Docket: 2002-4614(EI)

BETWEEN:

DANY GÉLINAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 4, 2003, at Montréal, Quebec

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

Counsel for the Appellant:	Louis Brousseau
Counsel for the Respondent:	Julie David

JUDGMENT

The appeal is dismissed and the decision rendered by the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator

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Date: 20030625
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REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Montréal, Quebec, on April 4, 2003.

[2] The appellant institutes an appeal from the decision of the Minister of National Revenue (the "Minister") according to which the employment held with Maçonnerie Grand-Mère Inc., the payer, during the periods in issue, from January 12 to December 4, 1998, from January 11 to December 17, 1999, from February 7 to December 15, 2000, and from January 22 to December 21, 2001, is excluded from insurable employment within the meaning of the *Employment Insurance Act* (the "*Act*") on the ground that he and the payer were not dealing with each other at arm's length.

[3] Subsection 5(1) of the *Act* reads in part as follows:

> 5.(1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied

> contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

> [...]

[4] Subsections 5(2) and (3) of the *Employment Insurance Act* read in part as follows:

> (2) Insurable employment does not include
>
> [...]
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (3) For the purposes of paragraph (2)(*i*),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the Income Tax Act; and
>
> (*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[5] Section 251 of the Income Tax Act reads in part as follows:

> **Section 251: 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

[...]

(2) Relationship defined. For the purpose of this Act, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

[...]

[6] The burden of proof is on the appellant. He has to show on a preponderance of proof that the Minister's decision is ill-founded in fact and in law. Each case stands on its own merits.

[7] In making his decision, the Minister relied on the following assumptions of fact stated in paragraph 5 of the Reply to the Notice of Appeal, which were admitted or denied by the appellant:

[TRANSLATION]

(a) The payer, which was incorporated on April 23, 1996, specializes in masonry and heritage restoration. (admitted)

(b) During the periods in issue, the payer's capital stock was allocated as follows:

Josée Jeansonne, the appellant's de facto spouse, with 70 percent of the shares;

The appellant with 30 percent of the shares. (admitted)

(c) The payer's place of business was located in the couple's residence, which belongs solely to the appellant. (admitted)

(d) The payer occupies an office and the garage of the residence without paying the appellant any rent. (admitted)

(e) The payer's lines of credit, totalling $85,000, are guaranteed by the two shareholders, and more particularly by a mortgage guarantee on the appellant's residence. (admitted)

(f) Josée Jeansonne has taken a business start-up course and obtained her competency cards as a specialized masonry worker. (admitted)

(g) Josée Jeansonne provided the $10,000 surety required as a financial guarantee to qualify the payer with the Régie du bâtiment. (admitted)

(h) The appellant is a master mason and holds his competency cards as a journeyman mason. (admitted)

(i) When the payer bids on a contract, it is generally the appellant who goes to evaluate the work to be done and to determine the number of scaffolds required. (denied)

(j) On September 23, 1999, the appellant took out a personal loan of $29,986 to pay for the purchase of a truck (six wheels) for the payer and to consolidate a loan which the payer had taken out in 1995. (admitted)

(k) The appellant borrowed the amount himself because the payer was unable to assume responsibility for the loan. (denied)

(l) From October 1999 to June 2002, the payer repaid the appellant $250 a month to cover a portion of the cost of that loan amounting to $499.77 a month. (admitted)

(m) The appellant was generally remunerated in accordance with the rates established by the CCQ, except when work was not subject to the Construction Decree. (admitted)

(n) When the payer experienced financial difficulties, it did not record the appellant's hours of work. (denied)

(o) From 1998 to 2001, the appellant took part in the payer's bidding work on a volunteer basis. (denied)

(p) The appellant did not appear on the payer's payroll when other workers were on it. (denied)

(q) The appellant was involved in all the day-to-day activities of the payer, and the latter could dismiss him without jeopardizing its survival. (denied)

[8] The payer, which was incorporated on April 23, 1996, specializes in masonry work and heritage restoration. During the periods in issue, the capital stock of the payer was allocated as follows: Josée Jeansonne, the appellant's de facto spouse, with 70 percent of the shares, and the appellant with 30 percent of the shares.

[9] The payer's place of business is located in the couple's family home, which belongs solely to the appellant. The payer uses the garage and a room in the family home as an office without paying the appellant any rent.

[10] The appellant testified that he had been doing masonry work since 1978, that he has held competency cards as a journeyman mason since 1998 and that he has been an employee of the payer since 1996.

[11] The appellant's duties were to act as site foreman and to prepare bids: the technical side is his area. His spouse prepared the bids for the subcontracts offered by the general contractor as well as the price lists.

[12] The appellant admitted that he had taken out a personal loan to purchase a truck for the payer. He said that the truck had been bought suddenly in order to get it at a good price. He believed that the transaction would be conducted more quickly if he took out a personal loan instead of obtaining a loan by the payer. According to his explanation, for economic reasons, that was more advantageous in view of the urgent nature of the purchase.

[13] The document entitled "Loan Contract" (Exhibit I-1) shows that the appellant borrowed the total amount of $29,986.20, consisting of the amount of the loan, that is $20,000, plus the balance of a previous loan, interest and insurance premiums. The monthly payment terms were $499.77 over 59 months. The appellant stated that he had used one portion of the loan to purchase the said truck and the other portion to repay one or more previous loans taken out by the payer. The appellant also admitted that the payer might have been late with certain payments.

[14] The appellant's remuneration was established on the basis of an hourly rate of $25, in accordance with the Decree of the Commission de la construction du Québec, for work performed for the commercial sector. For residential restoration work, the wage was set at $20 since that work was not subject to the Construction Decree.

[15] In cross-examination, the appellant stated that he belongs to the fourth generation of a family of masons and therefore handles the technical side of the business. He said that his spouse decided on the sites where he was to work. When he was on the job sites with clients and they preferred to do business with him rather than his spouse, he noted the clients' personal information and handed it over to his spouse. The appellant's spouse, Josée Jeansonne, decided on the quantities of

materials and the prices. The appellant said that he had signed order forms while on the job sites.

[16] Josée Jeansonne, the appellant's spouse, testified that she had been a mother before 1996, the year in which the payer was incorporated. She stated that she had taken business start-up courses and had learned to prepare a business plan in order to form a masonry company. She took courses six hours a week over a number of weeks until the end of March 1996 and, at the end of her courses, obtained her competency cards as a skilled masonry worker in September 1996.

[17] She declared that it was she who had formed the company and that she had registered with the Régie des bâtiments before 1996. She added that she had worked for a masonry company for three years. She also said that she had invested $10,000 in the company, in addition to another amount of $25,000, which had come from her mother.

[18] Josée Jeansonne did the administration and sought out contracts. She also hired apprentices and "journeymen" workers; the "journeymen" supervised the apprentices. The appellant became a "journeyman" in the trade in 1998.

[19] When there were bids to prepare, Josée Jeansonne went to the job sites. She said that certain clients, particularly in the residential sector, preferred to talk with a man rather than a woman, and that is why the appellant prepared certain bids, but it was she who set the prices. Josée Jeansonne corroborated the appellant's testimony on the purpose of the loan taken out: the personal loan taken out by her spouse was urgently required to take advantage of a low purchase price.

[20] She explained that the appellant paid the Caisse Populaire $250 a month for his portion of the loan and that the payer repaid the other $250 for the purchase of the truck, but admitted that her spouse sometimes paid the payer's portion when the payer was short of cash.

[21] She stated in her testimony that the hours worked were always entered in the pay records, except on a few occasions when the business had just started up. She added that she had always attended to the pay records, payment of accounts, and collection and that she did the cleaning herself when the work on the job sites was finished.

[22] A document entitled "Advertising, Exhibit __" (Exhibit I-2) states, *inter alia*:

> [TRANSLATION]
>
> Maçonnerie Grand-Mère Inc., established in central Mauricie five years ago, operates in various lines of activity and has solid experience in residential, commercial and industrial work and high-end masonry.
>
> The business, which is operated by Josée Jeansonne and Dany Gélinas, a master mason from a family of master masons from father to son for four generations, has distinguished itself by its vitality and technical knowledge and has projects worth more than $1.2 million to its credit.

[23] According to the financial reports filed as Exhibit I-3, the directors made advances to the payer, without interest or repayment terms: $66 in 1999, $23,989 in 2000, $22,784 in 2001 and $20,514 in 2002. Josée Jeansonne was unable to explain the amounts. She said that they were the accountant's responsibility, but added that three-quarters of those amounts were owed to her.

[24] Josée Jeansonne stated that the appellant had been paid in accordance with the Degree of the Commission de la construction du Québec since 80 percent of the work performed had been in the commercial or industrial sectors. She added that she reduced the appellant's wages when the payer had financial difficulties. She also admitted that the appellant had taken out a mortgage on his house to guarantee the payer's $25,000 line of credit.

[25] The appellant admitted subparagraph 5(e) of the Reply to the Notice of Appeal, which states that the payer's lines of credit totalling $85,000 were guaranteed by the two shareholders and, more particularly, by a mortgage guarantee on the appellant's residence.

[26] According to Josée Jeansonne, when the payer submitted a bid on a contract, it was she who went to the job sites most of the time to examine the premises and set prices. She stated that the appellant or Jacques Lessard, another journeyman, occasionally went to examine the job sites. She added that she did not remember whether the appellant had been in a period of unemployment when he made certain bids.

[27] Louise Dessureault, an appeals officer with the Canada Customs and Revenue Agency, stated in her testimony that she had examined the payer's books and noted that there was no resolution of the board of directors to make the loans.

[28] According to a document entitled "Tables of Monthly Income, Number of Employees and Number of Bids for 1998, 1999, 2000 and 2001" (Exhibit I-4), order forms and bids were signed by the appellant while he was in periods of unemployment.

[29] According to Louise Dessureault, the appellant was required on a number of occasions to cover personally the portion of the loan that the payer had to pay each month. She admitted, however, that, according to the payer's books, the appellant had received sporadic repayments and that, except for an amount of $250, had been repaid in full.

[30] In cross-examination, Louise Dessureault stated that the bids had been made by the appellant or his spouse; in the case of complicated jobs or when certain clients preferred to deal with a man rather than a woman, it was the appellant who took charge of discussions with clients.

[31] According to this witness, Josée Jeansonne admitted to her that the bids were made by her and by the appellant. The tables filed in evidence (Exhibit I-4) show that the appellant took part in the bids, since his signature or his calculations appear on a number of them. Louise Dessureault therefore concluded that the appellant and his spouse had taken part, year-round, in the preparation of a number of bids a week.

[32] The appeals officer sent a letter to the payer requesting an explanation of the amounts owed to the shareholders, the directors' advances to the payer, without interest or repayment terms, as indicated in the financial statements filed as Exhibit I-3, but received no reply. It should be noted that, at the hearing of the appeal, the appellant's spouse was unable to provide any explanation on this point.

[33] In her testimony, Denise Prévost, an investigation and control officer with Human Resources Development Canada, said that she had met Josée Jeansonne and had received the documents that she had asked her to forward to her, including the pay records and accounts receivable.

[34] This witness also stated that, in her meeting with the appellant, the latter had acknowledged his signature or his writing on approximately 85 percent of the bids

made by the payer. She filed bids in evidence (Exhibit I-6): the red tabs indicate the bids which the appellant signed during the periods when he received employment insurance benefits and the blue tabs prove the appellant's involvement, by either his signature or his writing, while he was in a period of unemployment. The appellant admitted that he had gone to clients' premises to make bids and acknowledged his writing and that of his spouse on some of those bids.

[35] The appellant admitted that he had taken out loans for the payer, including a mortgage loan on the house of which he was the sole owner. The appellant brought no rebuttal evidence.

[36] In *Ferme Émile Richard et Fils Inc. v. M.N.R.*, [1994] F.C.J. No. 1859, the Federal Court of Appeal held that, in applying subparagraph 3(2)(*c*)(ii) of the *Unemployment Insurance Act*, now subsection 5(3) of the *Employment Insurance Act*, the Court must consider whether the Minister's decision "resulted from the proper exercise of his discretionary authority". The Court must first require "the applicant to present evidence of wilful or arbitrary conduct by the Minister".

[37] In *Canada (Attorney General) v. Jencan Ltd.*, [1997] F.C.J. 876, the Federal Court of Appeal reiterated our Court's role in cases similar to the case at bar and wrote as follows at paragraphs 31 and 32 of its decision:

> 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...

In Ferme Émile Richard et Fils Inc. v. Minister of National Revenue et al. (1994), 178 N.R. 361 (F.C.A.), this Court confirmed its position. In obiter dictum, Décary J.A., stated the following at pp. 362-363:

> As this court recently noted in Tignish Auto Parts Inc. v. Minister of National Revenue, (...), 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 concluded between the employer and employee if they had been dealing at arm's length.

[38] In *Bérard v. Canada (Minister of National Revenue - M.N.R.)*, [1997] F.C.J. No. 88, the Federal Court of Appeal held as follows:

> ...The clear purpose of the legislation is to except contracts of employment between related persons that are not similar in nature to a normal contract between persons dealing with each other at arm's length. It is in our view clear that this abnormality can just as well take the form of conditions unfavourable to the employee as of favourable conditions. In either case, the employer-employee relationship is abnormal and can be suspected of having been influenced by factors other than economic forces in the labour market.

[39] The payer is a family business whose two shareholders were the appellant and his spouse. Under the *Act*, a shareholder may be an employee of a company, if the terms and conditions would have been substantially similar had the parties been dealing with each other at arm's length. There is no doubt that the appellant and the payer were not dealing with each other at arm's length.

[40] The appellant's spouse testified at the hearing of this appeal with a certain degree of assurance. She stated that she had taken courses for the purpose of forming and managing a business.

[41] The appellant testified that he had worked in the masonry field since 1978. When the payer's business was formed in 1996, he was a bricklayer's/mason's apprentice. He did not become a "journeyman mason" until 1998.

[42] According to the document entitled "Advertising, Exhibit __" (Exhibit I-2), the appellant and his spouse presented themselves as the officers of the payer; furthermore, the appellant is referred to in that document as "a master mason from a family of master masons from father to son for four generations". The appellant was thus closely related to the business; he was an employee in it.

[43] In view of the non-arm's length dealing, it must therefore be determined whether the appellant's employment was insurable.

[44] The payer's place of business was located in the family residence of the appellant and his spouse. The payer paid the appellant no rent for the use of the office and garage.

[45] According to the financial reports for the periods in issue, the payer's annual turnover varied between $270,000 and $415,238. The traffic at the family home must therefore had been impressive. It is not normal for an employee of a business to lend his residence to such commercial activities without compensation.

[46] The financial reports prepared by an accountant show that the directors made advances to the payer without interest or repayment terms. The appellant and his spouse were unable to explain those advances to the appeals officer or the Court. It is not normal for an employee who is dealing at arm's length to advance money to a business without interest or repayment terms.

[47] The appellant took out a personal loan at the Caisse Populaire (Exhibit I-1) in order to purchase a truck, which was the property of the payer. It is true that the contract consolidated a previous personal loan of the appellant and the purchase price of the truck. To repay the loan, the appellant and the payer each paid $250 a month. The appellant occasionally paid the portion attributable to the payer when the latter was short of cash; however, the witnesses at the hearing stated that the payer had repaid the appellant in full. In signing the "Loan Contract", the appellant personally undertook to repay the loan: an employee dealing at arm's length would not personally undertake to repay a loan taken out for the employer.

[48] The appellant also took out a mortgage loan on his residence to guarantee the payer's lines of credit. It is not normal for an employee to make a financial undertaking for his employer's benefit.

[49] The appellant was paid at the hourly rate of $25, the rate provided for by the Decree of the Commission de la construction du Québec for work performed in the commercial sector. For work performed in the residential sector, which is not covered by the Decree, the appellant received remuneration of $20 an hour. This wage differential cannot in itself affect his employment's insurability. The appellant prepared and signed bids, approximately 85 percent of the total number, while receiving employment insurance benefits. The appellant went to the clients'

premises or to visit the job sites and make the calculations in preparing the bids. It is not normal for an employee dealing at arm's length to be so generous with his time for his employer's benefit.

[50] The Court examined the cases referred to it by the parties concerning non-arm's length dealing.

[51] The Court concludes that the conditions of employment would not have been the same if the appellant and the payer had been dealing with each other at arm's length. The appellant did not show on a preponderance of proof that the Minister's conduct was wilful or arbitrary.

[52] Accordingly, the employment held by the appellant was not insurable during the periods in issue since he and the payer were not dealing with each other at arm's length as contemplated by paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Act*.

[53] The appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 25th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator