Docket: 2015-207(EI)

BETWEEN:

CHRISTIAN LALANDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

2210066 ONTARIO INC.,

Intervenor.

Appeal heard on November 2, 2015, at Ottawa, Ontario

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kira Caceres
Agent for the Intervenor:	Patricia Mulder Lalande

JUDGMENT

The Appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue, as set out in a letter dated September 17, 2014 from the Canada Revenue Agency to the Appellant, is confirmed.

Signed at Ottawa, Canada, this 4th day of February 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2016 TCC 33
Date: 20160204
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CHRISTIAN LALANDE,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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2210066 ONTARIO INC.,

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REASONS FOR JUDGMENT

Sommerfeldt J.

[1] These Reasons pertain to an Appeal by Christian Lalande from a decision (the "Decision") dated September 17, 2014 on behalf of the Minister of National Revenue (the "Minister") regarding the insurability of Mr. Lalande's employment with 2210066 Ontario Inc. (the "Corporation") during the period from May 5, 2013 to May 4, 2014.

I. Factual Background

[2] Christian Lalande is married to Patricia Mulder Lalande,[1] who typically refers to herself as Patricia Mulder.

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[1] Certain corporate documents entered as Exhibit R-1 show the name of Mr. Lalande's spouse as "Patricia Mulder Lalande"; however, in her oral testimony, she indicated that she typically shows her name as "Patricia Mulder." In these Reasons, I will refer to her as Ms. Mulder.

[3] The Corporation was incorporated under the laws of Ontario on June 23, 2009. On or shortly after the date of its incorporation, the Corporation issued 100 voting Class A Common shares to Ms. Mulder and 100 voting Class C Special shares to Mr. Lalande.[2] No evidence was provided concerning the rights, privileges, restrictions and conditions attaching to the shares of these two classes, other than an indication that both classes of shares have similar voting rights and that the Class A Shares are common shares and the Class C Shares are special shares.

[4] In 2012 Ms. Mulder and Mr. Lalande decided to change their respective shareholding proportions in the Corporation. Accordingly, on May 11, 2012 Ms. Mulder subscribed for 80 additional Class A Shares, paying a subscription price of $0.10 per share, and Mr. Lalande subscribed for 20 additional Class C Shares, paying a subscription price of $0.10 per share. After these additional shares were issued, Ms. Mulder held 180 Class A Shares of the capital stock of the Corporation, representing 60% of all the issued voting shares, and Mr. Lalande held 120 Class C Shares of the capital stock of Corporation, representing 40% of all the issued voting shares.

[5] Mr. Lalande and Ms. Mulder explained that the reason for this change in the relative shareholdings in the Corporation was that Ms. Mulder had made, and was continuing to make, a greater contribution to the restaurant than Ms. Mulder, in terms of both invested capital and committed time. As well, Ms. Mulder unilaterally made all significant decisions pertaining to the Corporation's business. During the hearing, counsel for the Minister suggested that the reason for the change in the relative shareholdings in the Corporation was to enable Mr. Lalande, on the termination of this employment, to qualify for benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, as amended (the "*EIA*");[3] however, Mr. Lalande and Ms. Mulder were adamant that such was not the case. I do not think that it is necessary for me to determine the reason for the change in the shareholdings.

[6] In conjunction with the incorporation of the Corporation on June 23, 2009, Ms. Mulder and Mr. Lalande were appointed as the only directors of the

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[2] In these Reasons, I will refer to the voting Class A Common shares and the voting Class C Special shares, whether issued on incorporation or subsequently, as the "Class A Shares" and the "Class C Shares" respectively.

[3] See paragraph 5(2)(d) of the *EIA*.

Corporation. As well, Ms. Mulder was appointed as the president and as the secretary-treasurer of the Corporation. Mr. Lalande was not appointed as an officer of the Corporation.

[7] The Corporation was incorporated for the purpose of operating a Harvey's fast-food restaurant in Ottawa, Ontario. In conjunction with this objective, the Corporation acquired a Harvey's franchise from the restaurant chain's franchisor (the "Franchisor"). To finance the acquisition of the franchise and the development of the business, the Corporation obtained a loan from a financial institution. The initial amount of the loan was not provided in evidence; however, in August 2014 (when Ms. Mulder completed a questionnaire provided to her by the Canada Revenue Agency (the "CRA")), the outstanding amount of the loan was $153,000. To secure this loan, Ms. Mulder and Mr. Lalande mortgaged their family home to the financial institution. The details of the financing arrangement were not explained; however, Mr. Lalande stated that he incurred personal liability for the repayment of the loan.

[8] Ms. Mulder has worked in the fast-food industry for approximately 30 years. She has extensive experience in operating and managing fast-food restaurants.

[9] The Corporation conducts its business in premises leased from the Franchisor or an affiliate thereof (in either case, the "Landlord"). In August 2014 the monthly rent for the leased premises was $9,600. Mr. Lalande stated that he has incurred personal liability in respect of the rent (although the precise nature of the liability was not explained).

[10] When the premises for the Corporation's restaurant were being constructed, Mr. Lalande was employed elsewhere as an automotive mechanic. However, as a 50% (as he then was) shareholder of the Corporation, he played a role in dealing with the general contractor and overseeing the construction of the premises. When the restaurant opened, Ms. Mulder managed it. As Mr. Lalande was then otherwise employed, he initially did not participate in the day-to-day operations of the restaurant. Given Ms. Mulder's extensive experience in operating fast-food restaurants, and Mr. Lalande's lack of experience in the fast-food industry, he deferred to her in respect of the management and operational decisions pertaining to the restaurant.

[11] In September 2012, when Mr. Lalande was no longer employed as an automotive mechanic, the Corporation hired him as an employee. Mr. Lalande and the Corporation entered into a standard-form Associate Employment Agreement

(the "Agreement") dated September 4, 2012, in a format provided and required by the Franchisor. The Agreement describes Mr. Lalande's position as "BOH MGR," presumably meaning "back-of-house manager." During his testimony, Mr. Lalande indicated that, as he learned his duties and progressed in his position, he, in a sense, became an assistant manager, although there was no change in his formal title.

[12] While the Agreement contains a space (followed by "/hour") in which to insert Mr. Lalande's hourly rate of pay, that space was left blank and the word "SALARY" was written by hand to the right of the word "hour." The Agreement does not specify the amount of the salary. Mr. Lalande stated that the Agreement was completed in this manner as it was not possible to determine an hourly rate of pay because of the many factors that were in play. He also said that, by leaving the amount of the salary blank, the amount could be determined later. Ms. Mulder testified that the reason for leaving the salary amount unspecified in the Agreement was that all associate employment agreements were kept in the restaurant premises and she wanted to avoid the possibility of another employee finding those agreements and discovering the amount of Mr. Lalande's salary.

[13] Throughout the duration of Mr. Lalande's employment, including the period that is the subject of the Decision, Mr. Lalande's salary (once determined) was $40,000 per year.

[14] Although the Agreement described Mr. Lalande as a "BOH MGR," the timesheets (entitled "Pay Summary Reports") entered as Exhibit R-7 described him as a "cashier garnisher." The Minister, both in the Reply to the Notice of Appeal and in cross-examination, focused on Mr. Lalande's job description in the timesheets as a "cashier garnisher." The Minister's suggestion was that a salary of $40,000 per year was unreasonably high for a cashier or garnisher. Mr. Lalande and Ms. Mulder testified that the payroll software used by the Corporation was provided by the Franchisor and was somewhat outdated, such that it required all employees to be described in the timesheets as "cashiers garnishers," notwithstanding that they may have actually had different job titles. For instance, Mr. Lalande stated that the cooks were also described in the timesheets as "cashiers garnishers," notwithstanding that they clearly had a different job description and function. Mr. Lalande also indicated that he did not handle cash or garnish burgers, but the software required that his job description in the timesheets be shown as "cashier garnisher." Having listened to the evidence and having reviewed the exhibits, I do not think that a lot should be made of Mr. Lalande's description in the timesheets as a "cashier garnisher." Accordingly, I am satisfied

that Mr. Lalande's position was back-of-house manager or assistant manager (both descriptions were used in the evidence).

[15] Mr. Lalande's employment duties were extensive. He was required to clean exhaust hoods, filters, fryers and floors, to get the back of the restaurant ready for opening at 10:30 a.m. each morning, to cook and prepare food, and to clean the back of the restaurant. As Mr. Lalande generally worked in the morning and early-to-mid afternoon, he also prepared food for the evening shift and for the next day. He performed general maintenance repairs of the restaurant, made bank deposits, picked up supplies and dealt with service technicians. Most of those duties were performed at the restaurant premises, except when he was attending at the bank or picking up supplies.

[16] Each employee who worked at the restaurant was required to punch in on a computerized time clock when beginning a shift or returning from a break and to punch out when ending a shift or beginning a break. As Ms. Mulder desired to know the amount of work done by all employees, including Mr. Lalande, he too was required to punch in and to punch out.

[17] Mr. Lalande had specified hours of employment at the premises of the restaurant. On Mondays, Thursdays and Fridays he was expected to work in the restaurant from 8:30 a.m. to 4:00 p.m. On Tuesdays and Wednesdays he was expected to work in the restaurant from 8:30 a.m. to 2:00 p.m. There was some uncertainty in the evidence as to the number of paid hours that Mr. Lalande was expected to work each day. The schedule set out above suggests a work day of 7.5 hours on Mondays, Thursdays and Fridays and a work day of 5.5 hours on Tuesdays and Wednesdays. However, Ms. Mulder stated that each employee (including Mr. Lalande) was entitled to a half-hour unpaid lunch break, meaning that Mr. Lalande would have 7 paid working hours on Mondays, Thursdays and Fridays and 5 paid working hours on Tuesdays and Wednesdays.

[18] Mr. Lalande and Ms. Mulder each completed a lengthy questionnaire for the CRA. The questionnaires were entered as Exhibits R-3 and R-4 respectively. In item 7(d) of each questionnaire, it was indicated that Mr. Lalande was required to work 33 hours per week in the restaurant and 7 to 10 hours per week in respect of repairs and other duties. It was explained in oral testimony that the requirement of 33 hours per week pertained to work done on the premises while the restaurant was in operation and while Mr. Lalande was punched in on the time clock. Mr. Lalande's trips to the bank or to pick up supplies were performed when he was punched out, and thus would form part of the 7 to 10 hours per week of other

duties. Most repairs could not be made when the restaurant was in operation; therefore, Mr. Lalande made those repairs when the restaurant was closed. The time spent making the repairs would form part of the 7 to 10 hours per week to be performed when Mr. Lalande was punched out. As will be discussed below, there is an issue as to whether Mr. Lalande consistently worked the required number of hours each week.

[19] Mr. Lalande stated that he was aware that, while he was employed by the Corporation, the Corporation was not profitable. Ms. Mulder stated that the Corporation owed a considerable amount of money to the Landlord for back rent and that the Landlord had been pressuring her to pay the arrears. Ms. Mulder testified that in January 2014 she was advised by the Corporation's accountant that the Corporation should get rid of the "big salaries" (which was the term used by the accountant and by Ms. Mulder in her testimony). Accordingly, Ms. Mulder decided that it would be necessary for the Corporation to terminate the employment of Mr. Lalande, as well as the employment of Ms. Mulder's sister as the Corporation's bookkeeper. Hence, Mr. Lalande's employment was terminated in early May 2014. Mr. Lalande's last day of employment was Friday, May 2, 2014.

[20] Subsequent to the termination of Mr. Lalande's employment, no one was hired by the Corporation to replace him. Rather, Ms. Mulder performed most of the duties that had been previously performed by Mr. Lalande, other than the repair work, which was thereafter performed by third-party contractors.

[21] After Mr. Lalande's employment was terminated by the Corporation, he applied to the Department of Human Resources and Skills Development Canada ("HRSDC") for employment insurance benefits. HRSDC requested a ruling from the CRA on the insurability of Mr. Lalande's employment with the Corporation for the period from May 5, 2013 to May 4, 2014. On June 9, 2014 the CRA sent a written ruling to Mr. Lalande.[4] That ruling stated, in part:

> Based on our analysis, we have ruled that for the period under review, you were an employee. However, you were related to 2210066 Ontario Inc, and it is not reasonable to conclude that you would have entered into a substantially similar contract of employment had you been dealing with each other at arm's length.

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[4] This ruling was presumably issued pursuant to section 90 and/or section 90.1 of the *EIA*.

> Therefore, your employment was not insurable because of paragraph 5(2)(i) of the Employment Insurance Act.[5]

As well, on June 9, 2014 the CRA also sent a letter to the Corporation, to the attention of Ms. Mulder, reiterating the ruling sent to Mr. Lalande.[6]

[22] After receiving the above-mentioned ruling, Mr. Lalande appealed to the CRA's Chief of Appeals in the London-Windsor Tax Services Office.[7] On September 17, 2014 the CPP/EI Appeals Division of the CRA sent to Mr. Lalande the letter described above as the Decision.[8] The second paragraph of the Decision states:

> After the impartial review of all of the information relating to this appeal, it has been determined that this employment was not insurable. You were related to 2210066 ONTARIO INC. and after considering all of the circumstances of this employment, the Minister of National Revenue is not satisfied that a substantially similar contract of employment would have been entered into if you had been dealing with each other at arm's length. You were not dealing at arm's length with 2210066 ONTARIO INC.; therefore, your employment was excluded from insurable employment.

As well, the CRA sent an undated letter to the Corporation and Ms. Mulder, stating essentially the same thing.

[23] After receiving the Decision from the CRA, Mr. Lalande commenced the Appeal that is the subject of these Reasons,[9] and the Corporation intervened in that Appeal.[10]

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5 A copy of the letter dated June 9, 2014 from the CRA to Mr. Lalande formed part of Exhibit R-5.

6 A copy of the letter dated June 9, 2014 from the CRA to the Corporation formed part of Exhibit R-10.

7 See section 91 of the *EIA*.

8 See subsection 93(3) of the *EIA*.

9 See subsection 103(1) of the *EIA*.

10 See subsection 9(1) of the *Tax Court of Canada Rules of Procedure Respecting the Employment Insurance Act*.

II. Statutory Provisions

[24] Paragraph 5(2)(*i*) of the *EIA* provides that insurable employment does not include employment if the employer and the employee are not dealing with each other at arm's length. Paragraph 5(3)(*a*) of the *EIA* provides that, for the purposes of paragraph 5(2)(*i*) of the *EIA*, the question of whether persons are not dealing with each other at arm's length is to be determined in accordance with the *Income Tax Act*, RSA 1985, c. 1 (5th supplement), as amended (the "*ITA*").

[25] In the context of this Appeal, the critical statutory provision is paragraph 5(3)(*b*) of the *EIA*, which, in essence, states that, for the purposes of paragraph 5(2)(*i*) of the *EIA*, if the employer is, within the meaning of the *ITA*, related to the employee, they are deemed to deal with each other at arm's length if the Minister 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.

III. Analysis

A. Applicable Principles

[26] As Mr. Lalande and Ms. Mulder are married to each other and as Ms. Mulder controls the Corporation, it is clear, by reason of subparagraph 251(2)(*b*)(iii) of the *ITA*, that during the period in question the Corporation was, within the meaning of the *ITA*, related to Mr. Lalande.

[27] Paragraph 5(3)(*b*) of the *EIA* contains the phrases "… if the Minister of National Revenue is satisfied that … it is reasonable to conclude that…." These phrases suggest that the Minister has an element of discretion when determining whether an employer and an employee who are related to each other would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. There is a considerable body of jurisprudence dealing with the interpretation and application of paragraph 5(3)(*b*) of the *EIA*. In some of the earlier cases,[11] the Federal Court of Appeal indicated

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[11] For instance, see *Tignish Auto Parts Inc. v MNR*, [1994] FCAD 3460-01, 185 NR 73 (FCA); and *Attorney General of Canada v Jencan Ltd.*, (1997) 215 NR 352, [1998] 1 FCR 187 (FCA).

that the predecessor of paragraph 5(3)(*b*) of the *EIA* required the Tax Court of Canada to undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under that predecessor provision. At the first stage, the Court was required to confine its analysis to a determination of the legality of the Minister's decision (i.e., a determination of whether the Minister properly exercised his or her discretion). If, and only if, the Court found that an applicable ground for judicial interference had been established, could the Court then consider the merits of the Minister's decision.

[28] Subsequently, the Federal Court of Appeal indicated that a different approach should be taken. That different approach was described by Justice Marceau as follows:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.[12]

[29] Thereafter, in a later case, Justice Marceau reiterated that the two-stage inquiry was no longer to be used[13] and elaborated on the different approach to be taken:

> The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his

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12 *Légaré v MNR*, (1999) 246 NR 176 (FCA), ¶ 4.

13 *Pérusse v MNR*, (2000) 261 NR 150 (FCA), ¶ 14. In paragraph 14 of *Pérusse*, in addition to rejecting the earlier approach, Justice Marceau also quoted paragraph 4 of *Légaré*.

> officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and … directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.[14]

[30] Recently the Associate Chief Justice of this Court has summarized the approach to be taken when considering an issue in the context of paragraph 5(3)(*b*) of the *EIA*:

> … the role of this Court is to verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after so doing, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.[15]

[31] The following principles are derived from the cases referred to above:

(a) When reviewing a conclusion of the Minister in the context of paragraph 5(3)(*b*) of the *EIA*, this Court is to verify the facts inferred or relied on by the Minister, in order to confirm that those facts are real and were correctly assessed by the Minister.
(b) After investigating all the facts, this Court must decide whether the Minister's conclusion seems reasonable.
(c) The *EIA* requires this Court to show some deference to the Minister's initial assessment.
(d) When there are no new facts and there is nothing to indicate that the known facts were misunderstood by the Minister, this Court is not to substitute its opinion for that of the Minister.

B. Assumptions of Fact

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[14] *Pérusse, ibid.*, ¶ 15.

[15] *Guillemette v MNR*, 2015 TCC 6, ¶ 50. Other decisions of this Court which have referred to paragraph 4 of *Légaré* or paragraph 14 or 15 of *Pérusse* include *Birkland v* MNR, 2005 TCC 291, ¶ 3; *Porter v MNR*, 2005 TCC 364, ¶ 11-12; *Tremblay v MNR*, 2006 TCC 113, ¶ 28-29; *Yahyaoui v* MNR, 2007 TCC 392, ¶ 18-19; and *Huntley v MNR*, 2010 TCC 625, ¶ 27-28. See also *Le Livreur Plus Inc. v MNR*, 2004 FCA 68, ¶ 13.

[32] Given that this Court is required to verify whether the facts inferred or relied on by the Minister are real and were correctly assessed, it is helpful to reproduce the facts that were assumed by the Minister, as set out in paragraph 8 of the Reply to the Notice of Appeal (the "Reply"), as follows:

> In determining that the Appellant was not engaged in insurable employment by the Payer [i.e., the Corporation] for the Period [i.e., May 5, 2013 to May 4, 2014] , the Minister relied on the following assumptions of fact:
>
> **The Payer**
>
> (a) the Payer was incorporated on June 23, 2009;
>
> (b) the Payer's business involved the operation of a Harvey's fast food restaurant in Ottawa, Ontario;
>
> (c) prior to May 12, 2012, the shareholders of the Payer and their respective percentage holdings of the voting shares were:
>
> Patricia Mulder Lalande 50%; and
>
> Christian Lalande 50%;
>
> (d) effective May 12, 2012, the shareholders of the Payer and their respective percentage holdings of the voting shares were:
>
> Patricia Mulder Lalande 60%; and
>
> Christian Lalande 40%;
>
> (e) both Patricia Mulder Lalande (Patricia) and the Appellant were corporate directors;
>
> (f) Christian Lalande and Patricia are husband and wife;
>
> (g) Patricia controlled the day-to-day operations of the Payer's business and made the major business decisions;
>
> (h) Patricia had 30 years experience in the business;
>
> (i) the Payer's business hours were Sunday to Thursday from 10:30 a.m. to 10:00 p.m. and Friday and Saturday from 10:30 a.m. to 11:00 p.m.;
>
> (j) the Payer issued T4 slips to 34 employees for the year 2013;
>
> (k) the Payer had the following gross monthly sales:

Month/year	Sales	Month/year	Sales
Nov 2012	$60,621.51	Oct 2013	$78,534.28
Dec 2012	$54,134.65	Nov 2013	$60,624.51
Jan 2013	$72,954.89	Dec 2013	$55,250.29
Feb 2013	$58,598.35	Jan 2014	$74,184.09
Mar 2013	$44,658.78	Feb 2014	$56,401.31
Apr 2013	$69,027.19	Mar 2014	$60,856.67
May 2013	$65,674.93	Apr 2014	$76,573.00
Jun 2013	$61,683.44	May 2014	$68,991.00
Jul 2013	$78,415.48	Jun 2014	$63,341.58
Aug 2013	$56,990.79	Jul 2014	$78,518.54
Sep 2013	$67,760.61		

(l) the Payer expensed maintenance and repairs of $11,688 and $7,609 for the years ending December 31, 2012 and December 31, 2013, respectively.

The Appellant

(m) the Appellant and the Payer are related persons;

(n) the Appellant was hired by the Payer to work in the restaurant;

(o) the Appellant performed his services for the Payer under a contract of service that was formed in the province of Ontario;

(p) the Appellant first performed services for the Payer in August of 2012;

(q) the Appellant had worked as a licensed automotive technician, prior to being hired by the Payer;

(r) the Appellant had construction, mechanical and managerial work experience;

(s) the Appellant had no prior work experience in the restaurant industry, at the time he was hired by the Payer;

(t) the Appellant's job title was "cashier/garnisher";

(u) the Appellant's duties included:

(i) cleaning the back of the restaurant;

(ii) cleaning the restaurant equipment;

(iii) sweeping, mopping and degreasing;

(iv) general maintenance and repairs to restaurant;

(v) making bank deposits;

(vi) picking up supplies;

(vii) delivering cheques to suppliers;

(viii) washing dishes;

(ix) preparing and cooking food; and

(x) dealing with technicians;

(v) the Appellant usually performed his duties at the Payer's premises;

(w) the Appellant worked Monday to Friday each week;

(x) the Appellant's hours of work were roughly from 8:30 a.m. to 4:00 p.m., Monday, Thursday, Friday, and from 8:30 a.m. to 2:00 p.m., Tuesday and Wednesday;

(y) the Appellant's hours were based on his children's child-care needs;

(z) the Appellant's total daily hours were recorded by the Payer on timesheets;

(aa) the Appellant was required to punch in on arrival at the restaurant and punch out when departing the restaurant;

(bb) the Payer provided the Appellant with training on how to use the restaurant equipment and cleaners;

(cc) the Payer directed the Appellant on the work to be performed;

(dd) the Payer made certain that the Appellant performed his duties properly and in accordance with the restaurant's standards;

(ee) the Appellant did not supervise any of the Payer's employees;

(ff) the Appellant's rate of pay was $41,000 annually;

(gg) the Appellant's biweekly rate of pay was $1,576.92;

(hh) the Appellant's biweekly pay remained the same regardless of the actual hours he worked during a pay period;

(ii) the Appellant's hours varied from week to week;

(jj) the Appellant worked a total of 1437.55 hours during the Period;

(kk) the Appellant worked an average of 27.64 hours per week, during the Period;

(ll) on average, the Appellant was paid $28.52 per hour;

(mm) the Appellant was paid on a biweekly basis, which was the same for all of the Payer's employees;

(nn) the Payer's other employees were paid between $10.50 and $15.00 per hour;

(oo) the Payer's other employees were only paid for the actual hours worked;

(pp) based on Labour Market Wage Reports, the median pay rate for a line cook was $11.00 per hour;

(qq) the Payer paid an unrelated worker, who performed similar duties as the Appellant, $12.00 per hour;

(rr) the Payer reimbursed the Appellant for any expense that he incurred in performing his services;

(ss) the Payer paid the Appellant vacation pay, which was the same for all employees;

(tt) the Appellant was paid for sick days and statutory holidays;

(uu) with the exception of Patricia, the Payer's other employees' total earnings typically varied each pay period;

(vv) the Appellant did not receive any bonuses or employee benefits from the Payer, which was the same for all employees;

(ww) the Appellant assumed personal liability for the business loans and lease agreements of the Payer;

(xx) the Appellant's and Patricia's home was pledged as security in support of the Payer's business loans;

(yy) the Appellant did not have signing authority on the Payer's business bank accounts;

(zz) the Appellant was not laid off by the Payer due to the Payer's inability to pay the Appellant's salary;

(aaa) the Appellant was laid off by the Payer so that he could apply for Employment Insurance benefits;

(bbb) the Payer could have hired an unrelated worker to do the same job as the Appellant, for $11.00 per hour;

(ccc) Patricia performed the Appellant's duties, except for maintenance and repairs, after he was laid off;

(ddd) the Payer did not replace the Appellant with another worker;

(eee) after the Appellant was laid off, Patricia engaged the services of contractors to do the maintenance and repairs;

(fff) Patricia took over the bookkeeping duties that were performed by another worker;

(ggg) prior to being hired by the Payer in 2012, the Appellant collected Employment Insurance benefits totalling $14,210;

(hhh) the Payer reported net losses of $32,815 and $26,961, for the years 2012 and 2013, respectively; and

(iii) the Payer expensed salaries and wages of $249,240 and $250,806, for the years 2012 and 2013, respectively.

[33] The facts assumed by the Minister, as set out above, are taken as proven, unless they are refuted by Mr. Lalande or by the Corporation.[16]

[34] During the hearing, by means of oral testimony or documents entered as exhibits, the assumptions set out above as subparagraphs (a) through (i), (m) through (s), (u), (w) through (y), (aa), (cc), (gg) through (ii), (mm) through (oo), (ss), (tt), (ww) through (yy) and (ccc) through (fff) were proven. Neither Mr. Lalande nor Ms. Mulder (on behalf of the Intervenor) challenged, or provided any evidence in respect of, the assumptions set out above as subparagraphs (j) through (l), (dd), (pp) through (rr), (vv), (bbb) and (ggg) through (iii). Significant portions of the hearing were devoted to the assumptions set out above as subparagraphs (t), (v), (z), (bb), (ee), (ff), (jj) through (ll), (uu), (zz) and (aaa), which were challenged or qualified by Mr. Lalande and Ms. Mulder. This latter group of assumptions will be discussed below.

C. Preliminary Comments in Respect of Minister's Conclusion

[35] Before reviewing the challenged or qualified assumptions, a few comments are in order. Paragraph 5(3)(*b*) of the *EIA*, provides that, where an employer is related to an employee, in order for the employer and the employee to be deemed to deal with each other at arm's length, the Minister must be satisfied that, having regard to all the circumstances of the employment, it is reasonable to conclude that the employer and the employee would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. Therefore, the assumptions of fact that are most critical in this Appeal are those which pertain to the circumstances of Mr. Lalande's employment.

[36] As will be discussed below, Mr. Lalande and Ms. Mulder succeeded in refuting, in whole or in part, some of the Minister's assumptions of fact. However, the assumptions of fact that were not refuted, together with the evidence presented at the hearing of this Appeal, were, in my view, sufficient to provide a reasonable basis for the Minister's conclusion that, if the Corporation and Mr. Lalande had been dealing with each other at arm's length, they would not have entered into a contract of employment substantially similar to the agreement actually entered into by the Corporation and Mr. Lalande. I will expand upon this view below.

D. Analysis of Certain Assumed Facts

[37] I will now turn to an analysis of each of the challenged or qualified assumptions.

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[16] *Le Livreur Plus Inc. v MNR*, 2004 FCA 68, ¶ 12. See also *Porter v MNR*, 2005 TCC 364, ¶ 12; and *Lelièvre & Falardeau v MNR*, 2003 TCC 55, ¶ 6.

[38] In subparagraph 8(t) of the Reply, the Respondent assumed that the Appellant's job title was "cashier/garnisher." The key elements of the evidence in respect of this assumption are discussed above in paragraph 14 of these Reasons. As indicated above, I am satisfied that Mr. Lalande was described on the timesheets as a cashier/garnisher only because no other description was available in the timekeeping software used by the Corporation. While Mr. Lalande's position was described in the evidence as back-of-house manager or assistant manager, the evidence was not clear as to which was his actual position or title. Notwithstanding that lack of clarity, the assumption in subparagraph 8(t) of the Reply has been refuted.

[39] In subparagraph 8(v) of the Reply, the Respondent assumed that Mr. Lalande usually performed his duties at the Corporation's premises. During the hearing Mr. Lalande and Ms. Mulder made it clear that Mr. Lalande performed some of his duties, such as going to the bank, picking up supplies and running other errands, away from the Corporation's premises. Accordingly, the assumption set out in subparagraph 8(v) of the Reply has been refuted in part.

[40] In subparagraph 8(z) of the Reply, the Minister assumed that Mr. Lalande's total daily hours were recorded by the Corporation on timesheets. During the hearing Mr. Lalande and Ms. Mulder clarified that the hours recorded on the timesheets were only the hours that Mr. Lalande worked after he had punched in using the time clock and before he punched out. In addition to the "punched-in" hours, Mr. Lalande also worked other hours which were not recorded. The unrecorded hours pertained to the duties performed by him away from the Corporation's premises (when he was going to the bank, picking up supplies and running other errands) and the duties performed by him after the restaurant had closed (when he was doing maintenance and repairs). Hence, the assumption set out in subparagraph 8(z) of the Reply has been refuted in part.

[41] In subparagraph 8(bb) of the Reply, the Minister assumed that the Corporation provided Mr. Lalande with training on how to use the restaurant equipment and cleaners. During this testimony, Mr. Lalande stated that, when he commenced his employment with the Corporation, he received a modest amount of training from some of the Corporation's other employees. However, as he had a managerial role, those employees were reluctant to give him very much training, which meant that most of what he needed to know was self-taught, with the exception of safe and proper cleaning techniques for the fryers and grill hoods, in respect of which Ms. Mulder provided appropriate training to him. The assumption set out in subparagraph 8(bb) of the Reply has been refuted in part.

[42] In subparagraph 8(ee) of the Reply, the Minister assumed that Mr. Lalande did not supervise any of the Corporation's employees. During the hearing it became clear that Mr. Lalande functioned in a managerial capacity during the course of his employment. I am satisfied that he did supervise certain of the Corporation's employees. Therefore, the assumption set out in subparagraph 8(ee) of the Reply has been refuted. However, it is noteworthy that the detailed description of the duties performed by Mr. Lalande, as set out in paragraph 3(a) of the questionnaires completed by Mr. Lalande and Ms. Mulder (Exhibits R-3 and R-4 respectively), makes no mention of supervising employees or performing managerial duties. Therefore, I am left with some uncertainty as to the amount of the supervisory or managerial duties performed by Mr. Lalande.

[43] In subparagraph 8(ff) of the Reply, the Minister assumed that Mr. Lalande's rate of pay was $41,000 per year. The evidence during the hearing and the information provided in Exhibits R-3 and R-4 indicated that Mr. Lalande's salary was $40,000 per year. Thus, the assumption in subparagraph 8(ff) of the Reply has been refuted in part, but only to the extent of $1,000 (i.e., $41,000 – $40,000).

[44] In subparagraph 8(jj) of the Reply, the Minister assumed that Mr. Lalande worked a total of 1,437.55 hours during the period from May 5, 2013 to May 4, 2014.[17] While the precise manner in which the CRA determined the total number of hours worked was not discussed in detail during the hearing, it is my understanding that the assumed number of hours (i.e., 1,437.55 hours) was calculated by reference to the number of "punched-in" hours that were recorded on the timesheets entered as Exhibit R-7. As noted above, neither Mr. Lalande nor Ms. Mulder challenged or contested the assumed total number of hours worked. However, both Mr. Lalande and Ms. Mulder pointed out that the timesheets only recorded the hours worked by Mr. Lalande when he was "punched-in" and did not record the hours that he worked outside the restaurant or after the restaurant was closed. Both Mr. Lalande and Ms. Mulder indicated that the number of unrecorded hours worked by Mr. Lalande was in the range of 7 to 10 hours per week. However, that range was simply an estimate and was not corroborated. In particular, no records were produced to confirm that 7 to 10 hours of "non-punched-in" hours were worked on a weekly basis or to confirm that such

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[17] The assumption in subparagraph 8(jj) of the Reply is subject to an anomaly. The period that was the subject of the Decision began on May 5, 2013 and ended on May 4, 2014. This is the period in respect of which the Minister assumed that Mr. Lalande had worked 1,437.55 hours. However, the timesheets that were reviewed by the Minister actually covered the period beginning on April 29, 2013 and ending on May 5, 2014. I do not think that this anomaly has any significant effect on my analysis.

hours were consistently worked each and every week. I am satisfied that Mr. Lalande sometimes worked, away from the restaurant premises or after the restaurant was closed, additional hours in the approximate range of 7 to 10 hours in some weeks; however, I am not convinced that those additional hours were consistently worked each and every week from May 5, 2013 to May 4, 2014. Nevertheless, it is my view that the assumption in subparagraph 8(jj) has been refuted in part, but not to such an extent as to demolish the foundation on which the Minister based the Decision.

[45] In subparagraph 8(kk) of the Reply, the Minister assumed that Mr. Lalande worked an average of 27.64 hours per week during the period May 5, 2013 to May 4, 2014. The method by which this average was calculated was not discussed during the hearing; however, it is my understanding that the CRA divided the assumed total number of hours worked (i.e., 1,437.55 hours) by 52. Neither Mr. Lalande nor Ms. Mulder specifically challenged or contested the assumption in subparagraph 8(kk); however, they both vigorously testified that Mr. Lalande worked more hours than those that were recorded by the timeclock in the restaurant. Thus, I am satisfied that Mr. Lalande worked, on average, more than 27.64 hours per week. However, for the reasons stated in paragraphs 44 and 54 of these Reasons, I am not convinced that he worked an average of 40 hours per week during each and every week in the period from May 5, 2013 to May 4, 2014. Thus, I consider that the assumption in subparagraph 8(kk) has been refuted in part, but not to such an extent as to demolish the foundation on which the Decision was premised.

[46] In subparagraph 8(ll) of the Reply, the Minister assumed that, on average, Mr. Lalande was paid $28.52 per hour. As I understand the Minister's calculations, this average amount was calculated by reference to the number of "punched-in" hours that were recorded on the timesheets entered as Exhibit R-7. As explained above, those timesheets did not record the work that Mr. Lalande performed away from the Corporation's premises or after the restaurant was closed. Those hours were not recorded. The only evidence as to the number of "non-punched-in" (or unrecorded) hours worked by Mr. Lalande were unsubstantiated estimates provided by him and Ms. Mulder. Responses provided in the respective questionnaires entered as Exhibits R-3 and R-4 indicated that Mr. Lalande spent 7 to 10 hours per week in the performance of duties away from the restaurant or after the restaurant was closed. Based on the comments made in the preceding two paragraphs, I am satisfied that Mr. Lalande worked more hours than those recorded on the timesheets, with the result that, on average, he was paid less than $28.52 per hour. However, there was no evidence as to the precise amount per hour that was,

on average, paid to Mr. Lalande. He testified that his annual salary was calculated on the assumption that he would be paid $20 per hour.[18] Nevertheless, for reasons that will be set out below, I am of the view that his average hourly rate of pay was greater than $20.00 per hour.

[47] In subparagraph 8(uu) of the Reply, the Minister assumed that, with the exception of Ms. Mulder, the total earnings of the Corporation's other employees (i.e., other than Mr. Lalande) typically varied each pay period. The reason for which Mr. Lalande's and Ms. Mulder's respective earnings did not vary from pay period to pay period was that they were each being paid an annual salary, such that each pay period they each received a proportionate amount of that annual salary. During the hearing, Mr. Lalande and Ms. Mulder explained that, during the relevant period of time, the Corporation's bookkeeper was Ruby McCarville, who is Ms. Mulder's sister and who also worked as an assistant manager of the restaurant. As Mr. Lalande and Ms. Mulder both testified that Ms. McCarville was paid an annual salary, I am prepared to accept that her total earnings would likely not have varied from one pay period to the next. Accordingly, I am of the view that this assumption has been refuted in part, to the extent of one employee (i.e., Ms. McCarville), given that Ms. McCarville, like Ms. Mulder and Mr. Lalande, received an annual salary, but I do not think that anything turns on that point.

[48] In subparagraph 8(zz) of the Reply, the Minister assumed that Mr. Lalande was not laid off by the Corporation due to the Corporation's inability to pay Mr. Lalande's salary. Mr. Lalande and Ms. Mulder took issue with that assumption. Mr. Lalande and Ms. Mulder testified that, while Mr. Lalande was employed by the Corporation, the Corporation was losing money. As well, Mr. Lalande indicated in his evidence that he was terminated because the Corporation could no longer afford his salary. In addition, Ms. Mulder stated that, when she spoke with the Corporation's accountant about the Corporation's difficult financial situation, he advised her to reduce the Corporation's expenses and, in particular, to get rid of the Corporation's "big salaries," referring to the salaries paid by the Corporation to Mr. Lalande and Ms. McCarville. In my view, Mr. Lalande and Ms. Mulder have refuted this particular assumption. However, in doing so, they have identified another factor that supports the position taken by the Minister, namely, that, at a time when the Corporation was losing money, it was paying to Mr. Lalande a salary that was considered by the Corporation's

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[18] Mr. Lalande and Ms. Mulder testified that a typical restaurant manager is paid at the rate of $20 per hour.

accountant to be a "big salary." In my view, that factor was suggestive of a non-arm's-length arrangement.

[49] In subparagraph 8(aaa) of the Reply, the Minister assumed that Mr. Lalande was laid off by the Corporation so that he could apply for benefits under the EIA. Mr. Lalande and Ms. Mulder vehemently disagreed with this assumption. Based on the evidence presented during the hearing, I am satisfied that the Corporation laid off Mr. Lalande for the reasons set out in the preceding paragraph. Accordingly, this assumption has been refuted. However, I do not think that the refutation of this assumption is determinative of the issue that is before the Court.

E. Reasonableness of Minister's Conclusion

[50] While Mr. Lalande and Ms. Mulder have refuted some of the Minister's assumptions, it is important to note that not all of the assumptions are of equal significance in resolving the issue before the Court. As stated above, the underlying issue is whether, having regard to all the circumstances of Mr. Lalande's employment by the Corporation, including the remuneration paid, the terms and conditions of the employment, the duration and the nature and importance of the work performed, it is reasonable to conclude that the Corporation and Mr. Lalande would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. In focusing on the factual assumptions and the evidence that pertain to the circumstances of Mr. Lalande's employment, I am of the view that:

(a) although Mr. Lalande and Ms. Mulder have refuted some of the Minister's assumptions of fact, the facts that were proven by oral or documentary evidence and the assumed facts that were not refuted were sufficient to support the Minister's determination and conclusion that, having regard to all the circumstances of Mr. Lalande's employment, the Corporation and Mr. Lalande would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length; and

(b) the conclusion with which the Minister was satisfied (for the purposes of paragraph 5(3)(*b*) of the *EIA*) was reasonable, particularly having regard to the factors discussed below.

F. Factors Supporting the Minister's Conclusion

[51] As mentioned above, when Mr. Lalande began to work for the Corporation, the amount of his remuneration was initially left undetermined and, when it was finally determined unilaterally by Ms. Mulder, it was not written on the Agreement. As an employee's rate of pay is a fundamental term of a contract of employment, I would expect that, in a typical arm's-length employment situation, the rate of pay would generally be negotiated and agreed upon by the employer and the employee at the commencement of the employment and would be set out in writing. As this was not done here, it suggests that the Minister's conclusion was reasonable, i.e., that Mr. Lalande's contract of employment was not one into which arm's-length parties would have entered.

[52] The Minister assumed that Ms. Mulder controlled the day-to-day operations of the Corporation's business and made the major business decisions.[19] Neither Mr. Lalande nor Ms. Mulder disputed or challenged this assumption. In fact, Mr. Lalande repeatedly testified that all major decisions were made by Ms. Mulder, that she was the manager, that she told him what to do, that she was extremely experienced in the fast-food industry, and that he had no experience in that industry. When Mr. Lalande and Ms. Mulder described his duties, in subparagraph 3(a) of the respective questionnaires completed by them (i.e., Exhibits R-3 and R-4), neither of them referred to any managerial responsibilities. Therefore, it appears that, although Mr. Lalande had some supervisory or managerial functions, his managerial responsibilities may not have been as significant as he suggested in his testimony.

[53] Based on the questionnaires completed by Mr. Lalande and Ms. Mulder, the Minister understood that Mr. Lalande was expected to be "punched-in" and to work from 8:30 a.m. to 4:00 p.m. on Mondays, Thursdays and Fridays, and from 8:30 a.m. to 2:00 p.m. on Tuesdays and Wednesdays.[20] This would have resulted in either 33.5 "punched-in" hours per week, or, as Mr. Lalande was entitled each day to an unpaid half-hour break (when he was "punched-out"), 31 "punched-in" hours per week. The evidence is somewhat confusing in this regard, particularly as the responses to the questionnaires completed by Mr. Lalande and Ms. Mulder indicated that he was required to work 33 "punched-in" hours per week.

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19 See subparagraph 8(g) of the Reply.

20 See subparagraph 8(x) of the Reply.

Nevertheless, regardless of whether Mr. Lalande was required to work 31, 33 or 33.5 "punched-in" hours each week, he did so infrequently.[21]

[54] The attached Schedule to these Reasons analyzes Mr. Lalande's required and actual "punched-in" hours each week during the year that is the subject of the Decision, as those weeks are set out in the Pay Summary Reports (or timesheets) in Exhibit R-7. The focus of the Schedule is the number of "punched-in" hours that Mr. Lalande was required to work in a particular week and the number of "punched-in" hours that he actually worked in that week. The third column of the Schedule shows the number of "punched-in" hours that were required each week. In a typical five-day work week, Mr. Lalande would have been required to work 31, 33 or 33.5 "punched-in" hours, depending on the view that one takes of the evidence that was presented. In a week containing fewer than five working days, the required number of "punched-in" hours would have been less and would have been a function of the days on which Mr. Lalande worked (as he was expected to work two hours more on Mondays, Thursdays and Fridays than he was on Tuesdays and Wednesdays). The fourth column of the Schedule shows the actual number of "punched-in" hours worked each week by Mr. Lalande, as set out in Exhibit R-7. The fifth column of the Schedule shows whether Mr. Lalande met the required number of "punched-in" hours each week. A review of that column indicates that, particularly during the latter portion of the year in question, the number of "punched-in" hours actually worked by Mr. Lalande was frequently less than the required number of "punched-in" hours. In my view, in an arm's-length employment relationship, it is unlikely that an employer would countenance an employee frequently working fewer hours than required.

[55] Although the Corporation had a sophisticated system for tracking the hours worked by the Corporation's employees, including Mr. Lalande, when they were working at the restaurant while it was open, there was no system for tracking the number of hours worked by Mr. Lalande away from the restaurant premises (when he was going to the bank or picking up supplies) or when he was doing repairs while the restaurant was closed. The lack of a system to track, or at least record,

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[21] In subparagraphs 8(ii), (jj) and (kk) of the Reply, the Minister assumed that Mr. Lalande's hours varied from week to week, that he worked a total of 1,437.55 hours during the year in question and that, on average, he worked 27.64 hours per week during that year. It is notable that the average number of actual "punched-in" hours per week, i.e., 27.64, is significantly less than the required number of "punched-in" hours per week, regardless of whether Mr. Lalande was required to work 31, 33 or 33.5 "punched-in" hours per week.

Mr. Lalande's hours in those circumstances may perhaps be indicative of a non-arm's-length contract of employment.[22]

[56] The Minister assumed that Mr. Lalande was paid by the Corporation, on average, $28.52 per hour.[23] As discussed above, Mr. Lalande and Ms. Mulder provided evidence to satisfy me that his average rate of pay was less than $28.52 per hour; however, by reason of the fewer-than-required number of "punched-in" hours actually worked by Mr. Lalande, as set out in the Schedule to these Reasons, even if it were to be accepted that each and every week of his employment Mr. Lalande worked an additional 7 to 10 "non-punched-in" hours, his average rate of pay would still have been greater than $20 per hour.[24] As I am of the view that Mr. Lalande's average hourly rate of pay was greater than $20 per hour (which, according to Mr. Lalande and Ms. Mulder, is a typical hourly wage for a restaurant manager), I am reinforced in my view that the Minister's conclusion was reasonable, i.e., that Mr. Lalande's contract of employment was not one that would have been entered into by arm's-length parties.

[57] The Minister assumed,[25] and the evidence confirmed, that, after Mr. Lalande's employment was terminated, the Corporation did not replace him with another worker. Rather, Ms. Mulder and third-party contractors took over Mr. Lalande's former duties. The fact that Mr. Lalande was not replaced by the Corporation might suggest that his employment was not essential to the operations

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22 See *Porter, supra* note 15, ¶ 24, where the court commented (in a situation where the amount of work performed was more important than the specific hours worked) about the importance of an employer setting up a system to track the amount of work completed by an unrelated employee, suggesting that this is an indicator of an arm's-length employment relationship.

23 See subparagraph 8(11) of the Reply.

24 During the year in question, Mr. Lalande worked 1,437.55 "punched-in" hours (see the Schedule to these Reasons). If he worked 7 "non-punched-in" hours per week, his total number of hours for the year would have been 1,801.55 (i.e., 1,437.55 + [7 x 52]), and his average hourly rate of pay would have been $22.20 (i.e., $40,000 ÷ 1,801.55). If he worked 10 "non-punched-in" hours per week, his total number of hours in the year would have been 1,957.55 (i.e., 1,437.55 + [10 x 52]), and his average hourly rate of pay would have been $20.43 (i.e., $40,000 ÷ 1,957.55). It should also be noted, as discussed above, that I am not convinced that Mr. Lalande worked 7 to 10 "non-punched-in" hours each and every week during the year in question.

25 See subparagraph 8(ddd) of the Reply.

of the Corporation, which, in turn, would support the Minister's conclusion that arm's-length parties would not have entered into a contract of employment with terms, conditions and circumstances similar to those pertaining to Mr. Lalande's contract of employment.[26]

[58] The Minister assumed,[27] and the evidence confirmed, that the Corporation paid vacation pay to Mr. Lalande, as was done in respect of the Corporation's other employees. Although this factor is indicative of an arm's-length employment relationship,[28] I am of the view that this factor does not outweigh the factors set out above, which support the reasonableness of the Minister's conclusion.

G. Summary

[59] To sum up, and as indicated above, based on the evidence, it is my view that:

(a) the facts that were proven by oral or documentary evidence and the assumed facts that were not refuted by Mr. Lalande and Ms. Mulder were sufficient to support the Minister's conclusion that, having regard to all the circumstances of Mr. Lalande's employment, the Corporation and Mr. Lalande would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length;

(b) the conclusion with which the Minister was satisfied (for the purposes of paragraph 5(3)(*b*) of the *EIA*) was reasonable; and

(c) there is no basis for me to reach a conclusion different from the Minister's conclusion.

IV. Conclusion

[60] Accordingly, paragraph 5(3)(*b*) of the *EIA* does not apply so as to deem the Corporation and Mr. Lalande to deal with each other at arm's length. Hence, by reason of paragraph 5(2)(*i*) of the *EIA*, Mr. Lalande's employment by the

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[26] See *Porter*, *supra* note 15, ¶ 22;*Yahyaoui v MNR*, 2007 TCC 392, ¶ 14; *Fitzgerald v MNR*, 2008 TCC 552, ¶ 14 and 20; and *Johnson v MNR*, 2011 TCC 501, ¶ 22 and 26.

[27] See subparagraph 8(ss) of the Reply.

[28] See *Huntley*, *supra* note 15, ¶ 34.

Corporation from May 5, 2013 to May 4, 2014 was not insurable employment. Therefore, Mr. Lalande's Appeal is dismissed and the Decision is confirmed.

V. Refund of Premiums

[61] In the fifth paragraph of the Decision, the CRA advised Mr. Lalande that he may be entitled to a refund of the premiums paid by him under the *EIA*. Similarly, in the undated letter sent by the CRA to the Corporation, in conjunction with the Decision, the CRA advised the Corporation that it may be entitled to a refund of the premiums paid by it under the *EIA*. If Mr. Lalande and the Corporation have not already applied for such refunds and if they choose to do so, I trust that the CRA will work harmoniously with Mr. Lalande and the Corporation in processing the applications for refunds.

Signed at Ottawa, Canada, this 4th day of February 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

SCHEDULE

Analysis of "Punched-In" Hours

Week Number	Week Dates	Required Hours	Hours Worked	Analysis
1	04/29/2013-05/06/2013	31/33/33.5	28.39	Under 31
2	05/06/2014-05/13/2013	n/a	n/a	n/a
3	05/13/2013-05/20/2013	24/26 (4 days)	23.46	Under 24
4	05/20/2013-05/27/2013	24/26 (4 days + 1 stat)	20.63	Under 24
5	05/27/2013-06/03/2013	31/33/33.5	29.85	Under 31
6	06/03/2013-06/10/2013	31/33/33.5	28.00	Under 31
7	06/10/2013-06/17/2013	31/33/33.5	30.71	Under 31
8	06/17/2013-06/24/2013	31/33/33.5	32.26	Over 31 Under 33
9	06/24/2013-07/01/2013	17/18.5 (3 days)	19.30	Over 18.5
10	07/01/2013-07/08/2013	31/33/33.5 (7 days)	37.82	Over 33.5
11	07/08/2013-07/15/2013	31/33/33.5	35.91	Over 33.5
12	07/15/2013-07/22/2013	31/33/33.5	30.92	Under 31
13	07/22/2013-07/29/2013	31/33/33.5	31.60	Over 31 Under 33
14	07/29/2013-08/05/2013	31/33/33.5	30.53	Under 31
15	08/05/2013-08/12/2013	24/26 (4 days + 1 stat)	25.82	Over 24 Under 26
16	08/12/2013-	31/33/33.5	30.19	Under 31

	08/19/2013			
17	08/19/2013- 08/26/2013	31/33/33.5	30.69	Under 31
18	08/26/2013- 09/02/2013	31/33/33.5	29.76	Under 31
19	09/02/2013- 09/09/2013	17/18.5 (3 days + 1 stat)	15.62	Under 17
20	09/09/2013- 09/16/2013	31/33/33.5	31.50	Over 31 Under 33
21	09/16/2013- 09/23/2013	31/33/33.5	31.79	Over 31 Under 33
22	09/23/2013- 09/30/2013	31/33/33.5	30.71	Under 31
23	09/30/2013- 10/07/2013	31/33/33.5	33.24	Over 33 Under 33.5
24	10/07/2013- 10/14/2013	31/33/33.5 (6 days)	33.21	Over 33 Under 33.5
25	10/14/2013- 10/21/2013	24/26 (4 days + 1 stat)	24.89	Over 24 Under 26
26	10/21/2013- 10/28/2013	31/33/33.5	31.50	Over 31 Under 33
27	10/28/2013- 11/04/2013	26/28 (4 days)	25.48	Under 26
28	11/04/2013- 11/11/2013	31/33/33.5	30.45	Under 31
29	11/11/2013- 11/18/2013	31/33/33.5	31.12	Over 31 Under 33
30	11/18/2013- 11/25/2013	26/28 (4 days)	26.84	Over 26 Under 28
31	11/25/2013- 12/02/2015	24/26 (4 days)	22.09	Under 24
32	12/02/2015- 12/09/2013	31/33/33.5	30.68	Under 31
33	12/09/2013- 12/16/2013	31/33/33.5	29.70	Under 31
34	12/16/2013- 12/23/2013	31/33/33.5	28.99	Under 31

35	12/23/2013- 12/30/2013	14/15 (2 days + 2 stats)	7.88	Under 14
36	12/30/2013- 01/06/2014	21/22.5 (3 days + 1 stat)	16.65	Under 21
37	01/06/2014- 01/13/2014	31/33/33.5	32.60	Over 31 Under 33
38	01/13/2014- 01/20/2014	31/33/33.5	29.96	Under 31
39	01/20/2014- 01/27/2014	26/28 (4 days)	22.99	Under 26
40	01/27/2014- 02/03/2014	26/28 (4 days)	26.05	Over 26 Under 28
41	02/03/2014- 02/10/2014	31/33/33.5	28.21	Under 31
42	02/10/2014- 02/17/2014	31/33/33.5	29.06	Under 31
43	02/17/2014- 02/24/2014	24/26 (4 days + 1 stat)	21.84	Under 24
44	02/24/2014- 03/03/2014	31/33/33.5	27.66	Under 31
45	03/03/2014- 03/10/2014	31/33/33.5	23.98	Under 31
46	03/10/2014- 03/17/2014	26/28 (4 days)	24.18	Under 26
47	03/17/2014- 03/24/2014	31/33/33.5	27.49	Under 31
48	03/24/2014- 03/31/2014	31/33/33.5	28.99	Under 31
49	03/31/2014- 04/07/2014	31/33/33.5	29.38	Under 31
50	04/07/2014- 04/14/2014	31/33/33.5	29.72	Under 31
51	04/14/2014- 04/21/2014	24/26 4 days + 1 stat	21.45	Under 24
52	04/21/2014- 04/28/2014	31/33/33.5	28.88	Under 31

53	04/28/2014-05/05/2014	31/33/33.5	26.93	Under 31
Total			1437.55	

CITATION:	2016 TCC 33
COURT FILE NO.:	2015-207(EI)
STYLE OF CAUSE:	CHRISTIAN LALANDE AND THE MINISTER OF NATIONAL REVENUE AND 2210066 ONTARIO INC.
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DATE OF HEARING:	November 2, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
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