

Dockets: 2005-849(EI)
2005-850(EI)

BETWEEN:

CHRISTIANE DUMAIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of *Jean-François Dumais* (2005-852(EI) and 2005-853(EI)), *Auberge sur la Côte inc.* (2005-854(EI)) and *Mario Dumais, operating Auberge sur la Côte enr.* (2005-856(EI)), on December 14 and 15, 2005, and March 23, 2006, at Québec, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

| | |
|-----------------------------|------------------|
| Counsel for the Appellant: | Sarto Veilleux |
| Counsel for the Respondent: | Claude Lamoureux |

JUDGMENT

The appeals filed under subsection 103(1) of the *Employment Insurance Act* are dismissed, and the decisions of the Minister of National Revenue are confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of June 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of November 2007.
Michael Palles, Reviser

Dockets: 2005-852(EI)
2005-853(EI)

BETWEEN:

JEAN-FRANÇOIS DUMAIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of *Christiane Dumais* (2005-849(EI) and 2005-850(EI)), *Auberge sur la Côte inc.* (2005-854(EI)) and *Mario Dumais, operating Auberge sur la Côte enr.* (2005-856(EI)), on December 14 and 15, 2005, and March 23, 2006, in Québec, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

| | |
|-------------------------|------------------|
| Counsel for Appellant: | Sarto Veilleux |
| Counsel for Respondent: | Claude Lamoureux |

JUDGMENT

The appeals filed under subsection 103(1) of the *Employment Insurance Act* are dismissed, and the decisions of the Minister of National Revenue are confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of June 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of November 2007.
Michael Palles, Reviser

Docket: 2005-854(EI)

BETWEEN:

AUBERGE SUR LA CÔTE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Christiane Dumais* (2005-849(EI) and 2005-850(EI)),
Jean-François Dumais (2005-852(EI) and 2005-853(EI))
and *Mario Dumais, operating Auberge sur la Côte enr.* (2005-856(EI)),
on December 14 and 15, 2005, and March 23, 2006, at Québec, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Sarto Veilleux
Counsel for the Respondent: Claude Lamoureux

JUDGMENT

The appeal filed under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, the 20th day of June, 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of November 2007.
Michael Palles, Reviser

Docket: 2005-856(EI)

BETWEEN:

MARIO DUMAIS,
OPERATING L'AUBERGE SUR LA CÔTE ENR.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
Christiane Dumais (2005-849(EI) and 2005-850(EI)),
Jean-François Dumais (2005-852(EI) and 2005-853(EI))
and *Auberge sur la Côte inc.* (2005-854(EI)),
on December 14 and 15, 2005, and March 23, 2006, at Québec, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Sarto Veilleux
Counsel for the Respondent: Claude Lamoureux

JUDGMENT

The appeal filed under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of June 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of November 2007.
Michael Palles, Reviser

Citation: 2007TCC261

Date: 20070620

Dockets: 2005-849(EI), 2005-850(EI),
2005-852(EI), 2005-853(EI),
2005-854(EI) and 2005-856(EI)

BETWEEN:

CHRISTIANE DUMAIS,
JEAN-FRANÇOIS DUMAIS,
AUBERGE SUR LA CÔTE INC.,
MARIO DUMAIS, OPERATING AUBERGE SUR LA CÔTE ENR.,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The appellants are appealing from decisions of the Minister of National Revenue (the "Minister") rendered under the *Employment Insurance Act* (the "Act"). The Minister decided that Christiane Dumais (the "Female Worker") and Jean-François Dumais (the "Male Worker") did not hold employment under a contract of employment and therefore did not hold insurable employment within the meaning of paragraph 5(1)(a) of the Act when they worked for Mario Dumais, who was operating Auberge sur la Côte enr., and when they worked for Auberge sur la Côte inc. (the "Payers"). The Minister also decided that the Male Worker and the Female Worker (the "Workers") did not hold insurable employment when they worked for the Payers, since he concluded that this was excluded employment, as the Workers and the Payers would not have entered into similar contracts if they had been dealing with each other at arm's length.

[2] The relevant periods for the Female Worker when she worked for Mario Dumais were as follows:

- (i) from January 1, 1999, to October 23, 1999;
- (ii) from December 26, 1999, to June 24, 2000.

[3] The relevant periods for the Female Worker when she worked for Auberge sur la Côte inc. (the "Company") were as follows:

- (i) from June 25, 2000, to October 14, 2000;
- (ii) from June 24, 2001, to September 29, 2001;
- (iii) from October 7, 2001, to October 13, 2001;
- (iv) from May 12, 2002, to October 26, 2002;
- (v) from June 21, 2003, to September 13, 2003.

[4] The relevant periods for the Male Worker when he worked for Mario Dumais were as follows:

- (i) from June 3, 1999, to October 23, 1999;
- (ii) from June 12, 2000, to June 24, 2000.

[5] The relevant periods for the Male Worker when he worked for the company were as follows:

- (i) from June 25, 2000, to October 14, 2000;
- (ii) from June 24, 2001, to September 29, 2001;
- (iii) from November 23, 2001, to September 21, 2002;
- (iv) from September 30, 2002, to September 27, 2003.

[6] In rendering his decisions in dockets 2005-856(EI), 2005-849(EI) and 2005-853(EI), the Minister determined that the Workers did not hold employment under a contract of employment when they worked for Mario Dumais. These decisions were rendered on the basis of the following assumptions of fact in docket 2005-856(EI):

- (a) On August 2, 1994, the appellant registered the corporate name of "Auberge sur la Côte enr";
- (b) The appellant operated a 12-room inn, a 3-bedroom cottage and a dining room with a capacity of 68 persons;

- (c) In 1999, the appellant was operating year round;
- (d) In January 2000, a fire at the inn forced it to close until May 2000;
- (e) The appellant hired up to 15 persons;
- (f) During the investigation, the appellant refused to disclose the documents requested by the respondent's representative;
- (g) During the investigation, counsel for the appellant advised the respondent's representative that there would be no interview with the Male Worker or the Female Worker;

Jean-François Dumais

- (h) The Male Worker worked for the appellant as head cook;
- (i) The Male Worker's duties consisted of setting the menus, dealing with suppliers and the other kitchen employees and preparing the meals themselves;
- (j) During very busy periods, the Male Worker would work up to 80 hours per week;
- (k) No accounting was made of the Male Worker's hours of work;
- (l) In 1999, the Male Worker's weekly salary was \$550;
- (m) The Male Worker began rendering services for the appellant in the beginning of May;
- (n) The Male Worker did not begin receiving his pay until the end of June;
- (o) The Male Worker was rendering services to the appellant on a full-time basis, without pay;
- (p) On May 10, 2002, Christiane Dumais stated to an HRDC investigator that in the spring, when the employees started working, they would bank hours so that they would not be penalized when they became unemployed and so that they would have large paycheques;

- (q) On October 26, 1999, the appellant issued to the Male Worker a record of employment that gave June 3, 1999, as the first day worked and October 23, 1999, as the last day worked. It also showed 672 insurable hours and 7 weeks with \$1,100.00 and 1 week with \$1,126.83 as insurable earnings per week;
- (r) On June 28, 2000, the appellant issued to the Male Worker a record of employment that gave June 12, 2000, as the first day worked and June 24, 2000, as the last day worked. It also showed 82 insurable hours and insurable earnings of \$1,248.00;
- (s) The Male Worker's records of employment do not reflect the actual hours and periods worked;
- (t) The periods during which the Male Worker allegedly worked did not correspond to the periods actually worked;
- (u) The appellant and the Male Worker entered into an arrangement to allow the Male Worker to receive employment insurance benefits while still rendering services to the appellant;

Christiane Dumais

- (v) The Female Worker worked for the appellant as an assistant manager;
- (w) The Female Worker's duties consisted of taking care of the reception desk, reservations, guest check-ins and check-outs and bills, helping with breakfast, making up rooms, doing the laundry, completing staff time sheets and keeping accounting records;
- (x) The appellant reported that the Female Worker worked 12 hours per day, 7 days per week;
- (y) The Female Worker's weekly salary was \$425 in 1999;
- (z) No accounting was made of the Female Worker's hours;
- (aa) The appellant had a policy allowing employees to bank their hours;
- (bb) On May 10, 2002, the Female Worker stated to an HRDC investigator that when the employees began working in the spring, they banked hours of work so that they would not be penalized when they became unemployed and so that they would have large paycheques;

- (cc) Before and after the disputed periods, the Female worker rendered services to the appellant on a full-time basis without any remuneration;
- (dd) On November 15, 1999, the appellant issued to the Female Worker a record of employment that gave January 1, 1999, as the first day worked and October 23, 1999, as the last day worked. It also showed 795 insurable hours and 8 weeks with \$850.00, 1 week with \$1,172.59 and 1 week with \$60.71 as insurable earnings per week;
- (ee) On June 28, 2000, the appellant issued to the Female Worker a record of employment that gave December 26, 1999, as the first day worked and June 24, 2000, as the last day worked. It also showed 19 insurable hours and \$177.84 as insurable earnings;
- (ff) The Female Worker's records of employment do not reflect the actual hours and periods worked;
- (gg) The periods allegedly worked by the Female Worker do not correspond to the periods actually worked;
- (hh) The appellant and the Female Worker entered into an arrangement to allow the Female Worker to receive employment insurance benefits while continuing to render services to the appellant.

[7] In rendering his decision in dockets 2004-854(EI), 2005-852(EI) and 2005-850(EI), the Minister determined that the employees did not hold employment under a contract of employment when they worked for the company, based on the following assumptions of fact in docket 2005-854(EI):

- (a) The appellant was incorporated on May 31, 1999; **(admitted)**
- (b) The appellant operated a 12-room inn, a 3-bedroom cottage and a dining room with a capacity of 68 persons; **(admitted)**
- (c) Before the appellant was incorporated, Mario Dumais had been operating the inn personally since 1994; **(admitted)**
- (d) Since 2000, the company has been operating from May through November; **(denied as drafted)**
- (e) The appellant hired up to 15 persons; **(admitted)**

- (f) During the investigation, the appellant refused to disclose the documents requested by the respondent's representative; **(denied as drafted)**
- (g) During the investigation, the counsel for the appellant advised the respondent's representative that there would be no interview with the Male Worker or the Female Worker; **(admitted)**

Jean-François Dumais

- (h) The employee worked for the appellant as head cook; **(admitted)**
- (i) The Male Worker's duties consisted of setting the menus, dealing with suppliers and the other kitchen employees and preparing the meals themselves; **(admitted)**
- (j) During very busy periods, the Male Worker worked up to 80 hours per week; **(denied)**
- (k) No accounting was made of the Male Worker's hours of work; **(admitted)**
- (l) From 1999 to 2003, the Male Worker's weekly salary was from \$550 to \$1,081; **(denied)**
- (m) The Male Worker began rendering services for the appellant from the beginning of May; **(denied)**
- (n) The Male Worker did not begin receiving payment until the end of June; **(admitted)**
- (o) On May 10, 2002, Christiane Dumais stated to an HRDC investigator that in the spring, when the employees started working, they would bank hours so that they would not to be penalized when they became unemployed and so that they would have large paycheques; **(denied)**
- (p) Following his alleged layoffs at the end of September or in mid October, the Male Worker continued to render services to the appellant without reporting any earnings; **(denied as drafted)**
- (q) On October 17, 2000, the appellant issued to the Male Worker a record of employment that gave June 25, 2000, as the first day worked and October 14, 2000, as the last day worked. It also showed 572 insurable hours and 7 weeks with \$1,248 as insurable earnings per pay period; **(admitted)**

- (r) On October 2, 2001, the appellant issued to the Male Worker a record of employment that gave June 24, 2001, as the first day worked and September 29, 2001, as the last day worked. It also showed 588 insurable hours and \$10,389.68 as insurable earnings; **(admitted)**
- (s) On October 1, 2002, the appellant issued to the Male Worker record of employment that gave November 23, 2001, as the first day worked and September 21, 2002, as the last day worked. It also showed 572 insurable hours and \$10,494 as insurable earnings; **(admitted)**
- (t) On September 30, 2003, the appellant issued to the Male Worker a record of employment that gave September 30, 2002, as the first day worked and September 27, 2003, as the last day worked. It also showed 776 insurable hours and \$16,866.72 as insurable earnings; **(admitted)**
- (u) The Male Worker's records of employment do not reflect the actual hours and periods worked; **(denied)**
- (v) The periods allegedly worked by the Male Worker did not correspond to the periods actually worked; **(denied)**
- (w) The appellant and the Male Worker entered into an arrangement to allow the Male Worker to receive employment insurance benefits while still rendering services to the appellant; **(denied)**

Christiane Dumais

- (x) The Female Worker worked for the appellant as an assistant manager; **(admitted)**
- (y) The Female Worker's duties consisted of taking care of the reception desk, reservations, guest check-ins and check-outs and bills, helping with breakfast, making up rooms, doing the laundry, completing staff time sheets, keeping accounting records and managing accommodations staff; **(admitted)**
- (z) The appellant stated that the Female Worker worked 12 hours per day, 7 days per week; **(denied)**
- (aa) No accounting was made of the hours worked by the employee; **(admitted)**
- (bb) From 1999 to 2003, the Female Worker's weekly salary ranged from \$425 to \$643; **(denied)**

- (cc) The Female Worker began to render services to the appellant from the beginning of May; **(denied)**
- (dd) The Female Worker did not begin receiving her pay until end of June; **(admitted)**
- (ee) On May 10, 2002, the Female Worker stated to an HRDC investigator that when the employees began working in the spring, they banked hours of work so that they would not be penalized when they became unemployed and so that they would receive large paycheques; **(denied as drafted)**
- (ff) After her alleged layoffs at the end of September or in mid October, the Female Worker continued to render services to the appellant without reporting any earnings; **(denied)**
- (gg) On October 17, 2000, the appellant issued to the Female Worker a record of employment that gave June 25, 2000, as the first day worked and October 14, 2000, as the last day worked. It also showed 654 insurable hours and 8 weeks with \$936 as insurable earnings per pay period; **(denied)**
- (hh) On October 2, 2001, the appellant issued to the Female Worker a record of employment that gave June 24, 2001, as the first day worked and September 29, 2001, as the last day worked. It also showed 588 insurable hours and \$7,421.20 as insurable earnings; **(admitted)**
- (ii) On October 16, 2001, the appellant issued to the Female Worker a record of employment that gave October 7, 2001, as the first day worked and October 13, 2001, as the last day worked. It also showed 42 insurable hours and \$530 as insurable earnings; **(admitted)**
- (jj) On November 13, 2002, the appellant issued to the Female Worker a record of employment that gave May 12, 2002, as the first day worked and October 26, 2002, as the last day worked. It also showed 574 insurable hours and \$7,952.54 as insurable earnings; **(admitted)**
- (kk) On September 16, 2003, the appellant issued to the Female Worker a record of employment that gave June 21, 2003, as the first day worked and September 13, 2003, as the last day worked. It also showed 462 insurable hours and \$7,085.65 as insurable earnings; **(admitted)**
- (ll) The Female Worker's records of employment do not reflect the actual hours and periods worked; **(denied)**
- (mm) The periods allegedly worked by the Female Worker did not correspond to the periods actually worked; **(denied)**

- (nn) The appellant and the Female Worker entered into an arrangement to allow the Female Worker to receive employment insurance benefits while continuing to render services to the appellant; **(denied)**

[8] In rendering his decisions in dockets 2005-856(EI), 2005-853(EI) and 2005-849(EI), the Minister determined that when the employees worked for Mario Dumais, they were not at arms' length with him within the meaning of the *Income Tax Act* (the "ITA"), based on the following assumptions of fact in docket 2005-856(EI):

- (a) Mario Dumais was the sole owner of the corporate name "Auberge sur la Côte"; **(admitted)**
- (b) The Male Worker is the son of Mario Dumais; **(admitted)**
- (c) The Female Worker is the spouse of Mario Dumais; **(admitted)**

[9] In rendering his decisions in dockets 2005-856(EI), 2005-849(EI) and 2005-853(EI), the Minister also determined that Mario Dumais and the Workers [TRANSLATION] "were not dealing with each other at arm's length in their employment relationship" and that it was not reasonable to conclude that Mario Dumais and the employees [TRANSLATION] "would have entered into a substantially similar contract of employment with each other if they had been dealing with each other at arm's length, taking into consideration the following circumstances":

- (a) All of the appellant's employees had to fill out a time sheet, except for the Workers; **(admitted)**
- (b) Except for the Workers, all the appellant's employees were paid at an hourly rate on the basis of the hours actually worked; **(denied as drafted)**
- (c) The Workers were paid a fixed weekly salary no matter how many hours were actually worked; **(denied as drafted)**
- (d) Before and after the disputed periods, the Workers rendered services to the appellant without receiving any pay; **(denied)**
- (e) A worker dealing at arm's length would have been paid for the hours actually worked; **(denied)**

- (f) A worker dealing at arm's length would not have worked 80 hours per week for a fixed weekly salary; **(denied)**
- (g) On November 4, 2004, Mario Dumais stated to a representative of the respondent that he considered it to be normal for the Workers to perform unpaid work because this was a family business; **(denied as drafted)**
- (h) A worker dealing at arm's length would not have performed unpaid work for the appellant; **(denied as drafted)**
- (i) The Workers' remuneration, conditions of employment and duration of employment would not have been the same if they had been dealing at arm's length with the appellant. **(denied)**

[10] In rendering his decisions in dockets 2004-854(EI), 2005-852(EI) and 2005-850(EI), the Minister determined that when the Workers worked for the company "Auberge de la Côte inc.", they were not dealing at arm's length with each other within the meaning of the I.T.A., based on the following assumptions of fact in docket 2005-854(EI):

- (a) Mario Dumais was the sole shareholder of the appellant; **(admitted)**
- (b) The Male Worker is the son of Mario Dumais; **(admitted)**
- (c) The Female Worker is the spouse of Mario Dumais; **(admitted)**
- (d) The Workers are related to a person who controlled the appellant; **(admitted)**

[11] In rendering his decisions, the Minister also determined that the company and the Workers [TRANSLATION] "were not dealing at arm's length with each other in their employment relationship" and that it was not reasonable to conclude that the company would have entered into [TRANSLATION] "a substantially similar contract of employment [with the Workers] if they had been dealing with each other at arm's length, taking into consideration the following circumstances":

- (a) All of the appellant's employees had to fill out a time sheet, except for the Workers; **(admitted)**
- (b) Except for the Workers, all of the appellant's employees were paid at an hourly rate on the basis of the hours actually worked; **(denied as drafted)**

- (c) The Workers received a fixed weekly salary no matter how many hours they actually worked; **(denied as drafted)**
- (d) Before and after the periods in dispute, the Workers rendered services to the appellant without being paid; **(denied)**
- (e) A worker dealing at arm's length would have been paid for the hours actually worked; **(denied)**
- (f) A worker dealing at arm's length would not have worked 80 hours per week for a fixed weekly salary; **(denied)**
- (g) On November 4, 2004, Mario Dumais stated to a representative of the respondent that he considered it to be normal for the Workers to perform unpaid work because this was a family business; **(denied as drafted)**
- (h) A worker dealing at arm's length would not have performed unpaid work for the appellant; **(denied as drafted)**
- (i) The Workers' remuneration, conditions of employment and duration of employment would not have been the same if they had been dealing at arm's length with the appellant. **(denied)**

Position of the appellants

[12] The appellants submitted essentially the following arguments:

(i) The Minister's decisions were the result of an inappropriate exercise of his discretion, because he committed such serious and important mistakes as to discredit the whole discretionary process. Therefore, they ask that the Court set aside all the Minister's decisions because they are illegal. In other words, the appellants submit that the Minister acted in bad faith and that for this reason alone, the decisions must be set aside. They criticize Pierre Rinfret, who conducted the initial investigation at the request of HRDC (Human Resources Development Canada), of having a preconceived idea about the insurability of the Workers' employment before even having met them, of having refused to consider all the facts and circumstances related to their employment and of having used a series of tricks to trap the appellants and some of the Payers' employees. Finally, they submit that the decisions rendered by the appeal officer, Nicole Chouinard, were also essentially based on the same facts as those used by Mr. Rinfret.

(ii) The terms and conditions of employment for the Workers were reasonable, having regard to all the circumstances. The Payers and persons dealing with them at arm's length would have entered into contracts of employment substantially similar to those entered into by the Workers and the Payers. As regards the work performed by the Workers outside of the relevant periods, they submit that it was minimal, marginal and infrequent, and that it happened for very short periods of time and was unrelated to the work performed during the relevant periods. On the basis of the teachings of the Federal Court of Appeal,¹ they submit that the Minister should not have taken into consideration unpaid work performed by the employees outside of the relevant periods, having regard to its nature, duration and importance.

(iii) The Workers held employment under a contract of employment.

[13] In the years in question, the evidence revealed the following, among other things, with regard to the Payers:

(i) The Payers operated an inn in the Charlevoix region. This inn offered hotel, restaurant and catering services. The inn featured "B&B" packages (accommodations and breakfast) and complete packages (accommodations, breakfast and dinner).

(ii) The inn had 12 rooms for 2 to 4 persons, a 3-bedrooms cottage and a restaurant with a capacity of 68 persons. The restaurant was generally open for breakfast and dinner. In addition, reservations could be made for wedding and funeral receptions. Finally, the restaurant was not exclusively used by guests staying at the inn. It should be noted that the Debeur Guide ranked the restaurant among the top 500 in Quebec.

(iii) The Payers had established a system allowing certain employees to bank their hours.

¹ *Carol Th  berge v. Minister of National Revenue – M.N.R.*, 2002 FCA 123.

(iv) The GST returns submitted by the Payers showed sales during the periods in question as follows.²

- For Mario Dumais, operating Auberge sur la Côte enr.:

| End of period | Sales |
|----------------------|--------------|
| 12-31-1999 | \$54,669 |
| 03-31-2000 | \$0 |
| 06-30-2000 | \$49,413 |

- For the company:

| End of period | Sales |
|----------------------|--------------|
| 09-30-2000 | \$221,388 |
| 12-31-2000 | \$49,879 |
| 03-31-2001 | \$666 |
| 06-30-2001 | \$60,332 |
| 09-31-2001 | \$246,918 |
| 12-31-2001 | \$47,786 |
| 03-31-2002 | \$0 |
| 06-30-2002 | \$47,337 |
| 09-30-2002 | \$258,818 |
| 12-31-2002 | \$50,208 |
| 03-31-2003 | \$0 |
| 06-30-2003 | \$46,158 |
| 09-30-2003 | \$259,869 |

(v) The registrations in the company's guestbook for 2001³ showed there had been

- 21 overnight stays during the week of May 6
- 28 overnight stays during the week of May 13
- 20 overnight stays during the week of May 20
- 6 overnight stays during the week of May 27

² See Exhibit I-1, tab 26, paragraph 90.

³ See Exhibit I-1, tab 39.

- 41 overnight stays during the week of June 3
- 62 overnight stays during the week of June 10
- 66 overnight stays during the week of June 17
- 111 overnight stays during the week of June 24

- 108 overnight stays during the week of July 1
- 129 overnight stays during the week of July 8
- 195 overnight stays during the week of July 15
- 191 overnight stays during the week of July 22
- 166 overnight stays during the week of July 29

- 161 overnight stays during the week of August 5
- 174 overnight stays during the week of August 12
- 104 overnight stays during the week of August 19
- 110 overnight stays during the week of August 26

- 85 overnight stays during the week of September 2
- 54 overnight stays during the week of September 9
- 38 overnight stays during the week of September 16
- 78 overnight stays during the week of September 23
- 58 overnight stays during the week of September 30

- 84 overnight stays during the week of October 7
- 32 overnight stays during the week of October 14
- 6 overnight stays during the week of October 21
- 42 overnight stays during the week of October 28

- 9 overnight stays during the week of November 4
- 8 overnight stays during the week of November 11
- 4 overnight stays during the week of November 18
- 2 overnight stays during the week of November 25

- 25 overnight stays during the week of December 2
- 8 overnight stays during the week of December 9

(vi) In 1999, the inn operated throughout the year, except for the month of November. From 2000, the inn operated from May to November. However, although Mr. Dumais testified that the inn was open from May to November,

the period of greatest activity (the "high season") was from the Saint-Jean-Baptiste holiday to Thanksgiving, or occasionally to Labour Day. Mario Dumais's testimony on this point is worth citing:⁴

[TRANSLATION]

Q. . . . Well, let's talk about the high season, which begins . . .

A. Around . . .

Q. . . .when?

A. Around the Saint-Jean-Baptiste holiday.

Q. Around the Saint-Jean-Baptiste holiday, that means around when?

A. Generally, it's always that, because if we don't have a reception or anything after, after Thanksgiving, that may be a quiet period, but it may also, depending on the seasons, depending on the heavy rains and the years, that it may even be quiet following Labour Day, which means that we do not have an occupancy rate of one hundred per cent (100%) during the week. There may only be five or six rooms a week.

...

I note right away that Mario Dumais had stated⁵ to Ms. Chouinard that the high season went from the Saint-Jean-Baptiste holiday to Thanksgiving. From this, I conclude that the high season generally extended over a period of approximately 15 weeks and could occasionally last approximately 11 weeks. I note that the testimonies and statutory declarations given by the employees were so hazy, vague and imprecise about the duration of the high season that it is impossible to determine its duration. Mario Dumais also testified that the inn was quiet in the low season and that, for this reason, the employees did not work full time during this period. On this point, Mario Dumais explained that a considerable portion of the inn's turnover before the beginning of the high season consisted of deposits (50% of the cost of the stay) paid by clients for reservations at later dates. I note that Mario Dumais or the other appellants could have submitted in evidence the accounting records of the Payers to support this allegation. They did not do so. From this, I infer that this evidence would have been unfavourable to them. Mario Dumais also testified that the packages sold in the low season often involved B&B packages and that, for this reason, the restaurant served few suppers

⁴ See transcript dated December 14, 2003, at page 79.

⁵ See Exhibit I-1, tab 26, paragraph 9.

during this period. I immediately note that the inn guestbook for 2001 does not show this. In fact, an attentive study of the guestbook leads me to conclude that, at least for the year 2001, the B&B packages represented only a small percentage of the packages sold by the Payers in the low season. I also note that the appellants' testimony did not in any way mention the restaurant's turnover related to catering, wedding and funeral receptions and meals served to clients not staying at the inn. The appellants had a unique opportunity to support their allegations to the effect that, for all intents and purposes, the restaurant only served breakfast during the low season, by submitting the accounting records of the Payers and the reservations book of the restaurant. They did not do so. From this, I infer that this evidence would also have been unfavourable to them.

[14] The evidence revealed the following about the Male Worker's employment:

(i) The appellants described the employee's tasks as follows⁶:

[TRANSLATION]

General work

- Preparing menus at the beginning of the season (at home)
- Preparing orders at the beginning of the season (at home)
- Hiring interviews (as needed)
- Preparing suppers (special events)
- Managing kitchen staff
- Keeping the kitchen in good order

Specific tasks

- Keeping inventory day after day, week after week
- Making food orders, receiving and storing them
- Preparing sauces
- Preparing pastries
- Preparing soups
- Preparing fish and meats (cuts, marinades)
- Preparing supper from 6:00 p.m. to 10:30 p.m.
- Preparing smoked salmon
- Preparing ice cream
- Preparing vegetables
- Preparing veal stock
- Preparing home-made cretons
- Preparing breakfast plates (placing plates)

⁶ See exhibit A-9.

The Chef's work begins with the start of the high season, around the end of June, and finishes with the end of the high season, in early or mid October. At the beginning and end of the season, the chef's work is sporadic, depending on client demand.

(ii) During the year 1999, the Male Worker received remuneration totalling \$8,826 from Mario Dumais, as follows:

- \$563 for the week of June 20
- \$563 for the week of June 27
- \$550 for the week of July 4
- \$550 for the week of July 11
- \$550 for the week of July 18
- \$550 for the week of July 25
- \$550 for the week of August 1
- \$550 for the week of August 8
- \$550 for the week of August 15
- \$550 for the week of August 22
- \$550 for the week of September 12
- \$550 for the week of September 19
- \$550 for the week of September 26
- \$550 for the week of October 3
- \$550 for the week of October 10
- \$550 for the week of October 17

It should be noted that the Male Worker was not paid for the week of August 29 (even though it was the high season) and the week of September 5 (also in the high season).

(iii) During the year 2000, the Male Worker received remuneration totalling \$1,248 from Mario Dumais, as follows:

- \$624 for the week of June 11, 2000
- \$624 for the week of June 18, 2000

(iv) During the year 2000, the Male Worker did not receive any remuneration from the Payers for the high season weeks of June 25 and July 2.

(v) During the year 2000, the Male Worker received remuneration totalling \$8,736 from the company, as follows:

- \$624 for the week of July 9
- \$624 for the week of July 16
- \$624 for the week of July 23
- \$624 for the week of July 30

- \$624 for the week of August 6
- \$624 for the week of August 13
- \$624 for the week of August 20
- \$624 for the week of August 27

- \$624 for the week of September 3
- \$624 for the week of September 10
- \$624 for the week of September 17
- \$624 for the week of September 24

- \$624 for the week of October 1
- \$624 for the week of October 8

(vi) Therefore, during the year 2000, the Male Worker received remuneration totalling \$9,984 from the Payers.

(vii) During the year 2001, in the period from June 24 to September 23 (i.e., 14 consecutive weeks), the Male Worker received a weekly salary of \$724 from the company, for a total remuneration of \$10,338.

(viii) During the year 2002, the Male Worker received remuneration totalling \$10,494 from the company, as follows:

- \$159 for the week of May 19;
- \$795 for 13 consecutive weeks, beginning with the week of June 30 and ending with the week of September 22.

(ix) During the year 2003, the Male Worker received remuneration totalling \$16,866 from the company, as follows:

- \$901 for the week of June 1

- \$901 for the week of June 8
- \$1,045 for the week of June 15
- \$1,045 for the week of June 22
- \$901 for the week of June 29

- \$901 for the week of July 6
- \$901 for the week of July 13
- \$901 for the week of July 20
- \$901 for the week of July 27

- \$901 for the week of August 3
- \$1,081 for the week of August 10
- \$1,081 for the week of August 17
- \$901 for the week of August 24

- \$901 for the week of August 31
- \$901 for the week of September 7
- \$901 for the week of September 14
- \$901 for the week of September 21
- \$901 for the week of September 28

(x) The Male Worker's records of employment showed the following:

- 672 insurable hours for the year 1999
- 736 insurable hours for the year 2000
- 630 insurable hours for the year 2001
- 574 insurable hours for the year 2002
- 462 insurable hours for the year 2003

(xi) The Male Worker received unemployment insurance benefits during the following periods:

- (a) from October 31, 1999, to June 10, 2000 (benefits were \$383 each);
- (b) from October 15, 2000, to June 30, 2001 (benefits were \$329 each);

(c) from September 30, 2001, to June 8, 2002 (benefits were \$408 each);

(d) from September 22, 2002, to May 17, 2003 (benefits were \$412 each).

(xii) The Male Worker's hours worked were not noted. Moreover, the appellants admitted that the insurable hours given in the Male Worker's records of employment did not reflect the actual number of hours worked during the relevant periods.

(xiii) In his statutory declaration⁷ made in the presence of Mr. Rinfret, dated October 29, 2003, the Male Worker stated the following, among other things:

[TRANSLATION]

(Q4) Is it correct to say that, from the time when the inn begins operating, you start working in the kitchen?

(A) It depends. This year, I started being paid full time from June 2, but in previous years, the pay period began on June 24.

(Q5) What happened between Victoria Day, in May, and June 24?

(A) Nothing much goes on. I make my orders and draw up the menus. I prepare my kitchen for the summer re-opening.

(Q7) Are there clients at the inn between Victoria Day and June 24?

(A) There sometimes are, but with the bed-and-breakfast package. In mid May, I start to open the kitchen, and things start up full time at the Saint-Jean-Baptiste holiday.

(Q8) During the period from the opening of the kitchen in mid May to the end of June, were you paid for this work?

(A) Well, no. I did $\frac{3}{4}$ of the work at home. I have to wash the cold storage room, clean the kitchen. I don't ask for any salary for that. I came today to help my father close the inn. I won't be paid for that. It's a family business.

(Q9) If I understand correctly, you may sometimes come to the inn to render services outside of your periods of employment without being paid?

(A) For sure. It's not as if there was work for three weeks. Today, I came to ~~elose~~ empty the hot water tanks. In the winter, I may come and remove the snow on the roof, and I am not paid. I just bought a house and I may go to BMR to buy materials; my father pays me half of the cost for services rendered. I am not here 20 hours per week.

⁷ See exhibit I-1, tab 17.

...

(Q12) Who prepares supper from October to December?

(A) For example, last year, at Thanksgiving, it was me, and I reported it. Outside of that, if it's only two or three suppers, it may be my assistant or it's my father who prepares supper.

(xiv) In her appeal report,⁸ Nicole Chouinard summed up the statements made by Mario Dumais concerning the employee as follows:

[TRANSLATION]

Concerning Jean-François Dumais:

29. Mr. Dumais states that Jean-François has been working for the business since the very beginning, in 1994.
30. For several years, he has held the position of head cook. As part of his duties, he is in charge of menus, the kitchen and dealings with suppliers. He may also work elsewhere in the inn. His tasks are determined by himself and Mario Dumais, who supervises him in the performance of his work. He adds that Jean-François Dumais begins working in May, to prepare the kitchen with a pre-season menu.
31. Mr. Dumais states that Jean-François has no training as a head cook. He is self-taught. He learned everything he knows from Jean-Louis Maltais, who was head cook at the inn in 1997 and 1998. Jean-François subsequently took one or two cooking courses consisting of a few hours' instruction. Mr. Dumais adds that the salary he paid Mr. Maltais was higher than what he pays Jean-François because Mr. Maltais had 15 to 20 years' experience as a cook.
32. Breakfast and supper is served in the inn's restaurant. Dinners are served only when there is a group reservation.
33. His work schedule is from 12 noon to 10:30 p.m., 6 days a week. He has Sundays off. His hours of work are always the same, even during the high season. He works fewer hours in the low season. Mr. Dumais explains that he does not note his hours worked and does not complete a timesheet like the other employees because he is a manager in the business, like Christiane Dumais. They are not paid for overtime. He adds that they are the only two paid managers in the business.

⁸ See Exhibit I-1, tab 26.

34. Mr Dumais states that the salary of Mr. Dumais is a total amount paid for one week of work, regardless of the number of hours worked. The payroll register indicates that he works 42 hours per week, but this figure was entered only because the pay figures require it. In reality, Jean-François works from 75 to 80 hours a week. As is the case for the other employees, his salary is paid biweekly by direct deposit and includes his vacation pay. He states that Jean-François Dumais has been paid for all the weeks he has worked.
35. Mr. Dumais states that he would pay the same salary to an unrelated stranger. According to him, the salary paid is not too high because in their region the salary of a head cook is often higher than that. According to him, a chef in Québec would not agree to come work there on a full-time basis.
36. Mr. Dumais states that he is the one who decides that Jean-François Dumais should stop working if there is less work. He acknowledges that he does not work at all times during the period of operation. He is not replaced and he performs his tasks personally when there are few clients (from 6 to 8); otherwise, he asks him to report for work and then pays him an hourly rate of \$22. He adds that it would cost too much to hire him on a full-time basis from the month of May.
37. When we asked Mr. Dumais if Jean-François Dumais performs unpaid work for the inn, Mr. Dumais answered, "Yes, he makes repairs, he renders services, this is normal, he is my son, he is allowed to do so".
38. Mr. Dumais states that in 2003 and 2004, when Jean-François took Sundays off, he was replaced by the sous-chef, Audrey Belley. Before her, it was someone named George.
39. When we asked Mr. Dumais who trained Frédéric Desbiens in May 2001, Mr. Dumais answered that Frédéric Desbiens was the third sous-chef, and that it was Jean-François Dumais who met with him when he was hired. He added that he had personally worked with Mr. Desbiens. He did not say who trained him. He thought that maybe Jean-François was injured and was receiving worker's compensation benefits in the spring of 2001. I asked Mr. Veilleux to verify the dates on which Jean-François was injured and to let me know later.
40. Mr. Dumais states that, at the beginning of the season, he sometimes has to take charge of the kitchen and prepare a three-course meal. Mr. Dumais adds that he has no training in cooking and was a teacher before he retired.

(xv) The Male Worker testified⁹ that he worked from 60 to 70 hours per week during the high season. Mario Dumais testified that during the high season, his son worked six, sometimes seven days per week, from noon to 9:30 p.m. or 10:00 p.m. I note that Mario Dumais also stated to Ms. Chouinard that the employee worked from 75 to 80 hours per week.¹⁰ From this, I conclude that the Male Worker worked a minimum of 65 hours per week during the high season. I also conclude that the Male Worker generally worked a minimum of 975 hours (15 weeks x 65 hours) during the high season and occasionally a minimum of 725 hours (11 weeks x 65 hours).

(xvi) The Male Worker acknowledged that, in each of the years in dispute, before the high season began, that is, outside of the relevant periods:

(1) He did major housekeeping in the kitchen, participated in hiring the kitchen employees, developed new menus from his home, negotiated the cost of food with suppliers and determined the prices for meals listed in the menu. The Male Worker acknowledged that he did the equivalent of two weeks of unpaid work to perform these tasks,¹¹ therefore, approximately 130 hours (65 hours x 2). I also note that these tasks were part of the employee's job description, which was submitted in evidence by the appellants. In addition, the Male Worker admitted that he trained kitchen employees during the periods and that he had performed the equivalent of several days' unpaid work at this task for a total of approximately 20 hours.

(2) He prepared dinners for free as required by the volume of business in the restaurant, although he was careful to point out that the restaurant served few dinners during this period. I also note that the employee admitted that he had acted as head cook without pay during the very busy Victoria Day weekend, that is, outside of the relevant periods.

(xvii) Finally, I note that the Male Worker acknowledged that he had also acted as head cook without pay for the period from the end of the high season to the closing of the inn, obviously taking pains to specify that the restaurant served few dinners during this period.

⁹ See the stenographer's notes from December 15, 2005, at page 55.

¹⁰ Exhibit I-1, tab 26, paragraph 34.

¹¹ See the stenographer's notes from December 15, 2005, at pages 64, 65 and 58.

(xviii) In his statutory declaration¹² made in the presence of Mr. Rinfret, dated July 10, 2002, Frédéric Desbiens stated, among other things, the following about the work performed by the employee outside of the relevant periods:

[TRANSLATION]

- (Q3) For how many years have you worked at the Auberge sur la Côte?
(A) Not really years, rather five to six months from May 2001 to September or October 2001. It's too bad, last week, I threw out a note of my hours.
- (Q4) What were your duties at the inn?
(A) I was a sous-chef, I replaced the chef one day per week, sometimes two. I worked an average of five (~~days per~~) to six days per week.
- (Q5) With whom did you work?
(A) There was the chef, Jean-François Dumais, and an assistant cook, Yves Lapointe, who was also a dishwasher. That was the kitchen staff. There was another dishwasher for nearly three weeks.
- (Q6) When did you begin to work at the Auberge sur la Côte?
(A) Uh, well, I began to work around May 10 or 12, before the beginning of the season. I would work one or two days per week.
- (Q7) Who was working with you in the kitchen during the month of May?
(A) Mario Dumais would come to help me. Jean-François would come to tell me what to do and he would then leave. I cannot say who would do the cooking on the other days. When we were short of something, it was either Mario Dumais or Ms. Dumais who would run errands at the convenience store.
- (Q8) You told me a little while ago that you began to work around May 10 or 12. How can you explain that on Record of Employment A72129469, the first day worked noted in box 10 was June 17, 2001?
(A) Ms. Dumais told me that my first days worked would be banked, because the payroll did not begin before the Saint-Jean holiday. She told me that I would start getting paid around the Saint-Jean holiday. She told me that I did not have to report it to unemployment because she did not report it either. Finally, I think that she spoke to me about it. In any event, I knew that if I had no pay, I would not be reported to unemployment. If I did report it, I would have been penalized, because I would (~~not~~) have reported amounts of money that I would not have received during those weeks.
- (Q9) If I understand correctly, it was Ms. Dumais who offered you the opportunity to participate in an hour banking system?

¹² See Exhibit I-1, tab 23.

(A) Yes, it was Christiane Dumais.

(Q10) I have some timesheets here in the name of Frédéric Desbiens. Do you recognize your handwriting on these timesheets?

(A) Yes, this is my handwriting on these sheets. Yes, these are my timesheets. I did not write what is written on the left side of these sheets.

(Q11) In your view, are these the hours you actually worked?

(A) Yes, these are my hours.

...

(Q18) What can you tell me about Jean-François Dumais?

(A) Well, my first two days in May were training days, and the hours I worked were done with him. The whole family was there, except for his sister. They were there almost every day. I was told to say that the hours I did before June 24 were worked with Mr. Dumais and not with Jean-François.

(Q19) Who told you that?

(A) It was Ms. Dumais, last week.

(Q20) Was Jean-François Dumais always there when you worked before the Saint-Jean-Baptiste holiday?

(A) Yes, he was always there. You could even say that he did more hours than me. When there were lots of people at the inn, Jean-François did the cooking. Mario Dumais did not really get involved with that. He certainly could not really make a three-course meal.

(Q21) Do you have anything else to state?

A) Uh, no. I wouldn't think so.

(xix) Ms. Chouinard summed up the statement given by Mr. Desbiens during a November 17, 2004 telephone interview¹³ as follows:

[TRANSLATION]

76. Mr. Desbiens confirms having worked for the Payer's business in 2001. He remembers having met investigator Pierre Rinfret in Charlesbourg on July 10, 2002.

Reading of his statutory declaration dated July 10, 2002:

Mr. Desbiens confirms that this is in fact his statutory declaration. He made a correction to his answer to question #7. It is not true that he did not

¹³ Exhibit I-1, tab 26, paragraph 76.

know who did the cooking on the days he did not work. He knows that it was Jean-François Dumais, because Mario Dumais did not do any cooking. He adds that he is fed up with protecting them, because he is the one who has the problems afterward.

He confirms that Christiane Dumais met with him before his interview with investigator Pierre Rinfret to ask him to say that it was Mario Dumais who gave him his training in the beginning of May, instead of Jean-François Dumais. He confirms that he actually was trained by Jean-François.

(xx) In his testimony, Mr. Desbiens, whose credibility is not at issue, essentially repeated the statements he gave to Mr. Rinfret and Ms. Chouinard, while specifying that during the low season, his hours of work varied depending on the volume of business at the inn. I also gather from the testimony and statements given by Mr. Desbiens that Christiane Dumais had put pressure on him so that he would hide the truth from the Minister about the nature of the work and the actual number of hours of work performed outside of the relevant periods.

[15] The evidence showed the following regarding the employment held by Female Worker during and outside the relevant periods for each of the years in question:

(i) During the year 1999, the Female Worker received \$8,032 in insurable earnings from Mario Dumais, as follows:

- \$609 for the week of May 16
- \$425 for the week of June 20
- \$425 for the week of June 27
- \$425 for the week of July 4
- \$425 for the week of July 11
- \$425 for the week of July 18
- \$425 for the week of July 25
- \$425 for the week of August 1
- \$425 for the week of August 8
- \$425 for the week of August 15
- \$425 for the week of August 22

- \$425 for the week of August 29

- \$425 for the week of September 5
- \$425 for the week of September 12
- \$425 for the week of September 19
- \$425 for the week of September 26

- \$425 for the week of October 3
- \$425 for the week of October 10
- \$747 for the week of October 17

(ii) During the year 2000, the Female Worker received \$177 in insurable earnings (17 insurable hours) from Mario Dumais.

(iii) During the year 2000, the Female Worker received \$7,488 in insurable earnings from the company, as follows:

- \$468 for the week of June 25
- \$468 for the week of July 2
- \$468 for the week of July 9
- \$468 for the week of July 16
- \$468 for the week of July 23
- \$468 for the week of July 30

- \$468 for the week of August 6
- \$468 for the week of August 13
- \$468 for the week of August 20
- \$468 for the week of August 27

- \$468 for the week of September 3
- \$468 for the week of September 10
- \$468 for the week of September 17
- \$468 for the week of September 24

- \$468 for the week of October 1
- \$468 for the week of October 8

(iv) During the year 2000, the Female Worker received \$7,665 in insurable earnings from the Payers.

(v) During the year 2001, the Female Worker received \$7,920 in insurable earnings from the company, as follows:

- \$530 for the week of June 24

- \$530 for the week of July 1
- \$530 for the week of July 8
- \$530 for the week of July 15
- \$530 for the week of July 22
- \$530 for the week of July 29

- \$530 for the week of August 5
- \$530 for the week of August 12
- \$530 for the week of August 19
- \$530 for the week of August 26

- \$530 for the week of September 2
- \$530 for the week of September 9
- \$530 for the week of September 16
- \$530 for the week of September 23

- \$500 for the week of October 7

(vi) During the year 2002, the Female Worker received \$7,952 in insurable earnings from the company, as follows:

- \$75 for the week of May 19

- \$75 for the week of June 16
- \$583 for the week of June 23
- \$583 for the week of June 30

- \$583 for the week of July 7
- \$583 for the week of July 14
- \$583 for the week of July 21
- \$583 for the week of July 28

- \$583 for the week of August 4
- \$583 for the week of August 11
- \$583 for the week of August 18
- \$583 for the week of August 25

- \$583 for the week of September 1
- \$583 for the week of September 8
- \$583 for the week of September 22

- \$111 during the week of October 6
- \$111 during the week of October 20

(vii) During the year 2003, the Female Worker received \$7,085 in insurable earnings from the company, as follows:

- \$583 for the week of June 29

- \$583 for the week of July 6
- \$583 for the week of July 13
- \$583 for the week of July 20
- \$583 for the week of July 27

- \$583 for the week of August 3
- \$583 for the week of August 10
- \$583 for the week of August 17
- \$583 for the week of August 24
- \$583 for the week of August 31

- \$583 for the week of September 7

viii) The Female Worker's records of employment show the following:

- 795 insurable hours for 1999
- 673 insurable hours for 2000
- 630 insurable hours for 2001
- 574 insurable hours for 2002
- 462 insurable hours for 2003

(ix) The Female Worker also received employment insurance benefits during the low season.¹⁴

(x) Her hours of work were not recorded, and the records of employment did not reflect her actual hours of work.

(xi) In her statutory declaration¹⁵ made in the presence of Mr. Rinfret, dated October 28, 2003, the Female Worker stated the following, among other things:

[TRANSLATION]

(Q5) What are your duties at the Auberge sur la Côte?

(A) Receptionist, office work, check-outs in the morning, and also check-ins.

(Q6) Do you have to hire staff for the inn?

(A) My husband does a lot of that. We're both involved, sir. It's what helps us, when he is there, I'm not there. We chat about it. I hired quite a lot in mid July. My husband does the tablecloths, the ironing . . .

(Q7) What are the opening periods of the inn?

(A) Ah, before 2001, it was up to the day after New Year's Day. Last year, we closed on November 3, and this year, it's been closed since October 26. In the spring, we open for Victoria Day.

...

(Q16) I audited your business in 2002 and noted that hours were banked in your business. Has this practice changed?

(A) Yes, it has changed, because the employees do not receive unemployment in the spring any more, so they want to be paid faster.

(xii) In her appeal report,¹⁶ Ms. Chouinard summed up some of the statements given by Mario Dumais concerning the Female Worker:

[TRANSLATION]

15. He states that she is an assistant manager. Her functions include taking care of the reception, doing the check-ins, the check-outs, billing clients, helping with breakfast, making up the rooms, doing the laundry, administrative work, such as filling out staff timesheets, forwarding the information to the Desjardins payroll service and recording bookkeeping entries made the day

¹⁴ See Exhibit I-23.

¹⁵ See Exhibit I-1, tab 19.

¹⁶ See Exhibit I-1, tab 26.

before. Breakfast is served from 8:00 a.m. to 10:00 a.m. when there are clients.

...

18. Her work schedule is from 7:45 a.m. to 9:00 p.m., 7 days per week. She does not have any days off but sometimes, when it is quiet, he tells her to finish work early. She always works the same number of hours, even in the high season. In the low season, she works less. He explains that he did not record the number of hours she works and that she does not fill out a timesheet like the other employees, because she is a manager in the business.

...

21. Mr. Dumais states that Ms. Dumais's salary is a total amount paid for one week of work, regardless of the number of hours worked. The payroll register indicates that she works 42 hours per week, but this figure was entered only because the payroll service requires it.
22. Concerning the \$5,000 paid to Ms. Dumais in 2002, Mr. Dumais explains that he paid her this amount on his accountant's suggestion. He does not know how this amount was recorded in the company's account books. Mr. Dumais states that the other employees were not paid anything extra. **Mr. Veilleux refuses to allow any further questions about this amount to be put to his client.**
23. Mr. Dumais states that he would pay the same salary to an unrelated stranger. He states that Christiane Dumais was paid for all the weeks worked. He adds that, when she worked a few hours outside of her regular periods of employment, she was paid according to an hourly rate and that these amounts were recorded in the pay book. Because he previously told us that he checked the figures in the tables prepared by the insurability officer, to be sure that they corresponded to the figures in the pay book, I asked him whether I would find the amounts for the weeks when she worked less if I looked in these tables. He answered that these amounts would not be recorded in them.
24. Mr. Dumais states that he is the one who decides that Christiane Dumais should stop working when there is less work. He acknowledges that she does not work throughout the entire period of operation. She is not replaced, and he performs her work.
25. He does not think that Ms. Dumais worked on November 2, 2001, during the Charlevoix rally. He adds that the rally would bring a large supper to the inn, but not any additional overnight stays.

26. When we asked Mr. Dumais if Ms. Dumais did unpaid work for the inn, he answered, "Yes, that's normal, this is a family business".
27. When we asked him to explain why some employees had stated that in May and June 2001 it was Christiane Dumais who gave them instructions, and that she was always at the inn, Mr. Dumais answered, "That's possible, but when she was there, it was not for six hours a day".

...

We gave Mr. Dumais a copy of his statutory declaration that he gave to Pierre Rinfret and signed on December 23, 2003, in Ste-Foy. We read this declaration to him. When we asked Mr. Dumais if this actually was his declaration we just read together, Mr. Veilleux told his client not to answer.

(xiii) The appellants described the nature of the work and the schedule of Female Worker as follows:¹⁷

[TRANSLATION]

7:45 a.m.: Wash the supper tablecloths and place mats, fold them and store them.
Do the breakfast dishes while waiting for the second chambermaid.
Answer the telephone.

9:00 a.m.: Check-out until 10:30 a.m.
Clean up and set the tables.

12 noon Lunch time.
to 6:00 pm: Run errands at the grocery store.
Reception desk
Do the bookkeeping for the tips and invoices and record time worked
(employees, waiters and kitchen, etc.)

From the end of June or beginning of July to the end of September or beginning of October, depending on the volume of business.

At the beginning (May) and end of the season (October), work is sporadic and depends entirely on the volume of business.

(xiv) In his testimony concerning the work schedule of the Female Worker during the high season, Mario Dumais stated the following:¹⁸

¹⁷ See Exhibit A-9.

¹⁸ See the stenographer's notes from December 14, 2005, at paragraphs 243, 248, 491, 492 and 493.

[TRANSLATION]

Q. At what time did Ms. Dumais's work schedule begin?

A. She would usually show up at the inn around half past seven (7:30 a.m.), eight o'clock (8:00 a.m.).

...

Q. At what time would her workday finish?

A. Usually, it's between four o'clock (4:00 p.m.) and six o'clock (6:00 p.m.) in the evening.

...

Q. You told the appeals officer that her schedule was from seven forty-five (7:45 a.m.) or a quarter to eight (7:45 a.m.) until nine o'clock (9:00 p.m.), seven days a week, during the high season?

A. Yes, yes.

Q. Is that it?

A. Yes, yes.

Q. O.K.

A. Well, that is in part the explanation that I gave you, when we had people visiting, it was part of those hours, when we had good clients or good friends visiting, she could delay the time when, at which she could leave. The hours worked by Christiane or Jean-François or myself or the employees were not written in stone. The employees, yes, because they had a written schedule, but that was a time we set or something like that. But once again, you know, well, you may conclude what you want to, but it wasn't like that every day.

The work schedule of the Female Worker¹⁹ submitted in evidence by the appellants and the testimony²⁰ of Mario Dumais on this point show that the Female Worker generally worked 7 days per week during the high season, from 7:45 a.m. to 6:00 p.m., for 10 hours and 15 minutes per day. However, Mario Dumais had stated to Ms. Chouinard that his spouse worked 7 days per week during the high season, from 7:45 a.m. to 9:00 p.m., that is, for 13 hours and 15 minutes per day.²¹ From this, I conclude that the Female Worker

¹⁹ Exhibit A-11.

²⁰ See the stenographer's notes from December 14, 2005, at paragraphs 243, 248, 491, 492 and 493.

²¹ Exhibit I-1, tab 26, paragraph 18.

generally worked a minimum of 1,391 hours in the high season (15 weeks x 92 hours 45 minutes) and occasionally a minimum of 1,020 hours (11 weeks x 92 hours 45 minutes).

(xv) On the subject of the unpaid work performed by the Female Worker outside of the relevant periods, Mario Dumais essentially testified that it was minimal (from three to four hours per week).²² He explained that his spouse regularly went to the inn outside of the relevant periods to relax, not to work, because there was [TRANSLATION] "not much to do" in Charlevoix during this period.²³ However, he did admit that occasionally, when she was at the inn outside of the relevant periods, his wife could give instructions to the Payer's employees. The Female Worker essentially testified to the same effect as her spouse on this point. It is worthwhile to cite an excerpt of her testimony²⁴ on this point:

[TRANSLATION]

Q. In 2001, if I understand correctly, you began in May to (inaudible), is that true?

BÉDARD J.: I did not understand your question, counsel.

BÉDARD J.: Well, I will rephrase the question.

Q. Do you know Suzie Gagnon?

A. I know Suzie Gagnon.

Q. And Anne-Marie Girard?

A. Naturally, they worked at our place.

Q. But they were the ones who took care, there, of doing, for the rooms, it's, like, they were called chambermaids, correct?

A. They are, they are my room attendants.

Q. That's it, room attendants. And you supervised them, correct?

A. When, before that, for preparing the inn, we would recall some of them, and I would ask them to do certain things.

²² See the stenographer's notes from December 15, 2005, at paragraphs 516 to 520.

²³ See the stenographer's notes from December 14, 2005, at paragraph 260.

²⁴ See paragraph 415 to 427 of Christiane Dumais's testimony in the stenographer's notes from December 15, 2005.

Q. So that when these persons worked, you also worked?

A. Well, no.

Q. Weren't there only two of you?

A. No, no, I just told you that I would tell them what to do, that's not work.

Q. O.K. Telling them what to do, for you, you were not working?

A. No, of course not.

Q. O.K.

A. Of course not.

Q. But for the year 2001, do you remember the year 2001? In May 2001?

A. I'll try and . . .

Q. O.K. If we look at, if we take the time that these people put in or worked, the periods during which they worked, Sylvie Gagnon and Anne-Marie Girard, it was about the same time when you were also at the inn?

A. Not always, my husband was on site and knew what he wanted, and when he gave orders to an employee for something that I didn't see or if I was gone, he was the one who said what was to be done.

Q. But do you remember that in May and June, beginning of June 2001, you were present at the inn at the same time as those people were working?

A. I would make an appearance there occasionally.

Q. And do you remember that in 2001, in May and in the beginning of June, that you were present at the inn at the same time as those persons, do you remember it or do you not remember?

A. As I've said from the beginning, I would go there and talk with them and see what they were doing.

The statutory declaration²⁵ given by Anne-Marie Girard on July 22, 2003, to Mr. Rinfret, her telephone interview on November 12, 2004, with Ms. Chouinard²⁶ and her very credible testimony²⁷ show that during 2001 she worked for the company as a room attendant, specifically on May 5, 8 and 20 and on June 10, 15, 16, 17 and 22, therefore, outside of the relevant periods and according to instructions given by the Female Worker. The statutory declaration given by Suzie Gagnon on July 23, 2002, to Mr. Rinfret²⁸ and her very credible testimony²⁹ show that during 2001 she had worked for the company as a room attendant during the weeks of May 27, June 3 and June 10, therefore outside of the relevant periods and according to instructions given by the Female Worker.

[16] André Raymond, the appellants' expert witness, testified as follows:

(i) His mandate was to answer the following questions:

- Did the positions held by the Workers exist in other businesses of comparable size?
- Did the work conditions of the Workers correspond to the conditions offered for similar positions?
- Was the hiring period realistic and comparable with that of other comparable businesses in the same field?

(ii) In the performance of his mandate, he read the Minister's decisions, the job descriptions of the Workers, their conditions of employment and information relating to the Payers.

(iii) In the case at bar, he took into consideration the following factors to determine whether the Workers' conditions of employment were reasonable:

- The restaurant's reputation and its obligation to respect certain standards in keeping with its reputation and its ranking in a well-known

²⁵ See exhibit I-1, tab 22.

²⁶ See exhibit I-1, tab 26, paragraph 66.

²⁷ See the stenographer's notes from December 14, 2005, at paragraph 448.

²⁸ See exhibit I-1, tab 25.

²⁹ See the stenographer's notes from December 14, 2005, at paragraph 984.

guidebook. On this point, he noted that the Debeur Guide had awarded two stars to the Payers' restaurant and that this ranking was widely used in the inn's advertising in Quebec and abroad. Finally, he stated that it was compulsory for the Payers to maintain the standards of quality required to allow the inn to keep this ranking, and this is why it was necessary to always have a renowned chef capable of attracting clients.

- The job holder's experience.
- The availability of labour and the ability to replace it.
- The nature of the business (size, location, reasonableness of the activities).
- For the purposes of his mandate, he read a study published in 2001 for the Conseil québécois des ressources humaines en tourisme (CQRHT)³⁰ [Quebec council for human resources in tourism] which estimated that the hourly rate for a chef was at that time between \$17 and \$26, and the salary of a chef hired on a year-round basis (40 weeks or more) was from \$35,000 to \$54,500.
- The data used by the Minister about the salaries of head cooks, which came from Human Resources Development Canada and from the Institut de la statistique du Québec [Quebec institute of statistics], are of little significance, because they do not take into consideration all the factors mentioned above. Accordingly, it is difficult to establish comparable data.
- Only a survey of establishments in the Charlevoix region which are similar to the Payers' in terms of size and activities would allow us to draw conclusions about the reasonableness of the Male Worker's terms and conditions of employment. Accordingly, the expert conducted a survey of six businesses in the Charlevoix region which were comparable the Payers' in terms of size and activities. Unfortunately, this survey was not part of his report submitted in evidence. Consequently, I did not consider his testimony on this point, and I disregarded his conclusion to the effect that the Male Worker's salary was reasonable, as this conclusion was essentially based on this survey.

³⁰ See Annex II of the expert's report.

I would add that the expert's conclusion must also be disregarded because it was based on information given by Mario Dumais, particularly as regards the Female Worker's hours worked, which I consider imprecise to say the least.

(iv) His mandate with regard to the Female Worker was much more complex. He stated the following on this point:³¹

[TRANSLATION]

Q. What did you do concerning Christiane Dumais, and how did you proceed?

A. Christiane Dumais's case was a little more complex, because her tasks were more varied. Therefore, as was touched on in our report, Ms. Dumais wore several hats, considering the size of the business. I will describe her position, just to review a little what we were saying. So, we could sum up her position as person in charge of accommodations, maître d', housekeeper and person in charge of human resources. A sort of melting pot, a little of everything that is done in a hotel.

So, once again, the basis for comparison included various types of positions. We looked at maître d's, housekeepers and accommodations managers. We looked at the job descriptions we had. She did a little of all that. Therefore, she has to perform tasks that are found in the largest of companies, which would be a little like an accommodations manager. She is a supervisor, as she supervises the chambermaids, among others. Therefore, there is supervisory relationship. Therefore, in our study, what we did was determine whether this type of position existed in other inns. Now, the name of the position varies considerably. That position actually does exist. Hotel manager. There are all type of positions. But, in effect, these are tasks which must be performed.

What we studied was the difficulty in replacing someone in that position. It is very difficult to find a replacement for a position like this, because if Ms. Dumais did not perform these tasks, and if we take all of them and make one position with them, there is a problem. Because someone is needed who does the washing, who folds the tablecloths. Then we need someone who is an accommodations manager. Therefore, someone who has experience with clients, who would be able to manage a small hotel and "boss" a team a little bit. But for a person having this experience, when you tell him, listen, among the tasks you will have to perform, you will also have to wash tablecloths and dishes. That's not very interesting for people. So, it is hard to find a replacement. On the other hand, if you find someone who has experience in dishwashing and in laundry and you tell him, well, now you will have to welcome clients who come from France, from Europe. Well then, the

³¹ See the stenographer's notes from March 23, 2006, at paragraph 360.

connection with knowhow, there is a little bit of a "crunch". And in an inn, the quality of the reception must not be neglected. That is what often makes an inn's reputation. You spoke about the Hilton. I know that you won't go back. Therefore, often it's

(v) For comparison purposes, according to Service Canada, the salary of an accommodations and restaurant manager (who has fewer responsibilities than the Female Worker) is somewhere between \$14 and \$17 per hour.

(vi) For comparison purposes, in its study, the CQRHT estimated that the salary of an accommodations manager could range from \$14 to \$20 per hour, and the salary of a maître d' could range from \$7.19 to \$12.88 per hour.

(vii) These data and those used by the respondent are of little significance because they did not take into consideration the versatility and adaptability of the job holder, her experience, the availability of labour and ability to find a replacement, the person's participation in marketing the inn and, finally, the nature of the business (size, location, reasonableness of the activities, etc.).

(viii) Only a study of establishments in the Charlevoix region whose size and activities are comparable to those of the Payers' could allow us to draw a conclusion about the reasonableness of the terms and conditions of the Female Worker's employment.

(ix) His study of six establishments in the Charlevoix region led him to conclude that the terms and conditions of the Female Worker's employment in this case were reasonable. For the same reasons as mentioned above, I did not take this testimony on this point and the conclusion into consideration. I would add that, in any event, I would not have taken the expert's conclusion concerning the Female Worker into consideration because it was based on information (particularly concerning her hours of work) given by Mario Dumais. I consider this information to be imprecise, to say the least.

[17] The evidence also showed the following:

(i) On October 8, 2004, Ms. Chouinard sent the Payers a letter requesting that they disclose certain documents, namely, the pay books for the years

1999 to 2003, the Workers' paycheques, the reservations guestbook of the inn, the contract of sale of the inn and a copy of the company's minutes book.

(ii) On October 19, 2004, during a telephone conversation, counsel for the appellants told the appeals officer that he refused to disclose the requested documents because, according to him, they could be used to improve the respondent's evidence.

(iii) On November 3, 2004, counsel for the appellants reiterated his position in a fax and advised the appeals officer that he objected to any interviews with the Workers.

(iv) At a November 4 meeting attended by Ms. Chouinard, Mario Dumais and counsel for the appellant, among others, counsel for the appellant once again refused to disclose the requested documents and gave the appeals officer documents which he deemed to be relevant, namely, an excerpt from the minutes book of Auberge de la Côte inc., a copy of the deed of sale of the inn, a five-page excerpt from the payroll register for the year 2002 and some advertising documents.

Analysis and conclusion

[18] Let us first review the administrative process which led to these appeals.

- (i) Pursuant to section 90 of the Act, the Commission requested an officer of the Canada Revenue Agency authorized by the Minister to make a ruling on whether the employment held by the Workers is insurable.
- (ii) On January 15, 2004, and on January 26, 2004, following an investigation by Pierre Rinfret, Pierrette Lecompte made rulings (Exhibit A-14) under subsection 90(3) of the Act, according to which the employment held by the Workers was not insurable because persons dealing at arm's length with the Payer would not have had the same conditions of employment as the Workers.
- (iii) Within the time limit specified under section 91 of the Act, the appellants appealed Ms. Lecompte's rulings to the Minister, pursuant to the same section of the Act.

- (iv) In accordance with subsection 93(1) of the Act, following the investigation by Danielle Chouinard, Nicole C. Bérubé advised the appellants on December 6, 2004 (Exhibit A-14), that the employment held by the Workers was not insurable, based on paragraphs 5(1)(a) and 5(2)(i) of the Act.
- (v) Pursuant to section 103 of the Act, the appellants appealed the rulings by Nicole C. Bérubé to this Court within the time limit specified under that same section.

[19] Counsel for the appellants submitted that the Minister's decisions were the result of an inappropriate exercise of his discretion, because his conduct at the time of the initial investigation was affected by errors sufficiently serious to discredit the discretionary process and allow the Court to set aside all of the Minister's decisions.

[20] Counsel for the appellants was especially critical of Mr. Rinfret's conduct during the initial investigation. Counsel argued that Mr. Rinfret had decided to render a decision that was unfavourable to the appellants even before having met them. According to counsel for the appellants, Mr. Rinfret deliberately refused to consider relevant facts and circumstances so as not to affect his preconceived idea about the insurability of the Workers' employment. In addition, counsel for the appellants criticized Mr. Rinfret for having used all kinds of tricks to trap *inter alia* the Female Worker and Frédéric Desbiens, an employee of the Payers.

[21] In addition, without directly accusing Ms. Chouinard (whose rulings are the subject of these appeals) of acting in bad faith, counsel for the appellants submitted that her rulings were incorrect because they were rendered essentially on the basis of the facts gathered by Mr. Rinfret during the initial investigation, which was itself tainted.

[22] Counsel for the appellants also submitted that since the initial investigation conducted by Mr. Rinfret was tainted, the appellants were entitled to refuse to co-operate with Ms. Chouinard. Furthermore, as regards the request for documents sent to the Payers by Mr. Chouinard, counsel for the appellants argued that section 93 of the Act does not create an obligation to disclose these documents. Rather, this section of the Act provides that an appellant may disclose information to protect his or her interests.

[23] There is no doubt that case law has very clearly established that I may set aside the Minister's decisions if I conclude that he exercised his discretion inappropriately, in that his conduct was capricious and arbitrary. However, before setting aside the Minister's decisions, in my opinion, it is appropriate to address the following issues:

- (i) May I consider Mr. Rinfret's conduct during the initial investigation? If so, did the appellants discharge the burden on them so as to prove on a balance of probabilities that Mr. Rinfret exercised his discretion inappropriately?
- (ii) Does my role rather consist in studying the conduct of Ms. Chouinard, as it is her decisions which are the subject of this appeal? If that is the case, did the appellants show on a balance of probabilities that Ms. Chouinard exercised her discretionary authority inappropriately?

[24] Although the matter of my entitlement to consider Mr. Rinfret's conduct during the initial investigation seems to me to be most interesting, in this case, I do not see the use of answering it, because I am of the opinion that Mr. Rinfret did not act in bad faith or for an unlawful purpose or reason. In fact, I am of the opinion that the appellants did not discharge the burden of proof on them with regard to this point. Of course, the evidence did show that Mr. Rinfret did not consider all of the relevant documents when he conducted his investigation, such as the Payer's account books and the restaurant reservation books. All in all, the appellants at the most showed that Mr. Rinfret's investigation could have been more thorough. However, in my opinion, to establish Mr. Rinfret's bad faith during his initial investigation, the appellants had to prove that he had deliberately refused to take note of these relevant documents. The appellants simply did not satisfy me of this fact. Moreover, I have difficulty explaining why the appellants did not show Mr. Rinfret these documents which, according to them, would have allowed him to make more enlightened decisions.

[25] As regards the allegations by counsel for the appellants to the effect that Mr. Rinfret tried all kinds of tricks to trap Mr. Desbiens and the Female Worker, I am of the opinion that they are simply unfounded. It is simply not possible to accuse Mr. Rinfret of bad faith for having encouraged Mr. Desbiens to change his version of the facts after having confronted him with his own timesheets, which clearly showed that he had been part of a hours banking system set up by the Payers. As regards the allegations by counsel for the appellants to the effect that Mr. Rinfret deliberately trapped the Female Worker by summoning her to an interview at the inn, in my opinion, they are simply farfetched.

[26] In this case, did Ms. Chouinard act in bad faith or for an unlawful purpose or reason? I am of the opinion that nothing in the evidence shows any abusive behaviour by Ms. Chouinard. Quite the contrary, the evidence shows that counsel for the appellants prevented Ms. Chouinard from playing her role by refusing access to the documents which could have led her to set aside the initial ruling. In fact, when an appeals officer receives an appeal under section 91 of the Act, his or her role essentially consists in verifying if there was additional information which could lead him or her to set aside the initial ruling made by the authorized officer under section 90 of the Act. The appellants should understand that Parliament established a second decision-making level not to allow the Minister to improve his evidence, but rather, among other things, to allow the appellants to convince the Minister to set aside his initial decision by disclosing information that was not considered during the initial investigation.

[27] Because I have concluded that the Minister's decisions were not the result of an inappropriate use of his discretion, I must now perform the role assigned to me under the Act. The Federal Court of Appeal³² has defined on several occasions the role granted by the Act to a justice of the Tax Court of Canada. This role does not allow a judge to substitute his or her discretionary decision for that of the Minister. Instead, the judge 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, . . . decide whether the conclusion with which the Minister was 'satisfied' still seems reasonable".

[28] In other words, before deciding whether the conclusion with which the Minister was satisfied still seems reasonable to me, I must, in light of the evidence available to me, verify whether the Minister's conclusions are, in spite of everything, well founded in whole or in part, taking into consideration the factors mentioned in paragraph 5(3)(b) of the Act.

[29] I immediately note that the appellant had the burden of proving on a balance of probabilities that the facts inferred or relied on by the Minister were not true or were not correctly assessed, having regard to the context in which they occurred. I immediately note that although the appellants were in a position to do so, they did not submit certain documents in evidence, particularly the accounting books and the restaurant reservations book for each of the years in question, which could have possibly cleared up certain facts. This greatly influenced my decision, because I have inferred from this that this evidence would have been unfavourable to the appellants.

³² *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878, paragraph 4.

[30] Therefore, I must determine whether the Payers and the Workers would have entered into such contracts of employment had they been dealing with each other at arm's length. In other words, I must determine whether the Workers' conditions of employment were reasonable, having regard to all the circumstances.

[31] The dispute essentially concerns the work performed by the Workers outside of the relevant periods and their remuneration.

[32] As regards the unpaid work performed outside of the relevant periods, the appellants argue that it was minimal, marginal and infrequent, took place over very short periods and was often unrelated to the work performed during the relevant periods. Relying on the decision of the Federal Court of Appeal in *Théberge v. Canada (Minister of National Revenue – M.R.N.)*, [2002] F.C.J. No. 464 (Q.L.), the appellants argue that the Court should not take into consideration the unpaid work performed by the employees outside of the relevant periods.

[33] First of all, I note that the approach adopted in *Théberge*, which dates back to March 28, 2002, was not followed in the more recent judgment of the Federal Court of Appeal in *Denis v. Canada*, [2004] F.C.J. No. 400 (QL). In his reasons delivered from the bench, Richard C.J.A. noted the findings of fact made by the trial judge, including the following:

[34] As indicated by the documentary evidence, the appellant made up the books by hand throughout the year: accordingly, she worked for the payer outside the period at issue without charge. The appellant also ran errands for the payer outside the periods at issue without being paid.

[34] The Federal Court of Appeal concluded that, at the conclusion of his hearing, the judge did not err in finding that the Minister's determination was reasonable. It was not mentioned in this case that the trial judge had erred in considering the unpaid work in confirming the decision of the Minister. I am of the opinion that the unpaid work performed by a worker outside the relevant periods must be considered when such work is not minimal and marginal and when such work is part of the tasks assigned to the worker by his or her employer under the terms of the contract of employment entered into by them.

[35] As regards the Male Worker, the evidence showed that the unpaid work performed by him outside of the relevant periods for each of the years in question was substantial and that this work was part of the tasks assigned to him by the

Payers under the contract of employment entered into by them. I note on this point that before the beginning of the high season, therefore outside of the relevant periods for each of the years in question, the Male Worker did major housekeeping chores in the kitchen, hired the kitchen employees, developed new menus at home, negotiated the cost of food with suppliers, determined the cost of meals which were on the menu and trained the kitchen employees. I also note that the evidence showed that the Male Worker performed unpaid work for a minimum of 150 hours in performing these tasks, which he was bound to perform under the terms of his contract of employment, as appears from his job description, which was filed in the court record by the appellants. In addition, I note that the evidence showed that the Male Worker had prepared dinners on a voluntary basis outside of the relevant periods. On this point, the appellants claimed that the guestbook of the inn for the year 2001, as well as the GST returns prepared by the payers, which were pivotal in the Minister's decisions, did not in any way show that the volume of business of the Payers outside of the relevant periods was related to the operation of the restaurant. On this point, the appellants added that if the Minister had taken pains to study the restaurant reservations book and to analyze the volume of business of the Payers, which was mentioned in their accounting books, he would have noted that few dinners were served at the restaurant outside of the relevant periods, and he would have concluded that the employee spent only a little time on this task. I note that the appellants, who had the burden of proof, had an un hoped-for opportunity to submit these documents, which they were in a position to submit, and thereby satisfy me that the Minister reached mistaken conclusions on the basis of the documents he studied and of his investigation. Unfortunately, the appellants did not consider it worthwhile to submit these documents, even though they were in a position to do so. I infer from this that this evidence would have been unfavourable to the appellants, because it would have shown that many more dinners were served in the restaurant outside of the relevant periods than what they tried to have me believe, and that an important part of the volume of business of the Payers was related to catering activities, wedding and funeral receptions and dinners served to clients who were not staying at the inn. In my opinion, these activities required a head cook. I conclude that it would be completely unreasonable to think that a person who was dealing at arm's length with the Payers would have agreed under his or her contract of employment to work on an unpaid basis for so many hours outside of the relevant periods.

[36] As regards the unpaid work performed by the Female Worker outside of the relevant periods, the appellants submitted that it was infrequent, minimal and marginal. They claimed that the Female Worker's services were not really required during the low season, because the inn was not very busy during this period. They

added that the majority of the tasks performed by the Female Worker during the high season were performed by Mario Dumais during the low season. The appellants' evidence on this point was based solely on the testimonies of Mario Dumais the Female Worker, who testified to the same effect as her spouse. I note that Mario Dumais testified to the effect that his spouse regularly came to the inn during the low season to spend time and not to work, if only for three or four hours per week. I immediately note that these testimonies did not satisfy me, especially considering that they were contradicted by the very credible testimonies of several of the Payer's employees. In addition, even if the evidence showed that the inn was not as busy during the low season, it nevertheless showed that a significant number of clients stayed there during this period and, accordingly, that the operation of the inn required, if only to a lesser extent, that someone be available to answer the telephone, take reservations, supervise the accommodations and restaurant employees (waiters and waitresses), wash the tablecloths and place mats, fold and put them away, act as a maître d' for the restaurant and bar, do the accounting (entries in the general ledger and pay sheets) and see to guests' check-ins and check-outs, although there were fewer of them during this period. Considering the very credible testimonies of several of the Payers' employees, I am of the view that it is more likely than not that this person was the Female Worker and not Mario Dumais. In my opinion, during the low season, the Female Worker had essentially the same responsibilities as in the high season and performed her tasks on an unpaid basis. I am also of the opinion that the Female Worker devoted a significant amount of time, although less than in the high season, to the performance of such tasks on an unpaid basis. For these reasons, I conclude that no person unrelated to the Payers would have accepted such working conditions.

[37] Was the Workers' remuneration during the relevant periods reasonable, having regard to all the circumstances? I note that the relevant circumstances related to the Male Worker's employment were the following:

- (i) The Male Worker was head cook in a small family inn located in a remote region;
- (ii) The quality of the inn's restaurant was recognized by the Debeur Guide;
- (iii) The volume of business at the inn was intimately related to the reputation of its restaurant;
- (iv) Only a competent head cook could maintain the restaurant's reputation;

- (v) The employment in question was seasonal, as the inn was in operation for only part of the year;
- (vi) The Male Worker was a manager;
- (vii) Because of the size of the inn, its location and the seasonal nature of its operation, the Payers would have difficulty replacing the Male Worker;
- (viii) The Male Worker's records of employment showed, among other things, the following information:

| | Insurable hours | Insurable earnings |
|------|-----------------|--------------------|
| 1999 | 672 | \$8,826 |
| 2000 | 654 | \$9,984 |
| 2001 | 588 | \$10,388 |
| 2002 | 572 | \$10,494 |
| 2003 | 776 | \$16,866 |

- (ix) During the year 1999, the Male Worker received weekly earnings of approximately \$550 from the payers for 16 weeks;
- (x) During the year 2000, the Male Worker received weekly earnings of approximately \$624 from the payers for 16 weeks;
- (xi) During 2001, the Male Worker received weekly earnings of approximately \$724 from the payers for 14 weeks;
- (xii) During 2002, the Male Worker received weekly earnings of approximately \$749 from the payers for 14 weeks;
- (xiii) During 2003, the employee received weekly earnings of approximately \$937 for 18 weeks.

I note that the relevant circumstances related to the employment held by the Female Worker were as follows:

- (i) The Female Worker worked for the Payers as assistant to the manager, person in charge of accommodations, maître d', housekeeper and person in charge of the employees. In the performance of her tasks, she answered the telephone, took reservations, supervised accommodations

and restaurant employees (waiters and waitresses), washed, folded and stored the place mats, acted as maître d' in the restaurant and bar, did some accounting work (entries in the general ledger and pay sheets) and, finally, saw to guest check-ins and check-outs. All in all, she held several positions within this business.

- (ii) The Female Worker's records of employment showed, among other things, the following information:

| Year | Insurable hours | Insurable earnings |
|------|-----------------|--------------------|
| 1999 | 795 | \$8,032 |
| 2000 | 673 | \$7,665 |
| 2001 | 630 | \$7,951 |
| 2002 | 574 | \$7,952 |
| 2003 | 462 | \$7,085 |

[38] I note that the appellants in this case had the burden of proving on a balance of probabilities that the Workers' remuneration during the relevant periods was reasonable, having regard to all the circumstances. To discharge this burden, the appellants had to establish the approximate number of hours worked by the Workers in each of the years in question so as to be able to show that the overall earnings received by the employees during these periods were reasonable, having regard to all the circumstances.

[39] The evidence submitted by the appellants in this case, on whom the burden of proof rested, did not clearly establish the number of hours worked by the Workers during the relevant periods for each of the years in question. Accordingly, in my opinion, the appellants could not satisfy me of the reasonableness of the remuneration during the relevant periods, having regard to all the circumstances. In fact, the testimony of the appellants, their statutory declarations and the statements given by Mario Dumais did not concern the Workers' hours of work during the relevant periods, but rather the hours of work of Mario Dumais during the high season, the duration of which, I note, did not necessarily correspond to the duration of the relevant periods.

[40] However, only because the evidence showed that the Male Worker had generally worked for a minimum of 975 hours during the high season and for a minimum of 150 hours in the low season during each of the years in question, I may conclude that the Male Worker had been paid at an hourly rate of \$7.84 in

1999, \$8.87 in 2000, \$9.23 in 2001, \$9.32 in 2002 and \$14.92 in 2003. It is obvious that these hourly rates, especially on the basis of the study published in May 2001 for the CQHRT (cited by the expert for the appellants), which established the hourly rate for a head cook as being between \$17 and \$26, that the overall earnings of the employee were not reasonable, having regard to all the circumstances. Having regard to all the circumstance, I am of the opinion that no one would have agreed to be paid such an hourly rate unless they were related to the Payers.

[41] Furthermore, only because the evidence showed that the Female Worker had generally worked for a minimum of 1,391 hours in the high season, I may conclude that she was paid at an hourly rate of \$5.77 in 1999, \$5.51 in 2000, \$5.71 in 2001, \$5.71 in 2002 and \$5.09 in 2003. I may therefore conclude that no person unrelated to the Payers who is so competent and who has as many responsibilities as the Female Worker did would have agreed to be paid at such a low hourly rate. This conclusion is obvious, especially if I take into consideration the numerous hours of unpaid work performed by the employee during the low season.

[42] On the basis of the evidence before me, after considering the factors set out in paragraph 5(3)(b) of the Act and after having verified their validity, the allegations made and the conclusions reached by the Minister are, in my view, reasonable. Therefore, I see no need to determine whether the Workers held employment under the terms and conditions of a contract of employment.

[43] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 20th day of June 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of November 2007.
Michael Palles, Reviser

CITATION: 2007TCC261

COURT FILE NOS.: 2005-849(EI); 2005-850(EI); 2005-852(EI);
2005-853(EI); 2005-854(EI) and
2005-856(EI)

STYLES OF CAUSE: Christiane Dumais, Jean-François Dumais,
Auberge sur la Côte inc., Mario Dumais and
the Minister of National Revenue.

PLACE OF HEARINGS: Québec, Quebec

DATES OF HEARINGS: December 14, 2005 and March 23, 2006

REASONS FOR JUDGEMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENTS: June 20, 2007

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