Docket: 2003-3760(EI)

BETWEEN:

PIERRE CAREY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 7, 2007, at Bathurst, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeal from the decision of the Minister of National Revenue under paragraph 5(1)(*a*) of the *Employment Insurance Act* is dismissed, and the decision of the Minister is upheld in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of October 2007.

"François Angers"

Angers, J.T.C.C.

Translation certified true
on this 31st day of January 2008
Michael Palles, Reviser

Citation: 2007TCC596
Date: 20071026
Docket: 2003-3760(EI)

BETWEEN:

PIERRE CAREY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] Pierre Carey is appealing against a decision of the Minister of National Revenue (the "Minister") to the effect that his employment from May 27 to November 9, 2002, with Théresa Jean, operating as Nipugt Eco Tech (the "payer"), was not insurable employment within the meaning of the *Employment Insurance Act* (the "Act").

[2] The Minister based his decision on the following assumptions of fact:

(a) The payer was the sole owner of an enterprise which supplied American pharmaceutical companies with branches of *Taxus canadensis* (the "shrub"), also known as ground hemlock or Canada yew. The extract obtained from young branches of this shrub is used in the treatment of cancer; (admitted)

(b) The appellant harvested the young branches of the shrub (the "harvest") to sell them to the payer; (admitted)

(c) The appellant was paid $0.60 per pound for his harvest; (admitted)

(d) The payer did not know how many hours the appellant worked; (denied)

(e) The appellant was responsible for finding harvesting sites; (admitted)

(f) It was up to the appellant to seek permission from the owners of wooded lots to harvest the shrub; (admitted)

(g) The appellant could have received help to harvest the branches and sell them on his own behalf; (denied)

(h) The appellant had to store his harvest and deliver it at his own expense to the payer's collection depot every week; (denied)

(i) The appellant had to purchase his own pruning shears to do the harvest; (admitted)

(j) The payer supplied bags for storing the harvest; (admitted) and

(k) The appellant determined the size of the harvest and his hours of work. (denied)

[3] The appellant admitted assumptions (a), (b), (c), (e), (f), (i) and (j) and denied the others. The appellant and a work colleague, Pierre Lapointe, testified at trial. It was Mr. Lapointe who had approached the appellant and who had given him information about this work. The appellant allegedly filled out a form and met with Théresa Jean and her friend Ryan Smith. The appellant was allegedly given Exhibit A-1, a salary guide for harvests. In this guide, salaries are calculated by taking into consideration employment insurance benefits and paid on the basis of the number of pounds of shrub branches cut.

[4] On the payer's recommendation, the appellant allegedly opted for the first scenario in the guide, that is, the scenario under which he had to harvest 763 pounds of branches at a rate of $0.60 per pound for a gross income of $458 per week. Employee source deductions for employment insurance, Canada Pension Plan, income tax, vacation pay and administration fees were to be subtracted from that amount. The appellant's net income was $303. However, the appellant testified that his gross weekly income was $416, and his net income was $303. In my opinion, the payer deducted her own share of the employment insurance premiums, Canada Pension Plan contributions and administration fees from the amounts paid to the appellant.

[5] The payer gave the appellant four hours of training. He was advised about the various generations of branches and their lengths, selective cutting techniques and the consequences of not adhering to the instructions, namely, that the harvest could be

refused, or the price per pound could be reduced. This was very difficult work, and it took the appellant 10 hours of work per day to meet the required quota.

[6] The harvest was carried out on private land, and the appellant had to personally ask the owners for permission. He had to specify the lot numbers and write them on the bags. When the harvest was done in Quebec, an inspector from the Quebec government would visit the site of the harvest three to four times during the summer to ensure proper management of this resource. The payer would contact Mr. Lapointe by telephone but would not go to the harvest sites.

[7] The appellant had to travel to his work site in the forest in his own automobile and at his own expense. He then had to carry his harvest to the weigh station. The appellant also had to store his harvest during the week, because initially the weigh station was only open on Saturdays and Sundays. The weigh station was subsequently open from Tuesday to Saturday. The appellant used his own pruning shears and set his own work schedule.

[8] Louise Gauthier-Boudreau is the appeals officer who ruled that the appellant's employment was not insurable. She testified that she had had a telephone conversation with the appellant and Eric Smith on May 27, 2003. The following information was given to her during this call. The business was started up in 2001. Eric Smith began running Théresa Jean's business in 2002. He also became the owner of this business that same year. He is Ryan Smith's father. An advertisement was placed in the newspapers to recruit workers for the harvest. The price paid was $0.60 per pound, and the worker determined the number of weeks he or she wanted to work. The worker also had the choice of [TRANSLATION] "participating in source deductions or not", according to the terms used by the enterprise. Therefore, the worker was either self-employed or received a salary with source deductions.

[9] During this same conversation, the appeals officer was also advised that the worker decided where to harvest and made the required arrangements with the owners of the premises. The payer did not assume any liability for damage caused to private property. The worker determined the duration of his or her work. Remuneration was based on production volume and was done by direct deposit. The harvest was handed in at the weigh station. The weight in pounds and the place where the product was harvested were indicated. People usually worked in teams of two, and they could obtain help. Workers paid their own travelling expenses and purchased their own pruning shears.

[10] Therefore, at issue is whether the appellant and the payer entered into a contract of service within the meaning of paragraph 5(1)(*a*) of the Act such that the work in this case is insurable employment.

[11] In *Wiebe Door Services Ltd v. Minister of National Revenue* [1986] 3 F.C. 553, the Federal Court of Appeal set out some tests which are useful for answering this question. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada approved these tests by summing up the state of the law as follows, at paragraphs 47 and 48:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[12] In *Charbonneau v. Canada* [1996] F.C.J. No. 1337 (Q.L.) Marceau J.A. of the Federal Court of Appeal noted that the factors in question are reference points which are generally useful to consider, but not to the point of jeopardizing the ultimate goal of the exercise, which is to determine the overall relationship between the parties.

[13] In a recent judgment, the Federal Court of Appeal once again explained the legal principles which govern the insurability of employment. In *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267, Létourneau J.A. summarized these principles as follows, at paragraphs 18 and 19 of his judgment:

> In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract

> of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid*.
>
> Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.*); D&J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".

[14] The evidence shows that the payer had two categories of workers: those who were self-employed, which seemed to be most of them, and those who, like the appellant, were paid a salary, with all that this entails, including administrative fees. The common denominator in all this is the fact that no matter what kind of relationship existed, remuneration was based on a price of $0.60 per pound multiplied by the number of pounds harvested, regardless of whether this was an employee or a self-employed worker. The only difference was that the appellant and his colleague had to harvest at least 763 pounds per week to receive their salaries. Otherwise, from what they understood, they would lose their employment.

[15] For all intents and purposes, the only thing that interested the payer was the quantity of the harvested product, that it was cut according to her instructions and that the lot number allowed the harvest site to be identified. The appellant, meanwhile, had to find harvest sites, obtain permission from the owner to cut the branches, store and transport his harvest and cover all travelling expenses. He was free to set his own work schedule. The fact that the appellant had to obtain permission from the owner to cut branches leads to the conclusion that the payer had no right of ownership in the harvest before paying the per-pound price. It is therefore reasonable to conclude that it was the appellant's harvest which was sold to the payer, such that the payment was a purchase price, not payment for services rendered by the appellant as an employee of the payer.

[16] Given this situation, it is difficult to conclude that the payer exercised any control over the appellant. He was free to work irregular hours and in places he chose. His hours of work were not accounted for by the payer, and the only instructions the appellant received were the ones given to him at the beginning and

concerned the branch harvesting process. Regular inspections were made to conserve the resource. Given the little control exercised by the payer, the appellant's situation is more akin to that of a self-employed worker than an employee.

[17] The fact that the appellant used his own pruning shears and transported his harvest to the weigh station at his own expense also indicates that the appellant is a self-employed worker under a contract of service. In this case, the appellant went to the various harvesting sites at his own expense, used his own all-terrain vehicle and paid for the vehicle's operating expenses himself. The mere fact that the payer supplied the bags does not establish that this was a contract of service.

[18] Even though the appellant was paid at a predetermined rate, this calculation was made on the basis of a price per pound and a minimum weight warranting a salary. It is obvious in this case that it was the appellant who chose to be an employee rather than be self-employed. It seems that this choice was of little significance to the payer, because in both cases it only cost her $0.60 per pound. Even if the intent of the parties in this case was to treat the appellant as an employee rather than a self-employed worker, I am not bound by what the parties agreed on if the evidence submitted leads me to conclude that things were otherwise. In my opinion, such is the case here.

[19] In addition, on the basis of the evidence submitted, it is difficult to conclude that the appellant's work was significantly integrated with the payer's activities. The payer needed to obtain the resource, but in this case she was not the owner of the properties on which the product was harvested, nor did she in any way seek permission to access these properties.

[20] In my opinion, and according to the analysis of the facts submitted to me, the relationship which existed between the parties does not support the argument that there was a contract of service. Therefore, the employment was not insurable. Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 26th day of October 2007.

"François Angers"

Angers J.

Translation certified true
on this 31st day of January 2008-01-31
Michael Palles, Reviser

CITATION:	2007TCC596
COURT DOCKET NO:	2003-3760(EI)
STYLE OF CAUSE:	Pierre Carey and M.N.R.
PLACE OF HEARING:	Bathurst, New Brunswick
DATE OF HEARING:	September 7, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	October 26, 2007

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Stéphanie Côté

SOLICITOR OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada