Docket: 2004-822(EI)

BETWEEN:

SUZANNE SAVARD, o/a COIFFURE SANSASS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GILLES LAVOIE, ELIE RIZKALLAH,

Interveners.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 13, 2004, at Montréal, Quebec

Before: The Honourable S.J. Savoie, Deputy Judge

Appearances:

Agent for the Appellant:	Roland Rail
Counsel for the Respondent:	Soleil Tremblay
Agent for the Interveners:	Roland Rail

JUDGMENT

The appeal is dismissed, and the decision of the Minister dated February 16, 2004, and the assessments concerning the two Interveners are confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 16th day of February 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 1st day of December 2005.

Aveta Graham, Translator

Citation: 2005TCC126
Date: 20050216
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REASONS FOR JUDGMENT

SavoieD.J.

[1] This appeal was heard in Montréal, Quebec, on December 13, 2004.

[2] The issue is whether Gilles Lavoie and Elie Rizkallah, the workers, held insurable employment during the years 2002 and 2003. The Minister of National Revenue (the "Minister") assessed the Appellant for unpaid employment insurance premiums during that period.

[3] By notice of assessment dated July 31, 2003, the Minister assessed the Appellant for unpaid employment insurance premiums for the years 2002 and 2003 in respect of five workers: Pierre Desparois, Hélène Farès, Gilles Lavoie (Intervener), Julie Levasseur and Elie Rizkallah (Intervener). The assessments were as follows:

YEAR	EI PREMIUMS	PENALTY	INTEREST	TOTAL
2002	$4,561.92	$406.19	$165.00	$5,133.11
2003	$2,177.28		$33.00	$2,210.28
TOTAL	$6,739.20	$406.19	$198.00	$7,343.39

[4] On September 24, 2003, the Appellant asked the Minister to reconsider the assessments of July 31, 2003.

[5] By letter dated February 16, 2004, the Minister notified the Appellant of his decision to reduce the premiums by cancelling the amounts associated with Pierre Desparois, Hélène Farès and Julie Levasseur because their employments were not included in insurable employment under the Regulations.

[6] The Appellant is appealing this last decision in relation to Gilles Lavoie and Elie Rizkallah (the "workers"). The Appellant does not know the workers' incomes, and submits that it is unjust and arbitrary to apply subsection 8(3) of the *Insurable Earnings and Collection of Premiums Regulations* to determine their insurable earnings.

[7] In rendering his decision, the Minister determined that the workers' employment was included in insurable employment under paragraph 6(*d*) of the *Employment Insurance Regulations*, and he relied on the following assumptions of fact:

> [TRANSLATION]
>
> (a) the Appellant has been operating a hairdressing establishment under the business name Coiffure Sansass since 1995; (admitted)
>
> (b) the Appellant operates the establishment in 1,800 square-foot premises located in Brossard; (admitted)
>
> (c) the Appellant rents these premises from 154216 Canada Inc.; (admitted)
>
> (d) the Appellant alone signed the lease with the owner of the premises and she alone is accountable to the owner with regard to the premises; (admitted)

(e) the premises rented by the Appellant consist of three closed rooms, which she sublets to two massage therapists and an aesthetician; (admitted)

(f) the rest of the premises are exclusively for the operation of the hairdressing establishment and contains three hydraulic chairs as well as sinks and a cash counter; (denied)

(g) the Appellant uses one of the chairs herself and rents the other two to workers who are hairdressers; (denied)

(h) the workers pay monthly rent to the Appellant which gives them the exclusive right to the area around their chair for providing their hairdressing services and gives them access to the common areas (washrooms, sinks and telephone); (denied)

(i) the Appellant purchases all the hairdressing products; the workers reimburse the Appellant for the products that they use; (admitted)

(j) each worker has his own customers and establishes his schedules and rates; (admitted)

(k) each worker prepares a bill for each of his customers and places the money in a single cash drawer; (admitted)

(l) at the end of the day, the money in the cash drawer is separated between the Appellant and the hairdressers based on their respective bills; (admitted)

(m) despite the prevailing billing system, the Appellant is unable to establish the workers' pay for the years in issue; (admitted)

(n) each of the workers must provide his own work tools; (denied)

(o) when a new customer comes into the establishment, the customer is referred to the hairdresser that is free at that time; (denied)

(p) during the years in issue, the workers were neither the owners nor the operators of the hairdressing establishment; (denied)

[8] The evidence reveals that the workers for whom the Minister's assessments were vacated were massage therapists, aestheticians and manicurists, not hairdressers.

[9] It is established that the workers signed a contract with the Appellant. The terms of that contract, set out in Exhibit A-1 which was produced at the hearing, reads as follows:

> [TRANSLATION]
>
> **CONTRACT**
>
> BETWEEN: Coiffure Sansass, 2230 Lapinière Boulevard, Brossard, operated by Suzanne Savard Légaré, residing at 1032 D'Iberville, Ascot, P.Q., **the head tenant**
>
> AND: Elie Rizkallah, women's hairdresser, residing at 155 de Navarre, Apt. 310, St-Lambert, P.Q., **the concessionaire**.
>
> This contract is further to the oral agreement between the parties for the operation of a concession.
>
> **Object of Contract**
>
> The operation of a concession.
>
> **Exclusive Space Subleased**
>
> The concessionaire is granted an exclusive space for the operation of his concession.
>
> **General Operating Costs**
>
> 1. The concessionaire shall pay the head tenant $500 per month for the exclusive space and the expenses related to power, heat, telephone and taxes.
>
> 2. The head tenant may increase the general operating costs on 60 days' notice to the concessionaire.

Common Areas

The concessionaire may use the washrooms, a meal area, the sinks and the main telephone.

Concessionaire's Responsibilities

1. The concessionaire shall furnish the space allocated by the head tenant.

2. The concessionaire shall supply his work tools.

3. The concessionaire shall keep the allocated space clean at all times.

4. The concessionaire may use his own products and purchase products from the head tenant as the case may be.

5. The concessionaire shall use the telephone number that is exclusive to the name under which he carries on business or may make an arrangement with the head tenant to use her telephone.

6. The concessionaire shall notify the head tenant of any deterioration in the premises as promptly as possible.

Head Tenant's Responsibility

It is expressly established that the head tenant shall in no way be responsible for the management of a concession granted to a concessionaire, or for the payment of amounts charged by various municipal, provincial or federal government authorities.

Advertising

1. The concessionaire shall be responsible for his advertising. He may make an agreement with the other concessionaires and/or the head tenant to advertise his business name in the news media.

2. The concessionaire may advertise his occupation in the store window or on the main sign by agreement with the head tenant.

Business Hours

1. The concessionaire shall comply with the head tenant's business hours.

2. The concessionaire may change the business hours by agreement with the head tenant.

Interpretation Clause

Whenever the context requires it, any word written in the singular shall include the plural and vice-versa, and any word written in the masculine shall also include the feminine.

The words "head tenant" and "concessionaire" may mean one or more male or female persons, and one or more individuals or legal persons.

Compliance Statement

The concessionaire declares that the information provided for the purpose of obtaining a concession from the head tenant is true. If the information is not true, the head tenant may terminate the contract. Furthermore, the concessionaire shall compensate the head tenant for any costs incurred because false information was provided.

Renunciation of Contract

The parties shall give each other 30 days' notice to terminate the contract.

Signature of Contract

The parties have signed before a witness in Brossard on March 29, 1995.

[10] It was established that each of the workers was responsible for his share of the expenses. In addition, the Appellant showed that the workers were free to hire employees if they wished. It is also established that the workers were paid by their customers, not by the Appellant. The evidence adduced by the Appellant showed the money received from customers was divided between the Appellant and the workers daily.

[11] It was established that the workers purchased their products from the Appellant or elsewhere, and paid for their purchases from the Appellant weekly. The workers had their own furniture and tools. It was determined that if a new customer came into the establishment, the customer was directed to the hairdresser of her choice, or, if she made no choice, she became the customer of the hairdresser who stood up first or went to greet her at the door.

[12] Each hairdresser had his own clientele and was responsible for his own schedule, but they all had to comply with the establishment's business hours. Workers would notify the establishment if they were going to be absent.

[13] The Appellant paid no wages to the workers, and the workers got no T4 slips from the Appellant.

[14] The Appellant's agent argued that both workers have always been self-employed and that they associated with the Appellant under the terms of a contract which maintains their self-employed status. He submitted that the Minister's decision has the effect of denying the workers their contractual rights under the *Civil Code of Québec*, thereby violating their rights under section 15 of the *Canadian Charter of Rights and Freedoms*.

[15] The Appellant asks this Court to declare paragraph 6(*d*) of the *Employment Insurance Regulations* unconstitutional.

[16] The Appellant's agent claims that the Minister's decision is arbitrary. He adds that the decision is discriminatory because the Minister excluded, from insurable employment, three jobs that are similar to the worker's jobs.

[17] In making his determination, the Minister invoked paragraph 5(1)(*a*) and sections 92 and 93 of the Act, paragraph 6(*d*) of the *Employment Insurance Regulations* and subsection 8(3) of the *Insurable Earnings and Collection of Premiums Regulations*. It is therefore appropriate to reproduce the statutory provisions that are relevant to the analysis of this matter.

INSURABLE EMPLOYMENT

5.(1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

EMPLOYMENT INSURANCE REGULATIONS

6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:

. . .

(*d*) employment of a person in a barbering or hairdressing establishment, where the person

(i) provides any of the services that are normally provided in such an establishment, and

(ii) is not the owner or operator of the establishment.

INSURABLE EARNINGS AND COLLECTION OF PREMIUMS REGULATIONS

Barbering or Hairdressing Establishments

8.(3) Where the owner or operator of a barbering or hairdressing establishment is unable to determine the insurable earnings of a person whose employment in connection with the establishment is included in insurable employment under paragraph 6(*d*) of the *Employment Insurance Regulations*, the amount of insurable earnings of the person for each week during that employment shall be deemed, for the purposes of the Act and for the purposes of these Regulations, to be an amount (rounded to the nearest dollar) equal to 1/78 of the maximum yearly insurable earnings, unless the owner or operator of the establishment maintains records that show the number of days on which the person worked in each week, in which case the amount of the person's insurable earnings for that week shall

> be deemed to be an amount (rounded to the nearest dollar) equal to the lesser of
>
> > (*a*) the number of days the person worked in that week multiplied by 1/390 of the maximum yearly insurable earnings, and
> >
> > (*b*) 1/78 of the maximum yearly insurable earnings.

[18] In support of his submissions, the Minister cited *Nelson v. Canada (Minister of National Revenue – M.N.R.)*, [2001] F.C.J. No. 700 (C.A.), a case involving similar facts. Having analysed those facts, Sharlow J.A. determined that the workers in issue were engaged in insurable employment, and stated, *inter alia*, as follows:

> The facts are not in dispute. In 1995 and 1996, the respondent Connie Nelson was a member of a partnership that operated a hairdressing salon under the name "Team JK". The partnership had some employees and it is common ground that the employees were engaged in insurable employment. Team JK also entered into arrangements with four individuals who were not employees but "chair renters". The issue in this appeal is whether the chair renters were engaged in insurable employment.
>
> . . .
>
> It is common ground that the Team JK store was a hairdressing establishment within the meaning of paragraph 6(*d*) of the *Employment Insurance Regulations*. The Tax Court Judge held that the chair renters were employed in that hairdressing establishment, that they provided the services normally provided in such an establishment, and that they were not the owners or operators of the establishment.
>
> 8. Despite those findings, however, the Tax Court Judge concluded that paragraph 6(*d*) of the *Employment Insurance Regulations* did not apply to the chair renters. He held that the terms and conditions of service of the chair renters in this case were not similar to the terms and conditions of service of persons engaged by Team JK under a contract of service. On that basis, he held that paragraph 6(*d*) of the *Employment Insurance Regulations* is *ultra vires* in so far as it purports to apply to the chair renters, and should be read down so that it does not apply to them.

9. To understand this conclusion, it is necessary to consider the portions of section 5 of the *Employment Insurance Act* that authorize the enactment of paragraph 6(*d*) of the *Employment Insurance Regulations*:

Employment Insurance Act, paragraph 5(1)(*d*)
(successor to paragraph 3(1)(*d*) of the *Unemployment Insurance Act*)

5.(4) the Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment […]

> (*c*) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under a contract of service […]

10. Clearly, the Tax Court Judge treated the provisions of paragraph 5(4)(*c*) of the *Employment Insurance Act* as stating preconditions to the application of paragraph 6(*d*) of the *Employment Insurance Regulations*. The same reasoning was rejected by this Court in *Canada (Procureur général) v. Agence de Mannequins Folio Inc*. (1993), 164 N.R. 74 (F.C.A.). In that case Hugessen J.A., speaking for the Court, said this (translation):

> . . .
>
> [4] We are all of the opinion that the trial judge erred in law. Section 4 sets out the parameters within which the Commission may exercise its regulation-making power. The validity of section 12 of the Regulations was not challenged in this case. The provisions that allow for the power to be exercised are not conditions for the application of the regulation made under that power. Paragraph 12(*g*) of the Regulations sets out its own conditions, and the trial judge had no need to look for other conditions in the enabling provision.

11. In my view, the reasoning of Hugessen J.A. should apply to the interpretation and application of paragraph 6(*d*) of the *Employment Insurance Regulations* in this case. Paragraph 5(4)(*c*) of

the *Employment Insurance Act* is intended to permit the Commission to identify classes of persons for inclusion in the statutory scheme. It must be presumed that the Commission, in enacting paragraph 6(*d*) of the *Employment Insurance Regulations*, did so because it appeared to the Commission that, for persons working in barbering and hairdressing establishments in the circumstances described in paragraph 6(*d*), the terms and conditions of their service and the nature of their work is similar to that of employees working in such establishments. . . . Thus, once the Tax Court Judge found as fact that the chair renters met the conditions stated in paragraph 6(*d*) of the *Employment Insurance Regulations*, it was not open to him to decide that the regulation could not be applied because there were additional conditions in paragraph 5(4)(*c*) of the *Employment Insurance Act* that had not been met. . . .

12. In this case, . . . the validity of paragraph 6(*d*) of the *Employment Insurance Regulations* is challenged. The argument is that it is *ultra vires* in so far as it purports to extend the scope of the *Employment Insurance Act* to a person who does not provide services to the party that is to be treated as the notional employer of that person. I am unable to accept this argument.

. . .

14. Counsel for Ms. Nelson argues that Commission's authority under paragraph 5(4)(*c*) of the *Employment Insurance Act* did not permit the Commission to find a similarity between the terms and conditions of service (les modalités des services) of the Team JK chair renters and the employees of Team JK, because the chair renters provided services only to their own customers and not to Team JK. I cannot accept that interpretation of paragraph 5(4)(*c*) because it requires reading into the provision words that are not there and are not necessarily implied.

15. . . . Therefore, it is open to the Commission to conclude that chair renters in a hairdressing establishment who provide no service to the owners of the establishment are nevertheless engaged in employment that is appropriately described by the words of paragraph 5(4)(*c*) of the *Employment Insurance Act*.

16. Counsel for Ms. Nelson also argued that the employment of chair renters cannot be treated as insurable employment without first obtaining the approval of the Governor in Council and an affirmative resolution of Parliament. . . .

> 17. . . . However, that would not detract from the conclusion that the paragraph 6(*d*) of the *Employment Insurance Regulations* was authorized by paragraph 5(4)(*c*) of the *Employment Insurance Act*.

[19] Sharlow J.A. of the Federal Court of Appeal concluded his reasons as follows:

> 24. As I read these regulations, they impose on Team JK an obligation to pay both the employee premiums and the employer premiums with respect to the chair renters who are within the scope of paragraph 6(*d*) of the *Employment Insurance Regulations*.

[20] Counsel for the Minister also relied on *9070-8835 Québec Inc. v. M.R.N.* (2002 CarswellNat 2123), where Somers T.C.J. ended his analysis of the facts, which were similar to those in the instant case, as follows:

> [TRANSLATION]
>
> 21. The worker's employment as hairdresser with the Appellant is insurable because she provided services normally provided by such an establishment and was not the owner or the operator of the establishment.

[21] In my opinion, the matter before this Court was the subject of a detailed analysis by the Federal Court of Appeal, and resulted in Shalow J.A.'s determination, in *Nelson*, *supra,* that the workers' employment was insurable.

[22] By virtue of the principles of our jurisprudence, this Court is bound by that judgment.

[23] This Court must find that the assessments of the premiums made in respect of the workers are valid because it has been proven that each worker provided services normally provided by a hairdressing establishment and that they were not the owners or operators of the establishment. Consequently, each worker held insurable employment within the meaning of paragraph 6(*a*) of the *Employment Insurance Regulations*.

[24] This Court also finds that each of the workers' insurable earnings were established in accordance with the provisions set out in subsection 8(3) of the *Employment Insurance Regulations*.

[25] The Appellant's agent's argument that the Minister's decision fails to recognize the workers' contractual rights under the *Civil Code of Québec* is

rejected because there is no evidence to support it. His allegation that the workers' constitutional rights under the *Canadian Charter of Rights and Freedoms* were violated must fail as well. The allegation was not proven. It should also be specified that the Appellant did not give the prescribed notice of her intent to seek this type of relief.

[26] Consequently, the appeal is dismissed and the decision of the Minister and the assessments concerning the workers (Interveners) are confirmed.

Signed at Grand-Barachois, New Brunswick, this 16th day of February 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 1st day of December 2005.

Aveta Graham, Translator

CITATION:	2005TCC126
COURT FILE NO.:	2004-822(EI)
STYLE OF CAUSE:	Suzanne Savard, o/a Coiffure Sansass and M.N.R. and Gilles Lavoie and Elie Rizkallah
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REASONS FOR JUDGMENT BY:	The Honourable S.J. Savoie, Deputy Judge
DATE OF JUDGMENT:	February 16, 2005

APPEARANCES:

Agent for the Appellant:	Roland Rail
Counsel for the Respondent:	Soleil Tremblay
Agent for the Interveners:	Roland Rail

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