employment where none of its objectives is to unjustly abuse the protection offered by the EIA will be insurable employment.

...

514. Counsel for the Respondent understands that the Federal Court of Appeal would have liked to reconsider the concept of a genuine contract of employment in the context of the appeal in *Massignani*.[25] However, since the Respondent did not appeal the decision of this Court on that issue, the Federal Court of Appeal had to assume that there was a contract of employment.[26]

6.2.1. *Gauthier*

515. The facts in the case of the Appellant, Denise Bellefeuille, remind us of the facts at issue in *Gauthier v. Canada (Minister of National Revenue – M.N.R.)*.[27]

516.[65] In that case, the Appellant did some work for her husband's company but was paid for more hours than the work required. Judge Lamarre-Proulx of this Court commented as follows:

> My analysis of the evidence is that the Appellant's services, which I have no doubt were of excellent quality, could not, in the labour market, require the number of hours in issue, that is 40 hours per week, or be paid for at a salary of $350 per week. The Appellant provided certain services, but it is clear, and I am entirely convinced, that those services would not have been required to this extent in the normal course of business or remunerated with the amounts that were paid. The sums paid as salary were paid for reasons other than for the services of an employee on a weekly basis.
>
> ...
>
> The object of the Act is to insure true employment. Since no such employment is in issue in the instant case, there was no insurable employment within the meaning of section 3(1)(*a*) of this Act. [Emphasis added.]

...

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[65] The emphases in paragraphs 516 and 518 are those of the Minister's counsel.

6.2.3. *Thibeault*

518. The following comments of Judge Tardif of this Court in *Thibeault* v. *Canada (Minister of National Revenue – M.N.R.)*[29] also seem quite relevant to the present cases:

> ¶20 To receive unemployment insurance, now called employment insurance, the work must be performed within the framework of a genuine contract of service. The following criteria have been identified in the case law as elements of a contract of employment: a relationship of subordination giving the payer a power of control over the work performed by the employee, the chance of profit and risk of loss, ownership of the tools and integration.
>
> ¶21 The application of these criteria to the facts available obviously facilitates the exercise of characterization. On the other hand, it is just as important that there be genuine employment, without which the exercise of applying the criteria is completely useless.
>
> ¶22 Genuine employment is employment remunerated according to market conditions, which contributes in a real and positive way to the advancement and development of the business paying the salary in consideration of work performed. These are basically economic factors that leave little, if any, room for generosity or compassion.
>
> ...
>
> ¶26 The unemployment insurance scheme is a social program whose aim is to support those who lose a real job. It is definitely not a scheme under which it suffices to pay premiums for a certain period of the year in order to have automatic entitlement to benefits.
>
> ¶27 It is an insurance scheme under which all the known conditions defined by the Act and its regulations must be respected or else the person who has paid the premiums cannot claim automatic entitlement to the payment of benefits.
>
> ...
>
> ¶29 Of course, it is neither illegal nor reprehensible to organize one's affairs so as to profit from the social program that is the

unemployment insurance scheme, subject to the express condition that nothing be misrepresented, disguised or contrived and that the payment of benefits occur as a result of events over which the beneficiary has no control. Where the size of the salary bears no relation to the economic value of the services rendered, where the beginning and end of word [sic] periods coincide with the end and the beginning of the payment period and where the length of the work period also coincides with the number of weeks required to requalify, very serious doubts arise as to the legitimacy of the employment contract. Where the coincidences are numerous and improbable, there is a risk of giving rise to an inference that the parties agreed to an artificial arrangement to enable them to profit from the benefits. (Emphasis added.)

...

6.2.7. *Massignani*

525. With respect, the Respondent submits that this Court in *Massignani*[34] wrongly decided that a contract that meets the three essential conditions for the formation of a contract of employment (provision of services, remuneration and subordination) is necessarily a genuine contract of employment for the purposes of the application of the EIA.

526. In the decisions cited above, these three conditions essential to the formation of a contract of employment seem to be present and this did not stop this Court from finding that there was no genuine contract of employment for the purposes of the application of the EIA.

527. In addition, the Respondent respectfully submits that, if this Court had found that there were no genuine contracts of employment in *Massignani,* it would have avoided the result, which the Respondent considers inappropriate, resulting from the decision of the Federal Court of Appeal in that case.

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25 *Massignani*, *supra*, note 13.
26 *Massignani v. M.N.R.*, [2005] F.C.J. No. 777 (Q.L.)
27 [1993] T.C.J. No. 109 (Q.L.).
29 [1998] T.C.J. No. 690 (Q.L.).
34 *Massignani*, *supra*, note 13.

[Emphasis added.]

[60] With respect for the contrary view of counsel for the Minister, I still believe that a contract that meets the three essential conditions of article 2085 and the general conditions for the formation of a contract formation set out in the Civil Code necessarily creates an "employment...under the terms of a contract of

service” and, consequently, “insurable employment”, unless the employment is excluded under subsection 5(2) EIA. My remarks in *Massignani* may be of assistance:

> 47 As is often the case in this type of appeal, the recipients of unemployment insurance have arranged their affairs in such a way as to be eligible for the benefits provided for by the Act. However, as recognized by the Federal Court of Appeal, this fact does not necessarily prevent the employments from being insurable; nevertheless, this Court has a duty to ensure that the conditions set out in the Act have been met. This is what Hugessen J. says in *Canada (Attorney General) v. Rousselle*, [1990] F.C.J. No. 990 (Q.L.), at page 2 of the judgment:
>
>> I do not think it is an exaggeration to say, in light of these facts, that if the Respondents did hold employment this was clearly "convenience" employment, the sole purpose of which was to enable them to qualify for unemployment insurance benefits. These circumstances certainly do not necessarily prevent the employment from being insurable, but they imposed on the Tax Court of Canada a duty to look at the contracts in question with particular care; ...
>>
>> [Emphasis added.]
>
> 48 Moreover, in *Navennec v. Canada (M.N.R.)*, [1992] F.C.J. No. 1005 (Q.L.), Desjardins J., on behalf of the Federal Court of Appeal, said that the criteria established by the Supreme Court of Canada in *Stubart Investments Ltd. v. The Queen,* [1984] 1 S.C.R. 536, were applicable in matters involving unemployment insurance:
>
>> It is true that in *Stubart* the question was whether a company could, for the avowed purpose of reducing its tax, conclude an agreement by which its future profits were transferred to a subsidiary in order to take advantage of the latter's loss carry-forward; but the rules are still applicable to the case at bar when it must be determined whether the applicant has, in short, arranged his affairs so as to be able to collect unemployment insurance benefit; …
>>
>> [Emphasis added.]
>
> 49 It should be noted that, in *Stubart*, at page 575, the Supreme Court rejected "the proposition that a transaction may be disregarded for tax purposes solely on the basis that it was entered into by a taxpayer without an independent or bona fide business purpose." Desjardins J. applied the criteria set out in *Stubart* to *Navennec* as follows:
>
>> The parties in the case at bar are related; but what matters is to establish whether by their agreements they did what they said they intended to do. Did the applicant in fact intend to make the company a family business or did he retain control of it? Did his wife and

> children in fact intend to pay off their promissory notes by the profits they received from the business or by other income? - or did they never intend to do so? Were these legal obligations clear and executory, or was it a façade?

> 50 I note, from these two Federal Court of Appeal decisions, that an employment that is not a façade and that meets all of the conditions set out in the *Civil Code of Québec* constitutes a genuine contract of employment for the purposes of the Act, even where the purpose of this contract was to make a person eligible for unemployment insurance benefits. However, this Court has a duty to carefully examine the agreement that exists between the parties--in this case, the Appellants and Tiva--to ensure that a genuine contract of employment exists. I add that the impact of the reasons given by my colleagues, Tardif and Dussault, must be interpreted in light of these principles.

> 51 The first issue to be resolved here is whether the contract that binds the Appellants and Tiva constitutes a genuine contract of employment. As mentioned above, the three conditions essential to the existence of a contract of employment are: the provision of a service, payment of remuneration, and the existence of a relationship of subordination.[66]

[Emphasis added.]

[61] In addition to the reasons stated in *Massignani*, I would add the following in order to better respond to the points raised by counsel for the Minister in paragraphs 488 et seq. of his written submissions. First, it must be remembered that the issue that the Court must decide in this case is the existence or non-existence of "insurable employment". The term "insurable employment" is defined in section 5 EIA. This is the point of departure:

> **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;
>
> …
>
> (*d*) employment included by regulations made under subsection (4) or (5); and

66 Paragraphs 54 to 57 of my Reasons in *Massignani* are reproduced above at ¶57.

> …
>
> (2) Insurable employment does not include
>
> (*a*) employment of a casual nature other than for the purpose of the employer's trade or business;
>
> (*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> …
>
> (*h*) employment excluded by regulations made under subsection (6); and
>
> (*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.
>
> (4) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment
>
> …
>
> (*c*) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under a contract of service;
>
> [Emphasis added.]

[62] Paragraph 5(1)(*a*) defines insurable employment as, *inter alia*, employment in Canada … under any … contract of service …". The EIA does not define

"contract of service". This is a legal concept belonging to the field of "property and civil rights", that is, to one of the classes of subjects assigned exclusively to the Legislatures of the Provinces (subsection 92(13) of the *Constitution Act, 1867*). Where a federal statute that is to be applied in a province uses a concept of civil law that it does not define, recourse must be had to the concept in force in that province unless otherwise provided by law. This is the rule enacted by section 8.1 of the *Interpretation Act* (IA), in force on June 1, 2001.[67] The Parliament of Canada has thus codified the rule of construction known as the "principle of complementarity", which was often applied by the courts,[68] *inter alia*, for the purposes of the definition of "insurable employment" in paragraph 5(1)(*a*) EIA[69] and 3(1)(*a*) of the former *Unemployment Insurance Act*, R.S.C. 1985, c. U-1 (UIA). Thus, regardless whether one applies section 8.1 IA or the principle of complementarity deriving from the jurisprudence, the result is the same. As Décary J.A. recognized in paragraph 7 of *9041-6868 Québec Inc.* (*supra*), it is the Civil Code that applies when paragraph 5(1)(*a*) EIA must be applied to a contract of employment governed by the laws of Quebec, in particular, by article 2085 of the Civil Code.

[63] As Parliament chose to enact, by reference, the provisions of the provincial statute to determine whether a contract of employment (contract of service) exists, it must first be determined whether the contracts binding the Appellants and the payer in the instant case are contracts of employment within the meaning of the Civil Code. Now, the concept of a contract of employment is not subject to variation according to whether the contract is interpreted for the purposes of the

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67 This section sets out:

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

For a discussion of the conditions for the application of this section, see paragraphs 26 et seq. of my article (*supra*).

68 On occasion, the opposite principle was applied, i.e., the principle of uniformity or dissociation. For a discussion of these principles, see my article (*supra)* at paragraphs 14 et seq.

69 In particular, in the well-known decision in *Wiebe Door Services Ltd.* (*supra*).

Civil Code or for the purposes of a tax statute such as the ITA or for the purposes of the EIA or the *Act respecting the Quebec Pension Plan* (R.S.Q., c. R-9). When the lawmaker wants to enact in a particular statute a concept that differs from the common law concept, it provides a specific definition for the statute. See, in particular, subparagraph (1) of the definition of "employee" in paragraph 1(*l*) of the *Labour Code* (R.S.Q., c. C-27). Furthermore, Parliament has explicitly provided that the Commission, with the approval of the Governor in Council, may make regulations for including in insurable employment employment that "is not employment under a contract of service" (paragraphs 5(1)(*d*) and (5(4)(*c*) EIA reproduced *supra*). If all the requirements of the Civil Code are met, one must, for the purposes of the Civil Code, ascertain the validity of the contract of employment and the employment that it creates. According to paragraph 5(1)(*a*) EIA, it is "insurable employment", unless the employment is excluded from the definition under subsection 5(2) EIA.

[64] Counsel for the Minister rightly acknowledged that the Civil Code applies and that, if all the conditions for the formation of a contract of employment are met, there will be a genuine contract of employment for the purposes of the Civil Code. He acknowledged that, if there is no illegal cause, the contract between Ms. Garneau and the payer is a valid contract of employment. However, he argues, even if there is a valid contract of employment that creates an employment for the purposes of the Civil Code, it is not "genuine employment" for the purposes of the EIA. In order to reach this conclusion, he sees an "implied condition" in the EIA (paragraph 508 of his written submissions), which he justifies through the application of a purposive interpretation.

[65] With respect for the contrary view, I believe that this position is unfounded. In order to apply a purposive interpretation, the wording of paragraph 5(1)(*a*) EIA must be equivocal, ambiguous or vague. Where the wording is clear and not equivocal, it simply must be applied. This is what was said by Madam Justice McLachlin (as she then was), who delivered the unanimous judgment of the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 99 DTC 5682:

> 40 Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: *Continental Bank*, *supra*, at para. 51, per Bastarache J.; *Tennant*, *supra*, at para. 16,

> per Iacobucci J.; *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27 and 330, per Iacobucci J.; *Friesen v. Canada*, [1995] 3 S.C.R. 103…
>
> [Emphasis added.]

[66] In *Antosko*, the issue was the application of subsection 20(14) ITA, which provides a deduction to avoid the double taxation of interest accumulated on a bond before its transfer, but paid after the transfer. Essentially, the effect of the rule is that the interest accumulated before the transfer is included in the income of the transferor, and the interest accumulated afterwards, in the income of the transferee. Now, the transferor in *Antosko* was a tax-exempt organization and therefore the interest that the transferee was able to receive was partly tax-exempt: a windfall to which, according to the Minister, the taxpayer was not entitled. Iacobucci J., who delivered the unanimous judgment of the Supreme Court of Canada, summarized one of the arguments of the Federal Court of Appeal, at page 324, as follows:

> However, the Federal Court of Appeal, the only court to deal with this point, took the view that the transaction in question in this appeal was nonetheless not included within the class of transactions giving rise to a deduction pursuant to this section. The Court of Appeal held that this transfer of accrued interest was not in accord with the purpose of the section, when the section was viewed in light of economic and commercial reality. In its view, the object or spirit of the provision was the avoidance of double taxation, and the transfer between the board and the Appellants had nothing to do with such a purpose. ...
>
> [Emphasis added.]

[67] Iacobucci J. drew the following conclusion at page 328:

> In this appeal, despite conceding that these factual elements are present, the Respondent is asking the Court to examine and evaluate the transaction in and of itself, and to conclude that the transaction is somehow outside the scope of the section in issue. In the absence of evidence that the transaction was a sham or an abuse of the provisions of the Act, it is not the role of the court to determine whether the transaction in question is one which renders the taxpayer deserving of a deduction. If the terms of the section are met, the taxpayer may rely on it, and it is the option of Parliament specifically to preclude further reliance in such situations.
>
> [Emphasis added.]

[68] He added the following, at page 330:

> This transaction was obviously not a sham. The terms of the section were met in a manner that was not artificial. Where the words of the section are not ambiguous, it is not for this Court to find that the Appellants should be disentitled to a deduction because they do not deserve a "windfall", as the Respondent contends. In the absence of a situation of ambiguity, such that the Court must look to the results of a

> transaction to assist in ascertaining the intent of Parliament, a normative assessment of the consequences of the application of a given provision is within the ambit of the legislature, not the courts.
>
> [Emphasis added.]

[69] Here, the wording of the EIA cannot be more clear: "insurable employment" is "employment … under any … contract of service", a contract that, in Quebec, is defined as a contract of employment. "Employment" is defined in subsection 2(1) EIA as follows: the act of employing or the state of being employed." Thus, "insurable employment" within the meaning of the EIA includes, *inter alia,* "the state of being employed...under a contract of service."

[70] For counsel for the Respondent to be able to argue a purposive interpretation, the word "genuine" would at least have to appear in section 5 EIA. For example if Parliament had provided that insurable employment is "*genuine* employment … under a contract of service", or if it had defined the word "employment" as the state of being "*genuinely* employed", perhaps questions could have been raised about the meaning of the word "genuine". However, this word is not found in the EIA. As Rothstein J. stated in his historic appearance before a House of Commons committee, the courts' role is not to make law but to apply it. To apply to this case an "implied condition" allegedly contained in the EIA would amount, in my opinion, to making law.

[71] Not only do I find paragraph 5(1)(*a*) EIA completely clear and unequivocal, but I do not see how an "implied condition" of "genuine" employment could be justified through a purposive interpretation. Counsel for the Minister did not analyse the relevant provisions of the EIA in order to justify his position. If such an analysis were made, it would be seen that Parliament explicitly provided in the EIA for cases where "employment...under a contract of service" could be excluded from "insurable" employment. Subsection 5(2) lists a whole series of exclusions. They are, *inter alia,* employment of a casual nature and the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation. The Commission, with the approval of the Governor in Council, may even make regulations for excluding other cases (paragraph 5(2)(*h*) EIA).

[72] Then, there is the exclusion under paragraph 5(2)(*i*): "employment if the employer and employee are not dealing with each other at arm's length." Where these persons are related persons, the Minister may, however, under paragraph 5(3)(*b*), find that the employment qualifies for the purposes of the EIA if he is satisfied they would have entered into a substantially similar contract of

employment if they had been dealing with each other at arm's length. It clearly emerges from paragraphs 5(2)(*i*) and 5(3)(*b*) that they are an anti-avoidance rule, that is, that they are intended to exclude from the employment insurance scheme contracts with unreasonable terms and conditions. Adoption of the broad interpretation proposed by counsel for the Minister would make the exclusion provided for in paragraph 5(2)(*i*) EIA completely pointless. If the terms and conditions of employment are so unreasonable that it is considered not to be "genuine employment" and, therefore, not "insurable employment, what purpose would be served by the exclusion in paragraph 5(2)(*i*)? This interpretation would also override the Minister's discretion under paragraph 5(3)(*b*) EIA. We know that the Court owes a duty of deference to the exercise of this discretion; however, it would not owe such a duty if the genuine employment doctrine were applicable.

[73] Generally speaking, where the Minister raises before this Court the genuine employment doctrine to conclude that there is no insurable employment, he cites a number of decisions, the oldest being *Gauthier* (*supra*) on which more recent decisions are often based. Here, counsel for the Minister is no exception to the rule. It must be emphasized that *Gauthier* was decided in April 1993, yet paragraph 3(2)(*c*) UIA was inoperative with respect to the relevant period in that decision, namely, the period from February 26, 1990, to November 30, 1990.

[74] Paragraph 3(2)(*c*) UIA completely excluded from insurable employment any employment of a person by his or her spouse. It was struck down on July 21, 1987 by the Canadian Human Rights Tribunal in *Druken v. Canada*, [1987] C.H.R.T. No. 7 (QL), 8 C.H.R.R. D/4379, and the Federal Court of Appeal upheld this decision on August 15, 1988 (*Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24). The new paragraph 3(2)(*c*) UIA, similar to paragraph 5(2)(*i*) and subsection 5(3) EIA, did not come into force until November 18, 1990.[70] In *Gauthier*, I believe that there was an attempt, by arguing the genuine employment doctrine, to fill in the legal void created by the *Druken* decisions. As *Gauthier* was decided before the decisions of the Supreme Court of Canada in *Shell Canada* (October 1999) and *Antosko* (May 1994), I believe that this genuine employment doctrine, as interpreted by counsel for the Minister, is not compatible with these decisions and that, in the current state of the law, it should no longer be applied. It then becomes necessary to restrict the genuine employment concept to employment exercised under a contract of employment that is not a façade, that is, to a contract of employment valid for the purposes of the Civil Code.

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70 For an historical overview of these amendments, see my decision in *Thivierge* v. *Canada*, [1994] T.C.J. No. 876, paras. 26 et seq.

Credibility of the witnesses

[75] Let us apply these rules to the facts of these appeals. Before doing so, however, some preliminary comments are in order which concern the credibility of the key witnesses. As is often the case in appeals where the issue concerns the existence of an employment, or, if one does exist, its terms and conditions (so that one can determine whether the employment is excluded because of a non-arm's length relationship), one of the great difficulties is the credibility of the witnesses. Here, I should note that I found the testimony of Mr. Dubé and Ms. Garneau and Ms. Bellefeuille not credible. Although I found Ms. Bellefeuille's testimony more sincere than that of the Dubé-Garneau couple, it was too often imprecise and vague and insufficiently corroborated by documentary evidence or testimony.

[76] Mr. Maltais and Guylaine Dubé described Mr. Dubé as a manipulator. The evidence that I heard not only confirms this character trait of Mr. Dubé, but establishes that he is underhanded. He was the author of the scheme to use employment insurance benefits to indirectly finance his business, and from the outset, Ms. Garneau was his accomplice. The collusion began when the two worked together at BDC and continued later when they became not just the payer's employees but its directors as well.

[77] Mr. Dubé split his employment income from BDC; one part was paid to his daughter and very likely to his spouse. In fact, Mr. Dubé received a salary of $250 a week for 37 hours, which gave him an hourly wage of $6.76. The splitting not only allowed him to reduce the taxes that he would have had to pay but also to continue to receive his monthly pension of $1,068 from the CSST and enable his daughter and wife to claim HRDC benefits. Mr. Dubé even strongly urged his daughter, Guylaine Dubé, to make such a claim. She did not understand how she could be entitled to benefits since the money that the payer had given to her did not belong to her. Even though she had not worked for BDC and the payer, Guylaine Dubé could, for her claims for benefit, rely on the false and misleading Records of Employment prepared by Ms. Garneau. However, she had no success because HRDC refused her benefit claims because of her non-arm's length relationship with the payer, a decision that she did not challenge.

[78] At the hearing, even after he had confirmed that he had told the insurance officer that Guylaine Dubé had never actually worked for the business, Mr. Dubé tried to diminish the impact of his answer by giving the facts a spin (vol. 3 of the transcript, pp. 304 and 305):

[TRANSLATION]

A. It's true, Your Honour, yes, that is more or less what I said. She did not work for the business, she worked for me. However, the cheque that she gave, it was definitely Denise who cashed it. I said it on Friday, by the way, that she did it because she was going to get married and so I gave her this amount. Now, to say that she didn't work, that depends on what you mean by work, she didn't work on a bench inside but she went to get things I needed for the office, she made photocopies, she helped her mother make the schedule. She did a lot of things. She herself took documents to Pierre Lessard. I don't know if Mr. Lessard mentioned this, but she did that, too. But, it's like I said and I repeat, there is no doubt that, if she had been a stranger, she would not have had $150 per week, she might have had $150 every two or three weeks. But she was my daughter. So, she had $150 a week.[71]

[Emphasis added.]

[79] Ms. Garneau lied to the HRDC investigator when she said that Guylaine Dubé had really worked for BDC and the payer (Exhibit I-32, page 3). It is highly likely that she did likewise with respect to the alleged work of Ms. Bellefeuille. She also lied when she told the HRDC investigator that Ms. Bellefeuille replaced her at the office as a receptionist when she was absent (Exhibit I-32, page 3), since Ms. Bellefeuille denies working in the payer's office and says instead that her work was done at home (Exhibit I-35, pages 3 and 4). Ms. Garneau deceived HRDC by preparing Records of Employment for herself in which she gave as the reason for the Record of Employment the lack of work at BDC, whereas in fact she had left that business to be an employee of the payer and one of its shareholders. The Records of Employment prepared by Ms. Garneau for other BDC employees were also deceptive because they indicated that the employees had been dismissed for lack of work whereas they had left BDC to join the payer as employees. In her claim for benefit of July 17, 2001, she answered that she was not related to the payer's majority shareholder through a common-law relationship, whereas she had cohabited with Mr. Dubé since at least the beginning of January 2000 (according to her version)!

[71] The Record of Employment of Guylaine Dubé was not produced and it is impossible to know whether this amount really represents what the payor paid Mr. Dubé's daughter. According to Mr. Dubé, Guylaine [TRANSLATION] "did not work for the business, she worked for [him]." However, it was the payor who paid her! This was not the first inconsistency of Mr. Dubé.

[80] The Records of Employment of Guylaine Dubé, Stéphane Laferrière and Gaston Dubuc bear the forged signature of Marcel Maltais. These Records of Employment were prepared by Ms. Garneau. The evidence did not establish who had forged the signature. On the other hand, who had an interest in doing so apart from Mr. Dubé or Ms. Garneau? In any case, Mr. Dubé acknowledged that he had forged the photocopy of the six cheques for $276.08 to justify the payment of a salary higher than that actually paid to Ms. Bellefeuille from September 16 to October 21, 1999 (Exhibit I-24). Mr. Dubé also tried to obtain benefits during the transition period between his departure from BDC and the start-up of the payer's business. Mr. Laferrière indicated in his statutory declaration that he had received benefits while working full time for the payer although he knew that it was illegal. Mr. Dubé had told him that there was no risk because the cheques that he gave him were for his expenses (paragraph 11 *supra*). The payer even applied for a grant under a job creation program for employing this employee, although this was not a new job. This employee had already been working for the payer since February 24, 1997 (Exhibit I-27, page 5). The manipulative nature of Mr. Dubé is evident in his attempt to explain that Mr. Laferrière had started working for the payer as a subcontractor (under a contract of service) in February 1997 and had continued until April 19, 1997.

[81] At her meeting with the HRDC investigator on May 10, 2002 (Exhibit I-32, page 4), Ms. Garneau confirmed that she had prepared all of the payer's Records of Employment. However, she refused to provide any explanation concerning the Records of Employment for Ms. Bellefeuille or Ms. Dubé. When she was asked to explain why she had completed Records of Employment that were erroneous, particularly for people who stated that they had never worked for the businesses indicated, and why she had written down periods of employment that did not correspond to reality, and when she was asked to comment on the statements made by some employees of the payer that, as of January or February 1997, she was at work every day, Ms. Garneau answered (Exhibit I-32, page 5):

> [TRANSLATION]
>
> <u>We left the company with almost nothing in investments</u> and without any grant. We had been to see the banks and we had been stymied everywhere. <u>The government refused all our applications for grants</u>.[72] The owners of Boiserie D.C. blocked us whenever we applied for grants. <u>We had to figure out a way to get out of this by ourselves</u>.

[72] Which is untrue since the payor had obtained aid under a job creation program.

> If you only knew!!!
>
> I can tell you that I did not work every day at the office; there were days where I worked at home and Joseph brought me work.
>
> I refuse to talk about the original cheques and copies of cheques faxed on 16-12-99 by Denise Bellefeuille for the period from September 1999 and October 1999. Ask Joseph.
>
> I refuse to give explanations about the telephone conversation of 02-11-99 that I had with an employment insurance officer concerning Record of Employment #A66013347 of Denise Bellefeuille.
>
> I do not want to give any information about the requests for information sent by your office concerning my file dated 02-06-99 and 15-09-99 in which my writing appears.
>
> ...
>
> I refuse to give explanations concerning the Records of Employment; go see Joseph and ask him the questions.
>
> I refuse to give explanations about the fact that the number of documents completed by me, whether cheques or invoicing or other documents, was about the same number, regardless whether I was on the payroll journal or receiving employment insurance benefits.
>
> I no longer want to provide any information about the Boiserie Dubé company or the Boiserie D.C. company. You will have to speak to Joseph Dubé.
>
> [Emphasis added.]

[82] In addition to the underhanded dealings mentioned above, which raise many doubts about the credibility and honesty of Mr. Dubé and Ms. Garneau, there are all the lies and contradictions they gave, during the hearing or during the HRDC and Agency investigations. Moreover, there were many evasive answers on the part of this couple and Ms. Bellefeuille. In addition to all those that were referred to above, the following can be mentioned:

Jacinthe Garneau

[83] When examined by her counsel, Ms. Garneau stated that her salary had initially been $525. Then, she explained how her salary had increased (vol. 1 of the transcript, pp. 93 and 94):

> [54] Q. Were there variations in the salary after that?
>
> A. After that, well, as soon as...It is certain that in the beginning, we started slowly. But as soon as the business became a little more confident, if you will, the salary increased based on... It is certain that I had more work at that time. This meant that there were raises every year up to about, I think, I'll say $800 a week for basically having the same salary that I had.
>
> ...
>
> [55] Q. Beginning in what period did you reach $800?
>
> A. I think that it took three years or something like that.
>
> ...
>
> [58] Q. Between $525 and $800, were there others...
>
> A. Yes, yes, yes. It was beginning. Afterwards, I had $725. The year after that I had about $600. The year after that, I must have had $700 until I reached $800.
>
> [Emphasis added.]

[84] On cross-examination, she gave the following answer to counsel for the Minister (vol. 1 of the transcript, pp. 264 and 265):

> [TRANSLATION]
>
> [752] Q. You said this morning in reply to a question asked by Mr. Guertin, I'm going by memory, three years later, your salary went to $800?
>
> A. Because, when I started my job in 97, in the spring of 97, it was certain that we were at the start-up of the new company. You know that when you start up a company, you don't give salaries of $1,000 per shareholder per week, you have to give yourself a chance to succeed. This meant that we began with a salary identical to what I had before. Then, as the customers increased every year, I had a salary raise like just about all companies.
>
> [Emphasis added.]

[85] These answers reveal a number of contradictions or statements that do not correspond to reality. First, Ms. Garneau indicated that she earned $800 a week at Quincaillerie or BDC. However, as was noted above, under the heading "Factual

background”, it is highly unlikely that she earned a salary like that when she was an employee of Quincaillerie. Instead, her salary was not more than $528 at Quincaillerie and $525 at BDC (see tables 3 and 4 *supra*). In addition, in contrast to what she said, her salary did not progressively increase based on the payer’s business figure. Furthermore, it did not take three or five years to reach the $800 salary since, according to the payer’s payroll journal, Ms. Garneau earned $800 as of June 21, 1998, or one year after her official beginning with the payer (according to the payroll journal). That salary was paid until November 7, 1998. Her previous salary had been $600 for three weeks, i.e., from May 31 to June 20, 1998. It should be noted that in the ensuing years her salary essentially alternated between $700 and $800, depending on the periods (see table 5 *supra*).

[86] There are also contradictions between the testimony of Ms. Garneau and that of Mr. Dubé concerning the beginning of the discussions about the payer’s business. In his testimony, Mr. Dubé stated that it was before November 1996 that he had begun having discussions with Ms. Garneau (vol. 1 of the transcript, p. 396, Q. 1282). However, Ms. Garneau stated that these discussions had taken place once BDC had closed its doors and she had been unemployed for a number of months. This is what she said:

> [TRANSLATION]
>
> [5] Q. So, it’s another company, is it?
>
> A. O.K. that’s right, I’m getting to the... Boiserie D.C. closed its doors. I found myself unemployed. At the same time, Boiserie D.C., I had known Joseph Dubé who at that time wanted to start a company. Since I, I no longer had...
>
> ...
>
> [7] Q. Right.
>
> A. Then, since at that time, I had had no more work for some time, he told me about his plan to start a business, as for me, I needed to work, too. So I told him what I could do... to try to get into business, to create my own company, well, in part. That’s right.
>
> (Vol. 1 of the transcript, p. 78)
> [Emphasis added.]

...

[502] Q. But you said that before... that you had been for a long time without work after the closing of Boiserie D.C. because you did not find work?

A. I was six months. I have never been...

[503] Q. O.K., because you did not find a job, you went to see Mr. Dubé, Joseph Dubé, in order to create your business, did I understand correctly?

A. Yes. I was without work for several months and I had always worked since I left cegep. To be six months without working, with no prospects ahead of me, I had a hard time living with that.

(Vol. 1 of the transcript, pp. 205 and 206)
[Emphasis added.]

[87] On another occasion, Ms. Garneau stated that the discussions with Mr. Dubé began maybe in March 1997 (vol. 1 of the transcript, p. 224, Q. 573). After that, she again contradicted herself when she acknowledged, after a number of evasive answers, that she had considered becoming a shareholder of the payer in November 1996 (vol. 1 of the transcript, pp. 227 and 228):

[586] Q. Look, the question is simple, yes or no, had there been talk of your being a shareholder of the company in November 96?

A. Well, I had begun to see it as a possibility, but there was nothing official before the spring, as I said, of 97.

[587] Q. So, you say that there had been talk of it?

A. There had been talk of it.

[Emphasis added.]

[88] Furthermore, it must be remembered that, contrary to what Ms. Garneau's statement, BDC did not close its doors.[73] BDC replaced Mr. Dubé after his dismissal and continued its operations. In addition, as we have seen above, Ms. Garneau did not leave BDC because of the loss of her job, since Mr. Maltais tried to persuade her to stay with BDC. How could she have had "a hard time living with that" ("be six months without working") when she had left voluntarily to start up her own business with Mr. Dubé?

[73] Later in her testimony, Ms. Garneau acknowledged that BDC had not closed, but she maintained that she had lost confidence in the future of BDC.

[89] Ms. Garneau was evasive in her answers on more than one occasion. A question had to be asked several times before an answer was obtained, particularly when she was asked if she had told the HRDC investigator that it was Ms. Bellefeuille who had replaced her on occasion:

> [TRANSLATION]
>
> [920] Q. But the question is: did you or did you not tell that to the [investigator]? That's all it [the question] is. You are not being asked to comment on the contents, it's just, did you make that statement to [the investigator] that you were replaced by someone from Mr. Dubé's family? Do you remember saying that or not?
>
> A. I don't remember, but it's possible.
>
> (Vol. 1 of the transcript, pp. 300 and 301)

[90] A curious fact is that Ms. Garneau did not remember whether she was receiving benefits at the time of her meeting with the investigator in December 2001.[74] Was it because Ms. Garneau worked constantly at the office that she did not remember whether she was receiving benefits at the time? In view of the scheme put in place by Mr. Dubé, it might have been thought that the meeting would be stressful and that she would have remembered her status at that time:

> [TRANSLATION]
>
> The Judge:
>
> [450] Q. No, but the question was: were you on job termination at the time of this interview, the third, is that right?
>
> BENOIT MANDEVILLE:
>
> [451] Q. At the meetings, Ms. Dion's first meeting, second and third?
>
> A. I have no recollection. Since I...
>
> (Vol. 1 of the transcript, p. 187)

---

[74] According to Exhibit I-29, Ms. Garneau received benefits.

Denise Bellefeuille

[91] Ms. Bellefeuille had no memory of the facts about which she was questioned and she was just as evasive. For example, she was asked whether she remembered telling the Agency that her daughter Guylaine had not worked at the payer's. She replied that she did not remember. After that, she was asked if in fact Guylaine had worked for the payer. Her answer was as follows (vol. 4 of the transcript, pp. 298 and 299):

> [TRANSLATION]
>
> [1052] Q. You don't remember saying that. But did she or did she not work at Boiserie Dubé?
>
> A. Well, she worked a little bit, did some little errands.
>
> [1053] Q. What kind of errands?
>
> A. Well, you will have to ask my husband.
>
> [1054] Q. No, no, I was asking you. What did she do at Boiserie Dubé?
>
> A. You will have to ask him.
>
> ...
>
> [1055] Q. But when you say that she did little errands, you can't tell us what?
>
> A. Well, errands, there are things like... just like when you have prepared the book, for example, there were things that had to be done, go make photocopies, go to... what's it called... Multipixels in Varennes, things like that.
>
> [1056] Q. So, to a printer?
>
> A. To the printer. Multipixels, is a printer, yes.
>
> BENOIT MANDEVILLE:
>
> [1057] Q. Did she do other jobs for Boiserie Dubé apart from that?
>
> THE JUDGE:

[1058] Q. As far as you know.

A. No, <u>I don't remember, I don't know</u>.

[1059] Q. You don't know.

BENOIT MANDEVILLE:

[1060] Q. In terms of Boiserie D.C., do you remember if she worked there?

A. <u>I don't remember</u>.

[Emphasis added.]

However, we know that Guylaine said that she did not work for BDC or for the payer.

<u>Joseph Dubé, Jacinthe Garneau and Denise Bellefeuille</u>

[92] In his statutory declaration of November 24, 1999 (Exhibit I-23), Mr. Dubé stated that Ms. Bellefeuille had earned $800 a week since September 5, 1999, [TRANSLATION] "because she replaced Jacinthe Garneau for about two weeks ..." During his meeting with the insurance officer on July 14, 2003, Mr. Dubé stated that Ms. Bellefeuille [TRANSLATION] "had come to work at the office for a few days"[75] (Exhibit I-38, page 1). In her statutory declaration of May 10, 2002, Ms. Garneau stated that she was replaced during her absences from the office by Ms. Bellefeuille, who [TRANSLATION] "went to the office to answer the telephone."[76] Now, none of the payer's employees who signed a statutory declaration (and who, for the most part, did not even know Ms. Bellefeuille) saw her in the payer's establishment (Exhibit I-30). Ms. Bellefeuille could not name any employee in the office or the factory or any vendor from BDC or the payer. Moreover she did not know what her salary was with the payer.[77] Ms. Bellefeuille

[75] In a statutory declaration made less than a year before, namely, on October 30, 2002 (Exhibit I-26, page 2) Mr. Dubé had denied that Ms. Bellefeuille had replaced Ms. Garneau [TRANSLATION] "in her duties at the office".

[76] Exhibit I-38, page 29. Ms. Garneau even stated that Guylaine Dubé, the daughter of Joseph Dubé, had worked as much for the payor as for BDC. However, Guylaine denied doing such work. Moreover, Mr. Dubé acknowledged before the insurance officer that Guylaine had never [TRANSLATION] "really worked for the business" (page 24 of Exhibit I-38).

[77] Summary by the insurance officer of the statutory declaration of Ms. Bellefeuille dated May 8, 2002 (Exhibit A-26, page 3).

acknowledged at the hearing that she did not do any work at the payer's establishment but said that she worked at home instead. She made the same statement on May 8, 2002: [TRANSLATION] "She said that when she replaced the secretary, when the latter was absent in 1999, she replaced her from home in the evening, she never showed up at the company."[78] Mr. Dubé said the same thing at the hearing, stating that [TRANSLATION] "Denise did not come to work in the office at all", when speaking of the period of Ms. Garneau's sick leave in 2001 (vol. 4 of the transcript, p. 27, Q. 76).

[93] Furthermore, there is another odd fact, revealed by tables 8 and 10 *supra* and the statements of Mr. Dubé and Ms. Bellefeuille, namely, that in September and until October 15, 1999, Ms. Bellefeuille was officially an employee of the payer and received a salary of $800 for 40 hours' work. However, Ms. Garneau was also with the payer at the time and received a salary of $800 for 40 hours (see tables 5 and 6 *supra* for the period from June 7 to October 22, 1999). In addition, in her claim for benefit of January 4, 2000 (Exhibits A-4 and I-9), in answer to question no. 24: [TRANSLATION] "Did you or will you receive vacation pay or other amounts from your last employer?", Ms. Garneau answered "No". In this way, the payer, according to his payroll journals, would have had two full-time secretaries working for him at a weekly salary cost of $800 each: Ms. Garneau in the office and Ms. Bellefeuille at home.

[94] There are two things to be said. First, how can Mr. Dubé claim in his statutory declaration of November 24, 1999 (Exhibit I-23) that Ms. Bellefeuille replaced Ms. Garneau when the latter was entered on the payer's payroll journal and she said that she did not have vacation pay? Furthermore, if there was enough work to justify a 40-hour week for Ms. Bellefeuille, why did she not report to the payer's office? -- especially since Mr. Dubé indicated in his statutory declaration that Ms. Bellefeuille did the invoicing and the statements of account. Ms. Bellefeuille could have reported to the office, since she had just ended her employment with the notaries on July 30, 2000, as shown in table 8 *supra*. Is a reminder needed that Ms. Bellefeuille's alleged period of work corresponds to the period for which Mr. Dubé provided HRDC with photocopies of the forged cheques?

[95] In her summary of the interview held on May 8, 2002, with Ms. Bellefeuille (Exhibit I-35, page 5), the HRDC investigator reported the following remarks of Ms. Bellefeuille (who refused to sign a statutory declaration):

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[78] *Ibid*, page 4. See also Exhibit I-35, page 6 (summary of the interview of May 8, 2002).

[TRANSLATION]

...Joseph brought me the small claims files and I prepared the cases and gave them to Joseph so that he could do them. I can't give you any names of customers whose credit was bad, I don't remember, there weren't a ton of them. I can't give you any names of people who worked or are still working for the company. It was Joseph or Jacinthe who brought me work at home. I did not go on the road, I worked at home. I don't know how many hours I worked, I didn't count them and I had no schedule; I can't say which days of the week I worked, I worked in the evenings and on weekends for two hours here and there and no one kept track of what I did or when I did it. I did things on my computer but I cannot explain what it was I did; I don't remember, even if it was in 2001.

I do not know why I did not say on some of my claims for benefit that I was related to the employer, Boiserie Dubé, i.e., Joseph Dubé, who is now my former spouse.

I do not know why I did not report the Record of Employment from Boiserie Dubé from 08-06-97 to 12-09-97 when I made my benefit renewal claim on November 18, 1997.

[Emphasis added.]

[96] However, Ms. Garneau denied that she had brought work to Ms. Bellefeuille:

[TRANSLATION]

I can say that it wasn't me who brought work home for Denise Bellefeuille, it was Joseph. She handled the small claims and took the documents to the lawyers. (Exhibit I-32, page 5)

[Emphasis added.]

[97] In his statutory declaration of November 24, 1999, Mr. Dubé justified the $800 salary paid to Ms. Bellefeuille for 6 or 7 weeks, from September 1999 to October 15, 1999, by the fact that she was [TRANSLATION] "*most of the time...on the road preparing some fifteen bad debt customer cases....she had to pay her own travel expenses ...*" (Exhibit I-23). In her statutory declaration of November 26, 1999, or two days after that of her husband, Ms. Bellefeuille had also justified the $800 salary, saying that it was given [TRANSLATION] "because of the higher volume of work and also to pay for my car travel" (Exhibit A-25). Now, according to the passage reproduced above, in paragraph 95, Ms. Bellefeuille said that she

did not go on the road and that she worked at home. When the investigator confronted her with her earlier declaration of November 26, 1999, Ms. Bellefeuille was unable to explain the contradiction. Her answer at that time was: [TRANSLATION] "I don't know and I don't want to say anything more" (Exhibit I-35, page 6). At the meeting on May 8, 2002, she was told about a number of $150 cheques that she was given in 2001 and 2002 for kilometrage, but Ms. Bellefeuille was unable to provide explanations in this case either (Exhibit A-26, page 4).

Absence of a contract of employment/deception

Guylaine Dubé

[98] The alleged contract of employment between Guylaine Dubé and the payer and between her and BDC are clear examples of simulated contracts of employment, of deception. Ms. Dubé acknowledged that she had not provided work to the payer and that the money she received was not hers: she signed the payer's cheques and gave them to her mother. Guylaine Dubé's husband confirmed that she had not worked for BDC or for the payer. Mr. Dubé acknowledged this himself during the investigation and during the hearing. The errands that she did for her father were the kind of thing one does to help out a family member. There is deception here since the three elements essential to the existence of a contract of employment are missing: Guylaine Dubé and the payer never intended for her to provide work in return for a salary and, consequently, the relationship of subordination was missing. The money paid by BDC and the payer was instead remuneration for Mr. Dubé's work with these two businesses. With regard to Guylaine Dubé's alleged employment with BDC and the payer, the Minister rightly argued that they were not genuine employment. In addition, the employment was not genuine for the purposes of the Civil Code nor, therefore, for the purposes of the EIA.

Jacinthe Garneau

[99] Concerning the contract between Ms. Garneau and the payer, I have no hesitation in concluding that this was a genuine contract of employment. All the conditions necessary for the existence of such a contract were present. Ms. Garneau provided work in return for a salary and the payer had the power of guidance or control over the work of Ms. Garneau. The fact that some conditions of the employment could be considered unreasonable does not invalidate the contract, but could lead to its exclusion from insurable employment under paragraph 5(2)(*i*) EIA, as will be seen below.

Denise Bellefeuille

[100] As for Ms. Bellefeuille, her situation is far less clear than that of Ms. Garneau or Guylaine Dubé. As the insurance officer and the appeals officer noted, the evidence is far from conclusively establishing that Ms. Bellefeuille provided work for the money paid her by the payer. First, Guylaine Dubé testified that she did not think that her mother had worked for the payer. In addition, the summary of the interview conducted by the HRDC investigator with Ms. Bellefeuille (Exhibit I-35, page 5) indicates that Ms. Garneau did not provide Denise Bellefeuille's employee records when HRDC requested the records of all of the payer's employees. It should also be remembered that Ms. Bellefeuille acknowledged that she had not worked continuously from June 21, 1998, to October 15, 1999. Here is something that clearly shows that there was no provision of service and payment of money in return. Not even a pay summary was submitted for the period after January 2, 1999. It is clear that Ms. Bellefeuille's Record of Employment of October 20, 1999, like a number of others prepared by Ms. Garneau, is false and misleading.

[101] The fact that Ms. Bellefeuille's testimony and that of Mr. Dubé and Ms. Garneau was evasive, vague or contradictory with regard to the services provided by Ms. Bellefeuille adds to the difficulty of the task. For example, Ms. Bellefeuille said that she did her work for the payer at home and that Mr. Dubé or Ms. Garneau brought her work. However, Ms. Garneau denies bringing work to Ms. Bellefeuille. In addition, there is the testimony of the investigator who revealed that in her conversation with Ms. Bellefeuille the latter could not provide details about her work at the payer's, whereas she gave many more details about the work she did for the various notaries. As was seen in paragraph 95, she could not [TRANSLATION] "give any names of customers whose credit was bad", even though dealing with bad debts would appear to have been her most important activity. In addition, she was unable to explain what she did on her computer. With such weak evidence and given the testimony of Guylaine Dubé, who did not think that her mother had worked for the payer, it is not surprising that the insurance officer believed that she had not worked for the payer.

[102] The main evidence for Ms. Bellefeuille's position is the testimony of the lawyer, Mr. Lessard, who confirmed that Ms. Bellefeuille had brought documents to him in his office in Varennes, the city where Ms. Bellefeuille lived and worked. However, he could not provide details about what work Ms. Bellefeuille might have done in connection with the collections files, except that he said that she

brought him documents and that he could ask her for details. A curious fact is that Mr. Lessard stated that he occasionally communicated with Ms. Bellefeuille at the payer's office. Yet, as was seen above, she did not work at the office. She worked at home. This contradiction raises doubts about the lawyer's testimony. However, he seemed more confident when he said that he communicated more often with Mr. Dubé or Ms. Garneau.

[103] It is highly likely, then, that Ms. Bellefeuille's work could have been summed up as being just a courier, "doing errands". She took documents to the lawyer, Mr. Lessard, whose office adjoined the notaries' offices where she was employed. When the notary who was her boss left the notaries' offices to move elsewhere in Varennes, Ms. Bellefeuille continued to deliver documents to Mr. Lessard. However, he said that Ms. Bellefeuille's 10 or 15 visits had been at the beginning of 2000, and she acknowledged in her testimony that she had [TRANSLATION] "really stopped going to Mr. Lessard's...around 2000. ... I went there less often, that is certain." (Vol. 4 of the transcript, p. 293, Q. 1021.) This situation could be explained by the fact that she had ceased to live with Mr. Dubé at the end of 1999.

[104] It is also highly likely that the amounts given by the payer to Ms. Bellefeuille were really amounts owed to Mr. Dubé for the work that he did for the payer. When he worked for BDC and later for the payer, Mr. Dubé received a salary well below a manager's. He received only $250 a week. The salary to which Mr. Dubé was entitled at BDC and at the payer could include both the amounts paid to Guylaine Dubé, his daughter, and those paid to his wife, Ms. Bellefeuille. Mr. Dubé had an interest in acting this way since he could hope to receive a disability pension from the CSST. Even if that had not been the case, Mr. Dubé could reduce his tax payable by splitting his income among three people. It must be emphasized that Ms. Bellefeuille did not work year-round in the notaries' office and thus her income was low.

[105] The fact that Guylaine Dubé acknowledged that she had never worked for the payer lends weight to this interpretation of the facts. It makes it more plausible that the amounts received by Ms. Bellefeuille from BDC and the payer were of the same nature as the amounts paid to Guylaine Dubé. This money was used to meet the household needs of the Dubé family. After the Dubé couple separated, the payer probably continued to pay amounts to Ms. Bellefeuille on behalf of Mr. Dubé who could have support obligations to Ms. Bellefeuille. If the remuneration paid by the payer to Ms. Bellefeuille represents remuneration for Mr. Dubé's services, it is clear that Ms. Bellefeuille's contract of employment

would be a simulation, a deception, and the alleged employment of Ms. Bellefeuille would not be genuine employment within the meaning of the Civil Code nor, as a result, for the purposes of the EIA.

- *Ms. Bellefeuille's contract of employment*

[106] In any case, even if Ms. Bellefeuille had actually provided services to the payer under an onerous contract, that contract would instead be a contract for services and not a contract of employment. The work provided by Ms. Bellefeuille, if one relies on her version of the facts and on that of Mr. Dubé, included well-defined tasks, to wit: the preparation of files for the lawyer so that the latter could launch collection proceedings, delivery of these documents to that lawyer, a little work making templates for invoices and other similar, well-defined tasks. Even if he did not keep track of the hours, Mr. Dubé stated, he did check Ms. Bellefeuille's work since the result was there. His counsel asked him if he had the power to monitor Ms. Bellefeuille's work. He answered in the affirmative. However, he acknowledged, in answer to a question from me, that he could have given the same instructions if Ms. Bellefeuille had been an independent contractor.

[107] The evidence as a whole leads me to believe that there was no relationship of subordination between her and the payer, such a relationship being one of the conditions essential for the existence of a contract of employment. In my opinion, the payer had no power of guidance or control over the work of Ms. Bellefeuille. The only control that the payer could exercise over her was that which a customer exercises over a provider of services. The circumstances in which the work was performed by Ms. Bellefeuille exhibit significant indicia of independence. The latter had all the flexibility she needed to carry out, whenever she saw fit, the tasks entrusted to her. Ms. Bellefeuille needed this flexibility because most of the time she also worked full-time in a notaries' office. The fact that Ms. Bellefeuille did not work in the payer's establishment, even after her employment with the notaries ended, is another indication of her independence.

- *Exclusion because of the non-arm's length relationship*

[108] In any event, even if there were a relationship of subordination between Ms. Bellefeuille and the payer and they were bound by a contract of employment, the contract of employment would clearly be excluded from the definition of insurable employment because of the non-arm's length relationship between them. In order to define the concept of a non-arm's length relationship, paragraph 5(3)(*a*) EIA refers us to the ITA. The relevant provisions of the ITA follow:

248 (1) Definitions — In this Act,[79]

"common-law partnership" – "common-law partnership" means the relationship between two persons who are common-law partners of each other;

"common-law partner" – "common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(*a*) has so cohabited with the taxpayer for a continuous period of at least one year, or

(*b*) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(*c*) and (*e*) and subparagraph 252(2)(*a*)(iii), and, for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

251(1) Arm's length

(1) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length; and[80]

...

(*c*) where paragraph (*b*) does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.[81]

251(2) Definition of "related persons" — For the purposes of this Act, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or common-law partnership or adoption;[82]

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[79] The two definitions are applicable as of January 1, 2001.

[80] This is a non-arm's length relationship in law.

[81] This is a de facto non-arm's length relationship.

[82] The paragraphs 251(2)(*a*) and 251(6)(*b*.1) that are reproduced here are the ones in force as of January 1, 2001. They had been amended to add the concept of "common-law partnership". Consequently, with regard to the taxation years relevant to these appeals, one must apply the concept of "connected by...marriage" together with subs. 252(4) ITA for

(*b*) a corporation and
 (i) a person who controls the corporation, if it is controlled by one person,
 (ii) a person who is a member of a related group that controls the corporation, or
 (iii) any person related to a person described in subparagraph (i) or (ii); …

251(6) Blood relationship, etc. For the purposes of this Act, persons are connected by

...

(*b*) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

(*b*.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other;

252(4) In this Act,

(*a*) words referring to a spouse at any time of a taxpayer include the person of the opposite sex who cohabits at that time with the taxpayer in a conjugal relationship and
 (i) has so cohabited with the taxpayer throughout a 12-month period ending before that time, or
 (ii) would be a parent of a child of whom the taxpayer would be a parent, if this Act were read without reference to paragraph (1)(*e*) and subparagraph (2)(*a*)(iii)

and, for the purposes of this paragraph, where at any time the taxpayer and the person cohabit in a conjugal relationship, they shall, at any particular time after that time, be deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

(*b*) references to marriage shall be read as if a conjugal relationship between 2 individuals who are, because of paragraph (*a*), spouses of each other were a marriage;

(*c*) provisions that apply to a person who is married apply to a person who is, because of paragraph (*a*), a spouse of a taxpayer; and

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1997 to 2000, and the concepts of "common-law partnership" and "common-law partner" as well as paragraphs 251(2)(*a*) and 251(6)(*b*.1) ITA for 2001.

> (*d*) provisions that apply to a person who is unmarried do not apply to a person who is, because of paragraph (*a*), a spouse of a taxpayer.
>
> [Emphasis added.]

Denise Bellefeuille

[109] In the case at bar, Ms. Bellefeuille was the wife of Mr. Dubé and, because of this fact, was "related" to him within the meaning of paragraph 251(2)(*a*) ITA. As Mr. Dubé controlled the payer, Ms. Bellefeuille was related to the payer and did not deal with the payer at arm's length (subparagraph 251(2)(*b*)(iii) and paragraph 251(1)(*a*) ITA). Where the parties to a contract of employment do not deal at arm's length because they are related (paragraph 251(1)(*a*)) and the employment created by this contract could therefore be excluded from the definition of insurable employment, it falls to the Minister to determine, pursuant to paragraph 5(3)(*b*) EIA, if these parties can be deemed to deal at arm's length and, consequently, if, in this case, Ms. Bellefeuille held insurable employment. More specifically, what this paragraph sets out is that, in this kind of case, the employer and the employee … "are deemed to deal with each other at arm's length if the Minister … 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."

[110] The Minister's power of determination "must clearly be completely and exclusively based on an objective appreciation of known or inferred facts"[83] and this Court must, in light of the facts revealed to the Minister and those shown to the Court, decide whether the Minister's conclusion still appears "reasonable". If this is the case, the Minister will have exercised his power "appropriately".

[111] Furthermore, an "objective appreciation" of the circumstances, such as the remuneration and the terms and conditions of employment, is incompatible with an "arbitrary" appreciation. To determine whether the terms of the contract of employment between an employee and his employer would have been substantially similar if they had been dealing at arm's length, it is useful, and even necessary, to compare them with contracts of employment between persons dealing at arm's length, whether in law or in fact. Paragraph 5(3)(*b*) EIA does not state that the

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83 *Légaré v. Canada (M.N.R.)*, [1999] F.C.J. No. 878 (QL), para. 4.

Minister is required to make this comparison and still less does it specify for which contracts he must do so. However, in order for the Minister's conclusion to appear reasonable, the existence of such points of comparison seems desirable. In any event, the comparison will facilitate reaching a conclusion about the reasonableness of the determination.

[112] These are the reasons provided by the appeals officer to justify his decision that Ms. Bellefeuille did not hold insurable employment (Exhibit I-40, p. 9):

> [TRANSLATION]
>
> **Remuneration paid:** It varied between $240 and $800 per week.
>
> **Terms and conditions of employment:** The worker allegedly worked at home and on the road but, on the payer's own admission, her hours were not monitored.
>
> **Duration of the work:** The worker allegedly performed some tasks from time to time between 1997 and 2001.
>
> **Nature and importance of the work:** Apart from Mr. Lessard, who states that he met the worker in his office, but could not, however, judge the quantity of work performed by the worker, we believe that the work performed by the worker was very little or was negligible. What she did cannot in any case justify the $750 or $800 remuneration paid in 1999 and 2000 over a number of weeks.
>
> Consequently, we believe that the payer and the worker would not have entered into such a contract of work if they had been dealing at arm's length. The employment is not insurable employment under paragraph 5(2)(*i*) of the *Employment Insurance Act.*
>
> ...
>
> (VIII) **RECOMMENDATION – RECOMMANDATION:**
>
> We recommend that the departmental notification stipulate that Denise Bellefeuille did not hold insurable employment under 5(1)(*a*) of the *Employment Insurance Act*. In the alternative, she did not hold insurable employment under paragraph 5(2)(*i*) of the *Employment Insurance Act* when she was employed with Boiserie Dubé et associés Inc. during the periods in question.
>
> [Emphasis added.]

[113] The evidence produced by Ms. Bellefeuille did not satisfy me as to the unreasonableness or inappropriateness of the Minister's decision. Moreover, if it had fallen to me to decide, I would have made the same decision as the Minister. I am in full agreement with the appeals officer that the work provided by the worker was "very little or was negligible", compared to the salary of $750 or $800. I would even say that this is true of the $240 salary. As tables 9 and 10 *supra* show, Ms. Bellefeuille's hourly rates with the payer were much higher than what she received from the notaries. Ms. Bellefeuille's average hourly wage, according to the payer's payroll journal for 1997 and 1998 was $15, or 50% more than what she received from the notaries (table 9 *supra*). Even assuming that Ms. Bellefeuille actually worked between 7 and 15 hours a week, as she stated at the hearing, an hourly wage with the payer is obtained that represents approximately the double and sometimes the triple of what she earned with the notaries who, it would appear, dealt at arm's length (whether in law or in fact) with Ms. Bellefeuille (table 10 *supra*). The salary was well above what an employer would have paid to an employee with whom he was dealing at arm's length.

Jacinthe Garneau

[114] The appeals officer determined that in law there was a non-arm's length relationship between Ms. Garneau and the payer because the two were related within the meaning of section 251 ITA. In reaching this conclusion, the officer seems to have assumed that Ms. Garneau had been Mr. Dubé's mistress since 1996 and his common-law partner since December 4, 1999, because they had shared the same apartment beginning on that date. As Mr. Dubé controlled 75% of the voting shares of the payer, there was a non-arm's length relationship between Ms. Garneau and the payer.

[115] In this analysis, the appeals officer made an error of law. He wrongly concluded that Ms. Garneau had in law a non-arm's length relationship with the payer during the Garneau periods, except with regard to the last period, that is, from March 4, 2001, to June 22, 2001. Under subsection 251(2) ITA, individuals like Mr. Dubé and Ms. Garneau could not be "related persons" before 2001 until they were married, and in respect of 2001 and the following taxation years unless they were united in a common-law partnership. According to subsection 252(4) ITA, persons of the opposite sex living in a conjugal relationship for a period of twelve months are considered married for the years prior to 2001.

First Garneau periods

[116] As the evidence disclosed that Mr. Dubé and Ms. Garneau did not cohabit until December 1999, they could not have been related by marriage or a common-law partnership until twelve months later, that is, in December 2000, or, if one accepts Ms. Garneau's version, in January 2001. The fact that they had been lovers since 1996 does not alter the situation. Consequently, these persons were related persons — and therefore deemed not to deal at arm's length — only in respect of the last Garneau period. For the other Garneau periods (**first Garneau periods**), there has to be a de facto non-arm's length relationship between Ms. Garneau and the payer in order for Ms. Garneau's employment to be excluded from insurable employment. In *Massignani* I wrote as follows on this point:

> 80 Prior to 1993, Ms. Provost was not related to Tiva and, consequently, there is no legal presumption of a non-arm's length relationship between her and Tiva, as is the case after 1992. Thus, it must be determined whether, in fact, such a non-arm's length relationship existed. The concept of a non-arm's length relationship has been addressed a number of times in case law. My colleague Bonner J. dealt with this concept in *McNichol v. Canada*, [1997] T.C.J. No. 5, para. 16 [97 DTC 111, at pages 117 and 118]:
>
>> 16 Three criteria or tests are commonly used to determine whether the parties to a transaction are dealing at arm's length. They are:
>>
>>> (a) the existence of a common mind which directs the bargaining for both parties to the transaction,
>>> (b) parties to a transaction acting in concert without separate interests, and
>>> (c) "*de facto*" control.
>>
>> The common mind test emerges from two cases. The Supreme Court of Canada dealt first with the matter in *M.N.R. v. Sheldon's Engineering Ltd.* At pages 1113-14 Locke J., speaking for the Court, said the following:
>>
>>> Where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arm's length.~. Apart altogether from the provisions of that section, it could not, in my opinion, be fairly contended that, where depreciable assets were sold by a taxpayer to an entity wholly

> controlled by him or by a corporation controlled by the taxpayer to another corporation controlled by him, the taxpayer as the controlling shareholder dictating the terms of the bargain, the parties were dealing with each other at arm's length and that s. 20(2) was inapplicable.

The decision of Cattanach, J. in M.N.R. v. T R Merritt Estate is also helpful. At pages 5165-5166 he said:

> In my view, the basic premise on which this analysis is based is that, where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties were dealing at arm's length. In other words where the evidence reveals that the same person was "dictating" the "terms of the bargain" on behalf of both parties, it cannot be said that the parties were dealing at arm's length.

The acting in concert test illustrates the importance of bargaining between separate parties, each seeking to protect his own independent interest. It is described in the decision of the Exchequer Court in *Swiss Bank Corporation v. M.N.R.* At page 5241 Thurlow J. (as he then was) said:

> To this I would add that where several parties -- whether natural persons or corporations or a combination of the two -- act in concert, and in the same interest, to direct or dictate the conduct of another, in my opinion the "mind" that directs may be that of the combination as a whole acting in concert or that of any of them in carrying out particular parts or functions of what the common object involves. Moreover as I see it no distinction is to be made for this purpose between persons who act for themselves in exercising control over another and those who, however numerous, act through a representative. On the other hand if one of several parties involved in a transaction acts in or represents a different interest from the others the fact that the common purpose may be to so direct the acts of another as to achieve a particular result will not by itself serve to disqualify the transaction

> as one between parties dealing at arm's length. The Sheldon's Engineering case [*supra*], as I see it, is an instance of this.

> Finally, it may be noted that the existence of an arm's length relationship is excluded when one of the parties to the transaction under review has de facto control of the other. In this regard reference may be made to the decision of the Federal Court of Appeal in *Robson Leather Company Ltd. v. M.N.R.*, 77 D.T.C. 5106.

> ...

81 To determine whether a non-arm's length relationship does exist, the courts analyze the facts as a whole. One indicator that a non-arm's length relationship exists is the fact that the terms and conditions under which property is acquired do not correspond with a regular business operation. In *Petro-Canada v. The Queen*, 2003 DTC 94, Bowie J. concluded as follows at paragraph 82:

> ... The evidence leaves me in no doubt that these transactions did not reflect ordinary commercial dealings between the vendors and the purchasers acting in their own interests and so were not at arm's length. ...

82 At page 1453 of *Freedman Holdings Inc. v. The Queen*, 96 DTC 1447, Rip J. stated that the guidelines set out in Interpretation Bulletin IT-419R appeared to him to be a reasonable application of the case law. Paragraph 19 of these guidelines reads as follows :

> 19. Failure to carry out a transaction at fair market value may be indicative of a non-arm's length transaction. However, such failure is not conclusive and, conversely, a transaction between unrelated persons at fair market value does not necessarily indicate an arm's length situation. The key factor is whether there are separate economic interests which reflect ordinary commercial dealing between parties acting in their separate interests.

83 In my view, this constitutes only one of the aspects that the courts must take into account to determine whether a non-arm's length relationship exists in situations that present indicators of a negotiated transaction, where in reality, one of the parties exercises influence over the other in such a way that this party is not free to participate in this transaction independently. Although Bonner J. (like many others) sets out three separate criteria to define the concept of a non-arm's length relationship, there is essentially one single criterion that can be summarized briefly as follows: is one party exercising control or influence over

> the other party? What the three criteria seek to determine is whether a relationship exists between individuals who are party to a transaction in which one of the parties exercises its influence over the other in such a way that the other party is no longer free to participate independently.

[Emphasis added.]

[117] There are also my remarks in *McMillan v. Canada* (*M.N.R.*), [1996] T.C.J. No. 1384 (QL):

> 18 Mr. McMillan was not related to BLI. In this case, the determination whether Mr. McMillan was dealing at arm's length with BLI remains a question of fact. The courts have held that a non-arm's length situation exist in a particular transaction when the relationship between the parties is such that they are not in a position to negotiate terms of a transaction that would reflect the prevailing commercial constraints of the market. This occurs when one party controls the other or the two parties are controlled by the same person. In a Supreme Court of Canada decision, *Swiss Bank Corporation et al. v. M.N.R.*, 72 D.T.C. 6470, at pages 6473-6474, Laskin, J. stated :
>
>> Although the circumstances here do not present the common type of non-arm's length dealing referred to by this Court in the *Minister of National Revenue v. Sheldon's Engineering Ltd.* [1955] S.C.R. 637 [55 D.T.C. 1110], they bring this case within the principle that underlies the disqualification expressed in s. 106(1)(*b*)(iii)(A), namely, that the payer and payee must not be persons who, effectively, are dealing exclusively with each other through a fund provided (1) by the payee for the benefit of the payee. A sound reason for this that the enactment itself suggests is the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests. A lender-borrower relationship which does not offer this assurance because there are, in effect, no separate interests must be held to be outside the exception that exempts a non-resident from taxation on Canadian interest payments. The fact that the interest actually authorized or paid is consistent with arm's length dealing is not enough in itself to avoid this conclusion.
>
> ...
>
> 20 Laskin, J. stated in *Swiss Bank Corporation* (*supra*) that the fact that the terms of a contract are consistent with arm's length dealing is not enough in itself to avoid the conclusion that a party does not deal at arm's length with another. I

> would add, however, that the fact that the terms of a contract are not consistent with arm's length dealing raises a strong indication of a non-arm's length relationship. When, in addition to this fact, there is also evidence that a special relation exists between the parties which would make it doubtful that they had independent interest in negotiating the terms of an agreement, then the conclusion that the parties were not dealing at arm's length may be inevitable.
>
> 21 Here, I find that the terms of the contract of service, if it existed, are not those of persons dealing with each other at arm's length. First, I do not believe that a person dealing at arm's length would accept to work for another without remuneration. Mr. McMillan agreed to work without any remuneration for BLI when he shovelled snow on a regular basis during the winter. In Mr. MacMillan's own words, "there was a lot of snow to shovel and this required two to three hours on every occasion". He stated that he did so because he "enjoyed it". However, BLI was the only beneficiary of this service.
>
> 22 There are also other indications of a non-arm's length relationship. On several occasions, he accepted receiving less than what he was entitled to for his services. Furthermore, Mr. MacMillan acknowledged that he was working longer hours without additional remuneration than what had been agreed to between him and BLI. Finally, there is the close relationship that existed between Mr. McMillan and Mrs. Leblanc, the owner of BLI.[84]
>
> [Emphasis added.]

Was there a de facto non-arm's length relationship between Ms. Garneau and the payer from 1997 to 2000?

[118] Since the payer was controlled by Mr. Dubé, a de facto non-arm's length relationship between Mr. Dubé and Ms. Garneau could be a revealing indication of a de facto non-arm's length relationship between the payer and Ms. Garneau. What facts could disclose the existence of such a relationship? First, there is the fact that Ms. Garneau may have been Mr. Dubé's mistress since 1996. On this, there is conflicting evidence. Moreover, the Respondent did not submit the best evidence for the existence of this fact, since Mr. Maltais' testimony is hearsay. The probative value of this testimony is less impressive than it would have been if Mr. Dubuc, who allegedly witnessed the above-mentioned sexual conduct, had testified himself. It would certainly have been useful if this employee had testified before the Court. However, it must be remembered that the onus is on Ms. Garneau

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[84] See also the decision of Léger J. in *McCaie v. Canada* (*M.N.R.*), [1996] T.C.J. No. 48 (QL).

to show that she was not Mr. Dubé's mistress in 1996.[85] However, Mr. Dubé and Ms. Garneau denied that they had had a relationship in 1996. Mr. Dubé allegedly did not begin to court Ms. Garneau until the summer of 1997.

[119] In rebuttal evidence, to counter the statement of Mr. Maltais, who established the beginning of the cohabitation of Ms. Garneau and Mr. Dubé at a particular time in 1997, the latter stated that he had not had intimate relations with Ms. Garneau prior to December 1998. However, Mr. Dubé is described as the new spouse of Ms. Garneau in her motion dated October 6, 1998. In order to be able to make this statement, the common-law partnership would have had to be created at some period prior to October 6, 1998! In any event, it is clear that they went out together beginning in May or June 1997. This would be consistent, at least in part, with the hearsay testimony of Mr. Maltais, who stated that Mr. Dubé and Ms. Garneau were living together at that time. Even if I believe that Ms. Garneau began to work for the payer towards the end of February 1997, the official commencement of her work with the payer, according to the payroll journal (Exhibit A-10) and according to Ms. Garneau's Record of Employment (Exhibit I-5), was May 5, 1997, which is more or less during the period when Mr. Dubé acknowledged that he was going out with Ms. Garneau.

[120] Another element that could support the conclusion that there was a de facto non-arm's length relationship would be evidence that the circumstances were such between Mr. Dubé and Ms. Garneau from 1997 to 2000 that the parties were not in a position to negotiate a contractual agreement that reflected the conditions of the market. Evidence of the existence of such circumstances can be given by showing that the terms of the contract of employment were unreasonable. Were the terms of Ms. Garneau's contract of employment with the payer sufficiently unreasonable to permit the inference that there was a de facto non-arm's length relationship between her and the payer?

[121] At first blush, the weekly remuneration of $525 paid to Ms. Garneau by the payer in 1997 seems very reasonable since it corresponds to what BDC had paid her in 1996, especially if we assume that she worked the same number of hours with the payer as she did for BDC. That company belonged to a group of shareholders which did not appear to have had a non-arm's length (in law or in fact) with Ms. Garneau. The terms and conditions of Ms. Garneau's contract of

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85 Moreover, under subss. 18.15(4) and 18.29(1) of the *Tax Court of Canada Act,* R.S.C. 1985, c. T-2, this Court is not bound by the rules of evidence when hearing an appeal under the EIA.

employment with BDC may therefore constitute an excellent point of comparison for determining whether the terms and conditions of her contract of employment with the payer corresponded to those of the market.[86]

[122] However, if Ms. Garneau only worked 35 hours with the payer, instead of 44 hours as she did with BDC, then her hourly rate went from $12 to $15, a substantial 25% increase. We must add to that the fact that with the payer she was paid by the week without taking into account the hours actually worked, whereas she had been remunerated on an hourly basis — and not weekly — with BDC, as the analysis in table 4 *supra* makes clear. Although there is a reference to the number of hours in the payer's payroll journal with regard to Ms. Garneau, Mr. Dubé acknowledged that her remuneration did not take those hours into account. He also acknowledged that Ms. Garneau often left work before the end of the day and that on occasion she did not even work on Friday.

[123] Mr. Dubé also confirmed that Ms. Garneau's remuneration depended on other factors, such as the payer's ability to pay and Ms. Garneau's financial needs. For example, in answer to a question posed by counsel for the Appellants, who asked him the reason for Ms. Garneau's salary raise to $700 and $800 per week, he explained that Ms. Garneau had to buy a new house, which she did after leaving her husband in August 1998. The house was conveyed to her in December 1998. Counsel for Ms. Garneau, realizing that this answer could harm his case, contradicted his witness and had him acknowledge that this kind of reason is not a justification when one is dealing at arm's length. At this point, Mr. Dubé changed his version and instead said that the company was making more profit and could pay a higher salary to reflect the fact that it had previously paid her a lower salary than she might deserve. Mr. Dubé then stated that, if Ms. Garneau had been dealing at arm's length, she would never have accepted a remuneration of $700. Therefore, it was time that the company paid her a higher amount. However, the case law recognizes that the acceptance of terms and conditions of employment that are less favourable than those which a third party dealing at arm's length would have accepted is an indication that such conditions would not have existed had there not been a non-arm's length relationship.

[124] Mr. Dubé also stated that Ms. Garneau's salary went from $800 to $700 after they began to live together in December 1999. Ms. Garneau's remuneration, which was $800 from June 13, 1999, to October 23, 1999, was reduced to $700 on May

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[86] This statement is also valid to determine whether the payor and she would have entered into a substantially similar contract of employment had they been dealing at arm's length.

22, 2000, when, according to the payroll journal, she had returned to the payer (table 5 *supra*).

[125] According to Ms. Garneau's version, the reason that she started with the payer at $525 was because she took into account the ability to pay of a new company just starting up. It is true that for its first fiscal year, the payer suffered a loss of $67,467. In the second fiscal year, profits were very small: $4,395. However, it should be noted that Ms. Garneau's attitude was more like that of a co-owner than an employee seeking the best possible remuneration while being aware of the circumstances of her future employer. Furthermore, this attitude is apparent in the following answer:

> [TRANSLATION]
>
> [773] Q. You did not count your hours?
>
> A. No. <u>When you have a company,</u> Sir, you don't count your hours.
>
> (Vol. 1 of the transcript, p. 271)
> [Emphasis added.]

[126] Another factor that could reveal the unreasonableness of the terms and conditions of Ms. Garneau's contract of employment is the fact that she worked without pay during her alleged periods of unemployment. In fact, it would be more accurate to state that she worked year-round and was remunerated for this work over short periods corresponding to the official periods of work, namely, those indicated in the payroll journal and on the Records of Employment. Mr. Dubé, like Ms. Garneau, tried to minimize the amount of hours worked by Ms. Garneau, although she was regularly at the payer's establishment during her alleged periods of unemployment. According to them, the number of hours a week during these periods varied between five and six.

[127] In her meeting with the investigator on May 10, 2002 (Exhibit I-32, page 3), Ms. Garneau denied working for the payer before May 1997. All that she admitted to was helping paint on weekends. [TRANSLATION] "I did nothing and put in no time or period of time" she said (Exhibit I-32, page 3). One cannot attach much probative value to this statement, however, since at the same meeting Ms. Garneau stated that Guylaine Dubé had worked for BDC and the payer. When she was told that Guylaine Dubé had said that she had not worked for BDC or for the payer, she refused to talk any more about this matter: [TRANSLATION] "I don't want to talk about Guylaine any more until I speak to my lawyer" (Exhibit I-32, page 3).

However, she acknowledged at that time that she worked during her alleged periods of unemployment, but [TRANSLATION] “perhaps fewer hours, perhaps half-days instead of full days” (Exhibit I-32, page 3). She added: [TRANSLATION] “I might work in the office only in the morning and the next day, I might go to work only in the afternoon” (Exhibit I-32, page 3).

[128] At her meeting with the insurance officer on July 14, 2003, Ms. Garneau indicated that she had not provided her services to the business without being paid (Exhibit I-38, page 30). When she was told that the Minister had evidence that she had signed cheques during some periods when she was receiving benefits, she acknowledged that she came to the office on Thursday mornings to prepare the payroll. She stated that she had not been paid for this time since [TRANSLATION] “it was very brief, sometimes it only took a few hours” (Exhibit I-38, page 30). She said that it was [TRANSLATION] only on Thursdays [that she came in] to prepare the payroll for the employees” (Exhibit I-38, page 30).

[129] According to the investigator, Ms. Garneau worked a great deal more than she was prepared to acknowledge. In support of his position, the Respondent produced numerous statutory declarations from employees or former employees of the payer that state that Ms. Garneau was in the payer’s establishment on a regular basis year-round. According to the investigator,[87] the following persons confirmed that Ms. Garneau worked regularly and continuously during the following periods when she was generally in receipt of employment insurance:

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87 Exhibit I-38, p. 30, and Exhibit I-30. In addition to the statutory declarations obtained by HRDC (Exhibit I-30), there is the fact that the insurance officer also met many employees of the payor, including, in particular, Laurent Ducharme, Stéphane Laferrière, Louise Lambert, Monique Poirier, Yves Ostiguy, Nancy Ménard, Jean-Pierre Latreille, Jean-Guy Tremblay, Stephan Perrault, Gaston Dubuc and Jean-Marc Charrier, who again confirmed the statements made to HRDC (Exhibit I-39).

Table 11

Alleged periods of unemployment	Witnesses
Dec. 21, 1996, to May 4, 1997	Dubuc, Ostiguy,[88] Latreille, Laferrière and Searles
Dec. 13, 1997, to May 30, 1998	Laferrière, Poirier, Searles, Martel and Harnois
Nov. 8, 1998, to June 6, 1999	Martel, Harnois, Searles, Poirier, Laferrière and Plante
Oct. 23, 1999, to May 21, 2000	Tremblay,[89] Laferrière, Perrault, Poirier, Searles and Martel
Oct. 7, 2000, to March 3, 2001	Ostiguy, Tremblay, Charrier,[90] Laferrière, Perrault, Searles, Martel and Patenaude
June 23, 2001, to Oct. 28, 2001 (sick leave)	Tremblay, Charrier, Lambert, Laferrière, Ménard, Ducharme, Perrault, Searles and Martel
Oct. 29, 2001, to Feb. 23, 2002	Tremblay, Ducharme, Charrier, Lambert, Searles and Martel

[130] Obviously, the statutory declarations of these persons, or summaries of the interviews with them, are not the best evidence that the Respondent could have produced. If these people had testified, the hearing would have lasted longer than the six days that it did.[91] However, this evidence is corroborated by the voluminous documentary evidence provided by the investigator. Moreover, the burden of demolishing the facts so established lay with Ms. Garneau and she did not succeed in this task. According to the HRDC investigator, analysis of the payer's documents (Exhibit I-28) revealed that, during Ms. Garneau's alleged periods of unemployment, there were never five consecutive days for which there is no

88 I consulted Mr. Ostiguy's statutory declaration (Exhibit I-30) and the summary of his meeting with the insurance officer (Exhibit I-39); I did not find any corroboration for this statement (Exhibit I-38, page 30) with respect to this period. He was employed by the payor from September 4, 2000, to December 8, 2000, and he confirmed Ms. Garneau's presence only for this period. Mr. Ostiguy's name also does not appear in the investigator's table for 1997 (Exhibit I-29).

89 Mr. Tremblay's name is not in the investigator's table for this period. He did not, moreover, have a meeting with her. It was the insurance officer who met with him. He confirmed that he had worked beginning on June 12, 2000. At the time of the meeting, May 7, 2003, he was on sick leave. See Exhibits I-39 and I-38, page 30.

90 For example, in his statutory declaration of April 25, 2002 (Exhibit I-30), Mr. Charrier states: [TRANSLATION] "I reported every day to the office [of the payor from January 7, 2001, to April 25, 2002] and every day I dealt with Joseph Dubé and Jacinthe Garneau."

91 However, this procedure is in many respects similar to a informal proceeding that is to be heard expeditiously. See note 85.

evidence of Ms. Garneau's signature on cheques, invoices or Records of Employment.

[131] The HRDC verifications even revealed that Ms. Garneau also provided information to various government departments or agencies, including the Agency and the Commission des normes du travail, during her alleged periods of unemployment. She was on site when the investigator came for the initial interview, in December 2001 when she was receiving benefits. On Friday, December 7, 2001, Ms. Garneau telephoned a collection officer to reconcile the employer's account and that of the Agency. On July 17, 2001, while Ms. Garneau was on sick leave, the collection officer telephoned the payer to obtain an amount of missing returns. It was Ms. Garneau who called back on Thursday, July 19, 2001, using the name Vachon, i.e., the family name of her former husband (from whom she had been divorced since March 17, 2000!) (Exhibit A-2). On Thursday, September 6, 2001, a collection officer contacted Ms. Garneau concerning the return for July. On the infamous date of September 11, 2001, an officer from the taxation centre obtained confirmation from Ms. Garneau of information concerning the shareholders. On Tuesday, January 8, 2002, a collection officer received a call from Ms. Garneau concerning the business' account. On Tuesday, February 5, 2002, a collection officer contacted Ms. Garneau regarding some post-dated cheques.

[132] There is another disturbing fact that raises a good many doubts about statements that Ms. Garneau worked very little during her alleged periods of unemployment. Mr. Dubé acknowledged that he had not replaced Ms. Garneau during her sick leave, from June 26 to October 28, 2001 (Exhibit A-3). As for Ms. Bellefeuille, she did not come to the office "to work". However, Ms. Garneau was normally employed from May or June to October, November or even December, every year. She was officially on the payer's payroll journal from May to December 1997, from May to November 1998, from June to October 1999 and from May to October 2000. Table 1 *supra* shows that the business figure for 2001 was $104,000 higher than the one for 2000. There was therefore more activity in 2001 than in all the previous years that the payer was in operation (table 1 and 2 *supra*).

[133] There are two possible interpretations of these facts. First, Ms. Garneau's work was not important and her services could be dispensed with; or, on the contrary, her work was important and Ms. Garneau continued to work while she was on sick leave and for the remainder of 2001. I prefer the second interpretation. Mr. Dubé acknowledged, moreover, that Ms. Garneau was present on a regular

basis at the payer's establishment at that time. According to him, it was personal considerations that dictated her presence: he feared that she might do something irreparable while she was depressed. It is true that the sick leave occurred during the last of the Garneau periods, during which Ms. Garneau was a "related person" vis-à-vis the payer, whereas it still must be determined whether there was a de facto non-arm's length relationship during the first Garneau periods. However, these facts raise significant doubts about the credibility of Ms. Garneau and Mr. Dubé when they minimize the work she accomplished during her periods of alleged unemployment.

[134] I conclude therefore that Ms. Garneau did not succeed in disproving the facts assumed in paragraphs 8(h) and (j) of the Minister's Reply to the Notice of Appeal, namely, that she [TRANSLATION] "worked year-round for the payer on the premises of the business" during the Garneau periods and that she [TRANSLATION] "continued to provide services to the payer after her alleged layoffs". Not only did she not disprove them, but I believe, on a balance of probabilities, that she worked year-round for the payer.

[135] To illustrate the effect on Ms. Garneau's remuneration of working for the payer year-round while receiving only the amounts indicated on the payroll journal as remuneration, it is revealing to calculate the true hourly wage that she received. For instance, let us take 1999, the middle year in the Garneau periods. Ms. Garneau was not officially on the payer's payroll journal except from June 6, 1999, to October 23, 1999. For these 20 weeks, she received a total remuneration of $15,900 [(19 x $800) + (1 x $700)] (table 5). Ms. Garneau stated that she had generally worked from 35 to 40 hours a week. On the assumption that she worked 38 hours a week on average, as is provided for, incidentally, in the contract between her and the company that purchased the payer's business in 2004, it can be calculated that she had to be paid for 1,976 hours in 1999 (52 x 38). A salary of $15,900 for 1,976 hours corresponds to an hourly rate of $8.05. Such a remuneration is far below that which an honest person, dealing at arm's length, in fact or in law, and not participating in any fraudulent scheme to unjustly receive benefits under the EIA, would have accepted. When Ms. Garneau worked in 1995 and 1996 for Quincaillerie and BDC, persons with which she apparently had a non-arm's length relationship (in law or de facto), she earned an hourly wage of $12, or 50% more. The remuneration that she received from the payer does not correspond to that which parties with distinct economic interests would have agreed to.

[136] Finally, another factor reveals the existence of a de facto non-arm's length relationship between Ms. Garneau and the payer in the first Garneau periods.

Ms. Garneau, holder of 25% of the voting shares of the payer, acted in concert with Mr. Dubé, the other shareholder of the payer, to institute the scheme that allowed the payer to finance its operations indirectly through the HRDC benefits paid to its employees while they were working for the payer. She participated in the scheme in many ways, including by working for the payer while receiving benefits, like a number of other employees. She had acted in concert with Mr. Dubé since the time that she had worked with him at BDC. She completed false and misleading Records of Employment for other employees of BDC and the payer, in particular for Guylaine Dubé, who admitted that she had not worked for these two businesses.

[137] I believe that all these circumstances show that Ms. Garneau was under the influence of Mr. Dubé who controlled the payer. The situation was such that she was unable to negotiate freely with the payer a contract of employment whose terms and conditions were consistent with those of the contracts that would have been entered into under normal market conditions. Moreover, Ms. Garneau considered the payer as "her" company. She held 25% of the voting shares. She allegedly invested up to $30,000 of her own money, even though it was through loans to Mr. Dubé. She acted in concert with Mr. Dubé. The latter acknowledged that Ms. Garneau could set her own salary. If she needed more money to purchase a condominium, the payer paid her more, if she needed less money because she was living with Mr. Dubé, the payer paid her less:

> [TRANSLATION]
>
> [671] Q. How was that determined?
>
> > A. It was maybe the salary continued from the year before or… it was determined like that. It was agreed at the beginning, she would start with a salary similar to what she had had with Dragon Chapdelaine more or less, and then as... that one couldn't always take big salaries, as the business figure increased, the company improved, that she could take money. <u>She did not have to ask me: can you let me have a raise or something. We were partners, that's how it was</u>. She needed money. In 98, that was the year when she needed money the most because her divorce, things were going badly, her divorce was coming up, and it was the year when we had discussed that she would take a little more money per week.
>
> (Vol. 2 of the transcript, pp. 168 and 169.)
> [Emphasis added.]

[138] In conclusion, it emerges from the evidence as a whole, on a balance of probabilities, that there was a de facto non-arm's length relationship between Ms. Garneau and the payer for the first Garneau periods and, consequently, the employment of Ms. Garneau is excluded for these periods under paragraph 5(2)(*i*) EIA.

Period from March 4, 2001, to June 22, 2001

[139] Concerning the last Garneau period, the one from March 4, 2001, to June 22, 2001, during this period Ms. Garneau was a person related to the payer because she was related to Mr. Dubé on account of their common-law partnership. Consequently, a non-arm's length relationship was deemed to exist between her and the payer. With regard to the period, it is for the Minister to decide whether the contract of employment between Ms. Garneau and the payer would have been substantially similar had Ms. Garneau been dealing with the payer at arm's length.

[140] The appeals officer justified the Minister's decision that Ms. Garneau's employment was excluded from insurable employment as follows (Exhibit I-18, pp. 7 and 8):

> [TRANSLATION]
>
> **Remuneration paid:** From the $525 per week in 1997, the worker's salary rose to $800 per week in the following years. Before and after the periods indicated on her Records of Employment, the worker continued to provide services to the payer without being paid.
>
> **Terms and conditions of employment:** She works on the premises of the payer in collaboration with the majority shareholder, Mr. Dubé. Her hours of work are not the subject of particular control because she performs her duties as they arise.
>
> **Duration of work:** The worker performed her duties continuously from the beginning of the payer's activities in the winter of 1997 contrary to what her Records of Employment indicate. In fact, the worker was the only person to have administrative skills and for that reason she worked continuously for the payer, that is, before and after the alleged periods of work indicated on her ROEs.

> **Nature and importance of the work:** Office and accounting clerical work for the payer, which is essential to the smooth functioning of the payer's operations.
>
> Consequently, we believe that the payer and the worker would not have entered into a similar contract of employment if they had dealt at arm's length. The employment is not insurable employment under paragraph 5(2)(*i*) of the *Employment Insurance Act.*
>
> ...
>
> (VIII) **RECOMMENDATION – RECOMMANDATION:**
>
> We recommend that the departmental notices stipulate that Jacinthe Garneau did not hold insurable employment under paragraph 5(2)(*i*) of the *Employment Insurance Act* when she worked for Boiserie Dubé et associés Inc. during the periods in question.

[141] The onus of showing that the Minister's decision does not appear reasonable, in light of the facts considered by the Minister and those shown to the Court, and that it was inappropriate, lies with Ms. Garneau. In my opinion, Ms. Garneau failed in this task. If I had had to decide the question, I would have reached the same conclusion as the Minister, as I have done, incidentally, in finding that there was a de facto non-arm's length relationship for the first Garneau periods. First, if one considers only the period when she was listed in the payroll journal, namely, from March 4, 2001, to June 23, 2001, the hourly wage paid by the payer to Ms. Garneau was much higher than the hourly rate of $12 that she had earned at BDC. It would in fact have been $16, $18.66 or $21.33, depending on the period, supposing that Ms. Garneau worked 37.5 hours per week (table 5). This is not surprising since I think that part of this salary covered the work she did during her alleged periods of unemployment. If one assumes that Ms. Garneau actually worked year-round, then the remuneration paid by the payer is clearly insufficient. In 2001, she would have earned an hourly wage of only $5.72.[92] From this perspective, the Minister's conclusion that Ms. Garneau and the payer would not

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92 According to the data in table 5, Ms. Garneau worked 16 weeks for a total salary of $11,300 [(800 x 2) + (700 x 13) + 600]. Assuming that she worked year-round, i.e., 1,976 hours (52 x 38), her hourly rate was $5.72 [(11,300/1.976)]. Even disregarding the statements by the other employees of the payor to the effect that she worked year-round throughout all of 2001 and excluding the hours when she was unable to work because of her illness from her hours of work, (18 weeks), the hourly rate for 2001 rises to $8.75 [11,300/((52 − 18) x 38)].

have entered into a substantially similar contract of employment if they had been dealing at arm's length appears completely reasonable.

[142] It is true that, in *Massignani*, 2005 FCA 165, the Federal Court of Appeal in a short decision, set aside my decision, stating in paragraph 4 that "Appellant parties accepted conditions of employment that other workers would not have accepted and that this acceptance is explained by the non-arm's length relationship they maintained with Tiva" and that "[I]t is therefore incorrect to conclude that they enjoyed an advantage in comparison with the other employees because of their non-arm's length relationship and that by that token their employment was not insurable." It is fully justified to state that in *Massignani* the other employees were "in law" dealing at arm's length with Tiva. However, it is not known whether they had a "de facto" non-arm's length relationship with Tiva, since I made no finding of fact in that regard, although the issue could have been raised since a number of employees who had testified at the hearing at stated that they felt obligated to take part in scheme because they were afraid of losing their jobs. In *Bélanger* (*supra*), I stated, as the Federal Court of Appeal did in *Massignani*, that it was persons "dealing at arm's length" with the employer who had abused the Act by participating in the scheme involved in *Massignani*:

> [74] In my view, failing to consider the fact that an employee works without remuneration for the same employer clearly opens the door to abuse. A good example can be found in the decision I rendered in *Massignani* ([2004] T.C.J. No. 127 (QL), 2004 TCC 75). In that case, the family members were not the only ones to abuse the Act. Employees dealing at arm's length with the employer were encouraged to participate in the scheme that had been devised. Failing to take into account the number of hours worked without remuneration would essentially enable employees to be remunerated through employment insurance while they continued to work for their employer. This is certainly not the intention of Parliament with respect to the employment insurance system.
>
> [Emphasis added.]

[143] Now, it would have been more accurate if I had written that persons not "related" or dealing in law at arm's length within the meaning of subsection 251(2) ITA had participated in the scheme. Although some persons are not related, this does not necessarily mean that there is not from a factual point of view a non-arm's length relationship between them. As I had made no finding of fact on that issue, I was wrong to state in *Bélanger* that persons dealing at arm's length had participated in the scheme in *Massignani*. As I believe that my *Bélanger* decision

was cited by counsel for the Minister before the Federal Court of Appeal in *Massignani*, it is possible that this statement might have misled that Court.

[144] Furthermore, in contrast to the situation in *Massignani*, the evidence in this case shows that some employees in respect of whom there was no appearance of a non-arm's length relationship in law or in fact with the payer refused to participate in the scheme, including Jean-Pierre Latreille (Exhibit I-30, summary of the interview of May 24, 2002) and Stephan Perrault (Exhibit I-30, statutory declaration of November 20, 2001). If, to answer the question posed by paragraph 5(3)(*b*) EIA, i.e., whether the persons would have entered into a substantially similar contract of employment had they been dealing "at arm's length with the employer", the Minister has, as a point of comparison, employees who fraudulently participated in the scheme and employees wholly at arm's length (in fact or in law) who refused to take part in it, I cannot imagine that Parliament intended that, in order to exercise his discretion, the Minister could consider the example of the former group and not the latter group. I fully adopt the point of view expressed by counsel for the Respondent as follows:

> [TRANSLATION]
>
> 707 According to the Respondent, this Court should make a clear ruling based on the comparison for the purposes of the application of paragraph 5(3)(*b*) of the EIA. According to the Respondent, this Court should rule that the comparison should be made with the terms and conditions of employment that would have been entered into by persons who were honest, in good faith, not related, in the regular job market, not acting in concert, free and subject to no restriction, well-informed, acting with prudence, and not parties to an arrangement for the purposes of unjustly profiting from the EIA.[49]
>
> [49] The Respondent was to some extent inspired by the definition of the phrase "fair market value" in Information Circular 89-3, "Policy Statement on Business Equity Valuations", of August 25, 1989.

[145] If it were necessary to use as the point of comparison persons who abuse the EIA in order to determine the reasonableness of the terms and conditions of a contract of employment, few or no jobs would be excluded under paragraph 5(2)(*i*) EIA.

[146] I would add to the reasons stated by the Minister in finding that Ms. Garneau's employment was excluded, the fact that she would not have received her remuneration, which was fixed on a weekly basis and did not take into account the hours that she actually worked, had she not been the common-law

partner of the person who controlled the payer. As noted above, when Ms. Garneau was employed with Quincaillerie and BDC, she was remunerated on the basis of the hours she actually worked. In my opinion, Ms. Garneau and the payer would not have entered into a substantially similar contract of employment had they dealt at arm's length. The Minister's decision relative to the last Garneau period still appears reasonable.

[147] For all these reasons, the appeals of Ms. Garneau and Ms. Bellefeuille are dismissed.

Dated at Ottawa, Canada, this 29th day of May 2006.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 15th day of March 2007.
Monica F. Chamberlain, Reviser

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