Docket 2008-3307(EI)

BETWEEN:

LES ASSURANCES JONES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on February 16, 2009, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Jérôme Carrier |
| Agent for the Respondent: | Laurent Brisebois, articling student |

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**JUDGMENT**

The Appellant's appeals are dismissed and the decisions are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of May 2009.

Pierre Archambault

Archambault J.

Translation certified true

on this 7th day of July 2009.

Daniela Possamai, Translator

Citation: 2009 TCC 273
Date: 20090521
Docket: 2008-3307(EI)

BETWEEN:

LES ASSURANCES JONES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

## REASONS FOR JUDGMENT

Archambault J.

[1] Les Assurances Jones Inc. (**LAJ**) is appealing the decisions of the Minister of National Revenue (**Minister**) that Philippe Jones and Élizabeth Jones (**Workers**) were engaged in insurable employment with LAJ during the period from January 1, 2004, to March 11, 2008[1] (**relevant period**). The dispute centres on whether the Minister properly exercised his administrative power provided for in subsection 5(3)(*b*) of the *Employment Insurance Act* (**Act**).

[2] In making his decision, the Minister relied on the following assumptions of fact, set out in paragraphs 5, 6 and 7 of the Reply to the Notice of Appeal. At the beginning of the hearing, counsel for LAJ admitted all these facts, with the exception of those set out in subparagraphs 5(f), (i), (l), (m), and (r) as well as in paragraph 7.

[TRANSLATION]

5. . . .

[1] March 14, 2008, in the case of Élizabeth Jones.

(a) The Appellant has been operating a company that sells home and business insurance since 1912;

(b) The Appellant's company is operated annually and generates about $15,000,000 in annual sales;

(c) The Appellant has approximately 40 employees including the Workers;

(d) The Appellant has four offices located in Lachute, St-Jérôme, Blainville and Mont-Laurier;

(e) The Appellant's head office is in Lachute;

(f) The Workers occupy management positions with the Appellant and have no written work contract;

(g) The Workers did not secure any loans on behalf of the Appellant;

(h) There were five signatories, including the Workers, authorized to sign the cheques on behalf of the Appellant and two signatures were required;

(i) Philippe Jones is the executive vice-president and his main duties and functions can be summarized as follows:

- oversee the sales team in the St-Jérôme office,[2]
- assess new products and market them,
- oversee relations between the Appellant's various insurers and business partners,
- develop the sales team's annual budget,
- participate in weekly meetings with Élisabeth [sic] so as to make appropriate day-to-day decisions regarding the Appellant's operations;

(j) Élizabeth Jones is vice-president of operations and her main duties and functions can be summarized as follows:

- oversee the day-to-day management of the Appellant's head office,
- manage the employees' attendance and absences and provide advice as required,
- oversee all aspects of informatics and seek the assistance of the "Ultima" group as required,
- oversee the hiring and training of new employees,
- oversee the management accounts receivable and do some bookkeeping,

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[2] Counsel for LAJ was prepared to admit the facts set out in this subparagraph if it was amended to indicate that Mr. Jones oversaw the sales team for all of the offices of LAJ.

- participate in weekly meetings with Philippe and William Jones so as to make appropriate day-to-day decisions regarding the Appellant's operations;

(k) The Appellant is a family-run business and the two Workers participate in discussions regarding the Appellant's operations;

(l) The two Workers generally work during the Appellant's business hours, that is, Monday to Friday from 8:30 a.m. to 5:30 p.m. and Thursday evening until 8 p.m.;[3]

(m) Philippe occasionally goes into work on Sunday, mainly to draft reports, to make up hours (golf or ski); he claims he works between 55 and 70 hours per week;[4]

(n) Élizabeth occasionally goes into work on on Thursday evening and conforms to a 40-hour-a-week work schedule;

(o) Philippe received an annual income of $62,400 plus commission on his sales and Élizabeth received an annual income of $59,800 plus commission on her sales;

(p) The Workers were paid by direct deposit every two weeks;

(q) The Workers were reimbursed for their travel expenses and certain meal costs incurred while on training or attending conferences;

(r) The Workers were covered, like all employees, by the Appellant's wage loss insurance, drug plan and life insurance;[5]

6. . . .

(a) The Appellant's voting shares were held by the following:

- 115514 Canada inc. (Gestion Jonasco) with 77.2 % of the shares,

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[3] The evidence adduced during the hearing demonstrated that this statement was well-founded.

[4] It seemed to me that the only reason counsel for LAJ was not prepared to admit this subparagraph was because of the presence of the term "make up." The evidence revealed that Philippe Jones did not have fixed working hours during which he had to provide his services. All that mattered was that the work was done. Therefore, the term "make up" is not the most appropriate to describe his work situation. However, it would so happen that Philippe Jones would work outside normal office hours.

[5] The evidence revealed that all employees received wage loss insurance and life insurance. In addition, there is no evidence to the contrary regarding the drug plan. Accordingly, seeing as this fact was not demolished, is considered as admitted.

- Édith Jones, Philippe Jones and Élizabeth Jones with the rest of the Appellant's shares (22.8%);

(b) William Jones was the sole shareholder of 115514 Canada Inc. (Gestion Jonasco);

(c) William Jones is the father of the two Workers;

(d) The Workers are related to a person who controls the payor.

7. . . .

(a) The two Workers occupied management positions for which an annual salary, rather than an hourly wage, was paid;[6]

(b) Despite the mutual confidence between the Workers and their father, the Appellant exercised its power of direction and control over the way the Workers did their work;[7]

(c) The annual remuneration paid to the Workers was reasonable considering their duties and responsibilities with the Appellant;[8]

(d) The Workers' working hours were consonant with the Appellant's needs and their work was essential to the Appellant's activities;[9]

[3] The Workers testified during the hearing and their father testified as well, as a representative of LAJ. Among the additional facts provided by their testimonies which are worth mentioning are the following. First, during the relevant period, there was another shareholder in addition to the ones mentioned in paragraph 6 of the Reply to the Notice of Appeal. The shareholder in question is Robert Jones, who held 200 of the 900 voting shares of LAJ. Those shares were sold to the Workers on April 4, 2008, a few days after the end of the relevant period, for about $550,000. The Workers paid that amount, at least in part, owing to a loan they obtained. Robert Jones was being paid by LAJ since 1993, despite the fact that he had stopped working. He suffered a stroke that partially paralyzed him. For family reasons,

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6 The evidence revealed the merits of this statement of fact.

7 Even though the evidence reveals that LAJ exercised its power of direction and control over the way the Workers did their work, there is no doubt that LAJ had the right to exercise such a power. Therefore, there was a real contract of employment between the Workers and LAJ. Furthermore, counsel for LAJ does not challenge the existence of such a contract.

8 This fact is at the heart of the dispute before the Court and will be commented on later.

9 The evidence adduced did not demolish the fact set out in this subparagraph; accordingly, it is considered as admitted.

William Jones decided that LAJ would continue to pay his brother so that he could provide for his family.

[4] Among the other employees of LAJ was the wife of William Jones, who performed bank reconciliations to ensure the integrity of financial data. She only worked four to six days per month and received a salary of about $30,000. LAJ also provided her with a car. The Minister determined that the wife of William Jones was not employed in insurable employment. However, the reasons for the Minister's finding were not admitted as evidence. The explanations provided by Élizabeth during her testimony were rather vague.

[5] As for William Jones, he considered himself as being on early retirement for about 10 years. When he testified, he was 70 years old. He provided "coaching" services de to his children, who are the company's directors. He generally worked one to three days per week. He received a salary of $110,000 per year. According to Philippe Jones, LAJ will continue to pay that salary as long as it is financially capable of doing so.

[6] The Workers were entitled to a car provided by LAJ. Philippe drove an Audi, which cost $1,000 a month to lease. Élizabeth drove a Subaru, which cost $790 a month to lease. Apart from other members of the Jones family, no other LAJ employee was provided with a company car. The other employees, however, received an allowance varying between $300 and $425 per month.

[7] The Workers spend most of their time managing LAJ. Philippe, who holds a degree in finance from the Université de Montréal, spends about 75 to 80% of his time doing so. The rest of his time is spent selling insurance. He has been working full-time for LAJ since he was about 22 years old. Since he loves his job, he does not mind putting in 57 to 70 hours per week. As for Élizabeth, she estimates spending 80% of her time managing LAJ and the rest of her time is spent on sales. In addition to her base salary, Philippe earned between $10,000 and $15,000 in commissions. His sister Élizabeth was also entitled to commissions from the sale of insurance products in addition to her base salary.

[8] Two other employees, Messrs. De Carufel and St-Vincent, have administrative responsibilities. The first employee is in charge of the St-Jérôme office, and the second is in charge of the Blainville office. According to Philippe Jones's estimates, Mr. De Carufel spends about 92% of his time selling insurance. Mr. De Carufel's La remuneration consisted in part of a base salary of $15,000 and the rest of his income derived from commissions on the sale of insurance products. His earnings varied

between $102,480 and $120,908 for the period from 2004 to 2007 (Exhibit 1.1, page 4). That of Mr. St-Vincent varied between $73,576 and $86,266. Mr. St-Vincent also had a base salary of $15,000 to $20,000 per year. The rest of his income came from commissions.

[9] LAJ employees who sell insurance are bound by a written work contract, whereas the Workers only have oral contracts of employment. The written contracts contain non-competition clauses.

## Analysis

[10] The relevant provisions for resolving the dispute are paragraph 5(2)(*i*) and subsection 5(3) of the Act:

> Excluded employment
>
> 5(2) Insurable employment does not include
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> . . .
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5(3) For the purposes of paragraph (2)(*i*),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> (*b*) if the employer is, within the meaning of 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.
>
> [Emphasis added.]

[11] Since the Workers and LAJ are not dealing with each other at arm's length, at first blush their employment is not insurable. However, under the power granted to

him by paragraph 5(3)(*b*) of the Act, the Minister may determine whether it is reasonable to conclude that the Workers and LAJ would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. The Minister must have regard to the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed. The wording of paragraph 5(3)(*b*) has been the subject of much discussion in the case law, some of which is set forth in my reasons in *Bélanger v. M.N.R.*, [2005] TCJ No. 16 (QL), 2005 TCC 36. I explain as follows in paragraph 35:

> [35] The role vested in this Court is to carry out a two-stage analysis. It must first verify whether the Minister exercised his discretion appropriately. As stated in *Jencan*, to which Malone J. refers in *Quigley Electric*, the decision resulting from the exercise of the Minister's discretion can only be changed if the Minister acted in bad faith, failed to consider all of the relevant circumstances, or took into account irrelevant factors. Where such a situation exists, the Court may decide that "the conclusion with which the Minister was "satisfied" [no longer] seems reasonable" and intervene by ruling on the application of subsection 5(3) of the Act. The Federal Court of Appeal said the following in *Jencan*:
>
> > 31 The decision of this Court in *Tignish, supra*, requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(*c*)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. If, and only if, the Tax Court finds that one of the grounds for interference are established can it then consider the merits of the Minister's decision. As will be more fully developed below, it is by restricting the threshold inquiry that the Minister is granted judicial deference by the Tax Court when his discretionary determinations under subparagraph 3(2)(*c*)(ii) are reviewed on appeal. Desjardins J.A., speaking for this Court in *Tignish*, *supra*, described the Tax Court's circumscribed jurisdiction at the first stage of the inquiry as follows:
> >
> > > Subsection 71(1) of the Act provides that the Tax Court has authority to decide questions of fact and law. The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister. The respondent submits, however, that since the present determination is a discretionary one, the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the

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

32 In *Ferme Émile Richard et Fils Inc. v. Minister of National Revenue et al.*, this Court confirmed its position. In obiter dictum, Décary J.A. stated the following:

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

> decide whether, taking all the circumstances into account, such a contract of employment would have been entered into between the employer and employee if they had been dealing at arm's length. [(1994), 178 N.R. 361 (F.C.A.) at par. 362 and 363].

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

. . .

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

. . .

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

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

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

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

[12] Does the decision rendered by the Minister via the appeals officer still seem reasonable after hearing the evidence of LAJ? Before answering this question, it is important to again analyze the wording of paragraph 5(3)(*b*) of the Act. What the Minister had to determine was: could it appear reasonable to him that the Workers would have entered into a substantially similar agreement with the payor if they had been dealing with each other at arm's length? It is not a matter of determining whether the work conditions necessarily reflect normal market conditions, although that can generally be a relevant circumstance to be taken into account.

[13] I emphasize this nuance because we are dealing with two workers who are at the same time shareholders of the payor holding its common shares. They are, in part, the owners of LAJ and, indirectly, the owners of its business. When paragraph 5(3)(*b*) of the Act requires that it must be determined whether the contract of employment would have been substantially similar in an arm's length relationship, it

means, I believe, that we must taken into account that we are dealing here with two workers who are at the same time owners of LAJ. Neither one or the other of the two Workers, nor the two together, control the payor and, therefore, had they not been related to the person who controls LAJ, none of the Workers would have been a person related to LAJ within the meaning of the *Income Tax Act* and they would then be at arm's length. Indeed, paragraph 5(3)(*b*) of the Act does not indicate that the financial interests that workers may hold in a payor must be ignored. Therefore, it is possible to imagine two people, who are at the same time workers and shareholders, with no family relation between them and the majority shareholder of a payor and remaining at arm's length with the payor. The issue to be determined by the Minister could therefore be expressed as follows: whether, as minority shareholders of LAJ, the two Workers would have entered into a substantially similar agreement had they been unrelated to the majority shareholder?

[14] It is known in law that workers who are both employees and owners (as shareholders) of the payor behave differently from those who are just employees. Indeed, an employee-shareholder may take into consideration the fact that unpaid wages will become non-distributed profits that may, for example, be declared as dividends at a later date. Moreover, such employees often prefer to receive dividends rather than a salary because that is often more advantageous for taxation purposes. However, to be entitled to contribute to a registered retirement savings plan, it is necessary (in general) that these employee-shareholders receive a salary. That is the context in which employees work who are also shareholders of their business and the context which the Court must take into account.

[15] My colleague Judge Bédard spoke to the same effect in *Entreprises Charles Maisonneuve Ltée v. MNR*, 2008 CarswellNat 1760, 2008 TCC 269. He stated as follows:

> **10** Does the conclusion with which the Minister was satisfied still seem reasonable considering the evidence of the workers? It will be recalled that the Minister was required to determine whether it was reasonable to conclude that the workers would have entered into a substantially similar contract of employment with the Appellant if they had been dealing with each other at arm's length. There was no question of determining whether working conditions necessarily reflected market conditions although, generally, this can be a relevant matter worth considering. In the Court's view, with regard to paragraph 5(3)(*b*) of the Act, that is, the matter of whether or not the employer and employees would have entered into a substantially similar contract of employment, it is necessary to remember that the four workers in question were not only the Appellant's only officers, but were also its directors and owners. There is no indication in paragraph 5(3)(*b*) of the Act that the workers' financial interests in the company must be disregarded. Consequently, it is possible

> to construct an abstract case involving four unrelated workers each holding approximately one quarter of the capital stock in the Appellant (with which they are dealing at arm's length), in addition to being its sole directors and officers. The question to be decided by the Minister could then be reworded as follows: would the four workers have entered into a substantially similar contract had they each held more or less one quarter of the shares in the Appellant and had they been dealing with each other and the Appellant at arm's length?
>
> **11** It is a matter of judicial notice that workers who are both paid employees of an employer and (as shareholders) owners of that same employer act differently from mere paid employees. In fact, the salary of someone who is a paid employee and shareholder may take into account the fact that salaries not paid will be retained earnings that can be reported as dividends at a future date. Workers who are also shareholders must often keep the company's financial needs in mind, especially if the company is experiencing cash-flow problems. This likely explains why some of the workers' earnings were lower in 2004.
>
> . . .
>
> **14** Had one of the workers worked only 10 hours a week year-round, but still received a salary equal to that of the other three workers, who might have averaged 50 hours, the Court would have arrived at a very different decision. It is quite normal for workers performing the types of duties involved here to be paid as these workers were, and to have a high level of autonomy in the performance of their duties. The Court finds that the four workers would have entered into a substantially similar contract of employment had they been dealing with each other and the Appellant at arm's length and had the same number of shares in the Appellant.

[16] Does the Minister’s decision still seem reasonable? In my opinion, the Workers did not succeed in demonstrating that it is unreasonable, given the circumstances of this matter. This is not a case where the Court should intervene to substitute its opinion for that or the Minister.

[17] However, these are people in positions where the work is not paid by the hour, but rather yearly or at least weekly. It is perfectly normal for workers in such positions to be paid as the Workers were in this case and for them to have a great deal of independence in deciding when to perform their duties. Moreover, as executives and shareholders of LAJ, they had great flexibility in performing their duties. Philippe Jones could, among other things, work during the weekend. I would like to point out that Philippe Jones worked more hours than his sister did. However, he was entitled to a greater income than his sister. Moreover, he was entitled to a more luxurious car. I believe that an executive with no interest in LAJ could have done so as well. I am sure that Mr. De Carufel does not refuse to meet with his

good clients when they want to consult with him on weekends or during social occasions. This is perfectly normal behaviour for executives or people working in sales, even when dealing at arm's length with the payor.

[18] In his oral argument, the agent for the Respondent relied on the excerpt cited above from *Jencan* to state that the decision resulting from the exercise of the Minister's discretionary authority can be amended only if the Minister acted in bad faith, failed to take into account all of the relevant circumstances or took into account an irrelevant factor. According to the agent for the Respondent, the evidence provided by LAJ did not demonstrate that the Minister acted in bad faith, failed to take into account all of the relevant circumstances or took into account an irrelevant factor. Counsel for LAJ does not really disagree with that position, except for stating that the Minister misinterpreted the facts.

[19] Moreover, counsel for LAJ tried to compare the salary paid to the Workers with that paid to the other members of the Jones family to justify that the salary paid to the Workers was unreasonable. He mentioned, *inter alia*, that their mother was paid $30,000 for four to six days of work per month (see para. 4, *supra*), whereas their father was paid $110,000 for one to three days of work per week (see para. 5, *supra*). According to counsel, one could also add the case of the brother, Robert Jones, who received a salary even though he did not provide any services. With respect to the brother, it is important to note that there could not have been a contract of employment between him and LAJ as he did not provide any services, and considering that such provision of services was one of the conditions essential to the existence of a contract of employment. Therefore, his "employment" would have been excluded from insurable employment owing to the inexistence of a contract of employment.

[20] As for Édith Jones, the reasons for excluding her employment from insurable employment were not really established in such a way as to convince the Court. Moreover, I do not see how one can conclude that the Workers' conditions of employment are unreasonable because those of their father, mother and uncle may have been so. That LAJ paid salaries to the main shareholder, his wife and his brother which some might regard as overly generous could be subject to attack by the Workers in their capacity of shareholders. However, the fact that the salaries paid to these three other family members may be considered unreasonable does not necessarily mean that the Workers' pay was so as well.

[21] Finally, the fact that the Workers' pay was lower than that of Mr. De Carufel is irrelevant in the present circumstances. Two important observations must be made.

First, Mr. De Carufel is not a shareholder of the company. Second, Mr. De Carufel spent more time selling insurance products, which explains his higher pay as compared to that of the Workers. It should be noted that his base salary was only about $15,000 and the fact that his earnings exceeded $110,000 can only be explained by the effort made by Mr. De Carufel and by his talent for selling insurance products. As shareholders, the Workers are not entitled to receive a higher salary as the earnings not paid to them remain in the patrimony of LAJ and the two Workers are its joint shareholders.

[22] I believe it is necessary to analyze the conditions of employment of the two Workers based on their individual circumstances. As I have said, the real question for the Court is the following: if the two Workers had been dealing with LAJ at arm's length, would the conditions of employment have been substantially similar? In the present case, the Court concluded that LAJ did not demonstrate that the Minister's decision seems unreasonable in the circumstances.

[23] For these reasons, the appeals of LAJ are dismissed.

Signed at Ottawa, Canada, this 21st day of May 2009.

Pierre Archambault

Archambault J.

Translation certified true

on this 7th day of July 2009.

Daniela Possamai, Translator

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|---|---|
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APPEARANCES:

| | |
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| Counsel for the Appellant: | Jérôme Carrier |
| Agent for the Respondent: | Laurent Brisebois, articling student |

COUNSEL OF RECORD:

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|---|---|
| For the Appellant: | Jérôme Carrier |
| Name: | |
| Firm: | |
| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |