Docket: 2011-1047(EI)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1048(CPP)), *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1049 (CPP)) and *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1050(EI)) on July 4, 2011, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Amanda Doucette Joseph Gill, Student-at-law
Counsel for the Respondent:	Bryn Frape

JUDGMENT

The appeal is allowed and the decision of the Minister is varied on the basis that Mr. Darcy J. Wesolowski did not hold insurable employment, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of October 2011.

"Paul Bédard"

Bédard J.

Docket: 2011-1048(CPP)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1047(EI)), *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1049 (CPP)) and *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1050(EI)) on July 4, 2011, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Amanda Doucette Joseph Gill, Student-at-law
Counsel for the Respondent:	Bryn Frape

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue is varied on the basis that Mr. Darcy J. Wesolowski's employment was excepted from pensionable employment, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of October 2011.

"Paul Bédard"

Bédard J.

.

Docket: 2011-1049(CPP)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1047(EI)), *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1048 (CPP)) and *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1050(EI)) on July 4, 2011, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Amanda Doucette Joseph Gill, Student-at-law
Counsel for the Respondent:	Bryn Frape

JUDGMENT

The appeal 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 11th day of October 2011.

"Paul Bédard"

Bédard J.

Docket: 2011-1050(EI)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1047(EI)), *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1048 (CPP)), and *Rudolf Heineke, operating as Creative Staging Saskatchewan* (2011-1049(CPP)) on July 4, 2011, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Amanda Doucette Joseph Gill, Student-at-law
Counsel for the Respondent:	Bryn Frape

JUDGMENT

The appeal 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 11th day of October 2011.

"Paul Bédard"

Bédard J.

Citation: 2011 TCC 475
Date: 20111011
Docket: 2011-1047(EI)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2011-1048(CPP)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2011-1049(CPP)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2011-1050(EI)

BETWEEN:

RUDOLF HEINEKE,
OPERATING AS CREATIVE STAGING SASKATCHEWAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] These appeals are from decisions by the Minister of National Revenue (the "Minister") under the *Canada Pension Plan* ("CPP") and the *Employment Insurance Act* (the "*Act*") that, during the period from January 1, 2008 to December 31, 2008, Darcy J. Wesolowski and during the period from January 1, 2008 to December 31, 2009 Bob Rosenfeldt, Adam Scott and Joey Prevost (all four hereinafter collectively referred to as the "Workers") were employed by the Appellant in pensionable and insurable employment.

[2] The Appellant was in the business of providing additional crew members to assist with set-up and take-down at concerts held at the Credit Union Centre in Saskatoon, Saskatchewan (the "Centre").

[3] The Minister's position is that:

> (a) the Workers held insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act* during the relevant periods since they were employed pursuant to contracts of service with the Appellant;
>
> (b) the Workers held pensionable employment within the meaning of paragraph 6(1)(*a*) of CPP during the relevant periods since they were employed pursuant to contracts of service with the Appellant;
>
> (c) the Workers were not employed by the Appellant in connection with a circus, fair, parade, carnival, exposition, exhibition or other like activity; accordingly, the Minister submits that the employment of the Workers with the Appellant was not excluded from insurable employment pursuant to

subsection 8(1) of the *Employment Insurance Regulations* (the "Regulations"), nor was it excepted from pensionable employment pursuant to subsections 28(1) and 28(2) of *Canada Pension Plan Regulations* (the "CPP Regulations");

(d) if the Court comes to the conclusion that the Workers were employed by the Payor in connection with a circus, fair, parade, carnival, exposition or similar activity, the employment of the Workers:

(i) was by virtue of subsection 8(3) of the Regulations, not excluded from insurable employment as the total period of the Workers' employment with the Appellant exceeded 6 days in both relevant years;

(ii) was, by virtue of subsection 28(4) of the CPP Regulation, not excepted from pensionable employment as the total period of the Workers' employment with the Appellant exceeded 6 days in both relevant years.

[4] Each case in which the question of whether a worker is an employee or an independent contractor arises must be dealt with on its own facts. The four components (control, ownership of tools, chance of profit and risk of loss) of the composite test enunciated in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, must each be assigned its appropriate weight in the circumstances of the case. Moreover, the intention of the parties to the contract has in recent decisions of the Federal Court of Appeal become a factor whose weight seems to vary from case to case (*Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, [2007] 1 F.C.R. 35; *Wolf v. Canada*, [2002] 4 F.C. 396; *City Water International Inc. v. Canada (M.N.R.)*, 2006 FCA 350, 355 N-R 77; *National Capital Outaouais Ski Team v. Canada (M.N.R.*), 2008 FCA 132, [2008] 4 C.T.C. 273).

[5] The facts on which the Minister relied to render his decision in CPP case 2011-1049(CPP) and EI case 2011-1050(EI) are the same. These facts are in each case set out in paragraph 9 of the Reply to the Amended Notice of Appeal, as follows:

(a) the Credit Union Centre (the "CUC") is a large entertainment complex in Saskatoon, Saskatchewan which hosts concerts and other entertainment events;

(b) each entertainment event would bring along its own crew (the "event crew") to organize, set up and take down the event;

(c) the Payor provides additional crew members to assist the event crew with the set up and take down for events held at the CUC;

(d) [the] CUC used the Payor almost exclusively to provide assistance for events;

(e) the Worker was hired by the Appellant to help with the set up and take down of the events held at the CUC;

(f) there was no written contract of employment between the Payor and the Worker;

(g) the Payor maintained a list of possible crew members that changed on a continuous basis due to the transient nature of the workers;

(h) the Payor's list of possible crew members had upwards of 300 names;

(i) there was no guarantee that the Worker would be called by the Payor to be a crew member at a particular event or show;

(j) the work was sporadic in nature and subject to being called by the Payor;

(k) the Payor decided which workers to call from its list;

(l) the Worker was called more often than other workers since he was considered by the Payor to be a good worker;

(m) the Worker had the choice of accepting the offer of work for each event held at the CUC;

(n) the Worker was able to call the Payor to advise that he was available to work;

(o) if the Worker was liked by the event crew and did [a] good job, he was likely to be called more often;

(p) the Worker reported to the event crew or was supervised by the Payor;

(q) the Payor was responsible to ensure that the tasks assigned to the Worker were done to the specific requirements of the promoter/event organizer;

(r) the events the Worker worked were predominantly musical performances;

(s) the Worker was paid an hourly rate of pay by the Payor;

(t) the Payor set the hourly rate of pay it paid to the Worker;

(u) the hourly rate paid by the Payor could vary from event to event;

(v) the Payor paid the Worker by cheque at the end of each event;

(w) the Worker received total remuneration from the Payor in the amount of $4,092.25 in 2008 and $2,379.31 in 2009;

(x) the Payor provided the Worker with workers' compensation coverage;

(y) the value of the tools brought by the Worker to perform his duties was minimal;

(z) most of the equipment needed by the Worker to perform his duties was provided by the event crew;

(aa) the Worker had to perform his duties personally;

(bb) the Worker was not paid any benefits or vacation pay;

(cc) the Worker was not responsible for any operating expenses;

(dd) the Worker had no financial interest in the business of the Payor;

(ee) the Worker mainly chose to work the events because of the advantage of attending the concerts;

(ff) the income earned by the Worker from the Payor did not make up a large percentage of the Worker's total income;

(gg) the Worker did not work at the same event for more that [*sic*] 7 days in a calendar year; and

(hh) the Worker worked between two to three concerts a month in both 2008 and 2009.

[6] The facts on which the Minister relied to render his decision in CPP case 2011-1048(CPP) and EI case 2011-1047(EI) are the same. These facts are in each case set out in paragraph 9 of the Reply to the Amended Notice of Appeal, as follows:

(a) the Credit Union Centre (the "CUC") is a large entertainment complex in Saskatoon, Saskatchewan which hosts concerts and other entertainment events;

(b) each entertainment event would bring along its own crew (the "event crew") to organize, set up and take down the event;

(c) the Payor provides additional crew members to assist the event crew with the set up and take down for events held at the CUC;

(d) [the] CUC used the Payor almost exclusively to provide assistance for events;

(e) the Workers were hired by the Appellant to help with the set up and take down of the events held at the CUC;

(f) there were no written contracts of employment between the Payor and the Workers;

(g) the Payor maintained a list of possible crew members that changed on a continuous basis due to the transient nature of the workers;

(h) the Payor's list of possible crew members had upwards of 300 names;

(i) there was no guarantee that the Workers would be called by the Payor to be a crew member at a particular event or show;

(j) the work was sporadic in nature and subject to being called by the Payor;

(k) the Payor decided which workers to call from its list;

(l) the Workers had the choice of accepting the offer of work for each event held at the CUC;

(m) the Workers were able to call the Payor to advise that they were available to work;

(n) if the Workers were liked by the event crew and did [a] good job, they were likely to be called more often;

(o) the Workers reported to the event crew or were supervised by the Payor;

(p) the Payor was responsible to ensure that the tasks assigned to the Workers were done to the specific requirements of the promoter/event organizer;

(q) the events the Workers worked were predominantly musical performances;

(r) the Workers were paid an hourly rate of pay by the Payor;

(s) the Payor set the hourly rate of pay it paid to the Workers;

(t) the hourly rate paid by the Payor could vary from event to event;

(u) the Payor paid the Workers by cheque at the end of each event;

(v) the Payor provided the Workers with workers' compensation coverage;

(w) the value of the tools brought by the Workers to perform their duties was minimal;

(x) the Workers had to perform their duties personally;

(y) the Workers were not paid any benefits or vacation pay;

(z) the Workers were not responsible for any operating expenses;

(aa) the Workers had no financial interest in the business of the Payor;

(bb) the Workers mainly chose to work the events because of the advantage of attending the concerts; and

(cc) the Workers did not work at the same event for more that [*sic*] 7 days in a calendar year.

[7] With the consent of the Respondent, paragraph 6.9 of the Amended Notice of Appeal in CPP case 2011-1049 (CPP) was further amended to read as follows:

> 6.9 The Appellant says that Mr. Prevost's total annual earnings for 2009 (from working for the Appellant) were $2,379.31. The Appellant says that the annual basic exemption amount for CPP contributions in 2009 was $3,500. Therefore, Mr. Prevost earned $1,120.69 less than the annual basic exemption amount.

[8] The Appellant's testimony, which seemed credible, was essentially the following:

(a) The Centre is a large entertainment complex in Saskatoon which hosts large concerts and other entertainment events.

(b) The Appellant provides additional crew members to assist with set-up and take-down for events held at the Centre.

(c) The Centre is contacted by an "event promoter". The event promoter advises the Centre that the entertainer (e.g., The Eagles) requires additional stage crew.

(d) The Centre then contacts the Appellant and advises him of the stage crew required, as well as the date and time of the event. He does not have a formal written contract with the Centre. He has no guarantee that the Centre will contact him for additional stage crew. The Appellant added that the work is sporadic because it is dependent on events coming to the Centre and is further dependent on the Centre contacting him to request additional crew for the events. In addition,

there may be several months in a year when there are no events and therefore no requests for workers.

(e) When he receives a request for workers from the Centre, he prepares a quote which is forwarded to the event promoter through the Centre. If the event promoter approves the quote, the Appellant receives confirmation of this through the Centre.

(f) He becomes aware of potential crew members largely by “word of mouth”. His list of possible crew members has upwards of 300 names. This list changes on a continuous basis due to the transient nature of the workers. Once advised by the Centre of the number of crew members required for a particular event, he looks at his list to obtain the requisite number of workers.

(g) He does not have a regular set of crew members. If a crew member works one event or concert, that person may not be called upon to work again for a long time. However, the Appellant admitted that he is inclined to call more often the workers who are liked by an entertainer’s crew (the “base crew”) and who did a good job. He called those good workers his favourites. I would point out immediately that in 2009 the Centre used the Appellant’s services for 30 concerts or events and that The Appellant used the services of Joey Prevost, Adam Scott and Bob Rosenfeldt for 14, 12 and 18 respectively of those concerts or events.

(h) The entertainer brings along his own base crew. The Appellant provides additional workers to support the base crew. When the workers arrive (at the time determined by him) at the Centre they report to him. He then assigns them to certain special tasks. From that moment, the workers work under the supervision and control of the base crew. The Appellant also explained that he is present all day at the Centre on the day of an event in order to, among other things, ensure that the tasks assigned to the workers are done to the specific requirements of the entertainer, and possibly to fire workers who are not meeting the entertainer’s requirements.

(i) He asks all workers to bring certain equipment or tools with them to the Centre. For example, all workers are responsible for bringing a pair of gloves and a crescent wrench, and riggers are required to bring their own ropes and harness. If a worker forgets to bring those items, the Appellant does not provide them. The Centre or the entertainer furnishes any extra equipment or tools. The Workers were not responsible for any operating expenses and they had no financial interest in the Appellant’s business.

(j) The crew members he hires are paid an hourly wage, which varies by event and by task. For example, the Appellant explained that riggers typically are paid a higher hourly wage than other workers on account of the more dangerous nature of the job. The hourly rate of pay is not negotiable. His rule in this regard is “take it or leave it”. The Workers were paid by cheque at the end of each day. He also provided the Workers with worker’s compensation coverage. He provides the Centre with an invoice for the cost of the workers supplied for an event. Once the invoice is approved, he receives payment directly from the Centre. He pays a worker for a minimum of 3 hours a day because he thinks labour laws oblige him to do so.

(k) The Workers were free to engage a helper provided that the helper was acceptable to the Appellant. I would point out in this regard that the helper was paid not out of the Worker’s pay, but directly by the Appellant.

(l) The Workers were free to send a substitute provided that he was acceptable to the Appellant. I would point out in this regard also that the substitute was paid not by the Worker but directly by the Appellant.

(m) He considers all the workers he hires to be subcontractors. However, the Appellant admitted that he never discusses the workers’ status with the workers he hires.

[9] Mr. Wesolowski’s testimony, which seemed credible, was essentially the following:

(a) He was hired under a verbal agreement. He never discussed with the Appellant the legal characterization of the services rendered to the Appellant. However, he considers that the relationship was one of part-time employment.

(b) He was paid an hourly rate of $10 to $12. The Appellant determined his rate of pay. The rate of pay was not negotiable. He was paid at the end of each day he worked. The Appellant kept a record of his hours worked.

(c) Mr. Wesolowski did not incur any expenses personally in performing services for the Appellant.

(d) His work was essentially physical work consisting of setting up and taking down a stage and of loading materials.

(e) He had no registered business name or number, no GST number, no business bank account, no other clients. He never advertised his services.

(f) On one occasion he brought a helper to the Centre. The Appellant hired the helper and paid him directly.

(g) When he arrived (at the time determined by the Appellant) at the Centre, he reported to the Appellant, who then assigned him certain specific tasks. From that moment, he worked under the supervision and control of the base crew. However, he considered that the Appellant was his principal boss. He reported to the Appellant with regard to complaints about his work.

[10] Mr. Joey Prevost's testimony was essentially similar to Mr. Wesolowski's.

[11] The evidence also revealed the following:

(a) Joey D. Prevost worked for the Appellant 21 days in 2008 and 14 days in 2009.

(b) Bob Rosenfeldt worked for the Appellant 24 days in 2008 and 18 days in 2009.

(c) Adam Scott worked for the Appellant 18 days in 2008 and also 12 days in 2009. Exhibit I-1 and paragraph 8(1) *supra*.

(d) Darcy J. Wesolowski worked for the Appellant 5 days in 2008.

Analysis and Conclusion

[12] I wish to begin with a few observations concerning the intention factor. First of all, if the intent of the parties is to be a determinative or tie-breaking factor, that intent must be shared by both parties. In other words, if there is no meeting of the minds and the parties are not *ad idem*, intent cannot be a factor. My second observation is that, where the parties' intention cannot be ascertained (which is the case here), it is quite proper, indeed necessary, to look at all the facts to see what legal relationship they reflect. In that regard, the four components of the composite test enunciated in *Wiebe Door* are relevant and helpful in ascertaining the intent of the parties to the contract and the legal nature of the contract.

[13] Turning now to the facts, what factors suggest that the Workers were employees of the Appellant?

Responsibility for investment and management

1. The Workers had no such responsibility.

Chance of profit / Risk of loss

2. The Workers had no expenses and no liability exposing them to a risk of loss.

3. There was in reality no opportunity for them to increase their income. The ability to work more hours and therefore to make more money does not constitute, in my opinion, a chance of profit.

Control

4. The Workers had to report to the Appellant at the start of their shift. The Appellant then assigned the Workers their various duties for the day. In other words, he told the Workers at the beginning of their shifts to whom they were to go. In fact, from that moment, the Appellant delegated most of his authority over the Workers to the base crew boss.

5. The Appellant was present all day at the Centre to ensure that, among others things, the tasks assigned to the Workers were performed to the specific requirements set out by the base crew and to terminate the employment relationship with any workers who were not meeting those requirements. The evidence clearly revealed that he terminated the relationship with a worker when an event promoter or a member of the base crew complained about that worker's work.

6. The Workers' hours were tracked by the Appellant and by him alone. The Workers did not invoice the Appellant for their hours worked.

7. This factor clearly supports a finding that the Workers were in a relationship of subordination with the Appellant. Darcy Wesolowski in particular indicated that in the hierarchy of people he was under, the Appellant was at the top.

Tools

8. Given the low value of the tools provided, I am of the opinion that this factor is neutral. In other words, I am of the opinion that this factor should not carry much weight in the overall decision.

[14] I am of the opinion that there are no significant factors suggesting that the Workers were in business on their own account. The insignificant factors raised by the Appellant's counsel cannot outweigh the overall reality that the Workers were not in business on their own account.

[15] The question I now have to answer is the following: were the Workers employed by the Appellant in connection with a circus, fair, parade, carnival, exposition or other like activity?

[16] Since counsel for the Appellant essentially repeated during the hearing her written arguments on this point submitted to the Court, I am of the opinion that it is useful to reproduce in full those written submissions, which are the following:

> 37. It is the position of the Appellant that the Workers should be excluded from insurable and pensionable employment, because the work of the Workers can be categorized under the phrase "or other like activity" from Regulation 8 of the EI Regulations, and Regulation 28 of the CPP Regulations.
>
> 38. The Respondent has chosen to take a narrow interpretation of Regulation 8 of the EI Regulations and Regulation 28 of the CPP Regulations, to limit the application of this exclusion to only "music festivals".
>
> 39. However, the Appellant says that this Honourable Court has previously found the phrase "or other like activity" (in the context of EI Regulations and CPP Regulations) can extend to work other than for music festivals.
>
> 40. In *[Lotfi] v. Canada*, this Court was asked to consider whether a pizza delivery man who worked varied hours over a several day period was considered to be under "insurable employment". The Court concluded he was not and relied on EI Regulation 8(1)(a)(ii), stating as follows:
>
> > 14 The evidence revealed that the employment of the Appellant lasted only a few days, two or three, according to the information provided by the Payor. **The short duration of this employment has the effect of excluding it from insurable employment in accordance with subparagraph 8(1)(a)(ii) of the Employment Insurance Regulations, which I will reproduce below:**
> >
> > > 8.(1) Subject to subsections (2) to (4), the following employments are excluded from insurable employment:
> > >
> > > (*a*) employment of a person by an employer, other than as an entertainer, in connection with a circus, fair, parade, carnival, exposition, exhibition or other similar activity if the person:
> > >
> > > [...]
> > >
> > > (ii) is employed by that employer in that employment for less than 7 days in a year.
> >
> > 15 **This Court must accordingly conclude that the employment of the Appellant was excluded from insurable employment.** However, in the opinion of the Minister, the employment of the Appellant was not insurable

> because he was providing services to the Payor under a contract for services and not under a contract of service. This Court is of the opinion that the circumstances in the instant case support this finding by the Minister, since an examination of the facts in light of the criteria established in *Wiebe Door Services Limited v. M.N.R.*, [1986] 3 F.C. 553 (F.C.J.) supports this conclusion.
>
> **[emphasis added]**
>
> **[*Lotfi*] *v. Canada*,** 2005 TCC 270 **[Tab J]**
>
> 41. The Appellant says that in interpreting Regulation 8(1)(a) in [*Lotfi*], this Court found that even a pizza delivery man could be categorized under the phrase "other similar activity". It is the position of the Appellant that if a pizza delivery man fits the qualifications for application of this phrase, surely stage crew working for a music concert could be categorized under this phrase a well.

[17] I am of the opinion that the Appellant cannot rely on the *Lotfi* case to argue that the employment of the Workers was excluded from insurable employment pursuant to subsection 8(1) of the Regulations and also were excepted from pensionable employment pursuant to subsections 28(1) and 28(2) of the CPP Regulations. In the *Lofti* case, Justice Savoie wrongly held that the employment of the worker was excluded from insurable employment pursuant to subsection 8(1) of the Regulations only because the evidence revealed that the employment lasted only two or three days. I am of the opinion that employment is excluded from insurable employment pursuant to subsection 8(1) of the Regulations and excepted from pensionable employment pursuant to subsections 28(1) and 28(2) of the CPP Regulations if the following three conditions are met:

(i) the employment must be in connection with a circus, fair, parade, carnival, exposition, exhibition, or <u>other similar activity</u>;

(ii) the worker must not be regularly employed by the employer; and

(iii) the worker must be employed by that employer in that employment for less than seven days in a year.

In the *Lotfi* case the conditions stated in (ii) and (iii) above were met. However, I am of the opinion that the condition stated in (i) above was not met. Indeed, I simply do not see how the activity of delivering pizza could be considered similar to an activity in connection with such things as a circus, fair, parade, carnival, exposition or exhibition.

[18] However, I am of the opinion that a "concert" is an activity similar to a circus, fair, parade, carnival, exposition or exhibition in that it is generally a travelling event

(i.e., an event moving from town to town) and an event the purpose of which is essentially to entertain the public.

[19] Finally, the Appellant submits that by virtue of subsection 8(3) of the Regulations, the employment of the Workers was not excluded from insurable employment and by virtue of subsection 28(4) of the CPP Regulations, it was not excepted from pensionable employment essentially because the work at each entertainment event was performed for a different promoter, and accordingly, in determining the number of days worked in a year, one should calculate the number of days worked per event. Since counsel for the Appellant essentially repeated during the hearing her written arguments in this regard submitted to the Court, I am of the opinion that it is useful to reproduce in full those written arguments, which are the following:

> 42. The Appellant recognizes that in order to be excluded from insurable and pensionable employment pursuant to Regulation 8 of the EI Regulations and Regulation 28 of the CPP Regulations, a worker must also: (a) not be in the "regular employment" of the Appellant; and (b) must not have worked more than 6 days in the year.
>
> 43. The Appellant says that the Workers are not in the "regular employment" of the Appellant. The Appellant says that each of the Workers is one of a list of potential workers who can be called on by the Appellant to work at entertainment events throughout the year. There is no guaranteed number of hours or days that the Workers will work in a year, and there is no guarantee that an individual worker would even be contacted by the Appellant.
>
> 44. Further, it is the position of the Appellant that because each entertainment event is worked for a different promoter, in calculating the number of "days" worked in a year, one should instead calculate the number of days worked per event.
>
> 45. The Appellant says that each of the "events" that took place at CUC during the years subject to appeal did not last for more than 6 days.
>
> 46. As support for this interpretation of the provision, the Appellant relies upon *Local 212 (I.A.T.S.E.) v. Canada*, a decision of this Honourable Court with respect to the predecessor legislation, the *Unemployment Insurance Act, 1971* (Canada).
>
> *Local 212 (I.A.T.S.E.) v. Canada*, [1988] T.C.J. No. 537 **[Tab K]**.
>
> 47. In *Local 212*, the Minister had determined that the appellant union, which consisted of motion picture and stage employees, was the deemed employer of the workers it supplied to producers. The union was paid at set rates for the workers' time, deducted two percent of the wage earned by each worker, and remitted the

balance to the worker. It did not withhold any employee source deductions or remit unemployment insurance premiums in relation to any of the workers.

48. This Court overturned the decision of the Minister, finding that the workers were not employed by the union for the following reason:

> The Appellant does not generate any employment. Instead the Appellant waits until there is a call for services for personnel by some performing body. The Appellant then submits at least two names of the type of workers required to the theatre company, exhibition or producer of the show etc. Remuneration for the different trades or skills is negotiated by the union beforehand. The person hiring the workers must sign an agreement similar to Exhibit A4 filed with these proceedings. The hiring organization outlined what it wants done. The Appellant assigns the workers to the job. When the job is completed the Appellant collects the total remuneration for the work and allocates it amongst the personnel involved after deducting 2% from the gross wages to pay for the union operating expenses as agreed upon by the union members.

49. The Court also held that the workers were excluded from insurable employment pursuant to Regulation 15(1) of the *Unemployment Insurance Regulations* (which reads similar to the current version of the relevant provisions in the EI Regulations and CPP Regulations):

> Sec. 15(1) The following employments are, subject to subsection (2), excepted from insurable employment:
>
> (a) employment, other than as an entertainer, of a person in connection with a circus, fair, parade, carnival, exposition, or similar activity if that person
>
> (i) is not regularly employed by the employer who employs him in that employment; and
>
> (ii) is employed by that employer for less than seven days in a year.

50. This Court reviewed a list of groups or organizations who needed the workers over the course of the year (i.e., Calgary Opera, Shrine Circus etc.) and concluded as follows with respect to the three conditions of Regulation 15:

> The workers in question were not entertainers, and thus fulfilled the first requirement of excepted employment.
>
> The second requirement for excepting the employees from insurability under this section is that the workers are not regularly employed by the employer who employed them in that employment…

> Some of these performances were probably a "one shot" effort. Others like the Shrine Circus are probably repeated annually. Assuming, for example, productions like the Shrine Circus are repeated annually, there is no guarantee that the same employees are employed by the Circus each time…. The workers in question thus fulfill the second requirement for exemption from insurability set out in section 15 of the Regulations. The third requirement for exemption from insurability under section 15 as aforesaid is that the employee "is employed by that employer for less than seven days in a year"…. **I find the employees in question were employed for less than seven days by each producer of a show or performance**. The employees in question meet the requirements set out in section 15(1)(a) of the Unemployment Insurance Regulations and there [sic] employment is excepted from insurability.
>
> [emphasis added]

51. The Appellant says that the Court in *Local 212* interpreted the phrase "employed for less than seven days in a year" to mean employed for less than seven days by each producer of a show or performance. The Appellant says that none of the events during the years 2008 or 2009 required workers for more than 6 days. Further, even if the same event was to return to CUC, there is no guarantee that the same workers would be contacted to work, or would be available to work again.

52. It is the position of the Appellant that even if this Honourable Court finds that the Workers are employees of the Appellant, the Workers should be excluded from insurable and pensionable employment pursuant to the exception found in Regulation 8 of the EI Regulations and Regulation 28 of the CPP Regulations. The Workers are not entertainers, are not regularly employed by the Appellant and are employed less than seven days in a year by each promoter of an event at CUC.

[20] I am of the opinion that the Appellant cannot rely on the *Local 212* case since in that case the Court found that the employees were employed for less than seven days by each producer of a show or performance. In other words the Court found that the employees in question had multiple employers in the year. I am of the opinion that in the present case the Workers had only one employer in the years at issue and that that employer was the Appellant. Consequently, I am of the opinion that, by virtue of subsection 8(3) of the Regulations, the employment of Mr. Prevost, Mr. Rosenfeldt and Mr. Scott in 2008 and 2009 was not excluded from insurable employment and by virtue of subsection 28(4) of the CPP Regulations, it was not excepted from pensionable as the total duration of each of those workers' employment with the Appellant exceeded six days in both 2008 and 2009. I note that the evidence revealed that

(i) Mr. Prevost worked for the Appellant 21 days in 2008 and 14 days in 2009;

(ii) Mr. Scott worked for the Appellant 18 days in 2008 and also 12 days in 2009;

(iii) Mr. Rosenfeldt worked for the Appellant 24 days in 2008 and 18 days in 2009.

[21] However, I am of the opinion that the employment of Mr. Wesolowski in 2008 was excluded from insurable employment pursuant to subsection 8(1) of the Regulations and was excepted from pensionable employment pursuant to subsections 28(1) and 28(2) of the CPP Regulations since the evidence revealed that he worked for the Appellant for only 5 days in 2008.

[22] For these reasons, I am of the opinion that:

(i) during the period from January 1, 2008 to December 31, 2009, Bob Rosenfeldt, Adam Scott and Joey Prevost were employed by the Appellant in pensionable and insurable employment;

(ii) during the period from January 1, 2008 to December 31, 2008, Darcy J. Wesolowski was not employed by the Appellant in pensionable and insurable employment.

Signed at Ottawa, Canada, this 11th day of October 2011.

"Paul Bédard"

Bédard J.

CITATION:	2011 TCC 475
COURT FILE NOS.:	2011-1047(EI) 2011-1048(CPP) 2011-1049(CPP) 2011-1050(EI)
STYLES OF CAUSE:	RUDOLF HEINEKE, OPERATING AS CREATIVE STAGING SASKATCHEWAN AND M.N.R.
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	July 4, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	October 11, 2011

APPEARANCES:

Counsel for the Appellant:	Amanda Doucette Joseph Gill, Student-at-law
Counsel for the Respondent:	Bryn Frape

COUNSEL OF RECORD:

For the Appellant:

Name:	Amanda S.A. Doucette Joseph Gill, Student-at-law
Firm:	Stevenson Hood Thornton Beaubier LLP

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada