Docket: 2009-660(EI)

BETWEEN:

MONIQUE BABICH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 16 and 17, 2009
at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant:	Earl Babich
Counsel for the Respondent:	Pavanjit Mahil Pandher

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated November 27, 2008 is varied to find that:

- Monique Babich was engaged in insurable employment with Able Enterprises Ltd. from April 1, 2008 to April 25, 2008.

Signed at Sidney, British Columbia this 28th day of October 2009.

"D.W. Rowe"

Rowe D.J.

Citation: 2009 TCC 551
Date: 20091028
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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant Monique Babich ("Babich") appealed from a decision by the Minister of National Revenue (the "Minister") dated November 27, 2008 wherein the Minister determined her employment with Able Enterprises Ltd. ("Able") from April 1, 2008 to April 25, 2008 was not insurable employment pursuant to paragraph 5(2)(*i*) of the *Employment Insurance Act* (the "*Act*"). As stated in the decision, the Minister, after considering the terms and conditions of the employment, was not satisfied the contract of employment would have been substantially similar if Able and Babich had been dealing with each other at arm's length.

[2] The Appellant was represented by her husband, Earl Babich ("Earl").

[3] Babich testified she resides in Mission, British Columbia and is employed by Fraser Valley Brain Injury Association (the "Association"). She agreed with the assumptions contained in subparagraphs 6a to 6d, inclusive of the Reply to the Notice of Appeal ("Reply") as follows:

a) the Payor was in the construction business and sold firewood;

b) the Payor's sole shareholder was Earl Babich ("Earl");

c) the Appellant was Earl's wife;

d) the Payor operated year round;

[4] Babich stated she was hospitalized for 10 days in February, 2008 arising from complications in her pregnancy and missed working some of the insurable hours required to qualify for maternity leave benefits pursuant to the Unemployment Insurance ("UI") benefits provisions of the *Act.* The Association is a non-profit organization that relies on grants from governments and during the period following the end of February, 2008, did not have sufficient funds to employ the Appellant for those additional hours. Babich stated she had never been employed by Able prior to the relevant period and during her working career had not been self-employed and even when providing private care to brain-injured persons - to supplement her income - did so as an employee of the care recipient. As at April 1, 2008, Babich was 8 months pregnant and had searched for other work without success. As stated in the letter – Exhibit A-1 – dated June 20, 2008 – sent by P.A. Bassi – Insurance Agent employed by Human Resources and Skills Development Canada (HRSDC) – Babich had accumulated 564 hours of insurable employment between April 29, 2007 and April 26, 2008 but needed 600 insurable hours to qualify for special benefits based on maternity leave. Babich stated she was not aware – at that time – of provisions in the legislation permitting her to apply for an extension of the benefit period based on hours of work missed during her hospitalization in February and insurable hours lost during the summer of 2007 when she was suffering from symptoms relating to the birth of her first child. After February, 2008, Babich continued to work for the Association from the office in her marital residence as she had done throughout her employment with that organization. She also started working for Able on April 1, 2008 and had been hired by Ernest Babich ("Ernest"), her father-in-law. Her duties were to sort receipts and to organize paperwork that had accumulated over the course of three or four years so Able could file the proper returns for corporate income tax and also the Goods and Services Tax ("GST") provisions of the *Excise Tax Act.* The wage was established at $16.00 per hour, the same rate earned from the Association and when providing care to a private patient. Babich stated she sorted receipts into categories and used an adding machine to create tapes of total amounts of various expenditures. She set her own hours of work and during the relevant period devoted 78 hours to that task. Her last day of employment with the Association - and for Able - was April 25 and the baby was born on May 1. Babich stated she worked for Able whenever her schedule permitted as she wanted to qualify for UI maternity leave benefits. During this period, she continued to work about 10 hours a week for the Association from her home office which was the same space used to perform the

work for Able. Babich stated she was not hired to complete GST returns for Able as assumed by the Minister at paragraph 6(f) of the Reply and any failure to file said returns – paragraph 6(g) – was not attributable to any default on her part. Babich stated she and her husband – Earl – had not lived in the same residence as her father-in-law – Ernest – and mother-in-law – Betty Babich ("Betty") – since October, 2005 and that the Minister was incorrect in assuming – paragraph 6(h) – that her duties for Able were performed in a home shared with her in-laws. Babich stated she pointed this out to the Rulings Officer when interviewed by telephone. During the relevant period, Babich had a 21-month old child living at home but care was provided often by the Appellant's mother and father. Babich stated her mother was on leave from her employment and her father was retired and the child sometimes was taken to their home in North Vancouver. Babich agreed she had been trained by Betty and that while not supervised directly, had to speak with Betty from time to time – in person or by telephone - to clarify certain matters concerning receipts or other documents. Babich conceded she did not have prior experience as a bookkeeper but in the course of her employment with the Association was responsible for writing cheques, preparing documents for signature by the Executive Director or a member of the Board of Directors, and assembled time sheets of 5 co-workers for delivery to the organization's accountant. She also opened and sorted mail and filed invoices when she attended the Association office and functioned as an administrative assistant. Babich stated Ernest was not absent from Canada during the relevant period as he and Betty only left on May 7 for their holiday cruise in Europe. Babich stated that for the month of April, 2008, the primary employer in terms of insurable hours was Able, although she continued to do some work for the Association. Details of work done and earnings received from both Able and the Association were set forth on the Claimant Attestation Form – Exhibit A-3 – prepared and submitted by the Appellant to Service Canada on May 15, 2008. On that document, the Association and Able are identified as FVBIA and Able Ent., respectively. Babich agreed the Minister's assumptions were correct in paragraphs 6(r) and 6(s) of the Reply in that she was 8 months pregnant when hired by Ernest on behalf of Able and her employment was terminated when the work was completed before the end of April. Babich stated there was no replacement worker hired subsequently because there was no more work to be done as the necessary material and documentation – delivered to her in a large cardboard box - had been sorted into taxation years, and amounts were tabulated and totals provided for the purposes of filing both corporate income tax and GST returns. When performing the work for Able, she thought the compilation of material and related work product would be provided to an accountant retained by Able. Babich stated the documentation delivered to her was in a "jumble" covering a period of about 4 years. Often, certain receipts or other papers were difficult to read or to understand their relevance as she had not participated in Able's business prior to her

employment on April 1, 2008. She was aware of an audit by Canada Revenue Agency ("CRA") but was not told directly by Ernest, Betty or Earl that the work to be done by her was connected to any audit. Babich stated she was trained by Betty for about 8 hours over a period of "a couple of days."

[5] Babich was cross-examined by counsel for the Respondent. She acknowledged that prior to her marriage to their son – Earl - she had lived in the same residence as Ernest and Betty but they moved out to live in their motor home on property they owned and were residing there throughout 2008. They did not use their former residence – now the residence of Babich and Earl – as their mailing address. Babich stated she suffered from a form of depression in July and August, 2007 and the following month discovered she was pregnant with their second child. Babich stated she has a degree in Community Rehabilitation and a Diploma in Patient Therapy. She was aware Earl was an Officer of Able and that he controlled day-to-day operations but did not know if there were other Officers of the corporation. Babich identified her signature on page 11 of a Questionnaire – Exhibit R-1, dated October 8, 2008 – that she completed and returned to CRA and agreed she was aware of the heading – Certification - on page 11 – and confirmed the answers provided therein were correct. Able had customers throughout the Fraser Valley and the business was operated out of the matrimonial home she shared with Earl. The company business was conducted from work space in a separate room and was equipped with two computers and the usual office equipment and supplies. The same space was used to perform her duties for the Association and – during April, 2008 – also for the work done for Able which did not require a computer, only a calculator with printer. Babich stated she was aware Able had been in business for about 30 years and that Earl had taken over the shares in the corporation at some point. To her knowledge, Able had no non-family employees in 2008 but she did not have any involvement with any payroll records including T4 slips. The office of the Association was in Abbotsford, about 25 miles from the Babich residence and it carried out a variety of functions relating to persons affected by brain injury. In 2008, Babich worked on an injury prevention program and staffed a booth at the Abbotsford Air Show. Pursuant to a written contract with the Association, Babich worked about 10 hours a week at rates varying from $16 and $18 per hour depending on the task. She received a Record of Employment ("ROE") – Exhibit R-2 – dated April 28, 2008 - from the Association in which it stated she had worked a total of 584 insurable hours and had insurable earnings in the sum of $5,877.44 during the period from March 1, 2007 to April 25, 2008. Babich stated the ROE – at box 11 – is incorrect when it showed the last day for which she was paid as April 5, 2008 because she had worked until April 25. Babich referred to a two-page statement issued by the Association – titled Statement of Earnings and Deductions – filed as Exhibit R-3. Babich pointed out the entries on page 1 of the statement

pertaining to the period ending April 9th which indicated she worked 22 hours at $16.00 per hour and 4 hours at $18.00 for a total of 26 hours. As shown on page 2 for the period ending April 25, Babich worked 36.5 hours at $16.00 and 9 hours at $18.00. When completing the Questionnaire – Exhibit R-1 – Babich prepared a calendar to record hours of work performed for Able and attached it behind the signature page. Babich stated that some of the hours included in her last pay period – from the Association - were composed of work performed earlier that were "banked" in the sense they were not paid for at that time, perhaps due to financial constraints during a certain pay period or periods. As for the work done for Able, Babich stated she recorded the number of hours worked - whether done consecutively or at different times on the same day - but did not record start and end times. Her young child was usually supervised by her parents or was absent from the home but her hours of work were flexible and could accommodate his care in the marital residence. She stated Ernest hired her about one week prior to April 1 and did so in order to present an "arm's length" aspect to the matter since Earl was the sole shareholder of Able. Prior to the relevant period, she had not assisted Earl in the Able business. She had not answered the business telephone nor performed office duties but knew that Ernest worked with Earl in carrying on business operations. Babich stated she contacted two other potential employers in Abbotsford that were operated by acquaintances and had requested employment prior to April 1, 2008. She was not hired and attributed that lack of success to her obvious pregnant condition and the impending birth date within a month or so. Babich reiterated she was hired to compile information from the mass of documents delivered to her but had no role in preparing the GST returns for Able. In relation to the work performed, Babich expressed the opinion that no special skills were required for the sorting and tabulating tasks other than those acquired by someone familiar with office routine and some aspects of payroll. Babich received some instruction from Betty on the proper methods to categorize documents and to place them in a particular order since Betty had been a bookkeeper for Able for many years. Babich stated she was paid for the hours of training by Betty but any subsequent contact with Betty or Ernest was for the purpose of obtaining a response to a query about the content or significance of certain documents. Babich stated she worked 78 hours – at $16.00 per hour – during the relevant period and earned the sum of $1,248.00. She was paid by a cheque – dated May 1, 2008 - signed by Ernest and drawn on the Able account. The cheque was deposited to her bank account in Abbotsford on May 8. With respect to Question 16(b) on page 8 of the Questionnaire – Exhibit R-1 – pertaining to the bookkeeping duties performed, Babich stated she provided that information after obtaining it from Able records. Her ROE from Able was prepared and signed by Ernest. Babich acknowledged she had no written contract with Able pertaining to the work done during the relevant period and had no documentary proof currently available to

demonstrate the work at issue had been performed. She acknowledged she was aware of the number of insurable hours required to qualify for UI maternity leave benefits and in February and March had requested more hours of work from the Association but it was short of funds because it relied on grants received at irregular intervals from various sources. Babich stated she had not specifically linked her request for more hours of work to her intention to qualify for maternity leave benefits.

[6] Earl conducted the re-direct examination of the Appellant. Babich stated she had some familiarity with accounting software and explained the scope of her work for the Association required her to "wear many hats." She was paid travel time and those hours were included in the total shown on the ROE issued by the Association. In 2000, the starting wage was about $10.00 per hour but it had risen to $16.00 for some years prior to 2008. Babich confirmed that the hours referred to as "banked" during the last part of April, 2008 were actually worked for which she was paid. She thought she may have attended a staff meeting at the Association office towards the latter part of April. With regard to the work done for Able, Ernest provided her with the documents that needed sorting and totals were prepared on an adding machine/calculator that produced tapes. Babich stated she was able to work for the Association and Able during the same time period. During those times when her mother and/or father were not present to provide care or had not taken the child with them to their home, she was able to work when the child was sleeping. As demonstrated by the earning statements – Exhibit R-3 – Babich stated she had worked for the Association after April 4. As for the work area in the home, there was more than one desk and a separate computer was utilized for the Able business.

[7] Ernest testified he resides in Harrison Mills, a small community near Agassiz, British Columbia but had lived at the residence on Sylvester Road in Mission until he retired in October, 2005. He and his wife – Betty – purchased a motor home and used it to travel for several months until July, 2006 when they located it on a lot they purchased at Harrison Mills. The State of Title Certificate was entered as Exhibit A-4. Ernest stated he spoke to Babich – in March - about performing certain work for Able but she was not hired until April. With respect to the ruling and confirmation by the Minister, Ernest recalled he spoke to someone at CRA about the employment of Babich and later completed, signed and returned a Questionnaire – Exhibit A-5 – dated October 8, 2008 - to CRA. He attached various documents to the Questionnaire including a certificate of incorporation stating Able was formed on February 14, 1979. During the relevant period, Ernest was not a Director of Able and did not occupy the position of either President or Secretary. However, he functioned as Business Manager and when not absent from the area worked with Earl in the business. One of the documents attached to the Questionnaire was a photocopy of a

cheque - dated May 1, 2008 - and drawn on the Able account at Canada Trust in Mission. The cheque was completed and signed by Ernest and was deposited to the account of Babich at the Royal Bank in Abbotsford on May 8. Ernest stated the Statement of Earnings and Deductions pertaining to Babich had been prepared by Earl. Ernest stated Betty had trained Babich how to perform the work because she had done the bookkeeping for Able and its predecessor entity for nearly 30 years. Ernest stated the tasks to be performed by Babich did not include preparing and/or filing any GST returns for Able as that was the responsibility of Earl. Ernest was a shareholder in Able from its inception in 1979 until September 12, 1995 when Earl became its sole shareholder. Ernest stated he has not been a Director of Able since September 15, 2000. With regard to the $16.00 per hour wage paid to Babich, Ernest stated he had spoken to some people and was satisfied that rate was reasonable for the type of work to be performed. Ernest stated he never received his mail at the Sylvester Road address in Mission and has used a Post Office box in Mission since 1990. Ernest stated he could have hired a non-related person to perform the necessary work in April, 2008 but it was a mutually beneficial arrangement to have Babich carry out the required tasks. At that time, Able had not filed corporate income tax returns nor GST returns for the years 2004 to 2007, inclusive. CRA had performed an audit covering the years 2000-2005, inclusive and matters arising therefrom had not been concluded. In order to comply with the filing requirements various bills, receipts and other documents had to be sorted and amounts tabulated. Ernest stated that the time spent by Babich – 78 hours – was reasonable considering the amount of work required. In his opinion, it was convenient to obtain the services of Babich because he and Betty were preparing to embark on a Baltic cruise and Betty was occupied in preparing for that extended holiday. Their departure – by air - from Vancouver was 3 or 4 days prior to the start of the cruise and it required them to be ready to leave by May 7.

[8] Ernest was cross-examined by counsel for the Respondent. As stated in the BC Company Summary for Able – Exhibit R-4 – based on the last annual report filed on February 14, 2007 - Ernest acknowledged he and Betty were listed as Officers and that the mailing address provided to the Ministry of Finance was the one at Sylvester Road in Mission, the residence of Babich and Earl. Because he is semi-retired and receives a private pension, Ernest stated he is satisfied to be paid by Able on an irregular basis for work performed. In 2008, he earned a total of $4,000.00 - paid by cheque – and no Employment Insurance (EI) premiums were deducted. Betty earned the sum of $8,200.00 in 2008 and no deductions were made for EI premiums or Canada Pension Plan (CPP) contributions. Able had 3 employees in 2008 and all were persons related to the corporation. Ernest stated Able was engaged in the business of selling firewood and during the course of 22 years was a supplier to

British Columbia provincial parks and to private buyers. During that time, it also undertook some construction work. The wood obtained by Able from several wood companies is known as “fall-down”, meaning it is a rejected or salvaged product. At one time, this wood had to be purchased but recently it is supplied to Able free of charge and delivered to their site. Able had used a small trailer as an office at a location of Dyke Road but due to a fire in a nearby shingle mill in 2004 the office was relocated and subsequently business records were maintained at either his residence or at Earl’s home on Sylvester Road. Currently, company records are kept in the motor home and Betty worked on them there and in the office at Earl’s house where certain records were kept by Earl on a computer. Ernest stated he and Betty started to build a home in April, 2006 and were busy with that project and that their lives were complicated by financial problems which led to a filing in bankruptcy in August, 2008. Beginning in April, 2006, he and Betty were building a house which is only 60% complete. The GST returns for the years 2004-2007, inclusive, were filed in July, 2008 but not before CRA had garnished the Able bank account on July 11. Ernest stated he was aware certain warning letters had been sent by CRA to Able and was of the opinion Earl – the person in charge of daily operations - had procrastinated in filing the necessary returns. Ernest identified his signature on page 14 of the Questionnaire – Exhibit A-5 – and acknowledged he provided the answer to Question 2(c) therein where he stated Earl, Betty and himself were individuals who “control the day-to-day operations of the payor and who make(s) the major business decisions ...”. Ernest stated Able did not operate the firewood business during the period from 1995 to 2000, inclusive. By way of background, Ernest stated he held a designation of Chartered Life Underwriter (CLU) and worked as a Branch Manager for Metropolitan Life, an insurance company for 14 years. He read an academic paper his brother had written about the viability of the firewood industry and it appealed to him to the extent he quit his job and started a firewood business. During the period from 1980 to 2000, the business was operated by Babich Enterprises Ltd. but later it was transferred to Able which, although in good standing, had been inactive. The GST returns were filed by Betty. At one point, the firewood business employed 12 people and had gross sales of $600,000.00. Returning to the employment of Babich on April 1, 2008, Ernest stated he had approached her about doing the work and knew she was not receiving enough hours of work from the Association. From his standpoint, the work had to be done so Able could comply with CRA requirements to file both income tax and GST returns and was certain it would have cost much more than $16.00 per hour to retain the services of a commercial bookkeeping enterprise. He estimated the training – done by Betty – occupied about one-half day and it made sense to him for Babich to carry out the required tasks since she needed the work, Betty was busy, and Able was in default of its legal requirement to file both corporate income tax and GST returns for a 4-year

period. He knew the parents of Babich were available to care for the young boy and was satisfied Babich could work at her own pace to accommodate her advanced pregnancy. Ernest confirmed he had prepared and signed the ROE attached to the Questionnaire – Exhibit A-5 – dated May 1, 2008. The information provided - at Question 16 - was obtained from Betty and based on Able business records. He, Betty, and Earl were signatories on the Able bank account. The letter – forming part of Exhibit R-5 - directed to the Chief of Appeals at CRA and dated August 25, 2008 – was prepared by Ernest and – at page 2 – refers to the work done by Babich as permitting Able to file "4 years of GST remittances."

[9] In re-direct examination, Ernest stated he did not read the Questionnaire – Exhibit R-1 - completed by Babich.

[10] The Appellant closed her case.

[11] Counsel for the Respondent called Raj Kandola ("Kandola") to the witness box. Kandola testified he has been employed by CRA since 2002 and occupied the position of Appeals Officer since July, 2008. He was assigned to handle the Babich appeal from the ruling and conducted a review of the matter which led to the preparation of his CPT 110 – Report On An Appeal ("Report") – Exhibit R-6 – and preparation of the decision letter – dated November 27, 2008 – signed by E. Jacquard ("Jacquard"), Team Leader. He recalled speaking to Ernest and to Babich by telephone on November 25 and referred to these conversations in Sections I and J, respectively, of his Report. Kandola stated he set out in detail his analysis of relevant facts in Section VI and his method of dealing with contradictions arising from information provided at various times. He stated he chose those versions which were capable of verification. Kandola - in Section VII, page 7 of the Report - set forth his review of the facts concerning the employment of Babich as it pertained to the remuneration, terms and conditions, duration and nature and importance. Under the category titled Nature and Importance, Kandola stated he found "the GST returns that were supposed to be completed by the worker performing these duties were not completed until several months after the fact. This factor points to a non-arm's length relationship." Kandola stated the meaning of the latter comment was in the context of the entire paragraph dealing with the nature and importance of the work done by Babich.

[12] Kandola was cross-examined by Earl. Kandola stated he provided his Team Leader – Jacquard - with the entire Babich file including his Report. He stated he was aware Babich needed an additional 36 insurable hours of employment to qualify for UI benefits based on maternity leave but that fact did not play any part in his analysis

and recommendation to Jacquard. Kandola stated he could not recall having spoken with Earl and any references to Earl in his Report at I – Follow-up Questions - 93 and 94 - are not correct as the conversation – on November 25, 2008 – was with Ernest.

[13] The agent for Babich submitted the work performed by her was genuine and the rate of pay and terms of conditions were reasonable. The tasks performed were limited in duration due to the nature of the employment and the work was necessary so Able could comply with income tax and GST filing requirements since it was already in arrears and subject to some urgency due to ongoing issues arising from a previous CRA audit. He pointed out several instances where the assumptions of the Minister were incorrect and submitted the evidence of Babich and Ernest was credible. In particular, the Minister did not understand the arrangement for child care while Babich was performing the work for Able and failed to take into account that there was very little difference between the work environment and employment circumstances whether she was providing services to the Association or to Able in April. He submitted the total hours of work – 78 – was not excessive in view of the task and that the Minister failed to take into account the contract of employment between Babich and Able was substantially similar to one that would have existed between parties who were not related.

[14] Counsel for the Respondent acknowledged the Minister had decided the contract of employment was valid. However, an analysis of the circumstances revealed Babich was the only employee of Able who had a deduction made for UI premiums and that she had not been able to find employment with a non-related party, probably due to her advanced pregnancy. Counsel referred to the response to Question 16 in the Questionnaire – Exhibit R-1 – regarding the volume of cheques written, number of clients and suppliers and frequency of bank deposits on an annual basis and submitted there would not have been a sufficient accumulation of papers to be sorted and categorized that would have occupied 78 hours. Counsel noted that Betty had performed the necessary bookkeeping work for Able and its predecessor entity for many years prior to the relevant period and had assumed that task subsequently. In counsel's view of the evidence, the decision of the Minister was based on a thorough and rational assessment of relevant facts and should be confirmed.

[15] The relevant provisions of the *Act* are paragraphs 5(1)(*a*) and 5(2)(*i*) and subsection 5(3) which read 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;
> …
>
> (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.

[16] In *Quigley Electric Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 1789; 2003 FCA 461, the Federal Court of Appeal heard an application for judicial review of a decision issued by a judge of the Tax Court of Canada confirming the decision of the Minister that the appellant's employment with a related employer was not insurable. Malone J.A., writing for the Court - at paragraph 7 and following – stated:

> 7 A legal error of law is also said to have been committed when the Judge failed to apply the legal test outlined by this Court in *Légaré v. Canada (Minister of National Revenue)* (1999) 246 N.R. 176 (F.C.A.) and *Perusse v. Canada* (2000) 261 N.R. 150 (F.C.A.). That test is whether, considering all of the evidence, the Minister's decision was reasonable.
>
> 8 Specifically, it is argued that the Judge circumscribed the scope of his review function when, after finding that the Minister clearly did not have all the facts before him he stated:
>
> > ... That is not to say that on reviewing new information, I am then precluded from finding that the Minister did not have, after all, sufficient information to exercise his mandate as he did without my interference.

> This would simply mean that I have found that the new factors not considered were not relevant.

9 According to the applicant, the proper question was not whether the Minister had sufficient information to make a decision, notwithstanding the evidence of Mrs. Quigley; rather the question was whether, considering all the evidence, the Minister's decision still seemed reasonable. Instead, the applicant asserts that the Judge carried out an irrelevant examination of whether Mrs. Quigley was a "principal" or a "subordinate" of Quigley Electric Ltd.

10 In my analysis, the Judge correctly followed the approach advanced by this Court in *Canada (A.G.) v. Jencan Ltd.* [1998] 1 F.C. 187 (C.A.), namely, that the Minister's exercise of discretion under paragraph 5(3)(b) can only be interfered with if she acted in bad faith, failed to take into account all relevant circumstances or took into account an irrelevant factor.

11 Bad faith on the part of the Minister is not an issue in this case.

12 While the reasons for decision are lengthy, it is clear that the Judge was analysing the oral evidence of Jean Quigley in conjunction with paragraph 5(3)(b); namely, whether having regard to all of 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. After reviewing other authorities in the Tax Court, the Judge rejected any suggestion that Mrs. Quigley could be termed a principal of Quigley Electric Ltd. and in turn dismissed her examples of special treatment within the company as arising from her personal relationship with the controlling shareholder and not to her employment contract.

13 He concluded by indicating that the factors considered by the Minister, as set out earlier in his reasons, were the relevant factors for his consideration. That, in the context of this case, can only mean that the Minister's decision was reasonable considering all of the evidence. I can discern no legal error in this analysis or conclusion.

14 I would dismiss the application for judicial review with costs.

[17] In the case of *Porter v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 266; 2005 TCC 364, Campbell, J. reviewed the comments of Justice Archambault in *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, 2005 CarswellNat 3971; 2005 TCC 36 and those of Justice Bowie in *Birkland v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 195; 2005 TCC 291 wherein both discussed the function of this Court in the context of the decision of

the Federal Court of Appeal in *Légaré, supra*, and subsequent decisions of that Court. At paragraphs 12 and 13 of her Judgment, Justice Campbell stated:

> 12 The Tax Court's mandate, in Employment Insurance cases as set out in the cases of Légaré and Pérusse, was recently reaffirmed by Letourneau J. in *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267 at paragraphs 12, 13 and 14:
>
> > 12. As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.
> >
> > 13. The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue -- M.N.R.)*, [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue -- M.N.R.)*, [2000] F.C.J. No. 310; *Massignani v. Canada (Minister of National Revenue)*, 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue)*, 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.
> >
> > 14. In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed*: Pérusse v. Canada (Minister of National Revenue - M.N.R.) supra*, paragraph 15.
>
> 13 In summary, the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, consider all of the facts in evidence before the Court, including any new facts, and to then assess whether the Minister's decision still seems "reasonable" in light of findings of fact by this Court. This assessment should accord a certain measure of deference to the Minister.

[18] I turn now to the facts in the within appeal. The Appeals Officer – Kandola – as detailed in Section (VI) of his Report – Exhibit R-6 - properly chose to rely on facts confirmed by the receipt of subsequent information and in the course of his analysis dealt with any confusion that may have existed at an earlier time concerning

matters such as mailing addresses, place of residence, the mistaken reference to Earl – instead of Ernest -and the purported absence of Ernest from Canada during the relevant period.

[19] In the Reply at paragraph 6(e) the Minister assumed Betty was responsible for bookkeeping and paperwork of Able. That was accurate as it related to the business operations of Able and its predecessor in previous years and subsequent to the relevant period. However, the evidence is clear that for many valid reasons the regular paperwork had not been performed for a period of 3 or more years and that Betty and Ernest were occupied with other events in their lives including having to deal with debt problems and the onerous task of constructing a house. In April, 2008, they were planning a major trip which involved flying from Vancouver to the port of departure in Stockholm and departed from Vancouver on or about May 7, 2008.

[20] At paragraph 6(f) of the Reply, the Minister assumed as follows:

> f) the Appellant was hired to complete GST returns for the Payor and to sort envelopes and bills into appropriate piles;

[21] The evidence before me does not substantiate that assumption as it pertains to GST nor do the responses to Question 3(a) in the Questionnaire – Exhibit R-1 – completed by Babich. Her answer therein is as follows:

> Specific bookkeeping duties:
> Organizing and sorting receipts into expense and revenue categories.
> Organizing and sorting receipts into corporate tax years.
> Determining totals for sorted receipts.
> Prepared totals for four (4) tax years.

[22] In responding to Question 3 in the Questionnaire – Exhibit A-5 – completed by Ernest, he stated the duties performed by Babich were “specific bookkeeping duties.” In answering Question 7(a) therein, Ernest stated Babich was “doing bookkeeping for G.S.T. and tax returns.” Kandola noted in his Report – Exhibit R-6 – at section I. 80 – that he was told by Ernest during the November 25 telephone interview that Babich only did preparation work to sort four years of paperwork and – in response to the following question – stated her “tasks were all administrative, including sorting envelopes and bills into appropriate piles.” In speaking to Babich the same day, Kandola noted – at Section J. 103 of his Report - that the Appellant’s “duties were to organize, sort and total receipts from boxes to different tax years” and that Babich had characterized those duties as “data entry type of work.”

[23] At paragraph 6(g) of the Reply, the Minister assumed:

> g) The Appellant did not complete GST returns for the Payor as the GST returns were not filed until July 2008;

[24] The evidence is clear that the responsibility to file GST returns rested upon Earl, the sole shareholder of Able. Babich was never fixed with that duty and it is clear the nature of her work was to sort and organize material in date order and categories and to do necessary additions and tabulations to enable those GST returns – and income tax returns – to be filed. Any delay in filing was not attributable to any default on her part.

[25] The Minister relied to some extent – paragraph 6(t) - on the fact Able did not hire a replacement worker. This is somewhat odd because the Minister – in the previous assumption – accepted the Appellant's work was terminated at the end of April when it was complete.

[26] The evidence established that Babich performed the work from an office in her home and that this work space was used when providing services to the Association. In the Report – Exhibit R-6 – prepared by Kandola, he took into account – at F. 61 on page 4 – the amount of annual transactions that would require attention by a bookkeeper. However, the scope of the Appellant's duties covered a variety of documents accumulated over a period of 3 or 4 years that were relevant for GST and income tax purposes.

[27] The Minister assumed – at paragraphs 6(u) and 6(v) that:

> u) the Payor and the Appellant have given false information in relation to the employment; and
>
> v) the Appellant was hired to qualify her for employment insurance maternity benefits.

[28] In Section VII of his Report, Kandola accepted that the rate of pay - $16.00 per hour – was reasonable and consistent with industry standards.

[29] With respect to the factor of the terms and conditions of the employment, Kandola relied on the fact Babich could set her own hours – and days – of work to accommodate her own needs while performing the duties in her own residence while she cared for her child and concluded these circumstances pointed to a non-arm's length relationship.

[30] Regarding the duration of the employment, Kandola decided Babich was hired only for the month of April because she was expecting a baby in early May and had not accumulated enough insurable hours to qualify for employment insurance benefits. He further found as a fact that Babich was not able to find employment with a non-related employer and that the position with Able was created to allow her to work the maximum number of hours required to qualify for those benefits. In his assessment, these factors taken together pointed to a non-arm's length relationship.

[31] Concerning the nature and importance of the employment at issue, Kandola relied on the fact Betty had done the bookkeeping work both before and after the relevant period and had trained Babich for the sole purpose of permitting her to qualify for employment insurance. The most significant aspect contained in the analysis of this factor is Kandola's assumption "the GST returns that were supposed to be completed by the worker performing these duties were not completed until several months after the fact. This factor points to a non-arm's length relationship."

[32] In my view of the evidence, Kandola did not appreciate the arrangements in place for child care and did not understand the work space available in the Appellant's matrimonial residence which was used to carry out her duties for the Association as well as for Able. He also did not give sufficient weight to the nature of the task performed which was finite, and consisted of a classic "lump of work" that had no prospect for extension. Even though he was satisfied the employment with Able was genuine, his Report demonstrates he was convinced Ernest, Betty and Earl had concocted a "make-work" project in April, 2008, and that Betty could have done that work personally.

[33] It is apparent on a review of the entire evidence that the overarching error on the part of the Minister was to insist that Babich had failed in her duty to complete and file GST returns, a relatively complex task requiring some special knowledge. There is no credible evidence upon which to base that assumption and it skewered the rest of the analysis. The number of insurable hours – 78 – worked was reasonable and was more than the 36 hours needed for Babich to qualify for maternity leave benefits. If the Appellant's work with Able had been at the front end of the total 12-month employment period - instead of at the end - it is doubtful the Minister would have had the same suspicions about its insurability. In the within case, the Minister embraced the theory that the *raison d'être* for the employment of Babich was to prepare and file GST returns. The Minister assumed Babich had failed to do so during that short period of her employment. It is apparent this perceived default was accorded disproportionate significance in the decision which appeared to focus on a finding that the special employment had been created solely for the purpose of permitting her

to receive maternity benefits under the national scheme and – therefore - did not constitute insurable employment pursuant to the provisions of paragraph 5(2)(*i*) of the *Act*.

[34] As a result of these conclusions, I have decided the decision of the Minister is no longer reasonable and that I must intervene and undertake my own analysis of the relevant circumstances pertaining to the employment at issue.

Remuneration:

[35] I concur with the conclusion of the Minister that the rate of pay was reasonable.

Terms and conditions:

[36] The type of work to be performed was suited to a flexible work schedule and was undertaken in the work space within the matrimonial home. The only tools needed were a calculator capable of printing tapes and some usual office supplies. The computer was not utilized for the work. The child-care arrangements were reasonable and afforded the Appellant time to complete the required work not only for Able but to perform any remaining tasks for the Association.

Duration:

[37] Provided one understands the nature of the Appellant's engagement by Able, this factor does not present any difficulty since the work had a definite start and the termination was predicated on the completion of the sorting, organizing, categorizing, tabulating and totalling of 3 or 4 years of corporate business papers. Based on the evidence, the number of hours devoted by Babich to complete this task was reasonable.

Nature and importance:

[38] The work performed by Babich was necessary so the GST returns and corporate income tax returns could be filed. Betty had not been doing that routine task for several years and – in April - either was not willing or unable to devote her time to that chore which did not require specific bookkeeping skills. The work to be done required a minimal amount of training and the supervision by Betty amounted mainly to providing explanations to the Appellant about the content of certain documents due to problems with legibility.

[39] In the case of *Docherty v. Minister of National Revenue*, [2000] T.C.J. No. 690, I commented – at paragraph 25 as follows:

> [25] The template to be utilized in making a comparison with arm's length working relationships does not require a perfect match. That is recognized within the language of the legislation because it refers to a "substantially similar contract of employment". Any time the parties are related to each other within the meaning of the relevant legislation, there will be idiosyncrasies arising from the working relationship, especially if the spouse is the sole employee or perhaps a member of a small staff. However, the object is not to disqualify these people from participating in the national employment insurance scheme provided certain conditions have been met. To do so without valid reasons is inequitable and contrary to the intent of the legislation.

[40] In the case of *Dancause v. Canada (Minister of National Revenue – M.N.R.)*, [2008] T.C.J. No. 365; 2008 TCC 320, Tardif J. heard the case involving the spouse of the payor and her employment with him as a hairdresser in a salon in which 7 other workers were employed. The Minister found the employment of the appellant did not constitute insurable employment. Tardif J. allowed the appeal as it pertained to a particular period but it is his comments at paragraphs 37 – 45, inclusive, that are instructive:

> 37 In this instance, the case raised some doubts from the start as to whether the work done by the Appellant was comparable to the work done by the other employees. I refer, in particular, to the duration of the periods of work, which corresponded to the periods of work the Appellant needed in order to be eligible for benefits.
>
> 38 In some cases, that situation can be a matter of chance. If the scenario recurs, however, there is no room for doubt left. If there is other evidence pointing in the same direction, that can be sufficient to tilt the balance of probabilities to favour the Respondent's position.
>
> 39 In this instance, in addition to the duration of the periods of work, there is the question of the Appellant's wage, which was reduced at one point so that it corresponded exactly to what the Appellant required in order not to be penalized by the employment insurance scheme. Those are objective facts, in addition to which the numerous general and often confused explanations, and the fact that witnesses were not called (co-workers, accountant, etc.) must also be considered.
>
> 40 This is a case in which the intention of taking maximum advantage of the employment insurance scheme had the effect of creating situations that were dubious, if not implausible.

> 41 There can be no doubt that entitlement to benefits is a legitimate and fundamental right. However, this does not mean that the right may be abused and/or used for accommodation; when the abuses are obvious, the consequence could be a finding that it is not reasonable to imagine a substantially similar employment relationship between unrelated parties.
>
> 42 If we take a reasonable and accommodating approach, some facts seem more plausible, and ultimately more acceptable in the context of a family business.
>
> 43 The right to benefits is indeed an important right, and it is entirely proper for unemployed persons to want to receive benefits when they meet the requirements.
>
> 44 Meeting the requirements of the scheme is one thing, and taking part in a subterfuge to make a person eligible for the maximum benefits provided by the scheme is another.
>
> 45 In this instance, on a balance of probabilities, the parties have plainly exaggerated. However, it is clear that because of her pregnancy, the Appellant was entitled to the benefits associated with her maternity leave.

[41] The facts in the within appeal are a far cry from those before Miller J. in *Hatami v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No, 268; 2007 TCC 428. In that case, the spouse of the payor assisted her husband to get a business into operation and worked sporadically without pay and held off cashing pay cheques until the cash flow of the business permitted her to negotiate them. Justice Miller also found that the timesheets were created after the fact and characterized them as “window-dressing”.

[42] The work done by the Appellant in the within appeal was limited in duration due to the specific nature of the task and she had not performed work for Able prior to the relevant period nor thereafter. The Appellant was entitled to perform legitimate work for an employer and did so. The problem arose because she was related to the employer-corporation which was a family-run business and the Minister decided the contract of employment was not performed under circumstances that would have been present in a substantially similar contract if the parties had been dealing with each other at arm’s length. I disagree. The circumstances relevant to remuneration, skills required, place of work, duration of the task, and the nature and importance of the work under the particular – and unusual – situation during the relevant period were consistent with those that would have been applicable to a working relationship with a non-related party. If a neighbour down the street had performed the task done by Babich under similar circumstances, it would have been reasonable. That non-

related worker may have been able to bring her own infant to work – occasionally - and to have provided her services in accordance with her own personal schedule and the physical and mental demands arising from an advanced pregnancy. The task was not onerous and had an expiration date of approximately 1 month.

[43] The testimony of the Appellant and Ernest was credible. Both were candid about her desire to obtain enough hours of employment to qualify for maternity leave benefits. As Ernest stated, "Monique was available and we were busy." Without more, there is nothing wrong with the resulting contract of employment between Babich and Ernest, acting on behalf of Able in his role as Business Manager.

[44] Based on my findings as stated earlier and applying the relevant jurisprudence, the appeal is allowed and the decision of the Minister – dated November 27, 2008 - is varied to find that:

> Monique Babich was engaged in insurable employment with Able Enterprises Ltd. from April 1, 2008 to April 25, 2008.

Signed at Sidney, British Columbia this 28th day of October 2009.

"D.W. Rowe"

Rowe D.J.

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COURT FILE NO.:	2009-660(EI)
STYLE OF CAUSE:	MONIQUE BABICH AND M.N.R.
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DATE OF JUDGMENT:	October 28, 2009

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