Docket: 2003-688(EI)

BETWEEN:

HENRY IVAN PERON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CHEERS BAR SERVICES INC.,

Intervener.

Appeal heard on August 20, 2004, and February 2, 2005,
at Montreal, Quebec.
Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	James Murphy
Counsel for the Respondent:	Emmanuelle Faulkner
Counsel for the Intervener:	Christopher R. Mostovac

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed, without costs, and the November 20, 2002, decision of the Minister of National Revenue is varied on the basis that the appellant was working under a contract of employment with Cheers Bar Services Inc. for the period from March 7, 2001 to March 7, 2002, and that he accumulated 1,688 insurable hours and received insurable earnings in the amount of $46,156.25 during that period.

Signed at Ottawa, Ontario, this 21st day of December 2005.

"Lucie Lamarre"

Lamarre, J.

Citation: 2005TCC800
Date: 20051221
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THE MINISTER OF NATIONAL REVENUE,

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CHEERS BAR SERVICES INC.,

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REASONS FOR JUDGMENT

Lamarre, J.

[1] This is an appeal from a decision of the Minister of National Revenue ("Minister") rendered on November 20, 2002, in which it was determined that the appellant was employed in insurable employment while working for Cheers Bar Services Inc. ("Cheers") for the period from March 7, 2001, to March 7, 2002, and that he had insurable earnings of $5,306 for the last 14 pay periods and 440 insurable hours during the period at issue. This decision reversed a previous decision by an authorized officer of the Canada Customs and Revenue Agency ("CCRA"), on June 28, 2002, that the appellant had accumulated 1,688 insurable hours and received insurable earnings of $46,156.25 during the same period while working for Cheers.

[2] The appellant is asking this Court to restore the first decision, rendered on June 28, 2002, and to confirm that he had accumulated 1,688 insurable hours and received $46,156.25 in insurable earnings during the period at issue. Cheers, the employer and the intervener in the present appeal, supports the second decision (that of November 20, 2002) and the position taken by the respondent in this

appeal, and asks this Court to confirm that the appellant accumulated 440 insurable hours and received $5,306 in insurable earnings during the same period, this being in conformity with the record of employment issued by Cheers on April 25, 2002 (Exhibit A-14). The first decision (June 28, 2002) was based on the premise that the appellant was paid the following amounts on a weekly basis as an employee of Cheers: $200 in salary, $400 in commissions, and tips in the neighbourhood of $275, the result being $46,156.25 in insurable earnings and 1,688 insurable hours over a period of 49 weeks (as per the testimony of Suzanne Cloutier, a rulings officer with the CCRA (transcript, first day of the hearing, August 20, 2004, at pages 20-26) during the period at issue. As for the second decision (November 20, 2002), it only took into account the amount of $200 weekly and considered that the $400 weekly paid to the appellant was received by him as an independent contractor and that the tips in issue were not insurable earnings pursuant to subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations* ("*IECPR*").

Issues

[3] The issues in the present appeal can therefore be summarized as follows:

(a) Was the $400 weekly earned by the appellant received by him as an employee of Cheers or as an independent contractor?

(b) Are the tips in issue insurable earnings under subsection 2(1) of the *IECPR*?

Facts

[4] Cheers operates bars and nightclubs. It is owned by Dayton Investment Limited, which is wholly owned by Mr. William Wolfstein (see paragraph 8 b) of the Reply to the Notice of Appeal ("Reply"), which is not disputed). The appellant's first involvement with Cheers was as a bartender, starting in September of 1990, at their "MacKay location" in Montreal. In October of 1993, he was transferred to the payer's location in Brossard, Quebec. In the fall of 1995, he was performing the duties of both bartender and acting night manager. In February 1998, he became the permanent night manager and ceased entirely working as a bartender.

[5] As night manager, he was responsible for the staff (bartenders, barmaids, waiters, waitresses and busboys); he interviewed them, checked their references

and hired them; he then trained them and organized their work schedules and vacation time.

[6] According to the appellant, however, if more staff was needed, or staff had to be reduced, he would discuss it with the owner, Mr. Wolfstein, who, in the end, was the one who made the decision.

[7] The appellant himself usually worked four days a week, from 8:00 p.m. till the closing of the bar at 3:00 a.m. or 4:00 a.m. Some weeks when the bar was busy, it would happen that he worked five days. His own work schedule was set by Mr. Wolfstein.

[8] There was no rule book, but there existed some guidelines concerning the manager's responsibilities.

[9] The night manager reported in a manager's log, which was kept in the office, anything of importance to the business (for example a shortage of glassware or beer, or problems that had occurred that night).

[10] Mr. Wolfstein very rarely came to the bar in the evening, but was there once a week during daytime hours, and gave orders that were recorded in the manager's log by the day manager for the attention of the appellant. There were video cameras installed covering every part of the bar. They were recording 24 hours a day and Mr. Wolfstein had a live feed from the business to his home. The appellant said that he represented Mr. Wolfstein in his absence and reported directly to him.

[11] One of the night manager's duties was also to promote the business. The appellant organized different activities that he said were suggested directly by Mr. Wolfstein or by MMi Media Marketing Inc., a company represented by Mr. Randolph Bickerton that was retained by Cheers to do promotional work.

[12] The appellant did not have any say regarding the price of the liquor or soft drinks that were sold on the bar's premises. Mr. Wolfstein was responsible for the fluctuations in prices and also decided on the brand names to be sold and the suppliers with whom he would do business.

[13] As for the appellant's remuneration, he was at first paid a salary of $600 weekly by Cheers when he became a full-time night manager. There also existed a policy at Cheers that the night manager was entitled to one percent of gross sales by the service staff, which was given directly to the appellant by the

service staff out of their tips. After each night shift, the appellant would record the names of the employees who had worked, the date, the amount of their sales and the one percent of sales paid to him by those employees. This also helped the appellant judge the staff's sales performance. Copies of those records were filed in evidence as Exhibit A-3. For the nights that the appellant was not working, that information and the one percent of sales was collected by the daytime manager from the nighttime assistant manager and afterwards handed over to the appellant.

[14] According to Exhibit A-3, the appellant collected $14,718 out of the employees' tips for the period from February 2001 to January 2002, that amount being the one percent of sales by the service staff for that period.

[15] The appellant explained, however, that Mr. Wolfstein had control over his entitlement to collect that one percent. He gave as an example an instance, drawn from the manager's log (Exhibits A-4 and A-5), in which the owner was once unhappy about a decision of the appellant to change the schedule of daytime staff. Mr. Wolfstein decided unilaterally to temporarily suspend his right to collect the one percent on daytime sales for a period of three months.

[16] The appellant never declared that one percent from the employees' sales as income in his income tax returns.

[17] With respect to the $600 weekly salary, the appellant soon realized after being appointed full-time manager in February 1998 that he was making less money than when he had been working as a bartender, although he had more responsibilities. The appellant explained that he had been earning between $850 and $1,000 weekly net working just as a bartender. He therefore complained to Mr. Wolfstein and asked for a raise. The appellant proposed that he be paid a weekly salary of $200 that would be recorded on the employer's payroll and $400 weekly in cash. Mr. Wolfstein, whose business was regularly audited by the government, did not accept the appellant's proposal. Instead, according to the appellant's version, Mr. Wolfstein suggested a two-tier system under which the appellant's weekly salary would be reduced to $200 and he would provide promotional services to Cheers on a contract basis for $400 weekly. In other words, the appellant would invoice Cheers $400 weekly for services as a manager-consultant. This would be justified by the promotional role assumed by the nighttime manager. The appellant would continue receiving the one percent of employees' sales on top of that. As the appellant observed, nothing changed in his duties thereafter. The only thing that changed was the mode of remuneration. Apparently, Mr. Wolfstein explained to the appellant at that time that to justify

such a change on the payroll, he would have to register under a business name, have several sources of income and obtain a registration number for goods and services tax ("GST") and provincial sales tax ("PST") purposes. It is my understanding that the appellant was satisfied with this arrangement at the time, as no income tax or other amounts were deducted at source by Cheers on that $400 weekly payment. It is also my understanding that the appellant never declared that amount in his income tax returns and therefore did not pay tax on it.

[18] The appellant started being paid a $200 weekly salary on May 6, 1998. From then the paycheque stubs filed as Exhibit A-2 show a salary of $400 and 20 insurable hours for each two-week pay period.

[19] It is my understanding that the appellant started invoicing Cheers for $400 per week at that same time. However the only invoices filed in evidence were those for 2000 and 2001 referring to promotional events (Exhibit A-6).

[20] It was only in August 2001, however, that Mr. Wolfstein insisted that the appellant bill under a business name and register for GST and PST. The appellant therefore registered with the *Inspecteur général des institutions financières* as an individual businessman under the name I. Peron on August 10, 2001 (see Exhibit A-7). He also requested a registration certificate for the purposes of the Quebec sales tax and received that certificate on August 27, 2001 (see Exhibit A-8). In addition, the appellant certified in a document dated August 28, 2001, that I. Peron (registered for GST and PST) was doing business with Cheers as well as with other businesses (Exhibit A-9).

[21] The appellant explained that he wrote that document (Exhibit A-9) at the request of Mr. Wolfstein but that, in fact, he never did business with anybody else. He only worked for Cheers. According to him, he was told that without this document Mr. Wolfstein would not let him work.

[22] The appellant also acknowledged that he first tried to invoice Cheers using false GST and PST numbers (see invoice dated August 26, number 599484, which is the third document in Exhibit I-3). Apparently, he did so because Mr. Wolfstein was putting pressure on him to charge the GST and PST, and was threatening him with dismissal if he did not provide his GST and PST registration numbers. Having not yet applied for them, he gave false numbers to try to satisfy Mr. Wolfstein. He had obtained his GST and PST certificates two days later.

[23] Thereafter, although the appellant charged GST and PST and collected those taxes (as per the copy of the Caisse populaire Desjardins passbook filed as Exhibit A-12), he never remitted the tax so collected to the taxation authorities.

[24] The appellant was dismissed from his employment on March 11, 2002. After that, he went to the CCRA, met an investigator and disclosed his personal situation. He said that he wanted to make a clean breast of it, with the intent, I suppose, of being able to claim employment insurance benefits. On November 13, 2002, he cancelled the registration of the business under the name of I. Peron with the *Inspecteur général des institutions financières* (Exhibit A-7).

[25] Mr. Wolfstein told Yvan Brisebois, an employment insurance officer, that the appellant was dismissed because equipment with an approximate value of $100,000 was missing. Mr. Brisebois conducted his inquiry for employment insurance purposes between April 23 and May 2, 2002. In an affidavit signed by Mr. Wolfstein on April 29, 2002 (Exhibit A-13), in support of a motion presented before the Superior Court of Quebec for seizure before judgment against the appellant, Mr. Wolfstein also accused the appellant of theft and misappropriation of Cheers' funds. Mr. Brisebois was not made aware of these allegations against the appellant.

[26] In rendering the CCRA's first decision, dated June 28, 2002, Suzanne Cloutier, the rulings officer, came to the conclusion that the appellant's work as night manager in the period at issue was in its entirety insurable employment and that he had accumulated 1,688 insurable hours and received insurable earnings of $46,156.25. To reach that decision, she relied on a letter dated June 1, 2001, signed by Ms. Sheree Jackson, office manager/payroll officer for Cheers, and addressed to the appellant's personal banking officer, written to confirm the appellant's income in order for him to obtain approval for a loan (Exhibit I-1). That letter stated that the appellant had been in Cheers' employ since September of 1990. The letter mentioned, among others things, that since 1995 the appellant had been employed as general manager, which was a full-time position. Ms. Jackson stated the appellant's income from Cheers as follows:

PAYROLL-	$200.00 WEEKLY $10,000.00 YEARLY
INVOICED-	$100.00 DAILY $400.00 WEEKLY $20,800.00 YEARLY

STOCK OPTIONS-	$275.00 WEEKLY $14,330.00 YEARLY

Salary/fees/returns projected for the year 2001 amount to $45,500.00

[27] In a second affidavit, signed by Mr. Wolfstein on June 14, 2002, and filed as part of Exhibit A-13, Mr. Wolfstein stated the following in paragraph 22:

