Docket: 2006-3710(EI)

BETWEEN:

NICOLE VANASSE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 1, 2008, at Montréal, Quebec.

Before: The Honourable Justice B. Paris

Appearances

Counsel for the Appellant:	Gilbert Nadon
Counsel for the Respondent:	Nancy Dagenais

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* from the decision of the Minister of National Revenue dated October 27, 2006, respecting the insurability of the Appellant's employment for the periods at issue is dismissed and the Minister's decision is upheld.

Signed at Ottawa, Canada, this 10th day of March 2008.

"B. Paris"

Paris J.

Citation: 2008TCC134
Date: 20080310
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REASONS FOR JUDGMENT

Paris J.

[1] The appeal is from a decision by the Minister of National Revenue (the "Minister") under the *Employment Insurance Act* (the "Act") dated October 27, 2006, that the employment of the Appellant with 9058-5399 Québec Inc. (the "Payor") was excluded employment under paragraph 5(2)(*i*) of the Act for the following periods:

> December 6, 1999, to March 31, 2000
> December 11, 2000, to April 6, 2001
> December 24, 2001, to April 19, 2002
> December 23, 2002, to April 18, 2003
> December 22, 2003, to April 30, 2004
> December 13, 2004, to May 6, 2005

[2] Paragraph 5(2)(*i*) of the Act states that insurable employment does not include "employment if the employer and employee are not dealing with each other at arm's length". The fact that the Appellant and the Payor were not dealing with each other at arm's length was not disputed.

[3] However, in applying paragraph 5(2)(*i*), the Minister may consider the exception provided for under paragraph 5(3)(*b*) of the Act, which reads as follows:

> 5(3) For the purposes of paragraph (2)(*i*),
>
> …..
>
> if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] In this case, the Minister determined that it was not reasonable to conclude that the Appellant and Payor would have entered into a substantially similar contract if they had been dealing with each other at arm's length.

[5] The assumptions of fact on which the Minister relied in making the determination are set out in paragraph 7 of the Reply to the Notice of Appeal. Counsel for the Appellant admitted most of those facts, as follows:

[TRANSLATION]

(a) the Payor was incorporated on December 22, 1997, but the business had been in operation since 1988; (admitted)

(b) the Payor ran a bar and function room operating as "Le relais de la station"; (admitted)

(c) the Payor is open throughout the year, but the busiest season is from December to April, because of snowmobiler clientele; (admitted)

(d) the Payor's hours of operation in the winter and on Saturdays and Sundays year-round were 10 a.m. to 11 p.m.; on the other days, the business was open from 4 p.m. to 11 p.m.; (admitted with explanation)

(e) the Payor's gross income and losses were as follows:

Year	Income	Losses
1999	$144,236	-$34,318
2000	$149,956	-$34,506
2001	$164,497	-$39,144
2002	n/a	- $758
2003	$157,058	-$11,463

(admitted)

(f) according to the Payor's 2001 to 2005 quarterly GST returns, sales ranged between $22,451, the lowest, in the fall of 2003, to $54,070, the highest, in the winter of 2005; (admitted)

(g) the Appellant worked as a manager for the Payor; (admitted)

(h) the Appellant's duties consisted in scheduling the servers' hours of work and supervising the servers, doing inventory, doing the ordering and running errands, doing the cleaning, and handling the bookkeeping, payroll and bank deposits; (admitted with explanation)

(i) the Appellant had authorization to sign the Payor's cheques on her own; (admitted)

(j) the Appellant had worked for the business for 15 years; (admitted)

(k) Jacques Vanasse had a full-time job with another business and put in time with the Payor when he could; (admitted)

(l) in a signed statement to a representative of Human Resources Development Canada on August 24, 2005, the Appellant indicated that [TRANSLATION] "I generally work 40 hours a week over five days, from Monday to Friday"; (admitted)

(m) on August 30, 2005, Jacques Vanasse told a representative of the Respondent that the Appellant often worked more than 40 hours a week; (admitted)

(n) the Appellant was paid $450 a week into 2002 and $475 thereafter; (admitted)

(o) the Appellant was paid only during the winter months; (admitted)

(p) on April 5, 2000, the Payor issued the Appellant a record of employment that showed the first day of work as December 6, 1999, the last day of work as March 31, 2000, the number of insurable hours as 680, and insurable earnings as $7,956; (admitted)

(q) on April 11, 2001, the Payor issued the Appellant a record of employment that showed the first day of work as December 11, 2000, the last day of work as April 6, 2001, the number of insurable hours as 680, and insurable earnings as $8,109; (admitted)

(r) on April 25, 2002, the Payor issued the Appellant a record of employment that showed the first day of work as December 24, 2001, the last day of work as April 19, 2002, the number of insurable hours as 680, and insurable earnings as $8,109; (admitted)

(s) on April 24, 2002 [*sic*], the Payor issued the Appellant a record of employment that showed the first day of work as December 23, 2002, the last day of work as April 18, 2003, the number of insurable hours as 680, and insurable earnings as $8,559.50; (admitted)

(t) on May 5, 2004, the Payor issued the Appellant a record of employment that showed the first day of work as December 22, 2003, the last day of work as April 30, 2004, the number of insurable hours as 760, and insurable earnings as $9,566.50; (admitted)

(u) on May 11, 2005, the Payor issued the Appellant a record of employment that showed the first day of work as December 13, 2004, the last day of work as May 6, 2005, the number of insurable hours as 940, and insurable earnings as $10,573.50; (admitted)

(v) in actual fact, the Appellant worked for the Payor throughout the year, performing the same duties; (denied)

(w) the Appellant's hours of work were not recorded or paid during the eight months when she was allegedly laid off; (admitted with explanation)

(x) on October 19, 2006, in a statement to a representative of the respondent, the Appellant indicated that, during her periods of unemployment, she worked for the Payor on an unpaid basis between 7 and 10 hours a week; (admitted)

(y) the Appellant's records of employment do not reflect reality in terms of periods of employment and hours actually worked; (denied)

(z) the employment terms and conditions, remuneration and duration of employment of a person dealing at arm's length would not have been similar to those of the Appellant. (denied)

[6] With regard to paragraph 7(d), the evidence shows that, in addition to the hours of operation indicated, the Payor's establishment (Le relais de la station) sometimes stayed open until between midnight and 3 a.m. in the winter, and opened at 3 p.m. on Fridays in the summer.

[7] In addition to performing the duties indicated in paragraph 7(h), the Appellant was responsible for counting the money in the servers' till each morning, preparing the cash float for the day, filling the beer coolers, doing the bookkeeping and emptying the video poker terminal.

[8] In winter, she also had to lug in wood and light the stove, and shovel the snow off the verandas outside the bar.

[9] As regards the work performed by the Appellant for the Payor outside these periods of employment, the Appellant admitted that she performed substantially the same duties year-round, but that, in summer, the work took much less time. She stated that she worked for the Payor 40 hours a week, from Monday to Friday, during the winter, but only between half an hour and an hour a day in the summer. She explained that cleaning the bar involved much lighter work in the summer. For example, in the summer the floor needed washing only once a week, compared with every day in the winter (because of the snow), and she did not have to light the stove. Since the bar was not as busy in the summer and the hours of operation were shorter, there was less work to be done. In summer, there were only three servers, compared with four in the winter. In summer, the bar sold less beer and alcohol than in winter, which meant that placing orders, tabulating sales and refilling the coolers took less time. The same was true of the bookkeeping and accounting duties. She also confirmed that the work done for the Payor outside her periods of employment was unpaid work.

[10] According to Melissa Lesage, who worked as a server for the Payor from September 2000 to May 2002 and from September 2002 to May 2003, the Appellant worked on the Payor's premises at least three hours a day, seven days a week, during the summer. She stated that the Appellant would arrive at about 8 a.m. and would not leave before 11 a.m., and would come back to help serve during busy periods. She also indicated that the Appellant had worked for the Payor seven days a week during the winter. On weekends, the Appellant would do the same work as during the week between 8 and 11 a.m. and would help serve, if necessary, on Saturday and Sunday afternoons, the busiest times. Ms. Lesage stated that she herself had been paid an hourly wage and had been paid for all hours worked.

Appellant's position

[11] Counsel for the Appellant began by citing the decision of the Federal Court of Appeal in *Légaré v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 878 (F.C.A.) (QL), in which the Court stated the following concerning the role of the Court in an appeal from a decision of the Minister such as that in the case before us:

> [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.

[12] Counsel for the Appellant argued that the Minister erred in arriving at his conclusion in this case, as he took into account work done by the Appellant for the Payor outside the periods of employment. He cited the decision of the Federal Court of Appeal in *Théberge v. Canada (Minister of National Revenue)*, 2002 FCA 123, in which the Court stated:

> [19] What a claimant does outside the period during which he or she is employed in what the Minister considers to be insurable employment can be relevant, for example, to verify that the claimant is unemployed, to determine the amount of his or her benefits, or to establish his or her period of unemployment. However, for the purposes of the exception provided in paragraph 3(2)(*c*) of the Act, what a claimant does outside his or her period of employment will be of little relevance when, as in this case, it is not alleged that the salary paid during the period of employment took into account the work performed outside of that period, that the applicant had included, in the hours spent on his or her insurable employment, hours worked outside of the period, or that work performed outside of his or her period of employment had been included in the work performed during his or her period of employment. It seems to me to be self-evident, and this is confirmed by the evidence, that in the case of family businesses engaged in seasonal work, the minimal amount of work that remains to be done outside the active season is usually performed by family members, without pay. Excepting seasonal employment, in a family farm business, on the ground that cows are milked year-round amounts, for all practical purposes, to depriving family members who qualify by working during the active season of unemployment insurance and to overlooking the two main characteristics of such a business: that it is a family business and a seasonal business.
>
> [20] A claimant is not required to remain completely inactive while he or she is receiving benefits. Under section 10 of the Act, benefits are payable for each "week of unemployment" included in the benefit period and a "week of unemployment" is a week during which the claimant does not work a full working week. Under subsection 15(2) of the Act, a claimant may have earnings in respect

> of any time that falls in a week of unemployment and those earnings will be deducted only if they are in excess of an amount equal to twenty-five per cent of the claimant's weekly benefit. It is moreover settled law that work that is truly unpaid does not affect a claimant's status as unemployed (*Bérubé v. Canada (Employment and Immigration)*, (1990) 124 N.R. 354 (F.C.A.)). I also note that under subsection 43(3) of the *Unemployment Insurance Regulations*, a claimant who is employed in farming is not regarded as working a full working week at any time during the period from October 1 to March 31 if the claimant proves that the work he or she performed was so minor that it would not have prevented him or her from accepting full-time employment. I realize that those provisions do not apply, strictly speaking, in insurability cases, but they are nonetheless part of the backdrop.
>
> [21] Getting back to this particular case, the fact that the applicant worked without pay for ten to fifteen hours each week outside the active season and while he was receiving benefits may indicate that he would not have performed that unpaid work if he had not been his employer's son. However, that is not the work we are concerned with, and the judge erred by taking it into account in the absence of any indication that the insurable employment at issue was subject to special terms and conditions that were attributable services being rendered outside the period of employment.

[13] Counsel for the Appellant argued that the ruling in *Théberge* was followed by the Court of Appeal in *Aspiro v. Canada* (*Minister of National Revenue*), 2000 CANLII 15255 (F.C.A.) and *Chouinard v. Canada* (*Minister of National Revenue*), 2003 FCA 338. Counsel for the Appellant also argued that the work done without pay by the employee in *Théberge* was regular work that took at least 10 hours a week, as was the case for the Appellant. Finally, he maintained that there was nothing in the evidence to show that the terms and conditions, remuneration or duration of the work would have been any different had there been an employment contract between two parties dealing with each other at arm's length.

Analysis

[14] Based on the admitted facts in evidence, the Appellant has not persuaded me that the Minister's decision no longer seems reasonable. In my view, the unpaid work done by the Appellant for the Payor outside the periods of employment is a fact that the Minister is entitled to consider in assessing the relationship between the parties. In *Malenfant v. Canada* (*Minister of National Revenue*), 2006 FCA 226, the Federal Court of Appeal limited the scope of its decision in *Théberge* to circumstances where the Payor's business is a strictly seasonal family business, stating the following:

> [11] As far as the *ratio decidendi* in *Théberge* is concerned, I do not think it applies in this case. Here, we are not dealing with a strictly seasonal family business, as was the case in *Théberge*. The business for which the Appellant worked operated throughout the year and also employed persons who were at arm's length. In addition, the pay received by these persons was as a rule different from what the Appellant accepted and received and could not be explained otherwise but by the fact that the Appellant and payer were not dealing at arm's length. There was nothing like this in *Théberge*. Finally, in *Théberge*, there was no substantial number of hours spent on voluntary work during the paid hours of work, unlike in the case at bar.

[15] In this case, it is clear that the Payor operated its bar throughout the year, even if business was slower in the summer. Business was still considerable in the summer months, and the bar was open seven days a week. Moreover, in summer, the Payor employed three persons who were at arm's length. This was not a strictly seasonal family business.

[16] With regard to *Aspiro* and *Chouinard*, which were also cited by counsel for the Appellant, it seems that the payors in those cases were also strictly seasonal family businesses.

[17] Moreover, I am convinced that the scope of the Appellant's work for the Payor every summer was much greater than she claimed. I accept the testimony in this regard given by Ms. Lesage, a disinterested witness, who stated that the Appellant had worked at least three hours a day, seven days a week, during the summer, not counting the helping hand she provided when needed during peak periods. Ms. Lesage also stated that the Appellant's husband (who was the sole shareholder in the Payor) seldom worked in the business, even on weekends, contrary to what the Appellant claimed.

[18] In her rebuttal evidence, the Appellant did not contradict Ms. Lesage's statements. In any event, I have difficulty believing that the Appellant could have accomplished in one hour a day most of the duties that took her eight hours a day in winter, given that the Payor's business was still considerable in summer. Finally, the Appellant did not produce any other witnesses to support her statements.

[19] With regard to the wages, the onus was on the Appellant to prove that her wages were reasonable having regard to the circumstances. The evidence shows that, during her periods of employment, the Appellant worked 40 hours a week from Monday to Friday and at least six hours more on Saturdays and Sundays. The evidence also shows that she was paid straight wages of $475 a week. It is not clear

whether those wages took into account a workload beyond 40 hours a week and beyond five days a week, or whether the amount paid was equal to what the Payor would have had to pay an employee at arm's length. No evidence in this regard was adduced. The Appellant therefore did not succeed in proving that the remuneration she received was reasonable under the circumstances.

[20] For all of these reasons, I find that, upon consideration of all of the evidence, the Minister's conclusion in this case still seems reasonable. The appeal is accordingly dismissed.

Signed at Ottawa, Canada, this 10th day of March 2008.

"B. Paris"

Paris J.

Translation certified true
on this 6th day of May 2008.
Carole Chamberlin, Translator

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REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	March 10, 2008

APPEARANCES:

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