Docket: 2009-2681(EI)

BETWEEN:

MICHAEL D. HUNTLEY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 26 and November 22 and 23, 2010,
at London, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mélanie Sauriol

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed, and the ruling of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* is confirmed.

Signed at Ottawa, Canada, this 3rd day of December 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 625
Date: 20101203
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BETWEEN:

MICHAEL D. HUNTLEY,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

Motions

[1] On a motion by the Respondent and on consent of the Appellant, the Reply to the Notice of Appeal was amended to delete the last two sentences of paragraph 10.

[2] On a motion by the Respondent all witnesses other than the Appellant and the Respondent's representative, the CRA appeals officer, were asked to leave the courtroom during the testimony of other witnesses.

[3] This appeal was heard over three days, commencing on January 26, 2010 for one day and then adjourned to enable the exchange of documentation as had been requested by the Respondent and continued on November 22 and 23, 2010. Prior to resuming this trial on November 22, 2010, the Appellant brought a motion to exclude any materials and references to the decision of the Minister of National Revenue (the "Minister") in the matter of Edward Huntley, his acknowledged half-brother, chiefly on the grounds that that decision of the Minister was not appealed to the Tax Court of Canada and in effect should not be subject to attack here. I dismissed this motion on the basis that the subject matter of this appeal is not the decision of the Minister in the case of Edward Huntley but the appeal of the

Minister's decision in connection with this Appellant only and that any evidence dealing with his half-brother relevant to this decision would be given such weight as this Court deems just. Moreover, as the Appellant himself was the one who introduced a plethora of documents dealing with Edward Huntley's decision during his examination-in-chief, it is a bit too late to suggest we should be cancelling his testimony.

Issues

[4] The sole issues to be decided in this case are whether the Appellant and his employer are related and hence excluded from being in insurable employment within the meaning of paragraph 5(2)*(i)* of the *Employment Insurance Act* (the "*Act*"), and if so, whether the Minister erred in his decision that the Appellant and the Payer were not deemed to deal with each other at arm's length within the meaning of paragraph 5(3)*(b)* of the *Act* during the period June 2, 2008 to November 7, 2008 (the "Period").

Background

[5] There is no dispute that the Appellant was employed as an Amusement Device Mechanic and Operations Manager by his half-brother, Edward Huntley, who operated Gateway Children's Village Castle in proprietorship (the "Payer"); which was in the business of operating a seasonal inflatable rides amusement business since 2003. There is also no dispute the Appellant and Edward Huntley have the same mother but different fathers and hence are half–brothers. Although the Appellant acknowledged he had referred to Edward as a step-brother in past correspondence with Canada Revenue Agency ("CRA"), he admitted he did not understand the legal significance between the terms and in fact admitted he was raised with Edward as a normal brother, never distinguishing or denying his relationship as being other than as true brothers in the full sense of the word, and in any event, acknowledged they had the same mother and hence were related by blood. There is also no dispute between the parties that the Appellant, having regard to his duties, was in a contract of service or was an employee of the business as opposed to an independent contractor.

[6] The business is seasonal operating generally from June to October or November in any year, usually completing its outdoor operations involving inflatable children's amusement devices and some 12-volt non-regulated motorcycle and car rides in the fall depending on the weather, with some of the maintenance and winter storage preparation requirements done in shop at the end

of the outside operating season prior to storage of the devices and accessories for the winter, necessitating longer season operations as necessary. The Appellant was a qualified Amusement Devices Mechanic ("ADM") for the Payer, having all the statutory licences needed to run the amusement devices and drive the truck to transport them, which were a requirement of the position and hence qualified him to be the designated Operations Manager for the Payer as required under the *Technical Standards and Safety Act*[1] of Ontario ("TSSA"). He admitted that when the Technical Standards and Safety Authority ("TSSA Authority"), which oversees the TSSA, commenced regulation of inflatable rides in about 2003, both he and his brother were grandfathered as provisional licencees for the one year but after that he took the course to obtain his new licence since grandfathered licences ceased being accepted on May 31, 2004. The Appellant received $500 per week each week based on a 40-hour work week during the Period and the Appellant was always paid by cash although no receipts for payment were ever obtained. The responsibility of the Appellant was the erecting and dismantling of the rides as well as the general supervision of the rides and all repairs. The Appellant was also responsible for keeping a daily log as well as the daily inspection of the rides before opening them up to the public, both as required pursuant to TSSA regulations. There may have been volunteer help or part-time labour provided by the business where there was more than one ride in operation or the nature of the ride or TSSA rules governing its operations required more than one person in attendance. There is a dispute as to whether an ADM was required to actually operate the ride or supervise the operation of the rides, which the Appellant insisted must be the case since how else could he keep a daily log or be there to inspect the rides or repair them while the TSSA Authority director suggested the ADM did not have to actually operate the ride. However, the issue is not really pertinent here as the evidence of the Appellant and the assumptions of the Respondent confirm that the Appellant's duties included staying on duty from opening to closing during event operations.

[7] The inflatable rides business consisted of renting the equipment to organizers of public events who either paid a rental fee or allowed Gateway Children's Village to be paid by retaining all ticket sales at the event other than 10-20% which were remitted to the event organizer or committee, often a not-for-profit or charitable organization. If it was raining, during which times the rides were required to stop operating for safety reasons but remain erected either to wait out the rain or act as visual advertisements for the event unless cancelled by the event organizer, the business could in fact lose money. The business of the

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[1] *Technical Standards and Safety Act*, 2000, S.O. 2000, c. 16 as amended.

Payer had small profits from 2004 to 2006 and losses in the 2007 and 2008 years, with a business loss of over $10,000 in 2008 due, according to the undisputed evidence of the Payer, to the loss of the Payer's food concession contract for Western Fair in London, Ontario, which was his other business activity prior to that year .

[8] The Appellant admitted he collected Employment Insurance Benefits after his work ended with Gateway Children's Village each season from 2003 to 2008. The Minister reviewed the insurability of the Appellant's employment in 2005 and found him to be insurable in the end, however reviewed the insurability of his employment for the Period due to new facts which had come to its attention in the course of review of the insurability of Edward Huntley's employment as well.

[9] From May 21, 2006 to 2008, the Appellant was also the sole shareholder of Huntley Foods Ltd. ("Huntley Foods"), a corporation incorporated since 1977, which was in the business of providing food services including the sale of candy confection at amusement events until about 2001 after which the business consisted only of providing labour services to the Appellant's proprietorships which operated at the Brooklin Fair or the Western Fair in London, Ontario, or at other events. Each of these proprietorships, identified as Parades, Patio Café, Brooklin Fair, and Gateway (not the same as Gateway Children's Village) later called Western Fair more or less operated up to 2007 or 2008 and the Appellant filed with his T1 Tax returns a Statement of Business Activities for these proprietorships showing income earned as well as expenses including direct wages and storage fees for the off-season. The wages for provision of the services of Edward Huntley and a part-time worker known as Roland Richer to the Appellant's proprietorships were paid to Huntley Foods for the provision of labour which itself included the amounts as income and claimed wages and salary expenses as deductions.

[10] The proprietorships also paid storage fees to the Co-tenancy consisting of the Appellant and his half-brother Edward who owned a warehouse located at 103 Main Street in Highgate, Ontario, since 1989 where each of the businesses stored their equipment or rides during the off-season and conducted their repairs and maintenance work. The evidence shows that between 2003 and 2008 Huntley Foods also barely broke even or had small losses.

[11] The Appellant had acquired two-thirds of the shares of Huntley Foods on May 21, 2006, as a result of the death of his mother, Ann Huntley, having already owned the other one-third of the shares. The Appellant testified he did not work for

his own Corporation throughout the above period of years but instead continued to employ Edward Huntley his half-brother and employer at Gateway Children's Village as Operations Manager for Huntley Foods Ltd. as well as employed the services of a part-time employee named Roland Richer and a few other volunteers or temporary workers who sought work at the fairs. In 2001 Huntley Foods ceased to be active in the food business, and, according to the evidence of the Appellant, disposed of all of its equipment, which was old, and instead became a labour services business which supplied the services of the same Edward Huntley and Roland Richer to the Appellant's proprietorships as above mentioned.

[12] It should be noted that Edward Huntley had been the Operations Manager for Huntley Foods since at least 1995, most of those years during which the corporation was controlled by the late Mrs. Huntley. Huntley Foods paid Edward Huntley a salary very similar to the salaries the Appellant received from Edward Huntley from 2004 to 2008 and in fact for 2005, 2006 and 2007 both were paid the identical aggregate salaries although for 2008 the aggregate salaries differed by $1,150 only in favour of Edward. Edward Huntley held the necessary Propane Certificate and food handling certificate to qualify as Operations Manager for Huntley Foods pursuant to the TSSA requirements. However, the Appellant also testified he used to have a propane certificate when he and the Payer operated at the Western Canada fairs earlier, and that a propane certificate from TSSA Authority would not be required where the propane tanks did not exceed 30 pounds in volume.

[13] As earlier referred to, it should also be noted that a recent ruling in May 2009 by the Minister confirmed Edward Huntley was deemed at arm's length to Huntley Foods during the Period which was not appealed by the Minister.

Position of the Parties

[14] The crux of the Appellant's position is that since the evidence is that any person who wished to occupy the position of Operations Manager for the Payer under the TSSA requirements would have been required to hold an Amusement Devices Mechanic's certificate under that legislation enabling such person to set up, run, supervise and dismantle the inflatable rides and train an apprentice, as well as be required to have a valid Class D driver's licence to transport the rides by transport to the amusement events, then as the Appellant met all of the Payer's list of qualifications necessary for any party to be considered for that position, he must be at arm's length. The Appellant also argued the businesses of his half-brother were separate from his businesses and that his salary increases in 2005 and 2006

were the result in the greater workload created due to the business having more inflatable rides as well as him obtaining TSSA certification as an Amusement Device Mechanic for 2005. Similar reasons were given for the similar increases in pay the Payer received from the Appellant's business during the same period by the Appellant but the Appellant's brother, Edward Huntley testified these were for cost of living increases, making no mention of higher pay due to the TSSA qualifications.

[15] The crux of the Respondent's position is that this was a cross employment scheme to allow both the Appellant and Edward Huntley, his half-brother, to both receive EI benefits every year which they both have since 2004. More specifically, the Respondent's position is that after considering all the circumstances of employment the Appellant and Payer would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length during the Period, having specific regard to the facts pleaded in the Minister's assumptions which include that he received salary of $500 whether he worked 40 hours per week or not, did in fact not work 40 hours per week if at all, received his salary in cash, worked without pay during the off season, and in fact paid his half-brother the same or substantially similar amount he received from him suggesting cross employment was a condition of employment due to the circular flow of money as well as other factors all of which will be discussed in more detail.

[16] It should be noted that a great many of the Respondent's assumptions in paragraph 19 of its Reply to the Notice of Appeal, particularly those found in paragraphs (e), (g), (h), (i), (l), (n), (o) and (r) appear to deal with the provision of tools, management, supervision, duties and other factors which are pertinent in establishing whether the relationship was one of employment or independent contractor, which the Respondent's Rulings Officer advised was a necessary first step to establish but frankly, since both sides agree the relationship was one of employment, i.e., a contract of service, many of such assumptions become somewhat irrelevant, particularly since most of them are not in dispute.

[17] As to the issue of whether the Appellant is related to his employer, Edward Huntley, operating in sole proprietorship as Gateway Children's Village, the fact the two men have the same mother makes them related by blood within the definition of paragraph 251(2)*(a)* of the *Income Tax Act* ("*ITA*"). As blood relatives, they are deemed not at arm's length within the definition of paragraph 251(1)*(a)* of the *ITA.* As mentioned earlier, there is really no dispute as to this issue.

[18] Accordingly, the only issue to be decided is whether the Minister erred in ruling they do not deal with each other at arm's length within the meaning of paragraph 5(3)*(b)* of the *Act.*

[19] The question to be answered is in fact whether an unrelated person would have been hired for the position on substantially the same terms and conditions as the Appellant, having regard to the factors set out in that provision.

[20] Although a great deal of evidence was submitted by both the Minister and the Appellant on the employment relationship of Edward Huntley to Huntley Foods, a corporation controlled by the Appellant during the Period, I wish to make clear at this point that notwithstanding the fact the Minister has determined that such employment relationship is at arm's length, I can draw no conclusive inference from such arrangement to the case at hand. The issue here is whether the arrangement between the Appellant and his employer, Gateway Children's Village, can reasonably be considered to be an arm's length one only. In this regard, I do not agree with the Appellant's suggestion that the fact Edward was already found to be at arm's length by the Minister means that he as Appellant in this case must by inference be at arm's length to Edward operating at Gateway Children's Village. They may well have different terms of employment that would lead to a different conclusion, which is what must be determined by the evidence here in relationship to the factors that must be considered under the law.

[21] I also do not accept the Appellant's suggestion that the fact an arm's length and non-arm's length person both would have to have the same qualifications to do the job means they must both be treated as arm's length. While such qualifications are certainly factors to consider, they are by no means determinative of the issue to be decided.

The Law

[22] The relevant provisions of the *Act* in this matter are paragraph 5(2)*(i)* which excludes from insurable employment any employment where the employer and employee are not dealing with each other at arm's length and paragraph 5(3)*(a)* which provides that for the purposes of paragraph 5(2)*(i)* above, the question of whether persons are dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*. As I mentioned above, it is not in dispute the Appellant is related to the Payer and hence under the *Income Tax Act* is not at arm's length to him. Paragraph 5(3)*(b)* however provides that if the employer is related to the employee, they are deemed to be dealing with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances, 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.

[23] Before analyzing all the relevant factors contemplated by paragraph 5(3)*(b)* of the *Act*, it is important to summarize the law in relation to disturbing a Minister's discretion under the said paragraph.

[24] The Federal Court of Appeal decided in *Canada (Attorney General) v. Jencan Ltd.*, [1998] 1 F.C. 187 (F.C.A.), in paragraph 37 thereof, that the Tax Court would only be justified in interfering with 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 in the circumstances; or

iii) took into account an irrelevant factor.

[25] I should note at the outset that there is no evidence here that the Minister acted in bad faith or for an improper purpose or motive or that the Minister took into account an irrelevant factor, but only that the Minister failed to take into account all of the relevant circumstances as expressly required by the *Act*.

[26] The position of the Respondent is obviously that the Appellant has failed to demonstrate any of the above necessary to allow this Court to interfere since it argues the Minister's decision is still reasonable.

[27] The Respondent relies on the Federal Court of Appeal's decision in *Perusse v. Canada (Minister of National Revenue)*, [2000] F.C.J. No. 310 (QL), leave to appeal of which was denied by the Supreme Court of Canada, where Marceau J.A. adopted his statements in *Légaré v. M.N.R.*, 1999 CarswellNat 1458 where Marceau J.A. noted in paragraph 14 thereof that:

> … The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[28] In paragraph 15 of the *Perusse* case, Marceau J.A also stated:

> 15 … The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The *Act* requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. …

[29] The rationale of the legislative structure which creates a presumption of a non-arm's length relationship between related persons subject to the Minister's deeming them to be at arm's length where the Minister is so satisfied with the circumstances referred to in paragraph 5(3)*(b)* of the *Act* was clearly explained in the Federal Court of Appeal's decision in *Dumais v. Canada (Minister of National Revenue – M.N.R.)*, 2008 FCA 301, [2008] F.C.J. No. 1630 (QL) by Létourneau J.A. at paragraph 24:

> 24 … The *Act* assumes that "persons … related by blood, marriage or adoption are more likely to be able, and to want, to abuse the … *Act*" …

[30] Létourneau J.A. went on to say in paragraph 25 of that decision, in further explanation of the statutory structure:

> 25 One of the undeniable and undoubtedly laudable objectives of the provision is thus to provide the employment insurance system with protection against claims for benefits based on artifice, fictitious employment contracts or real employment contracts containing fictitious or farfetched conditions: …

[31] In light of these observations as to the current state of the law, I now turn to the facts of the case and the assumptions of the Minister relevant to them, following the categories of arguments used by the Respondent.

Remuneration

[32] The Minister's assumptions dealing with the Appellant's terms of remuneration are found in paragraphs 19(u), (x), (y) and (z) which are not disputed by the Appellant. In summary, the Minister therein assumed that the Appellant was paid $500 per week each week during the Period, with payment on a cash basis, and made regularly during the Period without disruption or delay. In addition, the Minister's assumptions in paragraphs 19(kk) and (ll), which are not disputed by the Appellant was that for the years 2004 to 2008 the Appellant and the Payer paid, according to issued T4 slips, each other substantially the same aggregate salaries, with identical aggregate salaries for the 2005, 2006 and 2007 calendar years, which was based on $500 per week, but that in 2008 the Appellant's businesses, through Huntley Foods, paid the Payer $550 per week while the Payer paid the Appellant $500 per week. There is no dispute either that salaries started at $300 per week in 2004 for both the Appellant and Payer, then jumped to $500 in 2005. The Minister also assumed in paragraph 19(oo) that the Appellant performed services for the Payer without remuneration. The Minister's position is that these are not normal remuneration terms in an arm's length relationship for several reasons.

[33] Firstly, the Respondent points out that the Appellant led absolutely no evidence that payment was even made. No receipts for payment were obtained and no accounting records were submitted into evidence suggesting a payroll ledger was even maintained. The only evidence is that of the Appellant and the Payer who testified such payments were made weekly in cash and that there was no record of their deposit into their bank accounts because neither of them deposited the sums into their bank accounts except as necessary to cover any preauthorized payments coming from their accounts, although no evidence was submitted to substantiate this claim either. When the Respondent's counsel asked the Payer whether money actually changed hands or whether the parties set off as against each other, his answer was vague, giving rise to some serious concerns I have about the credibility of the Payer's evidence, which will also be referred to later. Since the evidence

was also that each of the businesses was a cash business where cash sales were obtained and placed in an apron, at least in the case of the Appellant's food cart businesses of selling donuts and candy floss, one would at least have expected a simple daily sales journal or sheets to have been kept evidencing that sufficient sales were made to allow payment in cash or the withdrawal from the Payer's bank accounts of sufficient cash to do so. No such evidence was tendered either.

[34] Secondly, the Appellant admitted no statutorily required vacation pay was paid by either of the businesses to the Appellant or Payer, which the Respondent pointed out is hardly a term of employment at arm's length.

[35] Thirdly, there is in fact evidence that for at least one of the years, 2006, no salary could have been paid by the Payer to the Appellant, since the director for the TSSA Authority testified that Gateway Children's Village did not have a licence to operate amusement devices for that year. The Appellant did not counter with any evidence to dispute this evidence, no evidence of contracts obtained for that year or even a schedule of events for that year. Based on this evidence alone, I have serious doubts as to the credibility of the Appellant in this case.

[36] Fourthly, the Respondent effectively argued there was no rationale for the substantially same level of salaries paid by the Payer and Appellant to each other. The Respondent pointed out that the evidence strongly suggests that the role and duties of the Appellant for the Payer's business involved that of a mechanic with duties involved repairing and maintaining generators, air pumps and other machinery with significant statutory responsibilities such as following technical dossier instructions approved by the TSSA Authority for the erection and dismantling of the devices, keeping daily logs and arranging for inspections each day before the commencement of operations. The Payer on the other hand testified he cooked donuts and made cotton candy during the week for sale from two carts at events and held a propane certificate from the TSSA Authority to enable him to do the cooking. On the face of it at least it would appear a reasonable conclusion to presume that of the two, the Appellant was the more qualified and entitled to a higher salary in the workplace yet as noted above, the two half-brothers received identical salaries via each other for 2005, 2006 and 2007. In fact, the Appellant received $50 per week less than he paid the Payer in 2008 without explanation, other than his Huntley Foods held back $50 from Edward's salary per week for remittances. As a result, an identical $500 in cash was paid and received between the two. The Appellant, however, led no evidence to substantiate the level of salary paid to him as being competitive with what a non-arm's length person would receive let alone any evidence as to why the salary paid to Edward was reasonable

to challenge the Respondent's position that the salaries were simply consistent as part of a scheme to pay oneself. The Appellant simply stated that at the beginning of each year they negotiated a salary, albeit in fact, an identical one.

[37] Fifthly, the Respondent argued, the evidence shows that both the Appellant and the Payer's business made little profit and/or suffered losses, usually minor during the comparative years of 2004 to 2008 based on the evidence submitted from the tax returns of the Payer and the Appellant as well as of Huntley Foods and the largest expense which accounted for the majority of the expenses claimed by the businesses were the direct salaries paid to each other. As the Respondent pointed out, in *Lelièvre v. Canada (Minister of National Revenue – M.N.R.)*, 2003 TCC 55, [2003] T.C.J. No. 125 (QL), the fact a business operates at a loss in the context of hiring non-arm's length employees, is a significant factor evidencing a non-arm's length employment relationship.

[38] Finally, the Respondent argues, there is evidence that the Appellant worked during the winter months, during which he was not paid in lining up the amusement contracts for the next season. The evidence of the Rulings Officer for CRA was that in a telephone conversation she had with Edward Huntley, he advised her that it was Michael's responsibility to renew or deal with contracts for Gateway Children's Village and that he did this over the winter months. Edward Huntley himself denied this in testimony, instead testifying it was his responsibility and that he would sign up the customer at the end of each year for the following years, since customers had a hard time getting amusement devices booked and were eager to do so. I found the testimony of the Rulings Officer straightforward and credible while I had some difficulty with that of Edward Huntley who testified that while Gateway Children's Village and the Appellant's food businesses attended many of the same events, they did not attend all of them together, which of course suggests that he could not have met with the event organizers who required amusement devices if he was not always present. Secondly and more importantly, it would have been a simple matter to produce the event contracts evidencing his signature to back his claim yet nothing was produced into evidence.

[39] The Appellant has in no way rebutted the assumptions of the Minister in this regard. In the case of *Gray v. Canada (Minister of National Revenue – M.N.R.)*, 2002 FCA 40, [2002] F.C.J. No. 158 (QL), the Federal Court of Appeal confirmed that it was appropriate to compare the remuneration in other years to that of the year in question and further that whether the employee worked for the employer outside his remuneration period were factors the Tax Court could consider as part of considering "all the circumstances" as referred to in paragraph 5(3)*(b)* of the

Act, as I have above. In my view, the consideration of all the circumstances quite rightfully requires the consideration of any remuneration paid to the party in respect of whom the issue of non-arm's length arises as well, i.e., remuneration paid by the Appellant to the Payer in this matter, notwithstanding the Appellant's earlier objection that matters and evidence dealing with Edward Huntley's earlier decision be struck.

[40] In the case of *Academy Drywall Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, 2002 T.C.J. No. 15 (QL), Porter D.T.C.J undertook an examination of the law on the meaning of "arm's length", and correctly summarized in my view, the following result flowing from same at paragraph 28:

> 28 In effect what these cases say is that if a person moves money from one of his pockets to the other, even if he does so consistently with a regular commercial transaction, he is still dealing with himself, and the nature of the transaction remains "non-arm's length."

[41] In my view, the evidence of almost identical cash salaries, whether actually exchanged or not, but claimed to have been paid, is indicative of a circular flow of cash resulting in the payment to oneself, subject of course to the presentation of proof to the contrary, none of which has been given to my satisfaction here.

[42] As the Respondent also pointed out, the *Academy Drywall* case above also stood for the tenant that the Court will look to the presence or absence of a *bona fide* negotiation between the employee and payer as a factor in determining whether they are acting at arm's length. Clearly here, there was no sound evidence suggesting the Appellant and Payer conducted any *bona fide* negotiation concerning the issue of remuneration.

[43] In my view, a review of the terms of remuneration above, if any was even actually paid, strongly support the Minister's decision. The Appellant has in no way rebutted the assumptions of the Minister in this regard.

<u>Hours /Duration of Work</u>

[44] The assumptions of the Minister relevant to the Appellant's duration of employment and hours of work are found in paragraphs 19(d), (t), (v), and (w) of the Reply to the Notice of Appeal wherein the Minister assumed the Payer's business was seasonal and operated between June and November, that the Appellant's rate of pay was based on a 40-hour work week, that the Appellant did

not work 40 hours per week and that the Appellant's hours of work were not recorded. The Appellant agrees with all these assumptions save and except that he argues he did work 40 hours per week. The Appellant has quite rightfully stated that it is within his right to accept employment that is based on a weekly salary as opposed to an hourly one and testified that the 40 hours consisted of five eight-hour days which included not only setting up, operating and dismantling the amusement devices at events, with actual operating time being about five hours per day, but also attending to the maintenance, repair, cleaning and waxing of the inflatable rides themselves as well as the generators, air pumps and other equipment necessary to operate the business which were conducted at the Highgate shop before and after events. The Appellant and the Payer agreed that the majority of events occurred during weekend days and the maintenance, cleaning and repair described above during the week at the shop. Although technical dossiers filed with the TSSA Authority for two of the inflatable devices, the Obstacle Course and Giant Slide, set out the list of maintenance and operating requirements to be attended to, there is no indication thereon as to the time it would take to accomplish such requirements. The Appellant submitted no specific examples of the time needed to maintain, clean and repair any such equipment nor of the frequency of the maintenance and repairs nor even any maintenance schedule adhered to. This Court is really being asked to speculate as to such time.

[45] The Respondent has argued that even if the Appellant was remunerated at all, it was not for working a 40-hour week for several reasons as well.

[46] Firstly, as stated above, the Appellant nor the Payer have provided any proof or documentation of same, for the Court's consideration.

[47] Secondly, there is evidence suggesting the Appellant may not have even worked in 2008, let alone in 2006, due to the fact a Schedule of Events required to be filed with the TSSA Authority, and traditionally filed by the Appellant in past years by telefax addressed to a specific member of TSSA Authority was not filed with TSSA Authority for the 2008 year as confirmed by the testimony of the Director of Technical Services for the TSSA Authority. It should be noted that such director did also admit permits were issued for the operation of four rides for that year notwithstanding no compliance with the filing of the initial Schedule of Events. The Respondent entered into evidence a Schedule of Events purporting to be for 2008 as supplied by the Appellant to the Respondent on request which the Respondent suggests was not only not sent to the TSSA Authority as above but is a fabrication due to the fact the form supplied is a photocopy of the 2007/2008 form which was not the correct form to use for the 2008/2009 June 1 to May 31 year to

which the forms apply and would not have been accepted for filing by the TSSA Authority if sent, as per the above Director's testimony as well. In addition, the questionable form is not even an accurate photocopy since the form identification number found on the bottom left corner of the form is absent, suggesting it is a photocopy of a doctored form. The form also suggests it is a revision of a previously filed form instead of an initial filing, which according to the evidence of the said Director would have been the first time a revised schedule was ever filed by the Payer. Moreover, the questionable schedule refers to 17 events having taken place over 30 days during the Period, which the Respondent has demonstrated would indicate that for 2008 the Payer operated events during a number of days equal to twice the average for other years in which a schedule was actually filed, which averaged about 12 to 13 events over 15 days for the 2007, 2009 and 2010 seasons. Considering the Appellant and the Payer testified that each year most of the events' organizers sign on for the following year, it would stand to reason that there should be roughly the same number of events each year and the Appellant submitted no event contracts or other evidence to support such schedule. The evidence regarding this questionable form certainly indicates the form was not a true representation of the events, if any, attended by the Payer in 2008. It should be noted that the Appellant, having the opportunity to reply to these arguments, which seriously question the credibility of the Appellant and the Payer and suggest fraud, declined to reply. I can only draw the inference the Appellant had no evidence to rebut the allegations.

[48] Thirdly, the Respondent argued that even if the Court accepts that the questionable Schedule of Events is an accurate representation of the events of the Payer for 2008, then operating for 30 days means that during the Period, shop time to conduct such maintenance and repairs must have accounted for about three days of each week which seems highly incredible. If in fact the Court were to accept that the number of events were more consistent with the average of other years, then shop time must have accounted for a week and one half out of every two weeks which is even more incredible. Even more so, suggests the Respondent, when one considers that the technical dossier for the Giant Slide is very brief in its operating and maintenance requirements, when compared to the technical dossier for the Obstacle Course earlier mentioned.

[49] In all, the Appellant's lack of evidence as to the hours worked coupled with the evidence of the Respondent clearly leads me to conclude the Appellant has not rebutted the assumptions of the Minister in this regard and in fact on balance clearly supports the Minister's decision.

Other Circumstances

[50] The other relevant circumstances to be considered in this matter pursuant to the criteria set out in paragraph 5(3)*(b)* of the *Act* all generally deal with whether the interests between the Appellant and Payer are different enough to support reversing the Minister's decision. In the *Academy Drywall* case above, the Court, Porter D.T.C.J, as I indicated earlier, undertook an analyses of the meaning of "arm's length" and considered the relevant criteria in paragraph 30, adopting the statements of Bonner T.C.J. in *William J. McNichol et al. v. The Queen*, 97 D.T.C. 111:

> 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.

[51] In paragraph 38 of such judgment, Porter D.T.C.J . went on to say:

> 38 If the relationship itself … is such that one party is in a substantial position of control, influence or power with respect to the other or they are in a relationship whereby they live or they conduct their business very closely, for instance if they were friends, relatives or business associates, without clear evidence to the contrary, the Court might well draw the inference they were not dealing with each other at arm's length. That is not to say, however, that the parties may not rebut that inference. …

[52] And, in paragraph 40, summarized:

> 40 … The question that should be asked is whether the same kind of independence of thought and purpose, the same kind of adverse economic interest and the same kind of bona fide negotiating has permeated the dealings in question, as might be expected to be found in that marketplace situation. If on the whole of the evidence that is the type of dealing or transaction that has taken place then the Court can conclude that the dealing was at arm's length. If any of that was missing then the converse would apply.

[53] In the *Academy Drywall* case above, the Court found that two brothers who were the top officers of the corporation where a third uninvolved brother owned 100% of the shares were not at arm's length to the corporation.

[54] In the case at hand, the Respondent argues that the commingling of the business and personal interests of the Appellant and Payer together with the cross employment of each other by their businesses support its position that the two are not at arm's length and that in fact the Appellant is the controlling mind of the Payer's business for whom he works and that the arrangement between the two is but a scheme to allow the Appellant to obtain Employment Insurance Benefits.

[55] The Appellant of course takes the position that the two businesses are separately run by each of them, that they are different businesses and that the requirements of the businesses and the qualifications that each of the Payer and himself must have to work for the other are sufficiently different to support a finding of arm's length employment.

[56] The evidence is that prior to and in 2005 the Appellant, by his own admission, owned and operated two small inflatable rides, which he referred to as a side business. The Payer in 2005 to 2007, as confirmed in his tax returns, also operated a food vendor business. In fact, both the Appellant and Payer operated at one time or another a business known as Western Fair which were described as

food concessions at the annual London, Ontario fair. The Appellant, in fact, initially named his business activity at the fair "Gateway", which changed to Western Fair that he agreed he still operated even in 2008. The Payer on the other hand indicated his higher losses in 2008 were the result of the loss of his Western Fair contract for that year. In addition, the evidence is that both the Appellant and the Payer were equal shareholders of a corporation named 759776 Ontario Ltd. which, by the Appellant's testimony, operated fast food services at fairs in Western Canada, including in Calgary, Saskatoon and Edmonton, which was dissolved in about 2001.

[57] The evidence also shows that, notwithstanding the Payer's denial in testimony, both the Payer and Appellant were grandfathered by the TSSA as amusement device mechanics in 2003 up to May 31, 2004. Both the Appellant and Payer were listed as having amusement device mechanics certificate numbers and the Technical Director of TSSA Authority testified that those persons who had a certain level of prior experience in operating inflatable rides were grandfathered until the higher standards took over in 2004 requiring a course to be taken for continued certification. Likewise, the Appellant also testified he, like the Payer, operated propane devices at the fairs in Western Canada prior to 2001 suggesting he also had experience as a propane handler like the Payer.

[58] The evidence also shows that for 2008, based on the schedule of events supplied for both businesses, both businesses attended more or less the same events with few exceptions. The CRA Rulings Officer testified that in her conversation with the Payer, the Payer admitted that during the week he and the Appellant cooked the donuts and made the cotton candy for sale in the Appellant's food cart businesses on the weekend and that they both worked the amusement device business on the weekend, which was denied by the Appellant and Payer in oral evidence. As I mentioned earlier, I have some concerns regarding the credibility of the Payer who also testified he was not grandfathered as an amusement device mechanic before 2004 when the evidence of his own businesses' application for licence to the TSSA Authority, signed by him, includes him being listed as a qualified mechanic. I might add I also have some serious concerns about the credibility of the Appellant as well, as earlier mentioned, since he testified that Huntley Foods sold off its food business equipment in 2001 and became a labour services business, of which the Payer was the Operations Manager, and ceased to operate that business under Huntley Foods, while his tax returns clearly show he had significant machinery, furniture and fixtures which he was depreciating right up to his 2008 tax return, which showed an undepreciated balance of $55,631.

[59] Clearly, the evidence is that both the Appellant and Payer at one time or another operated similar businesses either together or separately at the same time and had the experience and qualifications to do so. They work for each other and pay each other in fact the same salary and pay out most of their businesses revenue to each other, with each showing only minor profits or losses each year from the 2003 to the 2008 year.

[60] The Respondent also asks the Court to consider that further evidence of their interconnectivity is that the Appellant and the Payer are equal owners of a property described as the Highgate Warehouse, having purchased it in 1989 and by admission, each of the Appellant and Payer store their devices or food carts and equipment during the winter, with each, according to the tax returns submitted into evidence, contributing payment to the co-tenancy for such storage and deducting such storage expenses. The Respondent also argued that it is not normal to pay oneself for the use of your own building. I am not sure what the relevance of that argument is and in fact it makes perfect sense to ensure that the businesses using the warehouse would pay for its use in an ordinary arm's length transaction. In this case, however, the jointly-owned warehouse supporting what appears to be only their interconnected businesses or dealings certainly suggests a greater degree of interconnectivity. No evidence was led suggesting the warehouse was leased to other parties.

[61] The Respondent also argued that the Appellant and Payer live together in the residence owned by the Payer, being further evidence of their non-arm's length relationship. The fact that an employee lives free of charge in property owned by the Employer was found to be a factor evidencing a non-arm's length employment relationship in the *Lelièvre* case. Both the Appellant and the Payer, his half-brother, are single men and clearly close to each other and I would not consider that the fact relatives live together to be indicative of some sinister motive to be used as evidence they are acting in concert as regards to their employment relationship or businesses. The difficulty I have with that factor however is that the Appellant vehemently denied he was living with his half-brother during the years 2003 to 2008 other than during the Period January 2008 to sometime in June 2008 because the furnace in his recreational vehicle that he normally lived in while it was parked at the Highgate shop had broken down. He testified he had to take up the floors of the vehicle to repair it and thus had to wait for better weather to do so as the reason he lived with Edward until June of that year. The Respondent, however, demonstrated that tax returns filed by the Appellant for 2007 and 2008 show his address as 15349 Muirkirk Line, Muirkirk, Ontario, the Payer's address. In fact, the 2008 tax return for Huntley Foods with respect to its November 30,

2008 fiscal year-end filed in 2009 also shows the same address. Likewise, the Appellant's Amusement Device Mechanics Certificate, ADM1 issued April 17, 2008, and expiring May 31, 2010, also show the Muirkirk address instead of the Highgate address, which is 103 Main Street, Box 165, Highgate, Ontario, and the Appellant filed no notice of address change with the TSSA Authority within 30 days as required by TSSA regulations. In fairness to the Appellant, he did admit into evidence his 2008 T4 which showed his address as the Highgate one and correspondence from the CRA in 2010 addressed to his Highgate address. The explanation given for the discrepancy is that both the Appellant and Payer use the same accountant and that the shop does not always receive mail in winter months due to poor accessibility, hence the reason mail might be sent to the other address. Of course, such explanation seems odd in that if the mail cannot get through, how does the Appellant. The Respondent also showed that tax returns of the Appellant for 2003 and 2005 show his address as 80 Chiddington Gate, London, Ontario, being the same address shown on the Payer's tax returns for 2005 and for Huntley Foods for 2003, being the Payer's residence at the time as well, suggesting they lived together at least since 2003. It seems to me a simple matter for the Appellant to have led other evidence by way of his personal identification documents and other witnesses to substantiate his claim he did not live free of charge with his brother but he failed to do so. At the very least, the Minister's assumption in paragraph 19(pp) of the Reply to the Notice of Appeal that the Appellant and the Payer has the same mailing address is unrebutted and I find that the preponderance of evidence supports the Respondent's argument that the two lived together as being at least reasonable.

[62] However, I do not agree with the Respondent's position that the Appellant is the controlling mind of the Payer however and hence had *de facto* control. The Appellant's own assumption found in paragraph 19(e) that the Payer made the major decisions for the business as well as the other assumptions suggesting the Payer had control and supervision over the employee clearly themselves contradict the Respondent's above position on *de facto* control.

[63] In all, however, the evidence above reasonably supports the Respondent's position that the Appellant and the Payer during the Period and both before and after, lived and conducted their businesses closely, demonstrating the same purpose and economic interests that are criteria of a non-arm's length relationship described in the *Academy Drywall* case above, so as to support the Minister's decision.

Summary

[64] Having regard to my findings regarding the Appellant's Remuneration, Hours Worked and Other Circumstances of his employment with the Payer, I must conclude that the Minister's decision was not only reasonable and should be deferred to, but that the evidence overwhelmingly supports the Minister's conclusion that the Appellant and Payer would not have entered into such contract of employment had they been at arm's length. Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 3rd day of December 2010.

"F.J. Pizzitelli"

Pizzitelli J.

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