Docket: 2019-1387(EI)
2019-1388(CPP)

BETWEEN:

CO-OPERATIVE HAIL INSURANCE COMPANY LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on February 9, 2023, at Toronto, Ontario

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	David W. Chodikoff
Counsel for the Respondent:	Princess Okechukwu

JUDGMENT

The appeal pertaining to both the *Canada Pension Plan* and the *Employment Insurance Act* is allowed. During the relevant 2016 period the worker did not work as an employee of the Appellant, but rather as an independent contractor.

Signed at Ottawa, Canada, this 6th day of April 2023.

"B. Russell"

Russell J.

Citation: 2023 TCC 40
Date: April 6, 2023
Docket: 2019-1387(EI)
2019-1388(CPP)

BETWEEN:

CO-OPERATIVE HAIL INSURANCE COMPANY LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction/Issue:

[1] This appeal is brought under two federal statutes - the *Employment Insurance Act* and the *Canada Pension Plan*. The appellant, Co-operative Hail Insurance Company Limited (Co-op Hail), appeals a January 25, 2019 decision of the Minister of National Revenue (Minister).

[2] The Minister's decision was to confirm a Canada Revenue Agency (CRA) ruling made November 23, 2018, that during the period April 1 to September 30, 2016 an individual, Mr. Casey Yeomans, had carried out work as a licensed crop hail adjuster for Co-op Hail in the capacity of its employee, and not as an independent contractor.

[3] The effect of this decision that Mr. Yeomans had worked as an employee rather than as an independent contractor is that Mr. Yeomans was determined to have been engaged in pensionable employment with Co-op Hail during the said period, per paragraph 6(1)(a) of the *Canada Pension Plan*, and likewise engaged in insurable employment with Co-op Hail per paragraph 5(1)(a) of the *Employment Insurance Act*.

[4] In its appeal, Co-op Hail maintains that the Minister erred in concluding that Mr. Yeomans had worked as an employee of Co-op Hail, and that actually he had carried out the subject work for Co-op Hail in his capacity of independent contractor.

II. Evidence:

[5] At the hearing two witnesses testified – Messrs. Yeomans and Daniel Anderson. In 2016 Mr. Anderson was CFO of Co-Op Hail and currently is its CEO.

[6] The evidence established that Mr. Yeomans was a secondary school teacher and vice-principal. He also was a licensed crop hail adjuster and worked as such during summers, including for purposes of this appeal the summer of 2016. Mr. Yeomans had taken training to become licensed in 2012 by the Insurance Councils of Saskatchewan as a crop hail adjuster.

[7] A licensed crop hail adjuster adjusts insurance claims of producers of various crops, such as wheat and canola, damaged by hail. The adjuster uses methods he/she has been trained in to evaluate the value of a producer's crop loss due to hail. Producers submit claims for hail crop loss to the particular insurance company or companies, such as Co-op Hail, that they had contracted with for insurance protection from such damage. The licensed hail adjuster will attend at the claimant producer's rural fields and ascertain the value of the loss. The adjuster will seek to obtain the producer's concurrence as to the lost value the adjuster has determined. The relevant insurance company is required to pay out as insurance proceeds the agreed upon lost value.

[8] On April 4, 2016 Mr. Yeomans and Co-op Hail entered into an "Independent Hail Adjusting Contract Agreement", specifying that Mr. Yeomans would work for Co-op Hail as an "independent contractor", in adjusting crop hail insurance claims.

[9] The agreement provided also that there was no promise as to the frequency or number of claim adjustments for which Co-op Hail would seek Mr. Yeomans' services. Also it stated that Mr. Yeomans would pay his own income taxes and Canada Pension Plan contributions, and that Co-op Hail had no responsibility for such payments.

[10] The agreement further provided that Co-op Hail would not directly oversee the actual work or instruct Mr. Yeomans as to how his adjusting work was to be performed. Mr. Yeomans was to keep Co-op Hail informed as to the progress of the

work and will comply with any reasonable Co-op Hail requests regarding documentation and or status of particular adjusting assignments.

[11] The agreement provided also that Mr. Yeomans was to decide the methods and means of performing his adjusting services and was to work within the requirements of his/her provincial hail adjusting license. In carrying out his adjusting work Mr. Yeomans was to adhere to the practices and procedures described in the Crop Hail Adjustment Manual as regulated by the Superintendent of Insurance in Saskatchewan.

[12] Mr. Yeoman's cycles of work would commence somewhat after a crop damaging hailstorm had passed through. He would be contacted by crop insurer Co-op Hail's "storm boss" (and possibly as well by storm bosses of other insurers). The storm boss would have in hand various crop hail damage claims lodged with Co-op Hail by producers having crops insured by Co-op Hail. The storm boss would request of Mr. Yeoman if he would work as adjuster for all or some of these claims.

[13] Mr. Yeomans preferred adjustment work respecting producers in the Swift Current area, being close to where he lived, and for time periods not conflicting with his family's summer schedule. He chose accordingly as to which damage claims he would accept to adjust.

[14] In the summer of 2016 Mr. Yeomans (and other licensed adjusters) accepted Co-op Hail payment terms of $220 per day while engaged in hail crop adjusting for Co-op Hail, plus $185 per day for board, lodging and telephone, and $75 per day if working from home or returning home at day's end after working claims, plus a fixed kilometre amount for using his own vehicle.

[15] Mr. Yeomans, as were other adjusters, was expected to use his own vehicle for the travel necessary to do adjusting work, and to provide his own boots, rain jacket and mosquito netting. Co-op Hail provided pens and paper (e.g., official claims forms), as well as the manual that licensed crop hail adjusters in Saskatchewan were to adhere to.

[16] The work to adjust for damaged crops involved, as Mr. Yeomans specified in completing a CRA questionnaire, "travel to the fields, measuring damage, counting seed on plants, diagramming, writing notes, discussion with farmer/insured to go over claim and get signature [on proof of loss] from farmer/member." ("Member" is reference to the fact that Co-op Hail was a co-operative.)

[17] As well Mr. Yeomans, as a licensed hail crop adjuster, was free to do similar work for other insurance companies, not just Co-op Hail, who might also seek to engage him for such work. What work Mr. Yeomans accepted was his choice, including whether to accept to adjust all or less than all of the claims requiring adjustment offered by the storm bosses of any other crop insurance companies including Co-op Hail.

[18] If a crop insurer did not wish to work with any particular adjuster that insurer's storm boss simply would cease contacting that adjuster to discuss allocation to him/her of claims for adjustment.

III. Law:

[19] There are several notable decisions in the development of the Canadian legal bases for distinguishing employees and independent contractors. For years, the guiding decision was *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 of the Federal Court of Appeal. *Wiebe Door* in 1986 endorsed a "four-in-one test", drawing upon English jurisprudence in identifying a "contract of service" (employees) and separately a "contract for services" (independent contractors). In *Wiebe Door* the four determining factors identified, are (i) control over how the work is to be done, (ii) ownership of tools, (iii) chance of profit and (iv) risk of loss.

[20] In 2001 the Supreme Court of Canada in *1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, established that the central question was whether the person engaged to work was or was not in business on his/her own account. *Sagaz* also recognized indicia, largely consistent with *Wiebe Door*, being control over the worker's activities, ownership of equipment, whether the worker may hire helpers, degree of financial risk, degree of responsibility for investment and management, and opportunity for profit by the worker in carrying out his/her tasks.

[21] In 2013 the Federal Court of Appeal in *1392644 Ontario Inc. v. M.N.R.*, 2013 FCA 85 (*Connor Homes*) established a two-step process for determining whether the individual was performing business services on his/her own account. The first step was to ascertain the subjective intent of the parties as to what the work relationship was. The second step was to consider various objective factors as identified in *Wiebe Door* and *Sagez* through the lens of the parties' said subjective intent, to ascertain if that intent was borne out.

IV. Analysis:

[22] Here, the appellant Co-op Hail particularly cites *Wray Agencies Ltd. v. M.N.R.*, 2003 TCC 428, decided by Rowe, D.J. of this Court in 2003, which has similar facts. In *Wray* the appellant insurer sold hail insurance in Saskatchewan and the worker, William Skene, was a licensed hail crop adjuster who did adjusting work for the appellant insurer. Mr. Skene was paid a per diem fee and related expenses to do his adjusting work. He had no written contract with the appellant insurer.

[23] The Court in *Wray* considered the *Sagaz* indicia. Regarding “control”, on occasion Mr. Skene also did licensed adjuster work for another insurer. He was not required to attend the annual industry conference of adjusters. Mr. Skene was required to use the manual for adjusting approved by the industry. Mr. Skene was able to set his own hours of work, was not required to report to the appellant and was free to accept or reject work offered to him by the corporate appellant.

[24] Regarding “provision of equipment and/or helpers”, in *Wray* the corporate appellant provided an additional adjuster if needed, without cost to Mr. Skene. Other helpers could be used by Mr. Skene, at his own expense, although this was not done during the relevant period. The corporate appellant provided pens and necessary stationary, clipboard and the manual to be followed. Mr. Skene provided his vehicle and necessary clothing for working in the crop fields.

[25] Regarding “degree of financial risk and responsibility for investment and management”, Mr. Skene was paid his per diem fees and expenses including a per kilometre fee to cover vehicle expenses. It was up to him to manage his time and whatever in-home office facilities as required to adequately perform his services.

[26] Finally, regarding “opportunity for profit in the performance of tasks”, the Court noted that Mr. Skene’s opportunity to earn more revenue was based on Mr. Skene’s willingness to accept more work, and to be efficient in carrying out his adjustment assignments so in the course of the short working season more claims could be adjusted. I do not wholly concur with this latter point because Mr. Skene was not paid on a per claim adjustment basis, but rather on a daily basis. Thus he would profit by accepting more work, resulting in more days of work and therefore more pay.

[27] In *Wray* the judge took note of the words of Noel, J.A., as he then was, of the Federal Court of Appeal in *Wolf v. Canada*, 2002 DTC 6853, that “in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties’ contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.”

[28] Rowe DJ. noted that Mr. Skene had considerable freedom as to when he could do his work, and whether or not to accept such work, during a short summer period. He was free to set up appointments with farmers. He could organize his own schedule to the point where he could advise whether or not he could accept additional work.

[29] Was Mr. Skene in business on his own account, per *Sagaz*? Rowe, DJ. found that he was, in the absence of any “jarring incongruity” in the overall circumstances indicating otherwise:

> There is very little to suggest that Skene was not ready, willing, able and content to provide his services to the appellant on that very basis [i.e., of Skene being in business on his own account]. There is no jarring incongruity with the overall circumstances of the working relationship under analysis that would cause one to question the legitimacy of that characterization by both the worker and the payor in the within appeals.

[30] In *Wray* the Court concluded that Mr. Skene worked as an independent contractor.

[31] Almost immediately thereafter Rowe DJ. decided *McQueen Agencies Limited v. M.N.R.*, 2003 TCC 430. It was similar to *Wray*, involving worker Ben Buchinski. Again the appellant corporation sold hail insurance in Saskatchewan. Mr. Buchinski differed from Mr. Skene insofar that his work with the appellant was as a trainee adjuster, supervised by senior adjusters. He was contacted from time to time by the appellant’s principal to advise as to his learning progress.

[32] Mr. Buchinski was found to be under the control of the corporate appellant because unlike Mr. Skene, an experienced adjuster, Mr. Buchinski had come to the hail insurance company seeking an opportunity to train as an adjuster. He did not yet know how to do adjusting work.

[33] As well he was in no position to retain helpers. He could not yet perform adjusting services personally, but rather he assisted senior adjusters. He could not manage his own schedule because at any one time he was working under the direct supervision of a senior adjuster.

[34] The Court concluded that Mr. Buchinski did not have the ability to perform at a level required of a person capable of providing adjusting services on his own account. Accordingly the appeal was dismissed and the Minister’s conclusion that

Mr. Buchinski was an employee rather then an independent contractor was confirmed.

[35] Turning to the respondent Crown, counsel cited *AE Hospitality Ltd. v. M.N.R.*, 2019 TCC 116, per D'Auray J. of this Court. In this matter the appellant corporation hired supervisors, servers, bartenders and chefs for catering companies. Were these persons employees or independent contractors? The Court found that the appellant and catering companies had mechanisms in place that in effect exerted control over workers, however experienced they may be, for both small and large events. The appellant and catering companies were not just present to coordinate. They had the residual authority to instruct staff, if felt necessary, as to what to do and how to do it.

[36] Also the appellant selected who were to be offered shifts for events and decided which functions wait staff would occupy. Head chefs selected chefs who would work at any given event. These control factors were found to indicate an employment relationship.

[37] As for the ownership of tools factor, such as wine bottle openers, bartending kits, aprons etc.; with the exception of bar kits the appellant made such items always available. Justice D'Auray found this a neutral factor.

[38] Regarding "chance of profit/risk of loss" as described by the Court, the Court concluded that working more or fewer hours does not equate to a chance of profit or a risk of loss. I am not wholly in agreement. As for "chance of profit", it seems to me that to the extent additional hours or shifts are readily available to be worked should the worker so choose, correspondingly the worker is enabled to more promptly earn a non-entrepreneurial profit, in the sense of potential to earn funds surplus to the quantum of select or all expenses.

[39] However, as for "risk of loss", it is difficult to conceptualize lessened risk in the context of working fewer or more hours. And incidentally, in *Wiebe Door* these factors - (i) chance of profit and (ii) risk of loss - are separately identified, indicative of requiring individual consideration, rather than jointly identified as in *AE Hospitality*.

[40] The *AE Hospitality* circumstances are not comparable to those in the case at bar. Hail Co-op exercises no similar degree of control over licensed hail adjusters. Mr. Yeomans has considerable flexibility in selecting what adjustment work he will do, including where and when. The fact that he must follow procedures set out in a

manual in adjusting for crop damage is an industry expectation applicable to licensed hail adjusters generally. It does not signal control exercised by Hail Co-op.

[41] The respondent cites also the Federal Court of Appeal decision of *Andre Gagnon v. M.N.R.*, 2007 FCA 33. This was an appeal from the Tax Court which considered the work status of 11 drywallers, orally retained by another drywaller when he had excessive work. Two of the 11 were paid on a piecework basis, and the remaining nine were paid hourly. The Tax Court had concluded that these workers were employees as their individual investment in this work was minimal, particularly as the drywaller hiring them provided many tools and supplies, even though at their own jobs they normally used their own tools.

[42] The Federal Court of Appeal agreed with the Tax Court and dismissed the appeal. The appellate court observed that the evidence had not focused on the matter of control. Control was found to have been exercised by the hiring worker, insofar as control was one of the respondent's assumptions, therefore presumed to be correct as not shown on a balance of probabilities to have been otherwise.

[43] Finally the respondent Crown cited *Maliyar v. Her Majesty*, 2006 TCC 671, rendered by Hershfield J. Here the appellant worker, a mechanical engineer, was found to be an employee. The Court determined that the putative corporate employer exercised significant control over the taxpayer and his work. Work was assigned to him on a regular basis with strict project guidelines and timetables. Also the taxpayer was to use the corporation's tools and software on its premises, regardless that the taxpayer had his own software.

[44] The Court also found there was no opportunity for profit and no risk of loss as the taxpayer earned an hourly wage and did not invest any capital. As well, the fact the taxpayer had registered a business name for GST purposes did not establish he had a business of his own. He had no other clients and did not advertise. It also was concluded that the parties' intention as to the taxpayer's work status was not necessary as traditional tests were determinative of the issue.

[45] In determining this appeal brought by Co-op Hail concerning Mr. Yeomans I am well cognizant that dealing with the issue of employee versus independent contractor, a plethora of caselaw has accumulated over several decades since 1986 when *Wiebe Door* was decided. Both parties have cited judicial decisions pertinent to this case at bar.

[46] I have determined that the appropriate decision is to allow the appeal, finding that Mr. Yeomans was an independent contractor as opposed to the Minister's decision that he was an employee. I so find for several reasons. First, the parties very clearly indicated this as being their intent, by means of their April 4, 2016 written agreement. Thus, following *O'Connor Homes*, I have looked at the factual circumstances through the lens of the parties' subjective perspective that Mr. Yeomans' worker status vis-à-vis Co-op Hail was that of independent contractor.

[47] In particular I see that Co-op Hail exercised negligible control of Mr. Yeomans' work as a licensed hail crop adjuster. Indeed for Mr. Yeomans' adjusting work to be accepted as fair as between the insurance company on the one side and the insurance claimant on the other, Mr. Yeomans had to be seen as not simply an extension or entity of the insurance company. Mr. Yeomans had substantial freedom in deciding what damage claims filed with Co-op Hail he would accept to adjust, based on personal considerations such as proximity to his Swift Current home.

[48] As to ownership of tools, the equipment provided by the Co-op Hail was relatively slight – pen, paper and clipboard. Co-op Hail also provided the manual issued to all licensed crop adjusters, developed not by Co-op Hail itself but by a provincially regulated body. Thus it was not Co-op Hail itself that was controlling how the adjusting work was done, but rather it was the manual, provided generally to licensed crop adjusters to serve the obvious need that adjusters use same methodologies in doing their adjusting work.

[49] As well Mr. Yeomans provided a substantial tool, being his own vehicle to convey himself to the differing rural locations in Saskatchewan where he had accepted to work, examining various claimants' damaged crops.

[50] As for chance of profit, in line with my above comments I consider there is some prospect of prospering (i.e., profiting) through working more rather than fewer days. More gross income would be generated, with the reasonable expectation that accordingly net income would likewise grow. I do not generally consider there to be any particular risk of loss. Of course there are always theoretical risks, such as the possibility that Mr. Yeomans could have a car accident while driving in the course of this work, leaving him unable to work at all.

[51] In concluding, I subscribe to the *Wray* decision of Rowe, DJ, rendered twenty years ago. It is a well written and well reasoned decision, dealing with startlingly similar facts.

[52] In accordance with the foregoing reasons, noting as well the principle of judicial comity, I will allow the appeal, finding Mr. Yeomans to have provided services to Co-op Hail during the 2016 period as an independent contractor carrying on business, and not as an employee of Co-op Hail. Thus for purposes of the *Canada Pension Plan* and *Employment Insurance Act*, during the relevant 2016 period Mr. Yeomans was not engaged in either pensionable or insurable employment.

Signed at Ottawa, Canada this 6th day of April 2023.

"B. Russell"

Russell J.

CITATION:	2023 TCC 40
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