

Docket: 2002-4098(EI)

BETWEEN:

JULIE LABRIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Nancy Thériault* (2002-4105(EI)) and *Caroline Plourde* (2002-4106(EI)), on May 5, 6 and 7, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Counsel for the Appellant: Frédéric St-Jean

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Maria Fernandes, Translator

Docket: 2002-4106(EI)

BETWEEN:

CAROLINE PLOURDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Julie Labrie* (2002-4098(EI)) and *Nancy Thériault* (2002-4105(EI)), on May 5, 6 and 7, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Counsel for the Appellant: Frédéric St-Jean

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Maria Fernandes, Translator

Docket: 2002-4105(EI)

BETWEEN:

NANCY THÉRIAULT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Julie Labrie* (2002-4098(EI)) and *Caroline Plourde* (2002-4106(EI)), May 5, 6 and 7, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Counsel for the Appellant: Frédéric St-Jean

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Maria Fernandes, Translator

Citation: 2003TCC540
Date: 20031007
Docket: 2002-4098(EI)

BETWEEN:

JULIE LABRIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 2002-4105(EI)

NANCY THÉRIAULT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 2002-4106(EI)

CAROLINE PLOURDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.

[1] These appeals were heard on common evidence on May 5, 6 and 7, 2003, at Québec, Quebec.

[2] The Appellants are appealing the decisions of the Minister of National Revenue (the "Minister"), that employment held during the periods at issue, with Cécile Labrie, the Payor, are excluded from insurable employment within the meaning of the *Employment Insurance Act* (the "Act") on the ground that the Appellants and the Payor would not have entered into a substantially similar contract of employment had they been dealing with each other at arm's length.

[3] The periods at issue for the Appellants are: Julie Labrie from June 12 to October 13, 2000, and from July 23 to September 1st, 2001; Nancy Thériault from May 7 to August 17, 2001; Caroline Plourde from May 1st to September 15, 2000, and from May 7 to September 1st, 2001.

[4] 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 . . . contract of service . . .

[5] Subsections 5(2) and 5(3) of the 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.

[6] 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) **Definition of "related persons"**. For the purpose of this Act, "related persons", or persons related to each other, are

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

...

[7] The burden of proof lies with the Appellants. They must establish, on a balance of probabilities, that the Minister's decisions are ill-founded in fact and in law. Each case stands on its own merits.

[8] In making his decision with respect to Julie Labrie, the Minister relied on the following assumptions of fact, which were admitted or denied:

[TRANSLATION]

(a) The Payor ran a fruit and vegetable farm operation. (admitted)

(b) The Payor ran three greenhouses and one raspberry field. (admitted)

(c) Harvested produce was retailed at a stand located on the same property as the greenhouses and the raspberry field. (admitted)

- (d) The Payor was the sole owner of the business, which she ran under the name "Serres des Hauts Plateaux Enr." (admitted)
- (e) The Payor rented out the raspberry field, stand and greenhouses. (admitted)
- (f) The Payor opened for business in March 1999. (denied)
- (g) The Payor's business was seasonal; activities began in March and ended in October. (denied)
- (h) During the on-season, the Payor was open daily from 8:00 a.m. to 9:00 p.m. (admitted)
- (i) During the 2000 season, the Payor had two people on the payroll: the Appellant and Caroline Plourde. (admitted)
- (j) During the 2001 season, the Payor had three people on the payroll: the Appellant, Caroline Plourde and Nancy Thériault. (admitted)
- (k) The Appellant is the Payor's sister: Caroline Plourde is the Payor's daughter and Nancy Thériault is the Payor's sister-in-law. (admitted)
- (l) The Appellant worked as a horticultural assistant and her primary tasks consisted of:
 - taking care of the cuttings, pricking out and seeding.
 - setting up flower boxes.
 - taking care of tomato greenhouses, potatoes (in 2000 only) and raspberries.
 - greeting and serving customers.
 - Running the cash register.
 - Cleaning the greenhouses and pots. (admitted)
- (m) The Payor provided all of the tools and equipment required by the worker. (admitted)
- (n) The Appellant's hourly pay was \$9.00 in 2000 and \$7.50 in 2001 based on a 40-hour workweek. (admitted)
- (o) The Appellant was paid partly by cheque, partly in cash or partly in merchandise (plants, seeds, etc.). (admitted)

- (p) The Payor did not record the Appellant's work hours. (denied)
- (q) The Payor's book of account does not contain evidence that the Appellant's wages were paid entirely during the periods at issue and these books contain discrepancies between the data in the pay registers, cheques and the data in the ledger. (denied)
- (r) In May and June 2001, the Appellant brought her children to daycare for full weeks or for two to three days at a time per week. (admitted)
- (s) The Appellant rendered services to the Payor outside the periods at issue. (denied)
- (t) The Appellant's work periods corresponded neither to the season of operation nor to the Payor's actual requirements. (denied)
- (u) On October 13, 2000, the Payor issued a record of employment to the Appellant indicating that she had worked between June 12 and October 13, 2000. (admitted)
- (v) In her statutory declaration signed November 21, 2001, the Appellant stated: "before that, I used to clean the greenhouses (last year) . . . I used to work with Caroline Plourde, if my memory serves me." (denied)
- (w) In 2000, the Payor issued Caroline Plourde a record of employment indicating that she had begun work on May 1st. (admitted)
- (x) On September 27, 2001, the Payor issued a record of employment to the Appellant indicating that she had worked between July 23 and September 1st, 2001. (admitted)
- (y) The records of employment received by the Appellant do not reflect the periods actually worked and the remuneration earned. (denied)

[9] The assumptions of fact on which the Minister relied to hand down his decisions in the Caroline Plourde and Nancy Thériault cases are substantially the same as those mentioned above.

[10] The Payor was operating a fruit and vegetable farm business comprising three greenhouses and one raspberry field since March 1999.

[11] Harvested produce was retailed at a stand on the same property as the greenhouses and the raspberry field.

[12] The Payor, Cécile Labrie, was the sole owner of the business, which she ran under the name "Serres des Hauts Plateaux Enr."

[13] She rented the property on which she ran the business of the Corporation des Hauts-Plateaux Enr. for \$500 a month.

[14] On February 4, 2000, the Payor took out a \$10,136.28 loan from the Société d'aide au Développement des Collectivités of the regional county municipality of Rivière-du-Loup, as it appears in Exhibit A-5.

[15] The Payor's spouse, R. Caron, from whom she has since separated, gave her \$8,000.00 to start up operations in March 1999.

[16] The rented property comprised one building, where the store and greenhouses were located. According to the photographs filed under Exhibit A-4, the property was impressively clean. Cécile Labrie lived on the property behind the store.

[17] Cécile Labrie worked for the Quebec ministry of natural resources in tree and flower planting. In November 2000, the ministry awarded her with a certificate of recognition for work accomplished over 25 years (Exhibit A-1).

[18] On April 23, 1999, she sent her employer a letter asking for a one-year sabbatical because she had become a business owner (Exhibit A-2).

[19] She told the Court that the Appellants did not work for her in 1999.

[20] On May 1st, 2000, she hired her daughter, Caroline Plourde, whom she trusted, until September 15 and again in 2001 from May 7 to September 1st.

[21] Caroline Plourde was paid \$6.90 an hour in 2000 and \$7.51 an hour in 2001. She worked as horticultural assistant and her primary tasks consisted of:

- taking care of the cuttings, pricking out and seeding.
- setting up flower boxes.
- taking care of tomato greenhouses, potatoes (in 2000 only) and raspberries.

- greeting and serving customers.
- running the cash register.
- cleaning the greenhouses and pots.

[22] Cécile Labrie hired her sister, Julie Labrie, from June 12 to October 13, 2000, and from July 23 to September 1st, 2001, at an hourly wage of \$9.00 in 2000 and \$7.50 in 2001. Her tasks were the same as those performed by Caroline Plourde.

[23] Nancy Thériault, sister-in-law of the Payor, worked for the latter from May 7 to August 17, 2001 at an hourly rate of \$7.30. She performed much the same tasks as Julie Labrie and Caroline Plourde.

[24] According to the Payor, the Appellants worked 40 hours a week, from 8:30 a.m. to 3:30 p.m. and from 8:00 a.m. to 3:00 p.m. She paid the workers weekly by cheque, in cash or in produce. According to the salary table (Exhibit A-6), paycheques varying between \$175 and \$200 were issued to the Appellants, though not every week.

[25] The Payor provided all of the tools and equipment required by the Appellants.

[26] The Payor issued Appellant Caroline Plourde records of employment indicating that she worked from May 1st to September 15 in 2000 and from May 7 to September 1st in 2001.

[27] Under Exhibit A-7, the Payor filed as evidence documents entitled "Statement of Business Activities" for 2000 and 2001.

[28] Gross revenues for 2001 were \$25,012.07 and wages were \$13,079.85; the Payor reported a loss of \$13,780.08.

[29] Gross revenues for 2000 were \$22,488.32 and wages were \$13,471.54; the Payor reported a loss of \$23,229.80.

[30] During 2000 and 2001, the Payor worked at the Quebec Ministère des ressources naturelles five days a week from 8:00 a.m. to 5:00 p.m.; she worked for her business in the evenings and on weekends.

[31] According to Cécile Labrie, activities began in March or April and ended in October. Preparations and orders were made in March and April, while the business opened its doors from May to October of every year.

[32] The Payor affirms that Julie Labrie worked at the business in the month of March and part of April 2000.

[33] The Payor stated with uncertainty that Caroline Plourde worked full-time in 2000. She stated that the Appellant worked the entire month of April 2000.

[34] She admitted that the work performed by Julie Labrie and Caroline Plourde for the months of March and April were not recorded in her books.

[35] A little further in her testimony, she stated that Caroline Plourde worked three hours per day prior to March and a few weeks in April and that she was paid entirely in cash.

[36] She admitted that the hours worked by the Appellants do not appear on the records of employment.

[37] In cross-examination, the Payor admitted that she had nothing in writing with regard to cash payment of wages. She added that the produce given to the Appellants in lieu of part of the wages is noted somewhere.

[38] She mentioned that it was the accountant who prepared the payroll. She added that she had had five accountants, alternatively, in 2000 and 2001.

[39] The Payor acknowledged having signed three statutory declarations (Exhibits I-1 to I-3) dated December 11, 2001, December 21, 2001 and January 4, 2002. At the hearing, she testified that the investigator intimidated her and that she had asked him if she could have someone there with her during the testimony. It should be noted that the declarations were made on different dates and that she never complained about the investigator's behaviour.

[40] With regard to her first declaration, she stated that she did not recall all of the events. She stated that the investigator showed up at her home without warning, while the beginning of the declaration that she had signed it is written: [TRANSLATION] "following the investigating officer's visit previously agreed to over the telephone."

[41] The Payor stated that the investigator did not give her a chance to consult with a lawyer; he allegedly told her that: "it's better that you sign this." She added, "I'm afraid."

[42] With regard to her second declaration, she also stated that the investigator had not telephoned her prior to the visit, while, as with the first declaration, it is written that the meeting had been "previously agreed to over the telephone."

[43] As to her third declaration made and signed at her home, the Payor declared that the investigator had telephoned her to set up an appointment and that he showed up 30 minutes later.

[44] In her declarations, she contradicted herself with regard to the periods of employment of Julie Labrie and Caroline Plourde. She finally admitted that these two Appellants had worked for her prior to the periods indicated on the records of employment and added that she did not want to do them harm.

[45] Caroline Plourde, daughter of the Payor, declared that her periods of employment were from May 1st to September 15, 2000, and from May 7 to September 1st, 2001.

[46] She described her tasks within the company and declared that she worked 40 hours per week, from 8:00 a.m. to 5:00 p.m. or from 8:30 a.m. to 5:30 p.m.

[47] She stated having been involved with the preparation of the salary table, filed under Exhibit A-6, and that it had been prepared the week prior to the hearing of these appeals. She stated that she was paid by cheque, in cash or in produce, at the hourly rate written in the Reply to the Notice of Appeal.

[48] She admitted having made a statutory declaration dated January 15, 2002 (Exhibit I-10). According to Caroline Plourde, the investigator called to meet with her and she went to his office in Rivière-du-Loup.

[49] This declaration signed by Caroline Plourde reads in part as follows:

[TRANSLATION]

. . . I acknowledge that the record of employment . . . for the work period from 1-05-00 to 15-09-00, is incorrect or false in that at least the first day of work is incorrect and false because I started working part-time in March 2000.

...

Cécile Labrie agreed, saying however that she had no money to pay me wages right away, that my full-time work weeks would be indicated in the books starting in April 2000 and that my part-time hours from March 2000 would be paid to me with those starting in April 2000, that is, when I was short on hours in a week starting in April 2000 and thereafter, she would bank those hours in order to complete my weeks and make them all 40-hour weeks. It is on my request that Cécile was supposed to start in April 2000 to have me down as full-time in the books . . .

[50] She also stated in her declaration that she had worked for the Payor in February 2000.

[51] In this declaration, the Appellant indicated: [TRANSLATION] "The same applies for 2001 as it did for 2000, i.e. that the first day of work on the record of employment . . . is incorrect because I started working part-time in early April, in 2001 if I recall."

[52] In cross-examination, she reiterated that she, the two other Appellants and the Payor had drawn up the table (Exhibit A-6) the week before the hearing of these appeals.

[53] Appellant Nancy Thériault, sister-in-law of the Payor, affirmed that she worked for the Payor during the period at issue.

[54] She provided explanations for the table filed under Exhibit A-6. She acknowledged that she was paid by cheque, in cash or in produce. She stated that she had included payments in produce in a workbook, without filing it as part of the evidence.

[55] She acknowledges having met with the investigator who went to her home without prior warning and having raised her voice when the investigator interrogated her. She added that the investigator had told her that he had a belt in karate.

[56] She stated that she gave him authorization to go check her bank account because, in her view, [TRANSLATION], "without that, her unemployment benefits would be cut off."

[57] In cross-examination, she admitted not having lodged a complaint with regard to the investigator's behaviour.

[58] According to Nancy Thériault, the investigator asked her friend, who was present at the time the declaration was made, to go into the living room in order to intimidate her with his karate belt comment. Despite that outcome, she still signed the declaration filed under Exhibit I-4.

[59] In her declaration, she stated the following, among other things:

[TRANSLATION]

. . . I began working in May 2001, on 08-05-01, and ended on 10-08-01. All the while I was working for "Les Serres" I travelled with my niece, who is also my neighbour since she worked for the same employer. I do not know if—when Caroline Plourde, my niece, started picking me up—she herself had started working before me but I believe that we both started at the same time because I remember that on my first day no work had been performed.

...

All of my wages were paid to me via cheque, which I cashed myself and used as I saw fit. I did not have any problems with pay.

...

[60] Julie Labrie, the Payor's sister, declared that she worked 40 hours a week during the periods at issue.

[61] She testified that she was the business manager because of her experience. She mentioned that she worked in March and April 2000, and that she received from the Payor \$300.00 and \$200.00, without being able to say how many hours she had worked.

[62] She declared not having worked for the Payor prior to July 23, 2001. She did not work prior to that period because she was looking after her daughter, who had undergone surgery.

[63] She declared having met with the investigator at her home, who showed up without warning.

[64] The Appellant admitted, via her counsel, subparagraph 5(r) of the Reply to the Notice of Appeal, that in May and June 2001, the Appellant brought her children to daycare for full weeks or for two to three days per week.

[65] She responded to the Court that she looked after her child following the operation but she still had to pay daycare.

[66] In her statutory declaration filed under Exhibit I-5 dated November 21, 2001, Appellant Julie Labrie declared the following:

[TRANSLATION]

. . . This is the second year that I work at that place. . . . I worked longer last year because I looked after the flowers, . . . Before that, I used to clean the greenhouses (2 [sic] last year) as it is done using bleach and takes a very long time. It takes two people at least two weeks per greenhouse and I used to work with Caroline, if my memory serves me. It was just the two of us cleaning the greenhouses and the flats. I then continued to work with Caroline Plourde. When we started, we both started at the same time last year (2000). We were only two employees throughout the entire season with this employer. . . . There was a time when I was alone doing the work because Cécile Labrie had no more money to pay the wages. There were no delays in the payment of my wages, which were always paid by cheque every two weeks.

[67] In her declaration dated December 17, 2001 (Exhibit I-7), Julie Labrie declared the following, among other things:

[TRANSLATION]

. . . it is correct that in 2000, when I worked for "Serres des Hauts-Plateaux Enr.", I earned \$9.00 an hour because Cécile Labrie had fewer wages to pay her employees, but she still did not have enough money to pay me right away; therefore, I was paid partly by cheque and the rest in cash.

. . .

I was paid every two weeks; therefore I received part by cheque every two weeks and at the same time, the rest of what she owed me in cash, and I couldn't tell you if the same thing applied to all employees; I was the one who asked about the \$9.00 an hour

because I thought \$7.50 was not enough, but I do not know about the other employees.

...

As for me, I never worked overtime: I always worked 40 hours a week in 2000 and the same in 2001 for that employer. In 2001, I was paid \$7.50 an hour and I understood that Cécile had more wages to pay; that year, all my wages were paid by cheque. It would happen—and I was still doing it in 2000 as well as in 2001—that I took all my flowers, my plants and my vegetables—whatever was available in the harvest at the Serres des Hauts-Plateaux. I did not run up a tab on my purchases last year and I paid at the end of every week. That year, Cécile deducted \$5.00 every week on my request and she deducted that amount from my tab.

[68] Paul Dessureault, an investigation officer with Human Resources Development Canada for 24 years, testified on the Respondent's behalf.

[69] He testified that he began his investigation on November 16, 2001, when a he paid Appellant Nancy Thériault a visit from 3:00 to 4:45 p.m. Nancy Thériault read her statutory declaration (Exhibit I-4), initialled and signed it.

[70] The investigator declared that he went to see that Appellant because he was having difficulty reaching the Payor and in addition, her employment insurance benefits were suspended.

[71] There is no need to report on the full content of the declaration, but only on the way in which it was obtained.

[72] The investigator affirmed that he did not threaten the Appellant during the visit. He showed up at her home without prior warning, showed her his identification card and explained the purpose of his visit.

[73] On December 11, 2001, the investigator met with the Payor, Cécile Labrie, during a visit to her home. There were second and third statutory declarations (Exhibits I-2 and I-3), which were obtained on December 21, 2001 and January 4, 2002.

[74] The investigator admitted visiting the Appellants and the Payor without warning in order to obtain statutory declarations.

[75] He admitted that there had been no warning and that he had suggested that she retain counsel. He denied telling Applicant Nancy Thériault that he had a belt in karate and Appellant Caroline Plourde that she could go to prison.

[76] He also admitted that, during a visit that lasted several hours with the Payor, the latter had cried and yelled, adding that he had suggested that they take a break, which she refused.

[77] He denied ever threatening the individuals who made a statutory declaration. The Payor, Cécile Labrie, gave three declarations without complaining to authorities at Human Resources Development Canada.

[78] He admitted that he was given a notebook outlining the produce given but , according to the declarations, not all are mentioned in it.

[79] The investigator filed the payroll journals as evidence (Exhibits I-8 and I-9) as well as a record indicating the amounts paid to the Appellants (Exhibit I-6).

[80] Lorens Côté, an insurance officer, testified that there were three conversations were held with the three Appellants and the Payor.

[81] At the beginning of each telephone conversation on February 19, 2002, he explained the *Employment Insurance Act*.

[82] In referring to her statutory declaration, he asked Nancy Thériault if she upheld the contents of her declaration, to which she responded in the affirmative.

[83] Nancy Thériault allegedly told him that she began working for the Payor in April 2001 for 15 hours a week and that she had worked at least two weeks on a volunteer basis.

[84] She told him that she began working full-time from May 2001 until August 2001. She told him that the hours worked in April 2001 were reported in May 2001 in order to get a full week.

[85] Caroline Plourde also upheld the contents of her statutory declaration during a conversation with Lorens Côté on February 19, 2002.

[86] She allegedly told the insurance officer that she worked for the Payor in April 2001, working 10 to 15 hours a week throughout the entire month.

[87] She also stated that she worked for the Payor in 2000, before Julie Labrie and that both finished work together. It should be noted that the periods at issue in 2000 for Caroline Plourde are from March 1st to September 15 and from June 12 to October 13 for Julie Labrie.

[88] Caroline Plourde stated that she only volunteered in 2000 and 2001 and that she did not work overtime with the exception of approximately 60 hours prior to being put on payroll, that is, for the periods at issue.

[89] Julie Labrie also upheld the contents of her statutory declaration. She affirmed that she received \$600.00 from the Payor in April and \$300.00 in March. She added that those amounts were paid for hours worked, indicated in the record of employment, including the period starting on May 1st, 2000, and ending on October 13, 2000, and that she worked with Caroline Plourde, save for one week.

[90] Cécile Labrie upheld the contents of her statutory declarations during her telephone conversation with the insurance officer.

[91] She allegedly told him that Caroline Plourde worked part-time, approximately 10 to 12 hours for two weeks in April. She admits that Caroline Plourde and Julie Labrie worked gratuitously for the Payor in March and April of 2000.

[92] Caroline Plourde allegedly banked her volunteer hours in order to complete her 40 hours per week for 2000 and 2001. The Payor acknowledged that she could not have hired a stranger, by banking her hours or have her work gratuitously or make delayed wage payments, which is what happened with Julie Labrie.

[93] Lorens Côté testified that there was a message from Julie Labrie on his answering machine saying that she had made a mistake on February 19, 2002, to the effect that she had not banked hours in 2000 and that it did not concern her but perhaps Caroline Plourde: no one else called him to make corrections to telephone conversations on February 19, 2002.

[94] In cross-examination, he stated having considered Exhibit A-10, that is, a cheque issued by the Payor, on April 14, 2000, to Caroline Plourde while the latter's period of employment was from May 1st to September 15, 2000.

[95] Lorens Côté acknowledged that the statutory declarations and the documents that he had in hand were enough to make his decision.

[96] The insurance officer could not ascertain that there were sales in March and April 2000 and 2001. Therefore, he concluded that sales took place between May and October.

[97] In ruling on employment insurability, the insurance officer found that the wages were unreasonable because, among other things, the Appellants worked up to 50 hours a week. However, he recognized that the hourly rates of \$6.90, \$7.50 and \$9.00 were reasonable.

[98] He took into account the fact that the business suffered losses. Employment duration does not reflect reality. He recognizes that the Appellants worked; however, given the conditions of employment and the non-arm's length relationship, he found that the jobs should be excluded from insurable employment.

[99] According to that officer, Julie Labrie needed 1,910 hours in 2000 in order to qualify for employment insurance benefits when she had only worked 934 hours.

[100] In 2001, Julie Labrie needed 450 hours in order to qualify when she had only worked 456 hours.

[101] In 2000, Julie Labrie worked 720 hours for the Payor and 214 hours for another Payor, for a total of 934 hours.

[102] In 2001, Julie Labrie worked 240 hours for the Payor and 216 hours for another Payor, for a total of 456 hours.

[103] The Appellants submitted no rebuttal evidence.

[104] The Court must decide if the Minister's decisions, based on paragraph 5(2)(i) and subsection 5(3) of the *Employment Insurance Act*, to exclude the Appellants' jobs from insurable employment during the periods at issue are justified considering the conditions of employment since the Appellants and the Payor were not dealing with each other at arm's length.

[105] The evidence showed that there was a non-arm's length relationship between the Appellants and the Payor.

[106] Caselaw has established that the role of the judge of this Court does not allow him to substitute his decision with that of the Minister; however, it is important to verify if the facts assumed or retained by the Minister are real and have been correctly assessed in light of their context and following their verification, to decide if the Minister's conclusion appears to be reasonable.

[107] Upon reviewing the facts, the Appeals Officer concluded the following in his report (Exhibit R-1):

[TRANSLATION]

Remuneration – The hourly rate is reasonable for the work performed but the wages were set at 40 hours a week, even for weeks over 40 hours. Payment methods are unusual and would not have otherwise existed between unrelated parties. The Payor's payroll journals do not contain tangible evidence that the wages were all paid for the periods and other periods and include discrepancies between data in the pay registers, cheques and ledger. The Payor's financial statement is very precarious and casts serious doubt on fund availability. Remuneration is not handled in a reasonable manner between the parties involved.

Terms of employment – There were discrepancies on the hours; therefore, it was impossible to establish the exact number of the worker's hours. The facts show work performed outside of declared periods, a banking of hours and a lack of evidence for wage payments. The duration of employment is incorrect but the Payor did not provide or submit any corrections. We are of the opinion that these terms and conditions would not have otherwise existed between unrelated parties.

Duration of employment – The duration of employment for both periods at issue does not reflect the Payor's actual requirements and season of operation. The duration is approximately the number required to qualify for employment insurance benefits for both periods at issue. The facts show that the worker worked outside the periods of employment reported by the Payor but with no pay for most of the time. We believe that the duration of employment would have been dealt with differently in a non-arm's length relationship.

[108] In making his decision, the Respondent relied on the statutory declarations of the Appellants and of the Payor as well as on the documents provided.

[109] The Appellants and the Payor tried to demonstrate that their declarations were not made freely and willingly, but were only so after the investigator intimidated them.

[110] The investigator denied telling one of the Appellants that he had a belt in karate and that she could go to prison if she refused to co-operate.

[111] The onus was on the Appellants to prove that their declarations were not made under normal circumstances, namely without intimidation and willingly, which would have led to their striking out from the evidence; however, the Appellants did not succeed in doing this.

[112] The Payor made three statutory declarations between December 11, 2001 and January 4, 2002. She could have informed herself through the authorities or counsel with respect to her rights or the manner in which the investigator used to obtain declarations. Since sums of money are being claimed from Human Resources Development Canada, the Respondent has a right to know if such sums are legitimate. Any debtor has the right to make sure that payments are made in due form.

[113] In another circumstance, the Appellant's friend, Nancy Thériault, was in adjacent room instead of in the examination: the Appellant could have complained to that person in order to feel more secure.

[114] The Appellants did not report the investigator's behaviour to the authorities. The insurance officer testified that the Appellants, one after the other, confirmed the content of their statutory declarations. They did not complain about the manner in which the declarations were obtained.

[115] It is possible that the Appellants felt nervous during the examination, but this does not allow the Court to cast doubt on the truthfulness of the given replies: the Appellants read, initialled and signed said declarations.

[116] In her statutory declaration dated January 15, 2002 (Exhibit I-10), Caroline Plourde admitted that the records of employment for 2000 and 2001 were incorrect and false. She declared that her employment with the Payor began in March 2000 and April 2001.

[117] The payrolls (Exhibits I-8 and I-9) indicate that Caroline Plourde worked for the Payor in March and April 2000 and in April 2001.

[118] In her declaration, Caroline Plourde declared that the Payor did not always have money to pay her. She added that the Payor [TRANSLATION] "would bank her hours in order to complete the 40 hours per week, starting in the month of May."

[119] In her statutory declaration, Nancy Thériault declared that her wages had always been paid by cheque. She added that she never had a problem being paid and that she was usually paid every week on Friday.

[120] This declaration is inconsistent with the salary table prepared by the Appellants one week prior to the hearing of these appeals (Exhibit A-6), to the effect that her wages were sometimes paid by cheque, in cash or in produce.

[121] In her statutory declaration dated November 21, 2001 (Exhibit I-5), Julie Labrie stated that she was always paid by cheque every two weeks.

[122] This declaration is inconsistent with the salary table (Exhibit A-6), which shows instead that she was paid in cash or in produce and a few times partly by cheque, and partly in cash and in produce.

[123] In another statutory declaration dated December 17, 2001 (Exhibit I-7), Julie Labrie declared that the Payor did not always have the financial capability to pay her wages and therefore, she was paid by cheque and in cash.

[124] Cécile Labrie, in her statutory declaration dated December 11, 2001 (Exhibit I-1), admitted that there were, at times, delays in wage payment; accordingly, she would pay her employees by cheque or in cash when she received her pay from her regular employer.

[125] In her statutory declaration dated December 21, 2001 (Exhibit I-2), the Payor stated that she did not note everything down, that sometimes she would pay in cash but that it was not noted. She added that she gave the accountant the start date of the Appellants.

[126] In her statutory declaration dated January 4, 2002 (Exhibit I-3), she declared the following:

[TRANSLATION]

. . . This morning I will tell you the whole truth about the work performed at Serres des Hauts-Plateaux Enr. . . . I told them that at the beginning, they would not be working full-time. I believe they did not want their start of employment to interfere with their unemployment and given that they were both present when this was discussed. I had informed them that I would take note of all their hours but that I didn't have enough money to pay them right away and that I would pay them their earned wages in March and April 2000 and in late May, early June 2000. . . . They told me they knew that I didn't have the money, that I was not in a position to pay them right away and so we agreed to bank the hours worked by Caroline and Julie in March and April 2000 and use them to complete the work time when they would pretty well be full-time in May and June, so that they would have all 40-hour work weeks when short on hours. . . . She [Caroline] also benefitted from the banking of hours because her 119 hours from March 2000 were banked during the period from 01-05-00 to 15-09-00 to make 40-hour work weeks. . . . I acknowledge that if the actual start date of employment is in March 2000 with regard to Caroline Plourde's start date, the date on her Record #A70073106, which is 01-05-00, is incorrect and I do not want to prejudice Caroline with this.

[127] There are clearly contradictions in the statutory declarations of the Appellants and the Payor. There was an arrangement to bank the hours worked in order that they could take full advantage of the employment insurance benefits.

[128] There are contradictions with regard to the method and frequency of wage payment. The Payor admitted that she would not note down everything. How could she take into account all of the produce that the Appellants were given as compensation for their wages?

[129] The Appellants prepared the table (Exhibit A-6) just one week prior to the hearing of these appeals: how reliable are those calculations, especially when payments were made partly in cash and partly in produce.

[130] The conditions of employment would not have been similar if the Appellants and Payor were dealing with each other at arm's length.

[131] In support of the appeals, the Appellants' counsel refers to *Théberge v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 464. In this

case, the parties had no arrangement to take advantage of the Act's provisions. Accordingly, this decision cannot be applied to the cases at bar.

[132] In *Michel Duplin v. M.N.R.* (docket 2000-2638(EI)), dated March 9, 2001, Tardif, J. of this Court said the following:

When services are provided or errands are run for an employer, I do not think that this automatically means there is no contract of service, where this is done from time to time or in special circumstances. However, if the services or errands are recurring, frequent and performed or run by a majority of an employer's employees, this raises questions; even where those providing such services or running such errands characterize what they are doing as free and voluntary, as mutual aid volunteer work, as support or as an expression of solidarity with their co-workers, the fact remains that such conditions, circumstances and facts are hard to reconcile with a genuine contract of service, under which all work must be paid work.

...

... A genuine contract of service exists where a person performs work that is defined in time and generally described in a payroll journal, in return for which that person receives fair and reasonable remuneration from the payer, which must at all times have the power to control the actions of the person it is paying. The remuneration must correspond to the work performed for a defined period of time.

...

Only the real facts are to be taken into account in determining whether or not a genuine contract of service existed. Often, the facts have been falsified, disguised or even hidden, which is why the Court must rely on the whole of the available tendered evidence. The only relevant facts and information are those relating to the performance of work, to the remuneration paid and to the existence or non-existence of a relationship of subordination.

...

... since as soon as a contract of employment is shaped by false or inaccurate information, it no longer meets the essential conditions for being characterized as a contract of service. Thus, when the evidence shows that the records containing the information essential to the existence of a genuine contract of employment are false and

incomplete, it becomes essential to prove conclusively that the real facts support the existence of a genuine contract of service.

In the case at bar, the respondent concluded that the work performed outside the periods referred to in the various records of employment was so performed under a genuine contract of service. This is a determination that is rather surprising and totally unjustified given the available facts as revealed by the investigation; I am referring, *inter alia*, to the hour banks and the work done outside the work periods shown in the records of employment. The purpose of an hour bank is often to make a week insurable when the number of hours worked for that week would require a finding of uninsurability. Evidence also adduced by the respondent showed that several employees, including the appellant, provided services outside the periods referred to in the records of employment. . . .

[133] In the cases at bar, it is clear from the statutory declarations of the Appellants and the Payor that the contract of employment is shaped by false, inaccurate data.

[134] In *Laverdière v. M.N.R.* (dockets 97-1901(UI) and 97-1902(UI)), dated February 25, 1999, Tardif, J. explains the notion of a genuine contract of service:

. . . First of all, only a genuine contract of employment can meet the requirements for being characterized as a contract of service; a genuine contract of service must have certain essential components, including the performance of work; that performance must come under the authority of the person paying the remuneration, which remuneration must be based on the quantity and quality of the work done.

Any agreement or arrangement setting out terms for the payment of remuneration based not on the time or the period during which the paid work is performed but on other objectives, such as taking advantage of the *Act's* provisions, is not in the nature of a contract of service.

. . . The terms and conditions of a genuine contract of service must centre on the work to be performed, on the existence of a mechanism for controlling the performance of the work and, finally, on the payment of remuneration that basically corresponds to the quality and quantity of the work done.

Of course, a contract of employment may be lawful and legitimate even if it sets out all kinds of other conditions, including

remuneration much higher or lower than the value of the work performed; some contracts may even involve work performed gratuitously. Work may be performed on a volunteer basis. All kinds of assumptions and scenarios can be imagined.

Any contract of employment that includes special terms can generally be set up only against the contracting parties and is not binding on third parties, including the respondent.

This is the case with any agreement or arrangement whose purpose and object is to spread out or accumulate the remuneration owed or that will be owed so as to take advantage of the *Act's* provisions. There can be no contract of service where there is any planning or agreement that disguises or distorts the facts concerning remuneration in order to derive the greatest possible benefit from the *Act*.

The *Act* insures only genuine contracts of service; a contract of employment under which remuneration is not based on the period during which work is performed cannot be defined as a genuine contract of service. It is an agreement or arrangement that is inconsistent with the existence of a genuine contract of service since it includes elements foreign to the contractual reality required by the *Act*.

...

... I have often said that unemployment insurance is a social initiative to assist those who truly lose their jobs and not a program of grants to help businesses or to benefit recipients who distort or modify the structure and terms of payment of the remuneration they are owed for the work they perform.

Any agreement or arrangement involving the accumulation or spreading out of hours has the effect of invalidating the contract of service, especially since it creates a contractual relationship that is hardly or not at all conducive to the existence of a relationship of subordination, which is an essential component of a contract of service.

[135] In light of all the circumstances, including the declarations of the Appellants, the Payor and of the aforementioned caselaw, the Minister has considered all of the relevant facts and finds that the conditions of employment would not have been similar if the Appellants and the Payor were dealing with each other at arm's length.

[136] Accordingly, the Appellants did not hold insurable employment under paragraph 5(2)(i) and subsection 5(3) of the Act.

[137] The appeals are dismissed.

Signed at Ottawa, Canada, this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Maria Fernandes, Translator