Docket: 2005-994(EI)

BETWEEN:

ARTHUR J. REYNDERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of
*Arthur J. Reynders* (2005-995(CPP)) on January 8, 2007
at Sydney, Nova Scotia.

Before: The Honourable Justice Theodore E. Margeson

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | William P. Burchell |
| Counsel for the Respondent: | Deanna M. Frappier |

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**JUDGMENT**

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister on the appeal made to her under section 91 of the *Act* is reversed on the basis that the Appellant was engaged in insurable employment with Reynders Landscaping Limited for the periods from June 20, 1999 to August 20, 1999, from August 23, 1999 to July 14, 2000, from July 17, 2000 to August 28, 2001, from September 30, 2001 to September 28, 2002 and from September 30, 2002 to July 26, 2003.

Signed at New Glasgow, Nova Scotia, this 16th day of April 2007.

"T. E. Margeson"

Margeson J.

Docket: 2005-995(CPP)

BETWEEN:

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Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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| Counsel for the Appellant: | William P. Burchell |
| Counsel for the Respondent: | Deanna M. Frappier |

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**JUDGMENT**

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the decision of the Minister, on the appeal made to her under section 27 of that *Plan* is reversed on the basis that the Appellant was engaged by the payor in pensionable employment for the periods June 20, 1999 to August 20, 1999, from August 23, 1999 to July 14, 2000, from July 17, 2000 to August 28, 2001, from September 30, 2001 to September 28, 2002 and from September 30, 2002 to July 26, 2003.

Signed at New Glasgow, Nova Scotia, this 16th day of April 2007.

"T. E. Margeson"

Margeson J.

Citation: 2007TCC219
Date: 20070416
Dockets: 2005-994(EI) and 2005-995(CPP)

BETWEEN:

ARTHUR J. REYNDERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

## REASONS FOR JUDGMENT

Margeson J.

[1] It was agreed at the outset that the evidence given would apply to both of these cases.

Evidence

[2] Arthur J. Reynders testified that he was born on April 23, 1956. He had a grade 9 education level. He was married with one child who is 15 years of age. He worked with his father's landscaping business when he was going to school and afterwards. He was involved in sodding, seeding, planting flowers and other landscaping. This work took place mostly in northern Cape Breton. Other members of the family had also worked with his father in the landscaping business.

[3] The work would normally start in April or May and extend to October, depending upon the weather. They worked five to six days a week commencing at 7:00 a.m. This was seasonal work.

[4] In the off-season the Appellant obtained employment insurance benefits. This was a regular occurrence for him. His father was the sole owner of the landscaping business prior to him retiring in 1984.

[5] Reynders Landscaping Limited ("the Company" or "the Payor") was incorporated in 1985. The father wanted to keep it going and so they hired a lawyer and an accountant for the purpose of the business. The incorporated body took over the business and the assets. This witness was the secretary-treasurer, his brother Peter was the vice-president and his father was the president. The Appellant had 39 shares, his brother had 31 shares and the father had 30 shares.

[6] Over the years, on a few occasions, Human Resources Development Canada ("HRDC") questioned him about the affairs of the Company but there were no problems. When his father was involved in the business he came around to the job site checking to see that things were going well. He died in 1993. Anne MacNeil, the Appellant's sister, received his shares. His brother Peter worked in the business as well but only when he was required to do so. The Appellant was employed by the Company and he did all of the jobs. He was also a kind of "supervisor". There were other employees besides the Appellant, including one Gary MacNeil. The business ceased operations after this case came about. Before that the Appellant had received employment insurance benefits a few times.

[7] In the year 1999 there was very little work for the Company so the Appellant went away to northern Alberta to work in the year 2000. He is still there. In the year 2003 the Appellant was aware of examination of the Company's books. He gave a statement to Mr. Connor from HRDC. He was penalized $9,000. He appealed that decision.

[8] From 1999 to 2003 he was paid $750 per week. He worked 50 to 60 hours per week. His wage was determined on the basis of his experience and after discussion with the other shareholders. He had been receiving this amount for a number of years. Sometimes he supervised one or two other persons. Some other companies are paying $15 to $16 per hour for work similar to the work that he did for the Company. The Company had equipment that was necessary for the business.

[9] Before and after the incorporation he was working hours similar to other companies doing the same kind of work. The work was very dependent upon the weather. Some years they were able to work longer than others depending on the type of work available and the weather.

[10] In September or October 2000 he started going out west. He never drew anything from the Company other than wages. He might have worked 18 weeks in all.

[11] Exhibits R-1, R-2 and R-3 were put into evidence by consent. He referred to Exhibit R-1, Tab 4 which was the Application for Unemployment Benefits. He identified his signature on page 4 of the document. At question 21 of the Application for Unemployment Benefits he agreed that that document indicated that he did not receive vacation pay and would not receive it from the employer. However, he said that he did receive it in his weekly pay. He answered "no" because he did not understand it.

[12] He also identified his signature on page 3 of Exhibit R-1, Tab 5 which was an Application for Unemployment Benefits for the period October 10, 2000 to December 14, 2000. He also identified the Record of Employment found in Exhibit R-1, Tab 5, page 6 and the Application for Unemployment Benefits found in Exhibit R-1, Tab 6. Again, he indicated that he did receive vacation pay from his last employer although his answer to question 1 was in the negative. This was a mistake and his vacation pay was included in his weekly pay.

[13] The answer given at question 35 was wrong and he admitted that he was related to his employer. He also identified the Application for Unemployment Benefits found in Exhibit R-1, Tab 7 and his signature on page 3 thereof. Again, the answer in question 21 was wrong where he answered that he did not receive vacation pay from his last employer.

[14] He identified the Application for Unemployment Benefits found at Exhibit R-1, Tabs 7 and 8. Again, the answer with respect to receiving vacation pay was wrong in this document. This was in error.

[15] He signed cheques for the Payor. He was always paid by cheque. Gregory Francis was the accountant and after his death in 2004 there was no accountant. Mr. Francis died in 2004.

[16] He was referred to Exhibit R-2, Tab 20 which was a record of Employee's Earnings. This included the names of workers other than himself who worked for the Company. He was asked who hired these employees and he said that he supervised all of the shareholders. He assigned the work to them and the shareholders set the pay at an hourly rate. He received $750 per week. He worked more hours than the others. He issued the invoices or otherwise the shareholders did. All shareholders attempted to collect funds outstanding. He paid the invoices.

[17] He never used the Company vehicle for personal reasons nor did the other shareholders. This vehicle is registered in the name of the Payor. The Company had no union.

[18] He was referred to Exhibit R-1, Tab 10, at page 28, which was a cheque written to the Labour's International Local 1115 for union dues. He did not know why it was issued. The dues were for him. The cheque shown at page 40, made payable to "Local 1115 Labourers Ben. Trust" for $160 was also written on his behalf with respect to the benefit plan. Cheques were also written for others as well for the benefit plan. The accountant submitted the remittances to Canada Revenue Agency ("CRA") and also signed the remittances. This witness dealt with the Workmen's Compensation on behalf of the Payor.

[19] Exhibit R-4 was a Worker Questionnaire completed by Arthur Reynders and dated August 24, 2004. This witness identified it. The address for the Company was his home. The telephone number was his as well. He said that the loans were negotiated by all three of the shareholders.

[20] This witness set the prices for the projects to be done by the Company, payday was on Friday and he issued the cheques. The Company did not operate while he was out west. He received no benefits at that time. He admitted that he would have done repairs on the Company machinery and that he would not have received pay for it. The shareholders decided if he was to be laid off or not.

[21] He was referred to Exhibit R-2, Tab 14 which was an invoice made out to the Nova Scotia Liquor Commission in Halifax for a total of $305.03 and he admitted that no one was on the payroll when this invoice was composed. The same thing applied to the invoice found at Exhibit R-2, Tab 14, page 2 in the amount of $316.25. He issued the invoices but agreed that there were no employees on the payroll until June 19. He was not paid for issuing these invoices.

[22] He was shown the invoice from B & M Service Centre to the Company dated June 1, 1999 which was a compilation of a number of charges made to the Company from May 7 to May 31. He agreed that there were no employees on the payroll until June 19, 1999. There were two invoices for gas although he said that they were not doing work at the time but they still needed gas. When referred to other invoices for gas he said that the vehicle was not being used. Then he said that it was personal use by him for working around the farm.

[23] Exhibit R-3, Tab 31 contained an invoice to "Reynders Landscaping" from B & M Service Centre for $44.83 dated August 5, 2000. He said that no one was on the payroll at that time but this was for gas "to get the machinery ready to go". He admitted that he made personal use of some of the tools.

[24] He identified Exhibit R-1, Tab 4 which was an Application for Unemployment Benefits dated October 8, 1999. At question 35 it was indicated that he was related to the employer. This information was put on the computer but not by him. Exhibit R-1, Tab 5 was an Application for Unemployment Benefits dated January 2, 2001. At question 35, he had indicated that he was not related to the Payor. However, this was incorrect.

[25] He signed the cheques for the Payor. He was always paid by cheque. Gregory Francis was the accountant and after his death there was no accountant. Mr. Francis died in 2004. Exhibit R-2, Tab 20 was a list of the employees' earnings from the Company for 1999, 2000, 2001, 2002 and 2003. The witness agreed that the documents are accurate.

[26] He would have done repairs for the Company on the machinery and would not have been paid for it. The shareholders decided whether he should be laid off or not. He was referred to the invoices in Exhibit R-2, Tab 14. He said that there was no one on the payroll at that time that the invoice was issued.

[27] With respect to the invoice at page 3, he said that this was on the basis of contract and they were paid whether any work was done or not. He issued these invoices but he was not paid for doing so. He was shown the invoice in Exhibit R-3, Tab 30 and he said that no employees would have been on the payroll at that time. Two of the invoices were for gas. The vehicle was not being used but they still needed gas. He then admitted that some of the use was for personal use around the farm.

[28] In redirect the witness was referred to R-1, Tab 4. He indicated that he was related to the employer. It was typed into the computer and not by him. His answer at question 35 was incorrect. The operator punched in the wrong key. Vacation pay was included in his weekly pay. The business does not operate when he was out west as there was no work. This is why he went out west. He said that he provided the banking information to the Minister of National Revenue ("Minister") and he thought that it was all there. He did not know.

[29] The Respondent called one James Alfred O'Connell to the witness stand. He was employed by HRDC as an investigation and control officer. He interviewed the Appellant with respect to this claim.

[30] Exhibit R-5 was introduced by consent. This was the Report of the Interview. The Appellant told him that he had done work as a secretary-treasurer and did not get paid for it. He also got parts for repairs for the Company equipment and did not get paid. There was no one else to do the work.

[31] With respect to estimating, he said that he did the estimating sometimes and sometimes his brother did it. He said that he gave direction to the workers and advised them what had to be done. He also checked up on it later.

[32] He admitted to using the Company truck to go back and forth to town if his vehicle was not available. With respect to collection of monies, he did it himself, or had another employee get it, or he would send out the bill in the mail.

[33] In cross-examination the witness said that the Appellant came into the office. He was co-operative but at times evasive as to the invoices. He was not clear as to what the invoices were about. He was shown three invoices that were issued in 1999 when he was not on the payroll. These were for December 1, December 11 and December 7.

[34] In the year 2000 there were 23 invoices issued between January 10 and September 27. He was not on the payroll at that time. In the year 2001, 29 invoices were issued from January 23 to November 9. The largest number of these was in the month of November. In the year 2002, 28 invoices were issued between July 9 and December 20. These were issued from late November to December. The witness was off the payroll at that time. In 2003, 23 invoices were issued between March and June 28 and he was not on the payroll. The witness told him that he was doing repairs on the equipment. No one else could do it as he hoped to get something out of it someday. The Company could not afford anyone else. He had been doing it that way for years. He did not get paid for it. He admitted that sometime he supervised and he did not get paid for it.

[35] Peter Reynders was called as a witness by the Respondent. He was referred to Exhibit R-6, which was introduced by consent. This was a questionnaire completed by this witness. In question 8, he said that he became a shareholder in the Company to help form the Company. Perhaps it would benefit him down the road. He also did work in the Company. He was a vice-president. The Company

held verbal meetings. Sometimes these were held at his place and sometimes they were held at the house of the Appellant. He did not keep minutes because he did not feel that it was necessary. Arthur did most of the work for the Company. Sometimes Peter would take part in buying supplies, equipment and in hiring people. He believed that the bookkeeper was taking care of all the book work.

[36] In cross-examination he said that the salary for the Appellant was $750 per week. He believed that this was reasonable for a work week of 50 to 60 hours. Sometimes there were breakdowns because of the weather and sometime because of equipment. This wage was comparable with other such workers doing the same kind of work. It operated much like other landscaping businesses in the area. When he purchased goods for the Company it was for repairs of the Company equipment.

[37] Anne MacNeil testified that she had completed the Payor Questionnaire noted as Exhibit R-7. Her signature was contained on the document and it was in her handwriting. Her father died and she became a shareholder by purchase. She paid for the shares by giving labour to the Company. She became a shareholder because they wanted to form a Company. Arthur wanted to keep the Company going and he wanted her to become a shareholder. She never voted shares and made no decisions.

[38] Her mother signed off her father's shares to her.

Argument on Behalf of the Appellant

[39] In written argument counsel for the Appellant said that Henry Reynders died on February 19, 1993 and remained active in business until his death. After his death, Anne Reynders, Henry Reynder's widow, transferred his shares to Anne MacNeil which was recorded in the Company's book on June 6, 1994.

[40] The business continued as it had in the past. The Appellant continued his practice of maintaining the equipment as he had when his father operated as a sole proprietorship.

[41] Counsel said that for some reason the Company came under the scrutiny of HRDC and a review was taken for the period June 1999 to July 2003. However, the Appellant fully co-operated with HRDC. Despite this co-operation, a penalty was imposed of $9,086 for false representations.

[42] The Minister made her decisions against the Appellant and these were appealed.

[43] Counsel said that many of the assumptions of fact made by the Minister in the Reply have been disproved by the Appellant, Anne Reynders and Peter MacNeil. Some of the assumptions of fact made by the Minister in the Reply are irrelevant. What difference did it make whether Anne MacNeil purchased her shares or not? Many of these assumptions were based upon mere speculation and suspicion rather than evidence. There was no evidence offered to substantiate this assumption at least. The assumption that the Appellant made the decisions that affected the Payor or its operation and that Anne MacNeil and Peter Reynders were not involved in making those decisions have been completely refuted by the testimony of Anne MacNeil and Peter Reynders as well as the earlier questionnaires they completed for HRDC and which have been tendered as exhibits herein.

[44] Paragraphs 8(f), (g) and (i) of the Reply appear to be the cornerstone of the Minister's decision but at the end of the day they mean nothing. The presumptions contained in paragraphs 8(j), (k), (l), (m), (n), (o) and (p) are not relevant to the issues before this Court and should not have been considered by the Minister in making the decision that she did.

[45] Counsel referred to the decision in *Wilfred Oldford v. M.N.R.*, 96-1691(UI) where Cuddihy D.J. interfered with the Minister's decision because he was satisfied that the Minister exercised her discretion in a manner that was contrary to law. Such considerations might be where the Minister:

1. acted in bad faith or for an improper purpose or motive;
2. failed to take into account all of the relevant circumstances as expressly required by the *Act*; and
3. took into account any irrelevant factor.

[46] It was the contention of counsel for the Appellant that in the case at bar, paragraphs 8(j), (k), (l), (m), (n), (o) and (p) were totally irrelevant to the matter at hand. For instance, a failure to file tax returns, keep current corporation registration status, keep other shareholders advised of the same, not hold formal shareholder's meeting, etc. have nothing to do with an Employment Insurance claim. As far as counsel was concerned the Appellant performed the duties required of him. His salary of $750 per week was set by the shareholders. The amount is not exorbitant and is less than others are paid in the local area. The Company would easily pay

the same or a higher amount to someone else to perform the same duties. The appeal should be allowed and the Minister's decision reversed.

Argument on Behalf of the Respondent

[47] The Respondent submits that there was no contract of service between the Appellant and the Payor as required by paragraphs 5(1)(*a*) of the *Employment Insurance Act* ("*Act*") and paragraph 6(1)(*a*) of the *Canada Pension Plan* ("*Plan*"). She referred to the leading cases on contracts for service such as *Wiebe Door Services Ltd v. Canada*[1] and *67112 Ontario Ltd v. Sagaz Industries Canada Inc.*[2] These cases set out the tests to be applied in distinguishing between a contract of service and a contract for services.

[48] Counsel took the position that there was no contractual relationship between the Appellant and the Payor. There was no written agreement between the parties. There was merely an informal arrangement between family members. The Appellant worked autonomously with evidence of little input from the other shareholders, his sister, Anne MacNeil and his brother, Peter Reynders, regarding the day-to-day operations of the Payor or regarding his duties. The Appellant had input into his own salary and paid himself from the Payor's bank account. The Appellant decided which jobs the Payor would handle and did work that he was not paid for and did not expect to be paid for. He set his own hours and was not supervised on the job. The Appellant did not account for expenses he incurred on behalf of the Payor and often used the Payor's bank account to pay for personal expenses. He made personal use of the equipment and truck owned by the Payor without having to account for it. In fact he was free to operate the Payor in the manner in any way which he saw fit without any terms or conditions imposed by a contract with the Payor.

[49] In the event that the Court should find that there was a contractual relationship between the Payor and the worker then it was not a contract for service but a contract for services. Here she referred to the various elements as referred to in *Wiebe Door, supra,* and said that even though the shareholders claimed to have exercised control over the Appellant, the evidence did not support that. The evidence on the matter of control speaks against the finding of a contract of service. Even though the evidence shows that the tools were owned by the Payor, the Appellant treated the tools and vehicles as his own and made personal use of

[1] [1986] 3 F.C. 553 (Court File No. A-531-85).
[2] [2001] 2 S.C.R. 983.

them and used the Payor's bank account to pay the related expenses indicating something other than a contract of service.

[50] With respect to the issue of chance of profit and risk of loss, only the Appellant had any chance of making a profit because he was the only one that was paid. He was the only person profiting from the Payor or with a risk of loss as he collected a salary from the Payor. This factor is indicative of there being something other than a contract of service.

[51] With respect to the matter of integration, she said that it was obvious that the Appellant was operating the Payor as his own business. His work was integral to the operation of the Company and he was responsible for the Company's bank account, completing repairs on the equipment, purchasing materials and supplies, pricing jobs, hiring and supervising other employees and preparing and collecting invoices. The Appellant worked for the Payor when no one else was on the payroll and did work for which he was not paid. Further, other shareholders indicated that the Appellant "was the business" and "was a principal mover" and that the Payor could not go on without the Appellant.

[52] All of the above factors weigh against the finding of a contract of service between the Payor and the Appellant.

[53] Inspite of the fact that the Appellant testified that his employment with the Payor was his main employment, the Appellant's records of employment and the Payor's payroll records indicate otherwise. It showed that the Appellant was on the payroll less than the other employees and that he worked for other employers more than he worked for the Payor. Further the other workers worked longer periods of time than the Appellant during the periods under appeal. Further there was no overlap between the time when the Appellant was on the payroll and the other workers were on the payroll for the years 2001, 2002 and 2003.

[54] Inspite of the Appellant's evidence that the Payor operated on a seasonal basis from early spring to late fall depending on the weather, the Appellant was only on the payroll for nine weeks during one season out of approximately 28 available weeks.

[55] She argued that the Appellant's work for the Payor was not his main employment.

[56] She further submitted that the Appellant could not be an employee engaged under a contract of service for a Company that does not exist. This argument was based on the fact that the Payor's status was revoked by the Registry of Joint Stock Companies prior to the periods under appeal.

[57] On the issue of arm's length, it was submitted that when one looks at the factors listed in paragraph 5(3)(*b*) of the *Act*, it is clear that the Appellant and Payor cannot be deemed to have been dealing with each other at arm's length.

[58] The evidence of Anne MacNeil indicated that the Payor would not have expected an unrelated employee hired to do the same duties as the Appellant to work without being paid and that the Payor would have had to pay an unrelated employee more than what the Appellant was being paid. She also said that the salary did not take into account that he would be doing extra repair work and working outside of the period the Payor was doing business and not be paid for it.

[59] On the issue of terms and conditions of employment, counsel argued that the evidence disclosed that an unrelated employee would have been paid more than the Appellant was paid because the Payor could not afford to pay more. Further, an unrelated employee would not have had sole signing authority for the bank account and the same freedom in running the business as the Appellant did.

[60] Another unrelated employee would not have been able to use the Payor's tools and vehicles or bank account to pay for related expenses. The Payor was paying the union dues and fees for the Appellant and was not doing so for the other employees.

[61] Regarding the duration and nature and importance of the work, counsel argued that the services provided by the Appellant were important and integral to the operation of the Payor and that the Payor could not have operated without the Appellant.

[62] Consequently, it is reasonable to conclude that a substantially similar contract of employment would not have been entered into with parties unrelated.

[63] The appeal should be dismissed and the Minister's decision confirmed.

Analysis and Decision

[64] Counsel for the Respondent has taken the position that during the period in issue, there could not have been a contract of service entered into and maintained between the Payor and the Appellant because during that period of time the Company did not exist. The Payor's status was revoked by the Registry of Joint Stock Companies prior to the periods under appeal. As a result, the Appellant would have been operating the Payor as a proprietor, not as an employee in an incorporated Company.

[65] Counsel did not refer to the appropriate provisions of the Nova Scotia legislation. The legislation involved is the *Corporations Registration Act*, chapter 101 of the Revised Statutes, 1989, as amended.

[66] There are two provisions of the *Corporations Registration Act* which are relevant to the case at bar and they are subsection 13(1) which provides as follows:

> If any corporation, whether incorporated before or on the first day of October, 1912, or at any time thereafter, does or carries on in the Province any part of its business while it does not hold a certificate of registration that is in force, such corporation shall be liable to a penalty of fifty dollars for every day on which it so does or carries on any part of its business, and every director, manager, secretary, agent, traveller or salesman of the corporation, who, with notice that the corporation does not hold a certificate of registration that is in force, transacts in the Province any part of the business of the corporation, shall, for every day on which he so transacts the same, be liable to a penalty of fifty dollars.

Further, subsection 17(1) provides as follows:

> Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any Company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature.

These sections were considered in the case of *Kaeser Compressors Inc. v. Bent*[3] by A. Boudreau J. The conclusion reached by the learned trial judge was:

[3] [2006] N.S.J. No. 390.

> I find that Section 17(1) of the Act does not apply to "domestic or Dominion corporations", i.e., companies incorporated by or under the authority of an Act of the Parliament of Canada or the Legislature of Nova Scotia. ... It appears that Section 17(1) applies only to "foreign corporations" as defined in Section 2(g) of the Act, unlike the penalty section, Section 13(1), which applies to "any corporation".

[67] Further, a review of subsection 13(1) would seem to contemplate, that a corporation such as the Payor might very well continue to operate even though their certificate of registration was not in force. The only result would seem to be the application of a fine. It does not mean that the Company ceases to exist or that the Company cannot carry on business.

[68] Therefore, even though the certificate of registration might have been revoked, the Company was capable of entering into a contract of service with the Appellant during the period in question. The argument of counsel for the Respondent in that regard is rejected.

[69] The Court is satisfied that a number of the presumptions contained in the Reply to the Notice of Appeal have been rebutted satisfactorily.

[70] Paragraph 8(f) of the Reply was an assumption that Anne MacNeil did not pay for her shares in the Payor. The evidence before the Court was that she did in fact pay for her shares providing unpaid labour to the Company. In any event, the Court is not satisfied that this was a significant or relevant presumption which could have assisted the Minister in making the decision that she did.

[71] Paragraph 8(g) of the Reply was an assumption that Anne MacNeil became a shareholder primarily to ensure that the Appellant would not own more than 40% of the Payor's shares and he could continue to qualify for employment insurance benefits. There was no evidence to support this contention whatsoever and the evidence clearly established that the purpose for Anne MacNeil becoming a shareholder was due to her father's death and that they wanted to continue on the business. There was no evidence to suggest that it was to enable the Appellant to continue to qualify for employment insurance benefits.

[72] Paragraph 8(h) was a presumption that Peter Reynders and Anne MacNeil were employed elsewhere and not by the Payor. This was not a presumption which would have assisted the Minister in making the determination that she did and is relatively "irrelevant".

[73] Paragraph 8(i) was a presumption that the Appellant made the decisions that affected the Payor in its operations and that Anne MacNeil and Peter Reynders were not involved in making those decisions. This presumption has been rebutted in its entirety because the evidence from the parties was clear that all of the shareholders made decisions affecting the Company and not only the Appellant. This must have been a significant consideration for the Minister in making the decision that she did and it has been proven to have been incorrect.

[74] Paragraph 8(j) of the Reply was a presumption that the Payor did not file income tax returns during the periods under appeal. Again the Court is unable to conclude that this is a relevant consideration. In any event, the Appellant did say that he did not know that that was the case until after this matter was instituted. He also indicated, as well as the other shareholders that the Company relied intrinsically upon their accountant to do whatever was supposed to have been done.

[75] Paragraph 8(k) of the Reply was an allegation that the Payor did not file annual returns with the Registry of Joint Stock Companies for the province of Nova Scotia for the periods under appeal. Again, the Court finds it difficult to conclude that this would have been a relevant consideration. In any event, the evidence was that the accountant of the Company was sick for a number of years and that is why some of the business of the Company, including the paperwork, was not attended to.

[76] Paragraph 8(m) of the Reply was an allegation that the Payor did not hold shareholders' meetings during the periods under appeal. This presumption has been rebutted by the evidence given by the shareholders. It is true that the shareholders said that they did not hold formal meetings nor did they keep minutes, however, they made it clear that they did hold shareholders' meetings and that they did conduct the necessary business of the Company at those meetings. Of significance, of course, was the decision of the Company to hire the Appellant during the periods for which he was hired.

[77] Paragraph 8(n) of the Reply was a confirmation by the Minister that he concluded that the Appellant's duties in the Company included soliciting work, arranging for materials and supplies needed, doing the work, hiring, supervising and terminating other workers as needed, maintaining the tools needed to do the work and managing the bank account. This allegation is in complete agreement with the evidence offered by the Appellant and the other shareholders and would not have assisted the Minister in making the decision that she did.

[78] Paragraph 8(o) of the Reply was an allegation that the Appellant continued to perform those duties without pay during times when the Payor had work available. In that regard the Appellant said that he did not agree with the whole paragraph and he said, "no, some of it". The Court is not certain as to what he meant by that but it was clearly a rejection of part of the allegation.

[79] There were some presumptions in the Reply which were not rebutted and which are of significance in this case. The Court is satisfied that the Appellant was not included on the payroll at periods of time when other workers were included on the payroll and when work was available for the Company. Further, the Court is satisfied that the evidence discloses that the Appellant performed work for the Company when he was not on the payroll including completion of invoices and working on repairs of the Company's equipment. Further, the Court is satisfied that the Appellant did make use of the Company's equipment at times and did not pay for it.

[80] These matters have to be taken into account in considering all of the evidence as to the true relationship between the Payor and the Appellant. No one factor is determinative of the issue.

[81] Counsel for the Respondent argued that various factors as set out in *Wiebe Door, supra,* can only be considered when the issue is whether or not there is a contract of service or contract for services. However, the Court is satisfied that this is not the case. The Court is entitled to look at all of those factors in every case in determining the issue as to whether or not there is a contract of service in existence and considering the issue as to whether or not a similar contract of service would have been entered into with parties unrelated.

[82] The Court considers the following factors in making the decision in this case as to whether or not there was a contract of service and as to whether or not a similar contract of service would have been entered into if the parties were unrelated:

1. supervision and control;
2. ownership of tools and equipment;
3. chance of profit and risk of loss;
4. integration.

On the matter of control, the Court is satisfied on the basis of the evidence that a substantial amount of control was exercised over the worker by the Payor. The evidence from the witnesses was to this effect and there was no evidence tendered by the Minister to rebut this evidence.

[83] The evidence was that the shareholders decided who was to be hired, what they were to be paid, they exercised control over them to the extent that was necessary. The Appellant was not free to do as he pleased.

[84] There can be no doubt that the Appellant, as the principal employee of the Payor, and as its manager and principal worker had a great deal of autonomy, but that would be expected in an arrangement such as here. The Court is satisfied that the Appellant exercised no more control over himself and his conditions of work than would be expected of a general manager or supervisor acting in similar circumstances. In any event, the Court is satisfied that ultimately control over him could have been exercised by the shareholders as they indicated in their evidence.

[85] On the factor of supervision and control, the Court is satisfied that the Payor exercised a sufficient amount of control as contemplated by *Wiebe Door*, *supra*.

[86] On the question of ownership of tools, there can be no question that the evidence of all shareholders was that the tools and vehicles used by the Payor were owned by the Payor and there was no evidence that indicated otherwise. This position was accepted *holis bolis* by the Respondent. It may very well be that the Appellant did make some personal use of the tools and equipment of the Company but this was not to any substantial extent.

[87] The ownership of tools argument points in favour of a contract of service and the amount of control that one would expect an employer to have over an employee who was not related to the Payor.

[88] With respect to the matter of integration, there can be no doubt that the work of the Appellant was completely integrated into the work of the Payor. The Court must look at integration from the point of view of the worker and when it does the conclusion must be that the work of the Appellant was completely integrated into the work of the Payor.

[89] It is true that the worker here was the principal worker of the Appellant, was its supervisor, and was the person who performed the majority of the

non-work-related tasks on behalf of the Company. That does not take away from the fact that the work was integrated into that of the Payor.

[90] The integration factor speaks in favour of a contract of service and not otherwise.

[91] On the question of chance of profit and risk of loss, there is no evidence that the Appellant had any chance of making a profit whatsoever from this business in the commercial sense as envisaged by the various cases on the subject. The only monies that the Appellant could possibly receive were salary and the evidence is that that is all that he received at any point in time. Likewise, there was no risk of loss for the Appellant except the loss of his salary. This is not the type of loss that is envisaged by case law on this issue. The loss of a salary would only come about if a Company had no work for the Appellant. This is not the type of loss that the cases are talking about.

[92] On the issue of whose business this was, or to put it as *Sagaz, supra*, did, "is the person who has been engaged to perform the services performing them as a person in business on his own account?" Contrary to what counsel for the Respondent argued, the Court is satisfied that the Appellant was not operating his own business. He was not performing these duties on behalf of himself. He was performing the duties on behalf of the incorporated body which consisted, not only of himself, but of two other shareholders. He testified that his actions as a worker for the Payor, were at the direction and control of all three shareholders.

[93] As *Sagaz, supra*, and other cases dictate, the Court must ask the question: "is the decision of the Minister reasonable, having regard to all of the circumstances", as outlined by the evidence?

[94] Bearing in mind the reference that the Court has made to the presumptions contained in the Reply and the effect of the evidence on those presumptions, the Court answers the question in the negative. The Court is satisfied that the decision of the Minister is not reasonable under all of the circumstances. The Court is satisfied that a similar contract of service would have been entered into by parties who were unrelated. If the evidence of the Appellant and the other witnesses had been rebutted in some of these material particulars, the answer might have been otherwise.

[95] The Court makes this decision in spite of the fact that it takes into account the Respondent's position that normally people in arm's length relationships do not

provide services for free. The Appellant did here. However, the Court is satisfied that these services were of a very minor nature, and were performed to a large extent when the Appellant was not on the payroll and when the Company obviously could not afford to pay him. Had the Appellant been paid during the off-season and when the Payor was not receiving funds, the question might have been raised as to whether or not this was a reasonable action on behalf of the Payor Company. The other tasks that the Payor performed for the Company, for which he was not paid, were also insignificant and not a determining factor on the circumstances of this case.

[96] The end result is that the Court is satisfied that the contractual relationship between the Appellant and the Payor, even though it was not based upon a written agreement, was nonetheless one of contract of service. It was more than an informal arrangement between family members as indicated by the Respondent. The Court is satisfied that the Appellant did not work autonomously with little input from the other shareholders regarding the day-to-day operations of the Payor with respect to his duties. The Court is satisfied that the Appellant had some input into his own salary but he was paid from the Payor's bank account on the basis of a decision made by the shareholders and the rate of pay was not unreasonable.

[97] On the basis of the evidence the Court is not satisfied that the Appellant set his own hours and that he was not supervised on the job. The evidence of the other shareholders was contrary to that position. Further, the amount of personal use that the Appellant made of the Company's equipment (truck) and the bank account was insignificant in relation to the total factual situation as disclosed by the evidence. The Court is not satisfied that the Appellant was free to operate the Payor in the manner in which he saw fit without any terms or conditions imposed by the Payor.

[98] In the end result, the Court is satisfied that there was contract of service in existence during the period in question and that this was a contract of service which would have been entered into with parties had they been unrelated.

[99] The Court will allow the appeal, reverse the Minister's decision, and find that during the period in issue, the Appellant was engaged in insurable employment.

[100] As agreed to by counsel at the beginning of this hearing, the same facts apply to the *Canada Pension Plan* matter and the Court finds on the basis of that evidence that the Appellant was engaged in pensionable employment during the period in issue.

Signed at New Glasgow, Nova Scotia, this 16th day of April 2007.

"T. E. Margeson"

Margeson J.

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