> 22. *On June 1, 2001, without my knowledge or consent, I have been informed by the said Ms. Jackson that Defendant [Peron] instructed the said Ms. Jackson to sign a letter addressed to Defendant's bank, to confirm Defendant's revenue, so that Defendant could obtain the approval of a loan, said letter containing false and misleading information which suggested that Defendant held "stock options" worth $14,330.00 yearly the whole as more fully appears from a copy of the said letter dated April 25, 2001, communicated herewith as Plaintiff's Exhibit P-2A, when in fact no such stock options exist, and I have never paid any revenue to Defendant in addition to his weekly salary and the amounts invoiced by "I. Peron".*

[28] In an affidavit signed by her on April 29, 2002, Ms. Sheree Jackson acknowledged that she had not been authorized by Mr. Wolfstein to sign the said letter, and that Mr. Wolfstein was not made aware of the existence of the letter. She also indicated in her affidavit that the letter of June 1, 2001, had been entirely prepared by the appellant for the sole purpose of obtaining a personal loan (Exhibit I-2)[1]. The appellant himself filed in evidence another letter, dated March

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[1] Counsel for the appellant objected to the filing of this affidavit on the basis that he was not in a position to cross-examine Ms. Jackson, who was not present in Court. At trial, I accepted that document subject to my ruling subsequently on its admissibility. I am now allowing it in evidence, as I am not bound by any legal or technical rule of evidence in an employment insurance appeal (see subsection 18.15(4) and paragraph 18.29(1)(*b*) of the *Tax Court of Canada Act*). Furthermore, the first document signed by Ms. Jackson (Exhibit I-1) having been filed without any objection, and the appellant having himself introduced, as we will see later on, another document signed by Ms. Jackson (Exhibit A-10), I consider that the intervener was entitled to file Ms. Jackson's affidavit, even though she was not present at trial to be cross-examined on it. In *Ainsley v. Canada*, [1997] F.C.J. No. 701 (QL), an unemployment insurance case, the Federal Court of Appeal confirmed that it is not necessary in order for a letter to be admitted into evidence that its author be called as a witness. While such a document may be admitted, Judge Christie (as he then was) stated in *Yakubu v. Canada*, [1997] T.C.J. No. 890 (QL), a decision under the informal procedure, that the veracity of the document must still be assessed and that the Court must assign whatever evidentiary weight it considered the

8, 2000, signed by Ms. Jackson as office administrator/payroll officer for Cheers and addressed to the appellant's personal banking officer (Exhibit A-10), in which she states the appellant's income from Cheers as follows:

> Mr. Peron's incomes from CHEERS BAR SERVICE, are as follows:
>
> PAYROLL - current salary $200.00 weekly
> $10,400 tearly [*sic*]
>
> INVOICED - Manager's Fees $100.00 daily
> $400.00 weekly
> $20,800 yearly
>
> Salary/Fees projected for the year 2000 amount to $31,200.

[29] This letter was signed in 2000 in order for the appellant to obtain a previous loan. There is no mention of stock options, and the appellant explained that the income recognized by Cheers in 2000 was sufficient for his purposes at the time.

[30] The appellant also said that it was Sheree Jackson who suggested putting "stock options" in the second letter, dated June 1, 2001 (Exhibit I-1), to reflect his entitlement to one percent of sales. He said that, contrary to what Ms. Jackson stated in her affidavit (Exhibit I-2), she composed the letter on her own and put his income from Cheers in 2001 at $45,500. The appellant also testified that it was on the suggestion of Mr. Wolfstein that he did not declare in his income tax returns either the income received by invoicing Cheers ($400 per week) or the one percent of sales paid to him by the staff out of their tips, and that he did not remit the GST and PST to the government. Apparently, Mr. Wolfstein told him to "keep quiet" about the one percent of sales that he received out of the staff's tips and about the $400 weekly invoicing. The appellant said that his employer considered that the tax savings on the non-declared income were equivalent to a raise for him. Mr. Wolfstein obviously does not agree with that statement. Mr. Wolfstein said that everything is recorded in Cheers' books, including the tips indicated by the employees on a tip sheet provided by the government.

[31] The appellant explained that he considered the one percent of the staff's daily sales given to him out of their tips as part of his salary because it was a condition imposed by Cheers on all its employees that they hand over this amount.

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document deserved in light of the whole of the evidence, taking into account the fact that the statements of fact in the document are hearsay.

He himself had had to pay the one percent to the manager when he first started to work for Cheers as a bartender. He said that that system existed when he first arrived and that it was a condition of employment. This was confirmed by another witness, Mr. Brian Loyer, who worked for Cheers in the years 1998 and 1999. That witness said that it "was the rule of the bar, if you wanted to work, you'd have to pay one percent (1%) at the end of the evening to the manager" (see page 11, transcript, first day of the hearing, August 20, 2004). The appellant acknowledged, however, that this one percent remuneration did not appear on his T4 slips as employment income.

[32] With respect to time off and holidays, the appellant testified that he was replaced by an assistant manager who was already working for Cheers. He could not hire someone from outside to replace him and he never paid the replacement out of his own pocket. He himself was not paid any salary and did not invoice Cheers for the days when he was not working.

[33] Counsel for the intervener tried to contradict the appellant on this point. Indeed, Mr. Wolfstein testified that during his holidays the appellant was replaced by Mr. Mike Gauthier, a bartender and assistant manager working for Cheers. He said that it was on the appellant's initiative that Mr. Gauthier replaced him, and that Cheers did not pay Mr. Gauthier as an assistant manager for the time during which he replaced the appellant, but only paid his bartender's salary. Mr. Wolfstein, however, did not have with him the payroll register for Mr. Gauthier in order to confirm this allegation. Furthermore, I note that in paragraph 17 of his affidavit signed on April 29, 2002, (Exhibit A-13), Mr. Wolfstein accused the appellant of being absent from the premises without authorization when he was supposed to be performing his work as night manager. This presupposes that the appellant needed such authorization in order to take any leave and to designate someone to replace him. In fact, in cross-examination, Mr. Wolfstein acknowledged that the person replacing the manager would normally submit his hours to the office and would be paid accordingly. He added, however, that if the appellant made his own arrangements with that person, the replacement would not be paid in that manner.

[34] With respect to the invoicing, counsel for the intervener tried to contradict the appellant's statement that he did not invoice Cheers for time when he was not working. The appellant had acknowledged that he had taken three weeks' holidays just before being dismissed in March 2002. Counsel for the intervener confronted him with three invoices dated February 16 and 23 and March 2, 2002 (Exhibit I-6), a period during which the appellant was taking his holidays. The appellant explained that he did not remember when he gave these invoices to Cheers but

believed that he was asked upon his return from vacation to produce them. He said that he was told what date to put on each invoice (which would explain why these three invoices bear consecutive numbers) and that they related to past work not yet recorded in the employer's books.

[35] The appellant was categorical: he did not receive a paycheque after the period ending January 27, 2002 (and this indeed seems to be the case, as per the paycheque stubs produced as Exhibit A-2). As a matter of fact, he never received payment on the above-mentioned invoices comprising Exhibit I-6, as can be seen from the void cheques produced as Exhibit I-8. According to Mr. Wolfstein, these invoices were prepared by the appellant before his leaving on vacation in February 2002 and cheques were prepared in advance to be given to the appellant upon his return. As pointed out by Mr. Wolfstein, the cheques prepared by Cheers for the appellant do not have consecutive numbers and could not all have been written at the same time upon the appellant's return. This, according to him, is evidence that the invoices were all prepared by the appellant before he went on vacation. According to Mr. Wolfstein, the cheques were to be given to the appellant upon his return, but they were cancelled when the appellant was dismissed. The payment was put in abeyance pending an eventual agreement, but in fact none was ever reached. The two parties are still litigating before civil tribunals.

[36] Furthermore, counsel for the intervener introduced a document from Ceridian, the accounting firm producing the payroll for Cheers (Exhibit I-7), to try to establish that the appellant received a payment for the period after January 27, 2002, contrary to what the appellant had stated. This document is a pay register for the appellant dated February 14, 2002. It indicates that a payment of $345.02 was made to the appellant. The document does not, however, indicate to which period this payment belongs. In addition, a letter from Mr. Wolfstein's lawyer dated November 6, 2002 (Exhibit A-20) seems to indicate that two salary payments, one for the period from January 29 to February 11, 2002, and the other for the period from February 12 to February 25, 2002, for net amounts of $345.02 and $376.36 respectively, remained outstanding. This document seems to confirm that indeed the appellant was not paid for any work period ending after January 27, 2002.

Analysis

[37] There is no dispute here that the appellant was working under a contract of service for Cheers as regards at least part of his work. What is at issue is the amount of insurable earnings and the number of insurable hours.

[38] The respondent accepted Cheers' version that the appellant worked for Cheers part of the time as an employee and part of the time as a contract worker. Although he made a statement to the contrary in Exhibit A-9, the appellant argued that he was working solely for Cheers during the period at issue and was doing so as an employee only. The appellant contends that the total remuneration he received from Cheers was employment income and that the respondent is wrong in treating part of that remuneration as contract income. The appellant put forward the same argument regarding the number of insurable hours he worked during that period. As the appellant considers that his work for Cheers was performed under a contract of employment only, and not a hybrid contract under which he would have been an employee part of the time and a contract worker for the balance of the time, he maintains that all the hours he worked for Cheers should be treated as insurable hours.

[39] The respondent relied on the record of employment in adopting Cheers' position.

[40] The issue here is to determine the nature of the contractual relationship that existed between the appellant and Cheers during the period at issue. There is no written contract, but the two parties entered into a verbal agreement for services to be rendered in the province of Quebec, and their relationship is therefore subject to the law applicable in the province of Quebec.

[41] This Court has to determine what the real contractual relationship between the parties was. In so doing, it will rely on the *Civil Code of Quebec* ("CCQ"), and more particularly on the following sections thereof:

1378. Le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation.	**1378.** A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
[...]	**[...]**
1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.	**1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.	**1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
[...]	**[...]**
2085. Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.	**2085.** A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer
[...]	**[...]**
2098. Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.	**2098.** A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution.	**2099.** The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[42] Thus, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage must all be taken into account. And among the circumstances in which the contractual relationship was formed there is the legitimate declared intention of the parties: an important factor accepted by the case law (see *9041-6868 Québec Inc. c. M.R.N.*, 2005 CAF 334, referring at

paragraph 9 to *Wolf v. Canada (C.A.)*, [2002] 4 F.C. 396, 2002 FCA 96, paragraphs 119 and 122; *Productions Petit Bonhomme Inc. v. Canada (M.N.R.)*, [2004] F.C.J. No. 238 (QL), 2004 FCA 54; *Livreur Plus Inc. v. Canada, (M.N.R.)*, [2004] F.C.J. No. 267 (QL), 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, [2003] F.C.J. No. 141 (QL), 2003 FAC 50; *Tremblay v. Canada (M.N.R.)*, [2004] F.C.J. No. 802 (QL), 2004 FAC 175).

[43] In the present case, the appellant was employed first as a bartender and subsequently as the night manager of the bar. His functions as night manager were to supervise the staff and to organize promotional events. He was responsible for the operation of the bar during his shift. It is not denied that the appellant's schedule was determined by Mr. Wolfstein. It is also clear from the evidence that the appellant reported to Mr. Wolfstein, either directly or through the manager's log, any problems relating to the operation of the bar. The bar was equipped with cameras covering all areas of the premises, and there was a live feed from these cameras to Mr. Wolfstein's home. Part of the appellant's functions was hiring employees or reducing staff, and this was done under Mr. Wolfstein's direction. Although the other functions of the appellant revolved around promotional activities, he did not have any latitude to change prices or to sell brands other than the ones decided on by Mr. Wolfstein. It is not denied that Cheers was contracting with a specific company, MMi Media Marketing Inc., for promotional activities. Although Mr. Wolfstein mentioned in his testimony that the appellant showed his direct interest in promoting the bar by increasing sales from $15,000 per week to $30,000 per week at a certain point in time, the evidence disclosed that the promotional role of the appellant was in effect limited, being restricted to the activities approved by Mr. Wolfstein. Even changes in staff schedules were scrutinized by Mr. Wolfstein, as appears from the one incident that cost the appellant a reduction in the amount he received out of tips, which reduction could be imposed at the sole discretion of Mr. Wolfstein.

[44] In Quebec civil law, a contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer. In determining the nature of a contract of employment, the Federal Court of Appeal, in *9041-6868 Québec Inc.*, *supra*, relied on the remarks of Robert P. Gagnon in *Le droit du travail du Québec*, 5th ed.(Cowansville, Qc: Éditions Yvon Blais, 2003), at pages 66-67:

> [TRANSLATION]

> **90** — *Distinguishing factor* — The most significant feature characterizing a contract of employment is the subordination of the employee to the person for whom he works... Thus, while the contractor or the provider of services "is free", under article 2099 C.C.Q., "to choose the means of performing the contract" and while between the contractor or the provider of services and the client "no relationship of subordination exists . . . in respect of such performance," it is a characteristic of a contract of employment, subject to its terms and conditions, that the employee personally performs the work agreed upon under the employer's direction and within the framework established by the employer.
>
> **91** — *Factual assessment* — Subordination is verified by reference to the facts. In that respect, the case law has always refused to simply accept the parties' description of the contract....
>
> **92** ... This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. . . . Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive the benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business. [Emphasis added.]

[45] If we apply those indicia to the present appeal, it is not very difficult to conclude, in spite of certain contradictions in the evidence, that the appellant was working with Cheers only under a contract of employment. Indeed, his presence on the premises was mandatory (see affidavit of Mr. Wolfstein dated April 29, 2002, at paragraph 17, Exhibit A-13). Some facts were uncontradicted or were corroborated by documentary evidence: the appellant's schedule and work were controlled by Mr. Wolfstein; the appellant reported to Mr. Wolfstein either directly or through the manager's log; he did not have much latitude in making decisions during his work shift, and was even threatened in some instances with having his remuneration reduced (see manager's log, Exhibits A-4, A-5 and A-15); Mr. Wolfstein had in the bar a camera system with a live feed to his home 24 hours a day; the appellant had no discretion at all as to the sale price of beverages or the brands sold, and thus his promotional activities were severely limited, being restricted to those approved by Mr. Wolfstein (see, for example, Exhibit A-18,

which shows that a special event had to be justified to Mr. Wolfstein); the appellant could not leave the premises without being replaced by someone already working for Cheers (Mr. Wolfstein was not able to demonstrate that the person replacing the appellant was paid by the appellant out of his own pocket. In fact, Mr. Wolfstein's testimony reveals rather that whoever replaced the appellant would normally be paid by Cheers for the greater responsibilities thus assumed).

[46] Even though, with respect to the appellant's remuneration, the parties came to an agreement which would tend to indicate in itself that the appellant was performing part of his work on a contract basis, it is not denied that the work was the same both before and after the mode of remuneration changed. It is worth noting also that only in August 2001 did the appellant register a business name and start to charge GST and PST, although he had been invoicing Cheers since the spring of 1998 under the two-tier system. It should be remembered here that Mr. Wolfstein testified that it was a condition precedent to contracting for work with Cheers that the contractor be registered under a business name and be registered to charge GST and PST. According to Mr. Wolfstein, the discussion with the appellant on this subject occurred in 1998 when the appellant asked for a raise. It is quite significant that for three years Cheers accepted the appellant's invoices without GST and PST being charged.

[47] In my view, the fact that the appellant sent invoices for $400 per week did not alter the fact that he was still working under the direction and supervision of Mr. Wolfstein. It is true that the appellant does not arouse much sympathy when one considers that it was he who took the first step towards having his mode of remuneration changed. The appellant was unhappy with his net income from his regular salary ($600 weekly) as night manager. Although he submits that it was Mr. Wolfstein who suggested the so-called two-tier system, it was the appellant who first proposed that he receive undeclared cash payments instead of a full salary recorded on the payroll. The appellant was also perfectly pleased with the invoicing system, as there was no amount withheld at source and he did not declare the income received in this fashion. Whether the suggestion not to declare that income came from Mr. Wolfstein or not, the fact remains that the appellant did not dispute this way of doing things until he was dismissed and realized, I suppose, that he would not be covered by the government employment insurance plan.

[48] Although I cannot but reprove both the appellant's and Mr. Wolfstein's attitude towards their civil responsibilities as Canadian taxpayers, my role here is to determine whether the appellant was employed by Cheers entirely under a contract of employment. On the evidence before me, I can say without hesitation

that the appellant was working for Cheers solely under a contract of employment, and that his remuneration comprised both the $200 weekly salary recorded on Cheers' payroll and the $400 weekly invoicings. Although Ms. Jackson wrote in her affidavit (Exhibit I-2) that she was not authorized by Mr. Wolfstein to sign the letter, filed as Exhibit I-1, stating the appellant's income, Mr. Wolfstein does not in fact disagree with the amount of income stated therein; he disputes only the statement that the appellant received stock options. Mr. Wolfstein moreover does not consider the tips as being part of the remuneration paid by Cheers to the appellant. In that respect, I am satisfied with the explanations given by the appellant, by Mr. Brian Loyer and by Ms. Suzanne Cloutier that the amount of $275 paid weekly to the appellant and referred to as "stock options" was in fact the money he received out of the staff's tips, corresponding to one percent of their sales.

[49] I must therefore decide whether these tips may be included in the appellant's insurable earnings pursuant to subsection 2(1) of *IECPR*, which reads as follows:

PART 1
INSURABLE EARNINGS

Earnings from Insurable Employment

> **2.** (1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is
>
> > (*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
> >
> > (*b*) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.
> >
> > . . .

[50] Although this subsection was included among in the statutory provisions relied upon by the respondent in the Reply, no argument was made either in the Reply or at trial regarding the application thereof. The intervener did not argue that point either. I have myself already decided in a previous case that tips distributed to an employee by an employer are to be considered insurable earnings (see *Union of Saskatchewan Gaming Employees Local 40005 v. Canada (M.N.R.)*, 2004 TCC

799, in which I relied on *Canadian Pacific Ltd. v. A.G. (Can.)*, [1986] 1 S.C.R. 678).

[51] In the present case, Cheers collects one percent of the staff's sales out of their tips for the shift when the appellant is not working and keeps that money in an envelope specifically for the appellant. During his shift, the appellant collects that one percent from the staff himself and records it in a book that is kept in the office of the employer. The evidence, in my view, clearly disclosed that it was Cheers' policy to ask the staff to share tips with the night manager. The evidence even disclosed that Mr. Wolfstein unilaterally decided on one occasion to temporarily deprive the appellant of that source of income from daytime sales. This certainly shows that those tips handed over to the night manager were under the employer's control and subject to the employer's discretion. In my view, they formed part of the appellant's insurable earnings as they were for all practical purposes distributed to the appellant under the employer's direction. Mr. Wolfstein also acknowledged that employees are required to declare their tips to the employer under provincial legislation. Finally, the amounts taken out of these tips were easily calculable, being one percent of the staff's sales. They were all recorded by the appellant (Exhibit A-3) and were recognized by Ms. Jackson in Exhibit I-1 under the "stock options" item referred to above. Ms. Jackson was not present to explain why she indicated these amounts as "stock options". There was some controversy over that letter, which she had written for the benefit of the appellant's bank. Nevertheless, Mr. Wolfstein did not deny the fact that the appellant was entitled, as night manager, to one percent of the staff's sales. The appellant explained that the amount shown under stock options in Exhibit I-1 corresponded to the payments that he received out of tips in the period at issue, and that figure is very close to his own calculation provided in Exhibit A-3.

[52] For all these reasons, I find that the appellant was working under a contract of employment, and I have no reason not to believe that he worked 1,688 insurable hours and received $46,156.25 in insurable earnings for the period at issue.

[53] The appeal is allowed, without costs, and the decision rendered on June 28, 2002, by Ms. Suzanne Cloutier for the CCRA is restored.

Signed at Ottawa, Ontario, this 21st day of December 2005.

"Lucie Lamarre"

Lamarre, J.

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COURT FILE NO.:	2003-688(EI)
STYLE OF CAUSE:	HENRY IVAN PERON v. M.N.R. and CHEERS BAR SERVICES INC.
PLACE OF HEARING:	Montreal, Québec
DATE OF HEARING:	August 20, 2004, and February 2, 2005
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DATE OF JUDGMENT:	December 21, 2005

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