Dockets: 96-2427(UI)
1999-4382(EI)
1999-4386(EI)
1999-4391(EI)

BETWEEN:

LYNE PÉRUSSE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on December 2, 3, 4, 5, and 6, 2002, at New Carlisle, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Guy Cavanagh
Counsel for the Respondent:	Valérie Tardif Chantal Jacquier

JUDGMENT

The appeals are dismissed and the Minister's decisions are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of May 2003.

"François Angers"

J.T.C.C.

Translation certified true
on this 13th day of May 2004.

Sharlene Cooper, Translator

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REASONS FOR JUDGMENT

Angers, J.T.C.C.

[1] These appeals were heard on common evidence at New Carlisle, Quebec. They are appeals from decisions of the Minister of National Revenue (the "Minister") that the Appellant did not hold insurable employment with Guy Cavanagh (the "Payor") during the periods from June 22 to September 11, 1992, from May 3 to July 23, 1993, from April 18 to July 8, 1994, from April 10 to July 7, 1995, and from March 4 to May 31, 1996, in Docket 96-2427(UI) (hereinafter "2427"); from January 6 to May 30, 1997, in Docket 1999-4382(EI) (hereinafter "4382"); and from June 16 to December 26, 1997, in Docket 1999-4386(EI) (hereinafter "4386"). Docket 1999-4391(EI) (hereinafter "4391") is an appeal from a decision of the Minister that the Appellant did not hold insurable employment with 9055-2159 Québec Inc. (hereinafter "9055 Qué. Inc."), during the period from December 29, 1997, to May 29, 1998.

[2] In Docket 2427, the Minister determined that the Appellant's employment during the periods at issue was not insurable under paragraph 3(2)(*c*) of the *Unemployment Insurance Act* (*UIA)*, because the Appellant and the Payor were not dealing with each other at arm's length and, if they had been dealing with each other at arm's length, the terms and conditions of employment would not have been the same.

[3] In rendering his decision in this case, the Minister relied on the following assumptions of fact, which the Appellant admitted or denied as indicated:

> [TRANSLATION]
>
> (a) The Payor practises law without a partner; **(denied)**
>
> (b) He employs two legal secretaries, one who works approximately 35 weeks per year and one who works approximately 18 weeks per year; **(admitted)**
>
> (c) The Appellant is the Payor's common-law spouse; **(admitted)**
>
> (d) They have three children who were ten, seven and four years of age in the summer of 1996; **(admitted)**
>
> (e) The Appellant has worked for the Payor as an office clerk since 1987; **(admitted)**
>
> (f) Her duties mainly consisted of:
>
> bookkeeping,
> preparing annual financial statements,
> preparing income tax returns,
> preparing statistics;
> **(denied)**
>
> (g) She worked full-time for 11 to 13 weeks per year and four hours per week for the remainder of the year; **(admitted)**
>
> (h) She received weekly remuneration of $700, for 32.5 hours of work in 1992 and 1993, and for 35 hours the following years; **(denied)**
>
> (i) She earned $80 for weeks in which she worked four hours; **(admitted)**

(j) The legal secretaries earned $350 to $400 per week for weeks of 32.5 to 35 hours; **(admitted)**

(k) The Appellant claims to have spent three weeks full-time preparing the income tax returns, whereas, employed full-time on June 22, 1992, May 3, 1993, and April 18, 1994, the Payor's federal tax returns for 1991, 1992 and 1993 were filed on April 30, 1992, April 12, 1993 and April 29, 1994; **(denied)**

(l) The Payor's financial statements show the following income:

	Gross Income	Net Income
As at 30/6/92	$130,965	$34, 009
As at 30/6/93	$106,982	$19, 645
As at 30/6/94	$105,396	$13, 796
As at 30/6/95	$141,630	$50,740

(admitted)

(m) The Appellant's duties did not require the hiring of a full-time employee for 10 to 13 weeks per year; **(denied)**

(n) The number of workweeks for each of the years at issue correspond to the minimum number of weeks the Appellant required to qualify for unemployment insurance benefits; **(denied)**

(o) For each period, she received unemployment insurance benefits until the day on which she started working full-time again; **(admitted)**

(p) The Appellant's salary was too high for her assigned duties; **(denied)**

(q) The Appellant had a *de facto* non-arm's length relationship with the Payor under the *Income Tax Act* for the period at issue from June 22 to September 11, 1992, in view of the aforementioned circumstances; **(denied)**

(r) In addition, for the subsequent periods at issue, it is not reasonable to conclude under the aforementioned circumstances that the Appellant would have entered into a

> substantially similar contract of employment if she had been dealing with the Payor at arm's length. **(denied)**

[4] In Docket 4382, the Minister determined that the Appellant's employment during the period at issue was not insurable under paragraph 5(2)(*i*) and subsection 5(3) of the *Unemployment Insurance Act* ("UIA") because the Appellant and the Payor were not dealing with each other at arm's length and, upon examining the terms and conditions of employment, that the parties would not have entered into a substantially similar contract if they had been dealing with each other at arm's length.

[5] In rendering his decision in this case, the Minister relied on the following assumptions of fact, which the Appellant admitted or denied as indicated:

> [TRANSLATION]
>
> (a) The Payor has operated a general law office since July 13, 1987, and since July 13, 1992, he has also operated a financial planning office. **(admitted)**
>
> (b) On October 3, 1997, following the incorporation of "9055-2159 Québec Inc.," the Payor's operations were split: Guy Cavanagh operates the general law office and the corporation operates the financial planning and management office. **(admitted)**
>
> (c) The Payor has a business office in New Richmond, Quebec, and when his law office opened in 1997, he hired the Appellant, his common-law spouse, as an office clerk. **(admitted)**
>
> (d) The Payor operates his law office year round. **(admitted)**
>
> (e) From 1987 to 1992, the Appellant held the position of office clerk on a continuous part-time or full-time basis. **(admitted)**
>
> (f) From 1992 to May 30, 1997, including the period at issue, the Appellant held the positions of office clerk, on a continuous part-time or full-time basis, and of financial planning assistant during the full-time periods. **(admitted)**
>
> (g) For the period at issue, the Appellant was listed on the Payor's payroll for 18 full-time weeks, at $700 gross per

week, and for two part-time weeks, at $80 per week. **(admitted)**

(h) During the period at issue, the Appellant received a fixed weekly salary of $700 for 32.5 hours per week (in the summer) or 35 hours per week during the remaining weeks; when she worked part-time, she worked four hours per week and she received a weekly salary of $80. **(admitted)**

(i) The Payor supervised the Appellant regardless of whether she was working as an office clerk or planning assistant. **(admitted)**

(j) During the period at issue, the Payor hired Ms. Josée Audet as a legal secretary; she received weekly remuneration of $420 for 35 hours of work. **(admitted)**

(k) The Payor also employed Ms. Louisa Bujold as a legal secretary, from the beginning of June until the end of November 1997, paying her $420 per week for 32.5 or 35 hours per week. **(admitted)**

(l) The Appellant was laid off on May 30, 1997, and the Payor hired Ms. Bujold full-time upon the Appellant's departure. **(admitted)**

(m) Unlike the two legal secretaries he hired exclusively for the full-time periods, the Payor could list the Appellant as full-time or part-time. **(admitted)**

(n) The Appellant received weekly remuneration of $700, whereas the two legal secretaries received weekly remuneration of $420 for the same number of hours. **(admitted)**

(o) The Appellant was listed on the Payor's payroll as part-time, full-time or was laid off regardless of the Payor's periods of activity or income. **(denied)**

(p) The Appellant rendered services to the Payor year round; however, she was only paid for certain periods. **(denied)**

[6] In Docket 4386, the Minister determined that the Appellant's employment during the period at issue was not insurable, for the same reasons as those for Docket 4382. In rendering his decision, the Minister relied on the following assumptions of fact, which the Appellant admitted or denied as indicated:

[TRANSLATION]

(a) The Payor has operated a general law office since July 13, 1987, and since July 13, 1992, he has also operated a financial planning office. **(admitted)**

(b) On October 3, 1997, following the incorporation of "9055-2159 Québec Inc.," the Payor's operations were split: Guy Cavanagh operates the general law office and the corporation operates the financial planning and management office. **(admitted)**

(c) The Appellant worked for the Payor's law office until December 26, 1997, and she started being paid by the corporation on December 29, 1997. **(admitted)**

(d) The Payor has a business office in New Richmond, Quebec, and when his law office opened in 1987, he hired the Appellant, his common-law spouse, as an office clerk. **(admitted)**

(e) The Payor operates his law office year round. **(admitted)**

(f) From 1987 to 1992, the Appellant held the position of office clerk on a continuous part-time or full-time basis. **(admitted)**

(g) From 1992 until the end of November 1997, the Appellant held the positions of office clerk, on a continuous part-time or full-time basis, and of financial planning assistant during the full-time periods; starting on January 1, 1997, the Appellant also performed secretarial work. **(admitted)**

(h) During the period at issue, the Appellant was listed on the Payor's payroll as follows:

- From June 16 to November 28, 1997: four hours per week, except for the week of September 1-5, for which 6 hours were listed.
- From December 1-19: full-time, 40 hours per week.
- From December 22-26: four hours.

(denied)

(i) During the period at issue, the Appellant received a fixed weekly salary of $700 for 32.5 hours per week (in the summer) or 35 hours per week during the remaining weeks; as of December 1, 1997, her hours increased to 40 hours per week; when she worked part-time, she received a salary of $20 per hour. **(admitted)**

(j) The Payor supervised the Appellant regardless of whether she was working as an office clerk or planning assistant. **(denied)**

(k) From January to the beginning of June 1997, the Payor hired Josée Audet as a legal secretary; she received weekly remuneration of $420 for 35 hours of work. **(admitted)**

(l) During the period at issue, the Payor hired Louisa Bujold as a legal secretary, from the beginning of June until the end of November 1997, paying her $420 per week for 32.5 or 35 hours per week. **(admitted)**

(m) The Appellant was laid off on May 30, 1997, and the Payor hired Ms. Bujold full-time upon the Appellant's departure. **(admitted)**

(n) Unlike the two legal secretaries he hired exclusively for the full-time periods, the Payor could list the Appellant as full-time or part-time. **(admitted)**

(o) The Appellant received weekly remuneration of $700, whereas the two legal secretaries received weekly remuneration of $420 for the same number of hours. **(admitted)**

(p) The Appellant was listed on the Payor's payroll as part-time, full-time or was laid off regardless of the Payor's periods of activity or income. **(denied)**

(q) The Appellant rendered services to the Payor year round; however, she was only paid for certain periods. **(denied)**

[7] Finally, in Docket 4391, the Minister determined that the Appellant's employment during the period at issue was not insurable, for the same reasons as in Dockets 4382 and 4386, except that in this case, the Payor is 9055 Qué. Inc., the only share of which is held by Fiducie ACMAP, of which Mr. Cavanagh is the sole director. In rendering his decision, the Minister relied on the following assumptions of fact, which the Appellant admitted or denied as indicated:

[TRANSLATION]

(a) Guy Cavanagh has operated a general law office since July 13, 1987, and since July 13, 1992, he has also operated a financial planning office. **(admitted)**

(b) On October 3, 1997, following the incorporation of the Payor, Mr. Cavanagh's operations were split: Guy Cavanagh operates the general law office and the Payor operates a financial planning and management office. **(admitted)**

(c) The Payor's sole shareholder is Fiducie ACMAP, which holds the only Class "A" common voting share; Mr. Cavanagh is the sole director of the trust, the beneficiaries of which are the three minor children of Mr. Cavanagh and the Appellant. **(admitted)**

(d) The Appellant worked for Mr. Cavanagh's law office until December 26, 1997, and she started being paid by the Payor on December 29, 1997. **(admitted)**

(e) As of December 29, 1999, the Appellant performed all of the duties previously associated with Mr. Cavanagh's law office, as well as the same duties for the Payor. **(admitted)**

(f) As of December 29, 1997, Mr. Cavanagh's law office no longer engaged personnel, because from that point on the Payor assumed its management. **(admitted)**

(g) Mr. Cavanagh has a business office in New Richmond, Quebec, and when his law office opened in 1987, he hired the Appellant, his common-law spouse, as an office clerk. **(admitted)**

(h) Mr. Cavanagh's law office and the financial planning and management office are operated year round. **(admitted)**

(i) From 1987 to 1992, the Appellant held the position of office clerk on a continuous part-time or full-time basis for Mr. Cavanagh. **(admitted)**

(j) From 1992 until the end of November 1997, the Appellant held the positions of office clerk, on a continuous part-time or full-time basis, and of financial planning assistant during

the full-time periods; starting on January 1, 1998, the Appellant also performed secretarial work. **(denied)**

(k) During the period at issue, the Appellant was listed on the Payor's payroll as follows:

- From December 29, 1997 to January 2, 1998, for a total of four hours.
- From January 5 to May 29, 1998, full-time, 40 hours per week.

(denied)

(l) During the period at issue, the Appellant received a fixed weekly salary of $700 for 40 hours per week; when she worked part-time, she received a salary of $20 per hour. **(admitted)**

(m) The Payor supervised the Appellant regardless of whether she was working as an office clerk or planning assistant. **(admitted)**

(n) Mr. Cavanagh hired Louisa Bujold as a legal secretary, from the beginning of June until mid-October, paying her $420 per week for 32.5 or 35 hours per week. **(admitted)**

(o) Unlike the two legal secretaries Mr. Cavanagh hired exclusively for the full-time periods, he could list the Appellant as full-time or part-time. **(admitted)**

(p) The Appellant received weekly remuneration of $700, whereas the two legal secretaries received weekly remuneration of $420 for the same number of hours. **(admitted)**

(q) The Appellant was listed on the Payor's payroll as part-time, full-time or was laid off regardless of the Payor's periods of activity or income. **(denied)**

(r) The Appellant rendered services to Mr. Cavanagh and to the Payor year round; however, she was only paid for certain periods. **(denied)**

[8] In all of these appeals, the Appellant maintains that paragraph 3(2)(*c*) of the UIA, as well as paragraph 5(2)(*i*) and subsection 5(3) of the EIA are discriminatory

and infringe the right to equality guaranteed under section 15 of the *Canadian Charter of Rights and Freedoms* ("Charter"), which reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[9] It is important to note that Docket 2427 involves a new trial held in accordance with a Federal Court of Appeal judgment dated March 10, 2000. The Federal Court of Appeal ruled on the constitutional issue raised by the Appellant and it concluded that there was no breach of subsection 15(1) of the Charter. In this case, the Appellant not only raised this issue during the new trial, which was ordered by the Federal Court of Appeal, but also during the subsequent appeals before this Court. In this case, notice was given to the federal and provincial Attorneys General, in accordance with the *Federal Court Rules*. I will come back to the constitutional issue later in my reasons.

[10] The fact that the Appellant and the Payor are common-law spouses is admitted for all of the periods at issue. Thus, there was a non-arm's length relationship between them during these years, including those in which the Payor was a corporation controlled by Mr. Cavanagh. In 1992, the Act did not refer to common-law spouses. Thus, the Minister argues that during this year, there was a *de facto* non-arm's length relationship. As the Appellant admitted, she and the Payor have three children, who were ten, seven and four years of age in the summer of 1996.

[11] The Payor has been practising law since 1982 and he operates a forestry business. In 1987, he opened his own office and hired one full-time legal secretary. Needing someone to do the bookkeeping and to perform other accounting duties for his law office and his business, he decided, upon consultation, that it would be less expensive for him to pay someone 18 to 20 dollars per hour to work on-site than it would be to hire an accounting firm at a cost of 50 dollars per hour. Therefore, he decided to hire his spouse. The latter has a Doctorate in Industrial Relations from Université Laval; she was doing contract work for the university at the time and she was earning between $700 and $1,000 per week. He not only felt that his spouse could provide technical assistance, he also believed that her training could be useful to him when dealing with cases involving the negotiation of collective agreements or the CSST. Thus, she became a resource person. She has worked a number of weeks a year for the Payor since 1987. During the years at issue in these appeals, she worked for eleven weeks in 1992, twelve weeks in 1993

and 1994, thirteen weeks in 1995 and 1996, twenty-one weeks in 1997, thirty-one weeks in 1998 and forty-three weeks in 1999. The number of hours worked per week varied between thirty-two and thirty-five hours. For the remainder of the year, the Appellant worked four hours per week, at an hourly rate of twenty dollars. She has worked full-time since 2000.

[12] The Payor testified that he had wanted to hire the Appellant for the entire year during the years at issue in these appeals; however, this was not feasible due to his sales figures. In this regard, he filed Exhibit A-1, showing his total gross income for each of the years at issue, including the years in which he incorporated his company and began providing financial planning services.

[13] When she was hired in 1987, the Appellant was paid $530 per week. For all of the periods at issue, her salary was $700 per week. She was paid $20 per hour during the weeks in which she worked four hours. According to the Payor, the Appellant was an important resource person in addition to having the necessary accounting skills. Her salary was set upon consultation with an accounting firm.

[14] The Payor filed in evidence the Appellant's curriculum vitae, the activity report that the Appellant prepared and her degree. Then he summarized the work she performed during each of the periods at issue.

[15] In 1992, the Appellant's mandate was to redo the billing for a number of the Payor's cases in order to specify the time he had spent on those cases. In addition, she helped the Payor with other cases and she did the accounting. During the eleven weeks that she worked, her hours of work were from 8:30 a.m. to noon and from 1:30 p.m. to 4:30 p.m. During this period, she performed her work at the office. The Payor emphasized that during all of the periods at issue, the Appellant did not receive any employment benefits other than those set out by law, as was the case with his other employees.

[16] The Payor explained that during 1993, 1994 and 1995, the Appellant came to work for him to meet the needs of his law office and to help him with some of his cases. When he became a financial planner, the Appellant's workload increased, which explains the increase in the number of workweeks until 1997. She had to prepare questionnaires and perform other duties relating to the financial planning services the Payor provided. She continued to do the accounting and she worked as a legal secretary in December 1997. He explained that the Appellant was three employees in one. During the last period at issue, she worked thirty-one weeks to complete the duties the Payor had assigned her. During the last period,

the incorporation of 9055-2159 Québec Inc. created extra work for the Appellant, which explains her additional workweeks.

[17] On cross-examination, the Payor testified that he spent approximately 25% to 30% of his time on financial planning services and that this percentage remained the same from 1992 to 1998. His services in this area are mainly associated with his law practice cases concerning separations, claims for damages and debt management for his clients. He explained that, when she was at the office, the Appellant's work consisted of analyzing financial data with him. Furthermore, he specified that he analyzed the data alone in her absence. He obtained information from clients; subsequently, the Appellant prepared the necessary balance sheets and financial statements. He acknowledged that the Appellant is not a financial planner and that there were no off-peak periods during the year. This work was continuous, although some months were busier than others.

[18] The Payor still had a full-time legal secretary. Their hours of work were the same as those of the Appellant and their salary varied between $350 and $400 per week. The legal secretaries' work was shared between two employees who were sharing the weeks. They never worked at the same time. One of the legal secretaries had a college diploma and the other had completed three years of studies.

[19] Exhibit I-1, tab 15, is the Appellant's request with regard to the insurability of her employment in Docket 2427, for the periods from 1992 to 1995. The Appellant's position title is office clerk. In this document, she described the duties she was required to carry out during the four-hour workweeks and her duties for the weeks in which she worked full-time. The duties the Appellant was required to carry out on a continuous basis, that is, four hours per week, included accounts receivable, accounts payable, quarterly GST and QST reports, payroll, bookkeeping, human resources management and bookkeeping for the trust account. The duties to be performed during the 35-hour workweeks, or 32.5-hour weeks in the summer, included preparing income tax returns, financial statements and statistics, updating various aspects of the Payor's practice, human resources management, special studies such as surveys, and remaining current in terms of computers and financial planning.

[20] The Payor acknowledged that he communicated with his debtors personally, in spite of the fact that, according to Exhibit I-1, tab 15, this duty was assigned to the Appellant. He was unable to specify when the Appellant completed her duties when she worked part-time, that is, four hours per week. He referred to one four-hour evening per week. Subsequently, he acknowledged that the time sheets

in Exhibit I-1, tab 33, indicated one hour per evening, four evenings per week. He said that he talked to the Appellant to decide which evening she had to work. In the end, he admitted that her schedule was flexible. The Payor was unable to determine the amount of time required to complete each of the duties the Appellant performed when she worked four hours per week; the time specified was an estimate of the amount of time spent on each task.

[21] With regard to the duties performed year round, he was unable to specify the amount of time spent on each of the duties described. He acknowledged that the income tax returns had to be completed prior to May 1 every year. The financial statements had to be ready by March 30 every year, and after 1996, they had to be ready by December 31 every year.

[22] Statistical information was used to divide the various fields of the Payor's practice and to identify the clients' place of residence in order to target advertising more effectively. However, for 1992-1998, he could not say during which years the statistics at issue had been prepared. The Payor admitted that the Appellant collected less data over the years, due to her workload. The Payor could not identify the amount of time devoted to this heading.

[23] The Payor admitted that the Appellant had to complete the duties listed under the heading [TRANSLATION] "updating" during her four-hour workweeks rather than when she worked full-time, as it was necessary to complete these duties year round. They included accounts receivable, credit card accounts and the filing of invoices. In spite of this admission, the Payor maintained that the Appellant did not accumulate the work that should be done when she was working part-time in order to do it when she was working full-time.

[24] The heading [TRANSLATION] "Human Resources Management" is a duty that the Appellant performed when she worked full-time. The Payor testified that this mainly involved ensuring the quality of the written and spoken French used at the office. He testified that he performed this duty in the Appellant's absence. He confirmed that the Appellant was responsible for occupational health and safety and he gave as an example that she was responsible for the height of the chairs and computer screens. He stated that the Appellant evaluated the secretary on a daily basis.

[25] The Payor was unable to describe what the heading [TRANSLATION] "special studies" involved, except he remembered that in 1992, the Appellant had drafted a report for one of his clients, which apparently required one to two workweeks to complete.

[26] The second last heading of annual duties performed during the Appellant's full-time work periods is entitled [TRANSLATION] "Information on New Developments." The Payor testified that in 1996 he asked the Appellant to study accounting software for his law office. He could not specify the amount of time she spent on this task and the project was later abandoned.

[27] The Payor testified that in 1993, he asked the Appellant to study a training course on financial planning. Already holding the title of financial planner, he wanted to upgrade his skills so that in 1997, he was able to introduce himself as such. The Appellant's work consisted of studying and summarizing the content of two volumes entitled "Successful Investing & Money Management." The Payor claimed to have studied them as well. The Appellant performed the work; however, she spread it out over three years, that is, from 1993 to 1995. She performed the work during the full-time employment periods.

[28] In 1996, the Payor enrolled in a course entitled [TRANSLATION] "Personal Financial Planning Synthesis" provided by the Institut québécois de planification financière. It involved the scheduled study and submission of a series of modules; it also involved studying two cases submitted by the Institut. Although she was not enrolled in the course, the Appellant studied and prepared each of the modules for the Payor. The first module was submitted on February 14, 1996, and the last one was submitted on June 28, 1996. Furthermore, in 1997 and 1998, the Appellant prepared a checklist, questionnaires and forms, making it easier to open files and compile information obtained from the Payor's clients. On January 29, 1997, the Payor received his certification as a financial planner.

[29] From December 1-19, 1997, the Appellant replaced the Payor's secretary. Subsequently, the Payor's corporation hired her for the period from January 6 to May 30, 1998, to perform her usual duties. Josée Audet was the secretary during the same period. According to the Payor, the Appellant was laid off on May 31, 1996, and on May 30, 1997, because her services were no longer required. However, he could not explain why the layoffs occurred on those dates. He claimed that the Appellant worked based on the requirements of his office.

[30] On cross-examination, Counsel for the Respondent inquired about the Payor's net income for each of the years at issue. The amounts in question are as follows.

Year	Gross Income	Net Income
1992	$154,507	$47,016

1993	$96,180	$21,807 ($27,212 following the audit)
1994	$99,180	$23,833 ($29,989 following the audit)
1995	$164,147	$34,953 ($46,352 following the audit)
1996	$108,499	
1997	$111,225	$26,435
1998	$154,192	$48,403

[31] The Appellant testified that she was hired by her common-law spouse, the Payor, when his office opened in 1987, to help organize the law office. At that time, her salary was set at $530 per week. In 1990, she earned $640 per week, and during the periods at issue, she earned $700 per week. For the purposes of this case, the Appellant filed in evidence a summary of the duties she performed for the Payor for each of the periods at issue. This document is filed as Exhibit A-8.

[32] According to her testimony and the summary at issue, the Appellant was responsible for regular and continuous duties, which she performed four hours per week during most of the periods. During the thirty-two and thirty-five hour workweeks, it seems as though the Appellant was assigned to specific projects, in addition to her regular work that required four hours per week.

1992

[33] The period of employment at issue is June 22 to September 11, 1992, or eleven weeks. This work period was necessary in order to carry out the duties associated with the fiscal year end, June 30. The Appellant testified that she also worked on the Payor's cases. In one particular case, her abilities made it possible to resolve the issue at hand. In addition, the Appellant had to redo the billing for a number of the Payor's cases, some of which required one month of work. In September 1992, the Payor acquired the title of financial planner and the Appellant had to make the appropriate preparations. She also spent time organizing the Payor's library.

1993

[34] The period is May 3 to July 23, 1993, or twelve weeks. The fiscal year still ended on June 30 and the Appellant prepared annual financial statements. During her full-time work period, the Appellant studied and summarized the first seven lessons of the Hume Publishing Company Ltd. study program (Exhibit A-6) entitled "Successful Investing & Money Management." The Appellant claimed that she had to become familiar with financial planning in order to provide services to the law office's clientele. Thus, she had to update her skills. As a result, she

summarized various economic indicators as well as certain documents for the Payor. Furthermore, the Appellant performed this work during the periods from 1993 to 1995. In addition, she explained the amount of time she spent on each of her duties when she worked part-time.

1994

[35] The period is April 18 to July 8, or twelve weeks. During the weeks in which she worked full-time, her work consisted of studying and summarizing lessons 8 to 15 of the Hume study program, continuing her training in economics and summarizing texts.

1995

[36] The period is April 10 to July 7, or thirteen weeks. She completed the same two duties as in 1994, that is, studying and summarizing lessons 16 to 19 and lesson 26 of the Hume study program, and continuing her economics training. According to the Appellant, the Payor told her that it was not necessary to complete lessons 27 to 31 of the program. In 1995, the Appellant had to prepare two financial statements because the fiscal year-end date had changed.

1996

[37] The period is March 4 to May 31, or thirteen weeks. During this full-time work period, the Appellant had to become familiar with tax and financial planning in order to provide services to the law office. The Appellant and the Payor had to complete thirteen modules, study two cases and summarize the modules during the period from February 5 to May 30. Thus, they completed this work together; in addition, she continued her training in economics and in financial mathematics methods.

1997

[38] The period is January 6 to January 24, for four hours per week, and January 27 to May 30, full-time, or eighteen weeks. As Exhibit A-3, the Appellant filed in evidence an activity report for this period. The Payor's financial planning service was established at the beginning of 1997. Thus, the Appellant prepared standard forms for opening files and for collecting information from clients to develop strategies; in short, she prepared everything necessary to providing the services. In addition, the Appellant wrote newspaper advertorials.

[39] The Appellant returned to work full-time from December 1-19, 1997. She carried out her duties as office clerk and she worked as a legal secretary, because Ms. Bujold had to leave the office. Thus, she had agreed to assist the Payor during this period.

[40] On October 3, 1997, the Payor formed a management company, 9055 Que. Inc., which did not start doing business until January 1, 1998. Thus, during the period from December 29, 1997, to May 29, 1998, the Appellant worked for this company for one four-hour workweek and for twenty-one forty-hour workweeks. She returned to work from June 15 to October 16, 1998. She performed three functions during the period at issue: office clerk, financial planning assistant and legal secretary.

[41] The Appellant testified that she has seen all kinds of things since 1993. Prior to that year, she was entitled to unemployment/employment insurance benefits, as were all Canadian citizens. Ever since amendments to the Act changed the insurability of employment in cases involving a non-arm's length relationship, the Appellant has been denied this benefit. Now, she must satisfy the Minister that an actual contract of service exists and that the terms and conditions of employment are no different than they would be for an unrelated person. The Appellant explained that when she went to the Human Resources Development Canada office in 1993, she was reminded to indicate that she had been hired by her spouse. Apparently, the individual made this remark in a dry, reproachful tone of voice, as the individual was acquainted with the Appellant.

[42] In addition, the Appellant testified that she was outraged by the comments appearing in the report of Jean Blais, an insurability officer with Human Resources Development Canada. This comment alluded to the fact that people would like to work for their spouse for 10 to 12 weeks. The Appellant described the difficulties she had encountered in her efforts to find employment and she explained the reality that women face in securing employment in the Gaspé Peninsula. In addition, the Appellant described a conversation with Gilles Turgeon, an Appeals Officer with CCRA, concerning the fact that she worked for her husband who is an attorney. The Appellant felt as though this meant she did not need unemployment insurance benefits.

[43] In addition, Jean Blais's report points out that the fact that the Payor is representing the Appellant free of charge is a determining factor with regard to a non-arm's length relationship. She was humiliated by these comments. Overall, she argued that the officers' work was not carried out in accordance with established practice and that they did not review her case objectively.

[44] On cross-examination, the Appellant seemed somewhat uncertain with regard to the amount of time required to prepare the financial reports and to collect the information required for their preparation, both for the Payor's law office and for their forestry and farm businesses. She was also uncertain as to whether or not this work was carried out when she was working part-time or full-time. In addition, the Appellant acknowledged that during the periods in which she worked part-time, she performed her duties at her home after the children were in bed.

[45] Furthermore, the Appellant was unable to specify how her time was divided between her duties as a legal secretary, and those as a financial planning assistant and an office clerk during the years at issue. In addition, she was unable to specify the amount of time she spent studying the thirty-one lessons of the Hume study program, or the reason it took her three years to do so, as well as summarizing an economics book that the Payor had not read. It is important to note that all of the Appellant's applications for unemployment/employment insurance benefits indicate a lack of work as the reason for separation.

[46] Gilles Turgeon is the Appeals Officer who was responsible for the Appellant's case for the periods from 1992 to 1996. This case was forwarded to him following a disagreement with regard to a ruling made by an officer from Human Resources Development Canada concerning the insurability of the employment. He received the Appellant's file for the periods from 1992 to 1995 in June 1996, and two weeks later, he received the file for 1996. He obtained the agreement of the Payor, who is also Counsel for the Appellant, to the effect that the interviews and information collected for the four years at issue also apply to 1996. He obtained this agreement through a discussion with the Payor on July 24, 1996.

[47] Mr. Turgeon filed his report in evidence. He interviewed the Appellant and the Payor, as well as the other stakeholders in the case. In addition, he consulted a statistician, an attorney and an auditor at the Revenue Canada office. He reviewed the documentation relevant to the case and he analyzed the time that the Appellant may have devoted to her duties. This information was obtained through interviews with the Appellant and the Payor, and mainly concerned task-sharing between the part-time work periods and the full-time work periods and the periods of the year

during which certain tasks were completed, such as taxes, as well as the amount of time devoted to these tasks. He submitted this information to his consultants for the purpose of conducting a comparative analysis.

[48] Furthermore, Mr. Turgeon reviewed the Appellant's salary, comparing it to the duties she performed, and he compared the entire situation having regard to the size of the business and the salary paid to other office employees in the province of Quebec. He questioned the duration of employment during the periods from 1992 to 1996, when it might have been more logical to hire the Appellant part-time year round, and full-time during peak periods, particularly since the business is operated year round. He also questioned the nature and importance of the work, as his analysis led him to determine that it was not necessary to use the accounting services of a full-time employee for ten to thirteen weeks from year to year.

[49] On cross-examination, Mr. Blais's competence and the way in which he carried out his work were called into question, as was the lack of resources the department made available to him. Mr. Blais denied suggesting that he would like to have the Appellant's job, claiming that such a comment would not be appropriate at the start of such an investigation.

[50] Jean-Pierre Gauthier is a CGA who works as an auditor for the Canada Customs and Revenue Agency. He was mandated to analyze the Appellant's duties as well as the Payor's accounting system, and to audit the Payor's income tax returns for 1992 to 1995 inclusive. He met with the Payor and spent three and a half days at the Payor's office. Based on his analysis, he determined that the Payor's accounting, both at the law office and at the forestry business, would require a fast, experienced employee to work part-time, ten hours per week. Mr. Gauthier did not analyze the time the Appellant may have spent working as a financial planning assistant.

[51] Jean Vézina is the Appeals Officer who was responsible for the periods at issue in 1997 and 1998. He filed his reports in evidence and testified concerning their content. He had telephone conversations with the Payor (Counsel for the Appellant) in which the Payor confirmed that the Appellant performed the same work from January to May 1997 as she had during the preceding years. The Payor informed the officer that the extra duties were added to her existing duties, that is, those of a legal secretary. Mr. Vézina was informed that a management company had been formed, the sole shareholder of which is a trust that is managed by the Payor. In addition, Mr. Vézina examined the documentation used by Appeals Officer Jean Blais during the prior periods.

[52] On cross-examination, it was revealed that the witness is not a task analysis specialist and that his employer does not provide him with any means of evaluating and analyzing this factor.

[53] In this case, the Appellant must show, on a balance of probabilities, that the Minister exercised his discretion improperly in determining that, having regard to all the circumstances, the Payor and the Appellant would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. According to the Federal Court of Appeal in *Canada v. Jencan*, [1997] F.C.J. No. 876, [1998] 1 F.C. 187, the Appellant must establish that the Minister acted in bad faith or for an improper purpose or motive, that he failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(*c*)(ii) of the UIA and paragraph 5(3)(*b*) of the EIA, or that he took into account an irrelevant factor.

[54] In *Légaré v. M.N.R.*, [1999] F.C.J. No. 878, the Federal Court of Appeal summarized the role of the Minister and that of the Court. Marceau J., summed it up as follows at paragraph 4:

> 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.

[55] The question of whether persons have a non-arm's length relationship, under the UIA and the EIA, must be determined in accordance with the *Income Tax Act* (ITA). Section 251 deals with the issue of related persons, because related persons do not deal with each other at arm's length. Under section 251, there is an irrebuttable presumption that persons connected by marriage or by common-law

partnership are related persons within the meaning of the ITA. However, this presumption did not include common-law spouses prior to 1993, when the ITA was amended to include them among related persons (subsection 252(4) of the ITA, applicable after 1992). Therefore, the Respondent cannot use this presumption for the first period at issue in this case. Thus, he must show that the parties were, in fact, not dealing with each other at arm's length. Paragraph 251(1)(*c*) of the ITA may apply, with the effect that common-law spouses are not dealing with each other at arm's length, insomuch as the evidence submitted proves such.

[56] In *François Fournier v. M.N.R.*, 91 DTC 743, Dussault J. of this Court appropriately summarized the concept of a non-arm's length relationship between unrelated persons when he said:

> When the parties to a transaction act in concert, when they have similar economic interests or they act with a common intent, it is generally admitted that they are not dealing at arm's length.

[57] There is no presumption to the effect that common-law spouses do not deal with each other at arm's length. It must be proved that they have acted in concert with a common economic interest, within the context of the employment at issue and not within the context of their life together.

[58] In *Lapointe v. M.N.R.*, [1995] T.C.J. No. 1551, Tremblay J., referred to paragraph 3(2)(*c*) of the UIA, stating at paragraph 76 that its purpose "is that we be satisfied that the contract of employment contains reasonable terms and conditions, between parties – the employer and employee – with separate interests." Further on, he writes at paragraph 79 that "in the context of paragraph 3(2)(*c*), the parties will be deemed to be dealing with each other at arm's length and not to have a *de facto* non-arm's length relationship if they have entered into a contract of employment the terms and conditions of which are similar to those that would normally be adopted by parties dealing with each other at arm's length." Obviously, these terms and conditions are those found in a contract of employment: the nature of the work, the remuneration paid, the terms and conditions, the duration and the importance of the work performed.

[59] In this case, it must be determined whether there is a *de facto* arm's length relationship. Therefore, it is appropriate to consider what took place outside the period at issue. As such, it is possible to consider the fact that during the periods prior to 1992, the Appellant's employment was deemed to be insurable within the meaning of paragraph 3(1)(*a*) of the UIA.

[60] Other considerations include the fact that the Appellant and the Payor have been common-law spouses since 1980, and they have three children from this relationship, born in 1985, 1988 and 1991. The Appellant has worked for the Payor/spouse since 1987. In 1992, she worked for him four hours per week, with the exception of a twelve-week period in which she worked full-time. The same scenario is repeated the following years, except that the full-time work periods have increased over the years.

[61] Undoubtedly, the Appellant performed the work and carried out the duties she described. Undeniably, she helped the Payor/spouse establish his law office, provide services to his clients and manage all aspects of the office. Such support is highly commendable. Furthermore, I agree that a law office such as this requires weekly work for bookkeeping and maintaining up-to-date accounts. Every year, it is necessary to prepare financial statements and income tax returns, to issue T4 slips and to evaluate performance. The amount of time spent completing each of these duties may vary depending on the employee's skills and the company's business volume.

[62] In this case, considering the evidence at trial, including the size of the law office, its sales figures, the number of employees and the work description during the part-time and full-time employment periods, it is difficult to accept the Appellant's claim that she is able to complete all of her duties within the time allotted during each of these periods. All of the evidence relating to the amount of time devoted to the duties during the part-time work period leads me to determine that it would take more than four hours per week to complete these duties, especially since the work was being performed for one hour per day, in the evening after the children were in bed. Moreover, every year, a period of ten to thirteen weeks is required to perform the year-end duties, financial statements, income tax returns, statistics and other duties that were described; this period seems too long. In fact, extra duties were added, such as the compilation of invoices in 1992, and the study of thirty-two financial planning lessons and an economics book, spread over a three-year period. However, according to the claims for unemployment insurance benefits, each work stoppage was due to a lack of work. Nothing in the evidence suggests that this approach is justified.

[63] The Appellant's salary is another factor to be considered in relation to the Payor's business and the characteristics of his law office. Undoubtedly, the Appellant's skills warrant substantial remuneration, which could even exceed the salary she received from the Payor. However, in the circumstances of this case, it is important to remember that the Payor needed someone to do his bookkeeping and accounting and, according to his testimony, it would be less costly for him to have

someone working for him that it would be to hire an accounting firm. In my opinion, as confirmed in the Appeals Officer's report, an employee in this field would have cost less than the amount he was paying the Appellant. On the evidence, it is obvious that less time was required to complete the accounting duties than the Appellant's hours of work, as she had time to study and summarize financial planning material.

[64] Should the Payor have invested so much time and money in training another employee, or could he have hired another employee so that he could study the financial planning material at issue? In this case, there is no doubt that all of the time the Appellant spent studying and training was to improve the law office's performance and their income. I cannot ignore the fact that during the Appellant's testimony, she referred to her work and to completing her duties using the word [TRANSLATION]"we," as though she were associated with the Payor.

[65] For these reasons, it is my determination that the Appellant and the Payor were, in fact, not dealing with each other at arm's length during the period from June 22 to September 11, 1992. Therefore, this employment is not insurable within the meaning of the UIA.

[66] With regard to the issue of whether the decisions made under paragraph 3(2)(*c*) of the UIA and paragraph 5(2)(*l*) of the EIA were made in a manner contrary to law, I shall reproduce paragraph 50 of the decision of Isaac C.J., in *Jencan*, *supra*, which reads as follows:

> The Deputy Tax Court Judge, however, erred in law in concluding that, because some of the assumptions of fact relied upon by the Minister had been disproved at trial, he was automatically entitled to review the merits of the determination made by the Minister. Having found that certain assumptions relied upon by the Minister were disproved at trial, the Deputy Tax Court Judge should have then asked whether the remaining facts which were proved at trial were sufficient in law to support the Minister's determination that the parties would not have entered into a substantially similar contract of service if they had been at arm's length. If there is sufficient material to support the Minister's determination, the Deputy Tax Court Judge is not at liberty to overrule the Minister merely because one or more of the Minister's assumptions were disproved at trial and the judge would have come to a different conclusion on the balance of probabilities. In other words, it is only where the Minister's determination lacks a reasonable evidentiary foundation that the Tax Court's intervention is warranted. An assumption of fact that is disproved at trial may, but does not necessarily, constitute a defect which renders a determination by the

> Minister contrary to law. It will depend on the strength or weakness of the remaining evidence. The Tax Court must, therefore, go one step further and ask itself whether, without the assumptions of fact which have been disproved, there is sufficient evidence remaining to support the determination made by the Minister. If that question is answered in the affirmative, the inquiry ends. But, if answered in the negative, the determination is contrary to law, and only then is the Tax Court justified in engaging in its own assessment of the balance of probabilities. Hugessen J.A. made this point most recently in Hébert, *supra*. At paragraph 5 of his reasons for judgment, he stated:
>
> > In every appeal under section 70 the Minister's findings of fact, or "assumptions", will be set out in detail in the reply to the Notice of Appeal. If the Tax Court judge, who, unlike the Minister, is in a privileged position to assess the credibility of the witnesses she has seen and heard, comes to the conclusion that some or all of those assumptions of fact were wrong, she will then be required to determine whether the Minister could legally have concluded as he did on the facts that have been proven. That is clearly what happened here and we are quite unable to say that either the judge's findings of fact or the conclusion that the Minister's determination was not supportable, were wrong.

[67] Thus, it must be determined whether the Minister's decisions were made in a manner contrary to law, even though some of the assumptions of fact could be disproved. In particular, I am thinking of the fact that the investigating officer did not consider the work that the Appellant performed in 1993, 1994 and 1995, outside of her accounting duties, such as studying the Hume program. Neither the Appellant nor the Payor informed the officer of this fact at the time. Therefore, it is difficult to criticize him for this oversight; however, even if he had been informed, I do not believe, based on all of the information gathered, that this fact could constitute a defect that would render the Minister's determinations contrary to the *Act*. In my opinion, there are sufficient facts to justify his determinations.

[68] The Appellant placed considerable emphasis on the amount of time required to complete her accounting duties and on the assessment of Jean-Pierre Gauthier, CGA. The latter had opportunity to review the books of account, the records and the financial statements during the audit of the Payor. Therefore, he was able to express an opinion with regard to the number of hours or days required to carry out these duties. In addition, the Payor testified that the accountant had informed him that it would be less costly for him to have an employee at his office than it would be to hire an accountant. I assume that a discussion took place at this meeting concerning the amount of time required to carry out the duties at issue. On both sides, it is my determination that the time varies depending on the skills and

experience of the individual assigned to these duties. One thing is certain: in this case, the Appellant did not need eleven, twelve or thirteen weeks to complete these duties during her full-time employment period. Moreover, this explains why she had time to complete the other duties she described in her testimony. In addition, there is no doubt that it was difficult for her to work her four hours per week part-time, one hour each evening, at home after the children were in bed. In my opinion, none of these issues would have changed the Minister's decision. The Payor's testimony regarding the Appellant's work left me with the distinct impression that he did not really know the amount of time the Appellant devoted to each of her duties. Clearly, her departure was not due to a lack of work.

[69] Based on the evidence submitted by the Appellant concerning the remuneration she received from the Payor, I cannot conclude that the Minister's analysis is unreasonable. The Payor testified that the Appellant's salary was calculated based on the salary she received from the Université Laval and based on her skills. There is no doubt that the Appellant's skills warrant a high salary; however, her duties and functions did not warrant the salary she received. The Respondent submitted evidence that the average hourly rate for an accounting employee is much lower than that which the Appellant received. The Appellant was clearly overqualified for this position; however, that does not justify the remuneration paid in this case. One must also consider that the value of a service is sometimes determined by what the labour market can provide for equivalent work.

[70] With regard to the work the Appellant performed that was unrelated to accounting, namely assisting with the Payor's financial planning studies, one must question the Payor's financial capacity to have an employee with a non-arm's length relationship to study and summarize the financial planning study programs. Moreover, the Minister took this issue into consideration, and with good reason, when he analyzed the remuneration paid and the nature and importance of the work performed.

[71] The Minister's analysis of the terms and conditions of employment correspond to all of the evidence presented at trial, except for the fact, as I mentioned previously, that the Appellant had extra duties that she did not disclose to the officers during their investigation, namely the financial planning study program. In my opinion, this does not preclude the fact that, on the totality of the evidence, the Appellant did not need all of the time she claimed she needed to prepare the financial statements, income tax returns, analyses and statistics. The Appeals Officer had reason to doubt this, given the size of the law office and its business volume. In addition, one must question why neither the Payor nor the Appellant disclosed these extra duties when they met with the officers.

[72] When the duration of employment corresponds, or nearly corresponds, to that which is necessary to qualify for employment insurance benefits, it is completely natural that this should raise questions, particularly in cases that do not involve seasonal employment. In this case, the Payor practises law year round, with no periods that are particularly slower than others. The Appellant's accounting work could not fill her entire work schedule. During the periods before she was hired as a legal secretary, the Appellant spent her time redoing invoices for a number of cases, and in subsequent years, she studied financial planning materials and prepared this service, which the Payor wished to add to his practice. What is questionable in this case, is that this work, which continually awaited the Appellant, was postponed year after year, whereas the records of employment indicated a lack of work as the reason for separation. The full-time employment in 1993 and 1994 does not correspond to the time of year in which she should have had to work to prepare the Payor's income tax returns. In my opinion, the Appellant should have worked more hours during some of the periods for which she claimed she worked four hours per week.

[73] The evidence the Appellant submitted did not contradict the facts upon which the Minister relied. No explanation was provided that would lead me to determine that the Minister's analysis with regard to the duration of the employment was unreasonable. The Payor explained the valuable assistance the Appellant provided in his work as a financial planner and the way in which she helped him with his cases. However, he did not explain how he was able to manage without her during the periods in which she was not at the office. If the services she provided were required year round, then what explanation is there for the length of the full-time and part-time employment periods? Clearly, there was no lack of work.

[74] In addition, the Appeals Officer questioned the nature of the work. In spite of the fact that his findings were made without any knowledge of the invoicing and study work that the Appellant performed during the periods from 1992 to 1997 inclusive, this evidence is not sufficient to support a determination that the final result of the Minister's analysis is unreasonable. There is sufficient surprising evidence, such as the need to extend the study of the Hume program over a number of years, work that could have been completed within a single year, not to mention that a "lack of work" was used to justify separation. In my opinion, the Minister had sufficient evidence to justify his determination. The Payor was aware of the periods during which the Appellant had to work in order to qualify for benefits. The Minister's determination for the periods specified in Dockets 96-2427(UI), 1999-4382(EI) and 1999-4386(EI) was not rendered in a manner contrary to law.

The Respondent's officers did not lack objectivity in the four dockets at issue and during their analysis of the periods at issue.

[75] The comments the officers made to the Appellant, or those included in their report, reflect reality rather than a lack of objectivity on their part. Thus, perception becomes very subjective. Furthermore, I reiterate the reasons I outlined in my conclusion with regard to the *de facto* non-arm's length relationship for the period in 1992, concerning the terms, conditions, and other aspects of the contracts of employment at issue.

[76] In Docket 1999-4391(EI), Counsel for the Appellant raised the fact that the Appellant occupied three positions during this period. He argued that the Minister did not have regard for this fact or consider the salary. The officer's report reveals that the information used in his analysis came from a letter from the Payor/Counsel for the Appellant, sent to him on April 19, 1999, explaining the additional work, particularly the secretarial work. His report describes the changes to the Payor's activities. Nothing in the evidence heard leads me to determine that the Minister acted in a manner contrary to law with regard to that period. In fact, based on the evidence heard, it is clear to me that there is a business complicity between the Payor and the Appellant, leaving very little room for an employer-employee relationship, or even any degree of subordination. I need only refer to the Appellant's testimony and to her use of the word [TRANSLATION] "we" in almost all of their endeavours.

Constitutional issue

[77] The Appellant argues that paragraph 3(2)(*c*) of the UIA and paragraph 5(2)(*i*) of the EIA contravenes section 15(1) of the *Canadian Charter of Rights and Freedoms*, which states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[78] The Appellant's position on this issue is that she, and any other individuals not dealing at arm's length with their employer, must be subject to a different burden, an even higher one, simply because of their marital status, a burden to which other employment insurance claimants are not subject. This different burden involves demonstrating to the Minister that it is reasonable for him to conclude, 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, that the contract of employment would have been substantially similar if they had been dealing with each other at arm's length. The Appellant argued that these provisions are based on the assumption of fraud, whereas they should be based on the assumption that everyone is acting in good faith.

[79] The Appellant testified that she felt very humiliated by the fact that during one of her meetings with a representative from Human Resources Development Canada, she was reminded to indicate on her benefit application form that she worked for her spouse. She was humiliated and hurt by this comment due to the tone of voice with which the comment was made. In addition, she felt that the investigating officers were inquisitive because she worked for her spouse and he was likely representing her free of charge; furthermore, if this were not the case, she would not have filed an appeal with our Court.

[80] The Appellant demonstrated the higher unemployment rate in the Gaspé area and the difficulties that this represents for women choosing to live in this area. Since the 1993 amendments to the UIA, she has been excluded from benefits unless she can prove that there is a contract of service that would be substantially similar if there were an arm's length relationship. The Appellant made a considerable effort to find a job upon arriving in the Gaspé area, but she was not successful. The Appellant emphasized the remarks made by officers Blais and Turgeon, which alluded to the fact that people would like to work for their spouse for ten to twelve weeks or that she was fine because she worked for her spouse. She found these comments demeaning, as she testified that she understood this to mean that she needs unemployment insurance benefits and that her husband cannot provide for her.

[81] The Respondent called the following witnesses: Wayne Bourbeau, Acting Chief, Coverage and Premium Policy regarding employment insurance; René Racette, Senior Manager, Plain Language Project (*Employment Insurance Act)*, both from Human Resources Development Canada*;* and André Le Bourdais, Appeals Officer with the same department.

[82] Mr. Bourbeau presented a systematic summary of the developments and modifications made to the Canadian unemployment/employment insurance program since 1970, particularly since 1990, when paragraph 3(2)(*c*) of the UIA came into force. He explained the procedure that was established to identify applications for benefits for which the employment might not be insurable under these provisions. Thus, three questions were added to the application forms and a

benefit policy circular was distributed on November 18, 1990. These administrative identification procedures have been modified and perfected over the years in order to quickly determine the issue of insurability, reduce the number of cases and only process questionable cases. As a result of these efforts, only 24% of cases that were deemed to involve a non-arm's length relationship were sent to Revenue Canada, now Canada Customs and Revenue Agency, for determination by the Minister. Of the 24% of cases sent to the Minister, 61% were deemed to be insurable and 31% were deemed to be uninsurable.

[83] Mr. René Racette has 29 years of experience in the federal public service and his responsibilities have always related to the UIA and the EIA. He and his colleagues have developed benefit entitlement guidelines on various subjects, including non-arm's length employment. Through his years of experience, he has acquired knowledge of the entire history of the UIA and the EIA. Since 1996, he has held the position of Senior Policy Advisor, Policy and Legislation Development Directorate at Human Resources Development Canada. His role consists of developing policies that impact legislative provisions relative to the benefits to be paid, the insurability of employment, insurable earnings and the insurable employment weeks credited on behalf of the Canada Employment Insurance Commission.

[84] In view of the decision of the Federal Court of Appeal in *Canada v. Druken*, [1989] 2 F.C. 24, he worked on developing Bill C-21, which took into account the government's concerns at the time, including:

- Promoting the reintegration of unemployed persons into the labour market;

- Making the unemployment insurance system more equitable and consistent with the *Canadian Charter of Rights and Freedoms* while preserving the system's integrity;

- Preventing an increase in the deficit.

[85] According to the witness, paragraph 3(2)(*c*) had two important objectives:

> [TRANSLATION]
>
> First, it needed to comply with the decision of the Federal Court of Appeal in *Druken* under the *Canadian Human Rights Act* by not

> discriminating on the basis of marital status. Furthermore, it needed to comply with the *Canadian Charter of Rights and Freedoms*.
>
> Second, it needed to find a remedy likely to ensure the integrity of the unemployment insurance system: indeed, workers and employers who, under Bill C-21, were required to fully contribute to the unemployment insurance fund had a right to expect that the government would use that fund in a manner consistent with the spirit of the system, namely to insure the risk of involuntary and temporary loss of employment.

[86] According to the witness, both objectives covered under the new paragraph 3(2)(*c*), were to ensure that workers were not denied benefits due to a place with the employer, provided that the circumstances of the contract of employment with the employer are similar to those of a contract of employment between parties who are dealing with each other at arm's length.

[87] Witness André Le Bourdais testified with regard to the number of appeals that were filed with the Tax Court of Canada from 1991 to 2001, and the percentage of the Court's decisions that vacated or varied the Minister's decisions in cases involving a non-arm's length relationship. From 1995 to 2001, the Court vacated 37% of the decisions. In addition, he submitted statistics according to the various types of non-arm's length relationships specified in the *Act* and he noted that there were fewer appeal cases. He explained that there was no relationship between a determination of insurability made by an officer from Human Resources Development Canada and one made by an Appeals Officer from Canada Customs and Revenue Agency.

[88] The Respondent's position is that this entire analytical process provides flexibility in assessing cases involving a non-arm's length relationship and that there is a gradual decline in the number of cases referred back to the Minister. Counsel for the Respondent maintained that the process by which to determine the insurability of employment is the same, regardless of whether or not the case involves a non-arm's length relationship, in the sense that Appeals Officers must gather the facts, analyze them objectively and render a decision. In cases involving a non-arm's length relationship, they must objectively analyze the conditions of employment. Related persons do not have a heavier burden, although it includes an additional component. The additional burden and the nature of the process do not undermine human dignity.

[89] In addition, Counsel for the Respondent raised the principle of *res judicata* with regard to the constitutional issue concerning Docket 96-2427(UI), where the Federal Court of Appeal referred the case back to our Court for a new trial. She

argued that this Court is simply ordered to rehear the appeal on the issue of employment insurability, not on the constitutional issue.

[90] In this case, the Federal Court of Appeal judgment disposed of the constitutional issue covered under paragraph 3(2)(*c*) of the UIA. In my opinion, this conclusion also applies to paragraph 5(3)(*b*) of the EIA. I shall quote the passage that, in my opinion, summarizes the matter at issue and its disposition.

> It can readily be seen that, in this s. 3(2)(*c*)(ii) describing the procedure to be followed in arriving at the conclusion that a contract between related persons was not unduly influenced by their relationship (and so is covered), Parliament applied essentially the approach adopted by the courts in concluding that unrelated persons were in fact not acting at arm's length in concluding a particular contract (which accordingly should be excepted). This finding, Judge Archambault maintained in his decision in *Thivierge*, suffices to protect the provision from any constitutional challenge based on s. 15 of the *Charter* as "It is . . . the terms and conditions of a given employment [whether between related persons or not] which determine the eligibility of an employment, not the personal characteristics of the employee". He summed up his thinking clearly in a passage quoted and adopted by the trial judge:
>
> > A reading of paragraph 3(2)(*c*) of the *Act* as a whole leads me to conclude that the exception of employment is not made on the basis of a personal characteristic, whether it be sex, marital status or family status, but rather on the basis of the very terms and conditions of the contract of employment. If the terms and conditions of the contract of employment are those that persons dealing at arm's length would have accepted, the employment constitutes insurable employment, whether the employee be female or the wife of the person who controls the employer. It is the terms and conditions of the contract of employment that determine whether there is insurable employment. Since there is no inequality based on personal characteristics, subsection 15(1) of the *Charter* cannot be argued in respect of paragraph 3(2)(*c*) of the *Act*.
>
> It seems to me, with respect, that these comments, proper though they may be, do not affect the constitutional argument. The inequality mentioned as a reason for unconstitutionality does not arise from the exception or final acceptance of the employment, which it is true is determined in all cases by the terms of the contract of employment. The inequality complained of arises from the process adopted in deciding on the exception or acceptance. In one case, review is required in all circumstances and must be made on the basis of a presumption that the employment is excepted, which

> implies that doubt will count against the claimant, while in the other, the review is highly exceptional and the presumption works in the opposite direction, which means that any doubt is resolved entirely in the claimant's favour.
>
> The real response to the constitutional challenge is that none of the conditions for application of s. 15 of the *Charter* as laid down by the Supreme Court, especially in its leading decision in *Law v. Canada* (M.E.I.), is present in the case at bar. The differential treatment in the procedure is not based on a personal characteristic of the claimants in question, it does not limit access by anyone to the benefits of the *Act* since any contract regarded as genuine will be covered, and finally the dignity of the individual is not affected.
>
> The distinction is made between related and unrelated persons, related persons being physical or artificial persons associated with each other by some existential link resulting: in the case of physical persons, from consanguinity, adoption or legal or (since 1993) *de facto* marriage; in the case of artificial persons, from the relationship between their controlling bodies. It seems to me that what is considered is a factual relationship, not some personal or individual characteristic of the persons involved. Related persons within the meaning of the *Act* clearly do not form a special group of individuals united by some common feature, still less a traditionally disadvantaged group. Moreover, the differential treatment exists only in procedural terms, it is made necessary by the need to ensure that the contract is genuine and it should not normally result in any substantive detriment. Finally, legislation seeking to ensure that the employer-employee relationship between two individuals has remained separate and apart from the relationship already existing between those individuals could not be regarded as demeaning their human dignity.
>
> The constitutional challenge, in my view resulting solely from what might roughly speaking be called a requirement of caution in accepting as genuine and proper a contract of employment concluded between two already related persons, cannot stand. If the wording could be interpreted as giving the Minister a purely discretionary authority to accept or disallow the contract, and it appears to have been understood that way by some people, the constitutional challenge might perhaps be more forcefully maintained. However, that is not the case, and this observation leads me to the second aspect of the application.

[91] In this case, the Federal Court of Appeal considered the conditions for applying section 15 of the *Charter*, as identified by the Supreme Court of Canada in *Law v. Canada*, [1999] 1 S.C.R. 497, and determined that none existed.

Therefore, in this case, it is not necessary for me to repeat the exercise carried out by the Federal Court of Appeal. The evidence submitted by the Appellant mainly concerned the employment difficulties faced by women in the Gaspé Peninsula compared to the rest of Canada, which I do not believe is a factor included in the comparative method found in *Law*. The unemployment rate in the Gaspé Peninsula does not render paragraph 3(2)(*c*) unconstitutional, nor do the Appellant's feelings that she was prejudged when she was reminded to check the box indicating that that she was employed by her spouse, or her inability to work in her field. These are all subjective factors, which, in my opinion, cannot be considered in the analysis required by *Law*. In this case, no condition for the application of section 15 of the *Charter* exists. I reiterate the passage in the Federal Court of Appeal case. The differential treatment in the procedure is not based on a personal characteristic of the claimants in question, it does not limit access by anyone to the benefits of the *Act* since any contract deemed to be genuine will be covered, and finally the dignity of the individual is not affected.

[92] The additional evidence submitted by the Appellant in all of the dockets is clearly insufficient to support a conclusion that differs from that of the Federal Court of Appeal. The answers to the three main questions that I must consider are the same. For these reasons, the constitutional argument is dismissed. Therefore, I do not need to address the issue of the principle of *res judicata*.

[93] In conclusion, I am not able to vary the decisions of the Minister for the periods at issue. These decisions are confirmed. Thus, the appeals are dismissed.

Signed at Ottawa, Canada, this 9th day of May 2003.

"François Angers"

J.T.C.C.

Translation certified true
on this 13th day of May 2004.

Sharlene Cooper, Translator