Dockets: 2018-2349(EI)
2018-455(CPP)
2018-3167(EI)

BETWEEN:

ROYAL CITY TAXI LTD. and DARCY G. DMETRICHUK,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DARCY G. DMETRICHUK,

Intervenor.

Appeal of Royal City Taxi Ltd. (2018-2349(EI)) heard on common evidence with the appeals of Darcy G. Dmetrichuk (2018-455(CPP) and 2018-3167(EI)) on February 4, 2019, at Vancouver, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant Royal City Taxi Ltd.	Nazeer Mitha, Q.C.
The Appellant and Intervenor Darcy G. Dmetrichuk	Darcy G. Dmetrichuk himself
Counsel for the Respondent	Katherine Shelley

JUDGMENT

The appeal from the determination made by the Minister of National Revenue under the *Canada Pension Plan* that Darcy Dmetrichuk was not an employee of Royal City Taxi Ltd. and was not employed in pensionable employment under the *Canada Pension Plan* is allowed and the decision of the Minister is vacated. As a result, I find that the Intervenor was engaged in

pensionable employment throughout the relevant period for the reasons set out in the reasons for judgment attached hereto. The appeal from the determination made by the Minister under the *Employment Insurance Act* that Darcy Dmetrichuk held insurable employment is dismissed. As a result, I find that the Intervenor held insurable employment throughout the relevant period for the reasons set out in the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 6th day of May 2019.

"Robert J. Hogan"

Hogan J.

Citation: 2019 TCC 105
Date: 2019-05-06
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BETWEEN:

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Appellant,

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DARCY G. DMETRICHUK,

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REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] These are appeals from decisions of the Minister of National Revenue (the "**Minister**") that Darcy Dmetrichuk (the "**Appellant-Intervenor**") was not employed in pensionable employment under the *Canada Pension Plan*[1] ("*CPP*") while allegedly working for Royal City Taxi Ltd. (the "**Appellant**"), but that he was engaged in insurable employment under the *Employment Insurance Act*[2] (the "*EI Act*"), during the period from January 1, 2016, to April 25, 2017 (the **"Period"**). These appeals were heard on common evidence.

[1] R.S.C. 1985, c. C-8 (CPP).
[2] R.S.C. 1996, c. 23 (EI Act).

Circumstances leading to the Appeals

[2] In 2009, the Appellant-Intervenor became a shareholder of the Appellant and owner of a taxicab. For almost 2 years, the Appellant drove a taxicab as an owner-operator. In 2011 or the beginning of 2012, the Appellant-Intervenor sold his vehicle and his shares in the Appellant and simply became a taxi driver. For years, the Appellant made EI payments on behalf of the Appellant-Intervenor, but in 2016, the Appellant suddenly stopped making these payments.

[3] The Appellant-Intervenor subsequently filed for a determination of his employment status with the Appellant. The Minister determined that during the Period the Appellant-Intervenor was not engaged as an employee for CPP and EI purposes under the common law meaning of "employment". However, the Minister determined that the Appellant-Intervenor held insurable employment under paragraph 6(e) of the *Employment Insurance Regulations*[3] (the "*EI Regulations*") and paragraph 5(1)(d) of the *EI Act*.

[4] The Appellant-Intervenor disagreed with the Minister's determination regarding his independent contractor status for CPP and EI purposes and appealed from that decision. The Appellant did not take issue with the Minister's decision that the Appellant-Intervenor was not an employee of the Appellant, under the common law test, but did not agree that the Appellant-Intervenor held insurable employment under the *EI Act* and appealed from that decision.

II. **The Facts**

[5] The Appellant operates a taxi business in the city of New Westminster. The focus of the evidence is on the Appellant's operations and the relationship that existed between the Appellant and the Appellant-Intervenor while the Appellant-Intervenor performed driving services during the Period.

[6] The Appellant called one witness, Reshma Singh, the general manager for the Appellant. I observe that Mrs. Singh has only been employed with the company for 6.5 months. Therefore, she does not have personal knowledge of matters that occurred during the relevant period. There was also only one witness called on

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[3] SOR/96-332 (EI Regulations).

behalf of both the Appellant-Intervenor and the Respondent: Darcy Dmetrichuk testified on his own behalf and was called as a witness for the Respondent.

Reshma Singh

The Appellant's business and the taxi industry

[7] A large part of Mrs. Singh's testimony was on the taxi industry in the city of New Westminster and how the Appellant operates its business.

[8] Mrs. Singh first provided a general overview of the Appellant's operations. She explained that the Appellant owns the licences to operate taxicabs which are issued by the Passenger Transportation Board.[4] Each licence represents two driving shifts, a day shift and a night shift.[5] Currently, the Appellant owns 62 taxi licences and accordingly has 124 shifts.[6] The Passenger Transportation Board determines how many licences it will issue to taxi companies and that determination is based on passenger demand in the city.[7] The actual taxicabs that are used in the business, however, are owned by the Appellant's shareholders.[8] Collectively the shareholders own approximately 62 taxicabs.[9] Depending on the number of shares owned by that shareholder, a shareholder could own the day shift, the night shift, or both.[10] The witness explained that a shareholder can choose either to drive his or her own taxicab or to lease it out to another driver on either a daily or longer-term basis.[11] I will refer to shareholders as either "shareholders" or "owner-operators, and will refer to drivers who lease the vehicles from shareholders as "lease-drivers".

[9] Mrs. Singh then explained that, in exchange for a fixed monthly dispatch fee, the Appellant provides the shareholders with certain services.[12] In particular, the Appellant provides dispatch and administrative services.[13] Mrs. Singh

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[4] Transcript at p. 11.
[5] Transcript at p. 12.
[6] Transcript at p. 12.
[7] Transcript at pp. 56-57.
[8] Transcript at pp. 10, 13, 60.
[9] Transcript at pp. 10-11.
[10] Transcript at p. 12.
[11] Transcript at pp. 13, 19, 20.
[12] Transcript at pp. 14-15.
[13] Transcript at p. 14.

explained that the dispatch fee is the only amount regularly received by the Appellant from the shareholders and it covers all of the Appellant's operating expenses.[14] More specifically, Mrs. Singh testified that the dispatch fee covers both the dispatch and administrative services for each shareholder, as well as any charges to the merchant that are associated with payments by credit card payments.[15] The witness later confirmed that, regardless of whether the shareholders drive the taxis themselves or lease them out to drivers, it is still the shareholder who pays the Appellant the monthly dispatch fee of $475 per shift.[16] This dispatch fee, however, will be paid out of the lease fees charged to a lease-driver.[17] Mrs. Singh also testified that the shareholders pay for the insurance associated with the taxicabs and that the Appellant does not pay any dividends.[18]

[10] Mrs. Singh also explained that the shareholders can be called upon to fund capital expenses, such as those required to replace and modernize the dispatch system.[19] The Appellant makes cash calls to the shareholders to obtain the funds required to renew its capital assets.

[11] On cross-examination, Mrs. Singh testified that the Appellant is in the business of transportation.[20]

[12] In terms of the requirements to be met in order to drive a taxi for the Appellant, the witness explained that the taxi industry in the city of New Westminster is highly regulated and there are several requirements imposed, both on the licensee and on the driver, in the bylaws, by the Passenger Transportation Board and in the National Safety Code.[21] According to Mrs. Singh, in order to comply with these regulations the Appellant implements similar policies for its owner-operators and lease-drivers.

[13] Specifically, Mrs. Singh testified that in order to be a daily taxi driver (such as the Appellant-Intervenor), regardless of whether the individual is an owner-operator or a lease-driver, that individual must obtain a Class 4 or better driver's

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[14] Transcript at pp. 18, 34, 69-70.
[15] Transcript at p. 19.
[16] Transcript at pp. 46-48.
[17] Transcript at pp. 46-48.
[18] Transcript at pp. 15, 34, 35.
[19] Transcript at pp. 68-70.
[20] Transcript at p. 95.
[21] Transcript at pp. 28-29.

licence from the Insurance Corporation of British Columbia, a TaxiHost certificate from the Justice Institute of British Columbia, and a chauffeur's permit issued by the New Westminster police.[22] Each individual bears the cost of obtaining his or her driver's licence, TaxiHost, certificate and chauffeur's permit.[23]

[14] Additionally, counsel for the Appellant read into the record the following specific rules from the Commercial Vehicle Bylaws for the city of New Westminster (Exhibit A-1), which the witness testified are reflected in the Appellant's policies:

> Every taxi licensee shall provide complete taxi service, including telephone answering and dispatching of not less than twenty-four hours in each of seven days in each calendar week of the licence year;[24]
>
> Each taxi licensee shall keep the taxi in a clean, undamaged and mechanically proper condition…[25]
>
> No person shall drive or operate or engage in the business of operating a taxi unless such taxi is equipped with a taximeter, which complies in every respect with the requirements set out… [in the relevant bylaw]…;[26]
>
> Every licensee and driver of a taxi shall accommodate the persons who desire his service in the order of their application, and if a taxi is not available to give the desired service within a reasonable time, then the applicant shall be informed;[27]
>
> No taxi licensee or driver shall charge any fare other than one calculated in accordance with Schedule "B";[28]
>
> Every driver of any taxi shall both in dress and deportment give no cause for offence;[29] and

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[22] Transcript at pp. 20-21: Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster; Bylaw 7742, 2015; Bylaw 7777, 2016 and Schedule "C" thereto.
[23] Transcript at p. 29.
[24] Transcript at p. 25; Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster, Bylaw 7742, 2015.
[25] Transcript at p. 25; Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster, Bylaw 7742, 2015.
[26] Transcript at p. 26; Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster, Bylaw 7742, 2015.
[27] Transcript at pp. 26-27; Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster, Bylaw 7742, 2015.
[28] Transcript at p. 27; Exhibit A-1, Commercial Vehicle Bylaws for the city of New Westminster, Bylaw 7742, 2015.

> Every driver of a taxi shall keep a daily record of all trips made by him.[30]

Driving a taxicab as an Owner-Operator vs. Lease-Driver

[15] Mrs. Singh described the process for how shareholders can earn money from driving the taxicab themselves. She explained that if an owner-operator drives the taxicab, the owner-operator gets the fare from the passenger. [31] If the fare is in cash, the owner-operator directly pockets the entire amount.[32] If the fare is paid with a credit card or debit card, the electronic payment is paid into the Appellant's bank account and the owner-operator must document the transaction on a daily trip sheet.[33] The owner-operator will then attach the daily trip sheet to the copies of the receipts and submit it to the Appellant. The amount of the fares is eventually paid in full to the owner-operator.[34] Similarly, the owner-operator receives the full amount of tips.[35] The handling of the electronic payments forms part of the Appellant's administrative services referred to earlier.[36]

[16] According to the witness, as regards how a lease-driver earns money, the process is essentially the same as for an owner-operator: the lease-driver pockets cash payments and completes and submits daily trip sheets to the Appellant for all debit card and credit card transactions.[37] The Appellant will then transfer the lease payment to the appropriate shareholder and the lease-driver will receive the residual amount.[38] Also, like the owner-operator, the lease-driver receives the full amount of tips earned.[39] While the Appellant-Intervenor confirmed that lease-drivers pocket all cash payments, he indicated that the Appellant is actually in a position to record cash transactions through their computers but that it disabled the feature that allows it to do so.[40] Presumably, the Appellant could demand that cash

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[29] Transcript at p. 27; Exhibit A-1, Commercial Vehicle Bylaws for city of New Westminster, Bylaw 7742, 2015.
[30] Transcript at p. 28; Exhibit A-1, Commercial Vehicle Bylaws for city of New Westminster, Bylaw 7742, 2015.
[31] Transcript at pp. 15-17.
[32] Transcript at pp. 15-16.
[33] Transcript at pp. 16-17.
[34] Transcript at pp. 16-17.
[35] Transcript at p. 36.
[36] Transcript at p. 17.
[37] Transcript at pp. 36, 41.
[38] Transcript at p. 40.
[39] Transcript at pp. 35-36.
[40] Transcript at p. 155.

payments be included on the daily trip sheet and the Appellant could verify the meters to ensure that this was done. This would prevent leakage of the total amount subject to CPP and EI and any corresponding tax leakage.

[17] Mrs. Singh also testified that the fares charged by an owner-operator and a lease-driver would be the same since, in accordance with the applicable bylaws the fares set.[41] Similarly, Mrs. Singh explained that, regardless of whether the taxi is driven by an owner-operator or a lease-driver, the person driving the taxi is responsible for collecting and remitting the GST.[42] The person driving the taxi is also personally responsible for any tickets or fines received while driving, any deductibles associated with a collision occurring while driving and for fuel used while driving.[43]

[18] The witness then described the process for a lease-driver to start working for the Appellant. She explained that each lease-driver is first assigned a dispatch ID from the Appellant.[44] Lease-drivers can then be matched up with shareholders in one of two ways.[45] A lease-driver can either approach a shareholder directly or the lease-driver can call the driver supervisor and request that his or her name be placed on the spare board.[46] Shareholders will in turn call in shifts and vehicles that are available and the Appellant will pair the driver and shift.[47] However, as explained by Mrs. Singh, even if the lease-driver places his or her name on the spare board, if a shift becomes available, the lease-driver still has the choice to accept or refuse the shift.[48] On cross-examination, the witness also stated that usually the spare board operates according to the order in which drivers' names are placed on the board, with the exception of cases where the driver is not equipped to drive a specific type of car.[49] Additionally, according to the witness, as long as a lease-driver does not breach the National Safety Code, that driver can drive for any taxicab companies or whichever shareholder he wants.[50]

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[41] Transcript at p. 27.
[42] Transcript at pp. 35-36.
[43] Transcript at pp. 43, 47, 48.
[44] Transcript at p. 37.
[45] Transcript at p. 38.
[46] Transcript at p. 38.
[47] Transcript at p. 38.
[48] Transcript at p. 39.
[49] Transcript at pp. 98-99.
[50] Transcript at p. 44.

[19] The witness then explained that the lease between a shareholder and a lease-driver will be the same regardless of whether the lease-driver approaches a shareholder directly or uses the spare board. [51] Mrs. Singh stated that the lease is a standard lease set by the board of directors of the Appellant. She stated that it ensures that all lease-drivers are paying the same amount, and that currently, a lease costs $95 per shift.[52] Although, according to the witness, if a taxi broke down while it was leased to a lease-driver, the shareholder would only receive a lease payment proportionate to the time during which the car was functioning.[53] Owner-operators as shareholders elect the board of directors, which in turn, is made up of shareholders.[54] Thus, contrary to lease-operators, owner-operators have influence over the rules and policies of the Appellant.

[20] Once in a vehicle, a driver should sign onto the dispatch system and will then have access to the Appellant's dispatch services.[55] On cross-examination, the witness explained that the dispatch system offers trips on the basis of the drivers being in the area and on the basis of the driver's position (i.e. being first in lines) and the driver in turns decides whether or not to accept the trip.[56] Mrs. Singh further explained on cross-examination that the Appellant has over 100 corporate accounts, including CN Railway, which provides guaranteed trips for the taxi drivers.[57] A driver can also pick up "flags" or personal customers that call directly.[58] For the purpose of charging, these customers, the meter should be on.[59] The driver decides when she or he wants to take a break.[60]

Entering the taxi business

[21] Mrs. Singh also described how someone could get into the taxi business without becoming a lease-driver. She explained that, since the bylaws limit the

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[51] Transcript at p. 39.
[52] Transcript at pp. 39, 46-48.
[53] Transcript at pp. 41-42.
[54] Transcript at p. 31.
[55] Transcript at pp. 44-45.
[56] Transcript at p. 77.
[57] Transcript at pp. 72-75.
[58] Transcript at p. 45.
[59] Transcript at p. 45.
[60] Transcript at p. 44.

available taxi licences to 67, of which 62 are owned by the Appellant and 5 are owned by Queen City Taxi, in order to enter the taxi business, one would have to buy a taxicab and a share from an existing shareholder.[61]

[22] According to the witness, shares of the Appellant can be sold provided that there are shares for sale and that "equal opportunities" are given to any person already in the system with the Appellant, stated in the shareholder agreement.[62] Other than the requirement of having to provide equal opportunity, Mrs. Singh testified that the shareholder has complete control over the decision to sell his or her shares.[63] The price of the share sold would be set by the Appellant's board of directors, which is made up of its shareholders.[64] According to Mrs. Singh, half a share of the Appellant, and consequently one shift, would cost about $55,000 and a full share would cost about $95,000. Additionally, Mrs. Singh stated that this would not include the cost of purchasing a car that complies with the regulations.[65]

EI payments remitted by the Appellant on behalf of the Appellant-Intervenor

[23] In direct examination, Mrs. Singh stated that during the Period the Appellant did not deduct any EI or CPP payments from the residual money that it gave to the Appellant-Intervenor.[66] She then testified, however, that from 2012 to 2016 the Appellant had been remitting EI payments on behalf of the Appellant-Intervenor.[67] Mrs. Singh explained that this was an error that was inadvertently committed by a fill-in accounting staff member who was brought in in the absence of the chief controller for accounting.[68] Once the error was discovered in 2016, the Appellant immediately took steps to correct it and no further EI deductions were made.[69]

[24] However, on cross-examination it became apparent that Mrs. Singh has no personal knowledge of the alleged error. Mrs. Singh stated that she was hired by the Appellant on July 18, 2018. Accordingly, she did not actually work for the

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[61] Transcript at pp. 30-31, 68, 92.
[62] Transcript at pp. 30-31.
[63] Transcript at p. 34.
[64] Transcript at p. 31.
[65] Transcript at p. 32.
[66] Transcript at p. 50.
[67] Transcript at p. 52.
[68] Transcript at p. 52.
[69] Transcript at p. 52.

Appellant when the alleged error was initially made, when it was detected, when the Appellant ceased making the EI deductions or, most notably, during the time frame at issue in these appeals. Her testimony regarding the alleged error is at best hearsay and I attach no weight to it. Furthermore, I query why the Appellant would not have chosen to call a witness who had first-hand knowledge of this "mistake", and I draw a negative inference from the failure to do so.

Sanctions and discipline

[25] During cross-examination, Mrs. Singh explained the disciplinary process for drivers. According to Mrs. Singh, any serious behavioural complaints regarding, or offences committed by a driver are handled directly by the police.[70] If the complaint is justified, the police will withdraw the driver's chauffeur's permit and the driver will be prohibited from driving taxis.[71] Mrs. Singh also described the Appellant's methodology for disciplining drivers, and stated that owner-operators and lease-drivers are disciplined in the same way.[72] According to the witness, the Appellant will revoke the driver's dispatch ID for a certain period of time.[73] Mrs. Singh explained that, during this time, however, a shareholder would still be able to lease out his or her vehicle. She also stated that there is no mechanism for imposing any sanction against a shareholder by taking away that shareholder's shares or removing the shareholder entirely.[74]

Agreement between the Appellant and Appellant-Intervenor

[26] On redirect, Mrs. Singh testified that when lease-drivers are recruited the Appellant has them sign a form stating that they are aware that they are self-employed and that they are not employees of the Appellant.[75] Counsel for the Appellant produced an agreement (Exhibit A-2) between the Appellant and the Appellant-Intervenor which states that it is the Appellant-Intervenor who is to pay the insurance deductibles.[76] However, as the Appellant-Intervenor correctly pointed out in his testimony, this agreement was signed back in 2009 when he was a shareholder and owner-operator. The Appellant-Intervenor then testified that no

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[70] Transcript at p. 61.
[71] Transcript at pp. 61-62.
[72] Transcript at p. 84.
[73] Transcript at pp. 84-85.
[74] Transcript at p. 62.
[75] Transcript at p. 117.
[76] Transcript at p. 117.

further agreement was signed between himself and the Appellant once he became a lease-driver.[77]

[27] On the whole, I found that the part of Mrs. Singh's testimony regarding the differences in treatment between owner-operators and lease-drivers conflicted with the Appellant-Intervenor's testimony. As will be seen, I prefer the evidence of the Appellant-Intervenor.

Darcy Dmetrichuk

[28] Mr. Dmetrichuk began his testimony by describing how he started working for the Appellant. Mr. Dmetrichuk testified that he is a cab driver and that he first started driving taxicabs for the Appellant in 2009 as an owner-operator.[78] He owned two shares in car number 88.[79] During the time he was an owner-operator, he would also lease his taxicab on weekends and on night shifts.[80] The witness stated that as an owner-operator, he was responsible for all fees associated with the ownership of the car and for the dispatch fee.[81]

[29] According to Mr. Dmetrichuk, in 2011 or at the beginning of 2012, he sold his shares in the Appellant and began driving taxicabs as a lease-driver.[82] The witness testified that during his time as a lease-driver, he would mostly use the Appellant's spare board system.[83] Mr. Dmetrichuk stated that he earns revenue by driving taxicabs; he has no other source of revenue.[84]

[30] Mr. Dmetrichuk then described the circumstances leading up to and surrounding his termination. According to Mr. Dmetrichuk, as a lease-driver, he did his own taxes and reported his income as employment income on the basis of the T4 slips that he received from the Appellant.[85] Mr. Dmetrichuk testified that the Appellant was making the EI deductions at source, but it was likely the owners

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[77] Transcript at pp. 158-159.
[78] Transcript at pp. 122-123.
[79] Transcript at p. 123.
[80] Transcript at pp. 124-125.
[81] Transcript at p. 124.
[82] Transcript at pp. 125-126.
[83] Transcript at pp. 126-127.
[84] Transcript at pp. 127-128.
[85] Transcript at p. 133.

who actually paid the EI premiums given that when he was an owner, he paid the EI premiums for his drivers.[86]

[31] Mr. Dmetrichuk explained that in late 2016 or early 2017, the Appellant asked drivers to sign a document stating that the Appellant was in the process of obtaining a ruling with a view to the discontinuation of EI remittances and containing a declaration by the drivers that they were self-employed.[87] Mr. Dmetrichuk did not sign this document.[88] Then in March 2017 he was told by the Appellant that he would not be receiving a 2016 T4 slip.[89]

[32] Mr. Dmetrichuk testified that, because the Appellant discontinued its practice of remitting EI premiums, he subsequently filed a complaint with Employment Standards and with the Canada Revenue Agency (the "**CRA**").[90] Mr. Dmetrichuk also testified that he complained about the slow payment system implemented by the Appellant.[91]

[33] According to Mr. Dmetrichuk, he applied anonymously for a CPP and EI ruling. However, in June 2017, he was called into a directors' meeting where he was told that the directors knew he had filed complaints.[92] Mr. Dmetrichuk testified that he was then warned and threatened by the Appellant on a few occasions in order to set him to withdraw the complaints.[93] Specifically, Mr. Dmetrichuk explained that he was told that if he dropped the complaints he would only be suspended for a couple of weeks, and if he did not he would be fired.[94] Mr. Dmetrichuk testified that he did not withdraw his complaints and, though he was scheduled to drive from December 2017 through March 2018, he was fired in December 2017.[95] According to the witness, he was told by the Appellant that the reason he was being let go was that he had a claim with Employment Standards and because he had filed a complaint with the CRA.[96] I believe the witness when

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[86] Transcript at pp. 133-134.
[87] Transcript at pp. 130-131; Exhibit I-3, document marked "C p. 1".
[88] Transcript at p. 130; Exhibit I-3, document marked "C p. 1".
[89] Transcript at p. 132.
[90] Transcript at pp. 129-130.
[91] Transcript at pp. 131-132, 134.
[92] Transcript at p. 135.
[93] Transcript at pp. 130, 135-136.
[94] Transcript at pp. 135-136.
[95] Transcript at pp. 128, 135-136; Exhibit I-2, document marked "D p. 8".
[96] Transcript at p. 129.

he says that this was the reason the Appellant took action to prevent him from driving for it.

[34] Mr. Dmetrichuk testified that the Employment Standards action is still pending.[97] Mr. Dmetrichuk also testified that he has never actually received any EI.[98] He explained that the ruling from the CRA regarding insurable earnings was made after he had been let go. Consequently, as Mr. Dmetrichuk explained, when Service Canada asked to obtain a record of employment from the Appellant, the Appellant informed Service Canada that he had left his job and no EI benefits were ever paid.[99]

Control

[35] Mr. Dmetrichuk then described the Appellant's level of control.

[36] He testified that the Appellant can curtail a lease-driver's ability to work by giving the lease-driver fewer hours or fewer days.[100] Mr. Dmetrichuk also testified that he drove exclusively for the Appellant.[101] He also stated that when people thought Uber was coming to New Westminster the Appellant notified drivers that anyone who registered with Uber would be fired on the spot.[102]

[37] With respect to the spare board system, Mr. Dmetrichuk stated that it is not a fair and equitable system.[103] According to the witness, while his name could be the first one on the list, an owner could call in, ask for the names of those available and then choose who will receive the shift.[104] Mr. Dmetrichuk also explained that there are many owners and drivers who are related by blood or marriage and that those owners will favour family and friends.[105]

[38] Mr. Dmetrichuk also explained that while the Appellant sets the standard lease rate, shareholders and lease-drivers can still negotiate the price of the lease.

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[97] Transcript at p. 136.
[98] Transcript at p. 136.
[99] Transcript at p. 136.
[100] Transcript at p. 141.
[101] Transcript at p. 146.
[102] Transcript at p. 146.
[103] Transcript at p. 127.
[104] Transcript at p. 127.
[105] Transcript at p. 127.

Therefore, depending on the relationship you have with the owner, the owner may change the lease payment.[106]

[39] Mr. Dmetrichuk also presented a transcript of a recording of a conversation between himself and a manager in December 2017.[107] The transcript suggests that Mr. Dmetrichuk made an agreement with an owner to lease that owner's taxicab while the owner was on vacation.[108] The transcript further indicates that Mr. Dmetrichuk was trying to sign on to the Appellant's system but that the manager would not allow it.[109] The transcript also indicates that the manager would not give Mr. Dmetrichuk a reason for not allowing him to sign on to the system.[110] The Appellant did not allege that the transcript was inaccurate on this point; Counsel for the Appellant said there was no need to play the recording.[111]

Chance of profit and risk of loss

[40] Regarding chance of profit and risk of loss, Mr. Dmetrichuk explained that, while a driver has the ability to either work a full 12-hour shift or end the shift early, there is not much that a driver can do to enhance the chance for profit.[112] According to Mr. Dmetrichuk, a driver essentially sits and waits for a trip from dispatch.[113] The witness further explained that all trips come off the stands and so, if you want to increase your chances of getting a dispatch trip in an area, you sit on that stand rather than drive around.[114] Mr. Dmetrichuk also testified that, while drivers have the ability to pick up flags, the city of New Westminster is a "tired old town" and, unlike Vancouver, it does not have people coming out of hotels and flagging taxis.[115]

[41] On cross-examination by counsel for the Respondent, Mr. Dmetrichuk testified that the amount of money that a driver can make during a 12-hour shift can vary significantly. According to Mr. Dmetrichuk, there are various elements

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[106] Transcript at pp. 142-143.
[107]Transcript at p. 121; Exhibit I-2, document marked "D p. 7".
[108] Exhibit I-2, document marked "D p. 7".
[109] Exhibit I-2, document marked "D p. 7".
[110] Exhibit I-2, document marked "D p. 7".
[111] Transcript at pp. 216-218.
[112] Transcript at pp. 144-145.
[113] Transcript at pp. 144-145.
[114] Transcript at p. 145.
[115] Transcript at pp. 146, 163.

that are out of a driver's control.[116] He testified that the following factors can have an impact on the amount of money made during a shift: the particular day or night you work, the weather, how well you can negotiate the lease with the owner, the driver's knowledge, "basic street smarts", whether the computer gives you good trips, and luck.[117] In particular, the witness stated that Friday and Saturday nights are the most lucrative and the other nights are "so-so".[118]

[42] On cross-examination by counsel for the Appellant, Mr. Dmetrichuk stated that when he was an owner-operator he remitted GST, but that as a lease-driver he never remitted GST on his fares from driving the taxicabs.[119] He testified that during the Period the Appellant did not make deductions from the cheques it gave the drivers.[120] The witness also testified that for the Period, he did not deduct any expenses in calculating his income tax.[121] Mr. Dmetrichuk explained that he never claimed fuel expenses because they would be offset by cash revenue that was not reported.[122]

[43] Overall, I find that Mr. Dmetrichuk's testimony suggests that owner-operators are treated as owners and lease-drivers are treated as employees. Mr. Dmetrichuk provided an example of how owner-operators do not respect the order of names on the spare board and can effectively control who will drive their taxi cab.

[44] The owner-operators also have other significant rights and duties. For example, when new licences were issued to the Appellant, the Appellant, in turn, would issue new shares on a proportionate basis to the owner-operators.[123] As noted earlier, when the Appellant requires capital to modernize its dispatch, financial reporting or administrative services, it looks to the owner-operators to provide the funds to do so. Equally, as noted earlier, if an owner-operator's licence is suspended, the person may still earn revenue by leasing the car. When the evidence is considered as a whole, it appears to me that the Appellant and the owner-operators have formed a joint venture to carry on a taxi passenger service

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[116] Transcript at pp. 172-173.
[117] Transcript at pp. 172-173.
[118] Transcript at p. 126.
[119] Transcript at pp. 166-167.
[120] Transcript at p. 167.
[121] Transcript at pp. 169-170
[122] Transcript at pp. 168-169.
[123] Transcript at pp. 58-59.

business.[124] The parties operate the business together. Most of the economic benefits of the joint venture relationship accrue to the owner-operators. It is for this reason that the owner-operators are also responsible for funding the business. The Appellant is responsible for providing the services listed earlier in this paragraph. The situation of the lease-drivers is very different than that of the owner-operators. The Appellant's role is that of manager of the joint venture.

[45] Mr. Dmetrichuk also explained that the owner-operators were displeased with his having made complaints and having requested a ruling regarding his employment status, and that they were able to take steps to essentially fire him. This action further buttresses my conclusion that the business is being conducted as a contractual joint venture between the owner-operators and the Appellant acting as the manager of the business. I have no reason to doubt Mr. Dmetrichuk's testimony on these points. I find Mr. Dmetrichuk to be a credible and a reliable witness on the matters on which he testified. Also, I note that Mr. Dmetrichuk testified that he reported his driving income as employment income and he was not challenged on this point by either counsel for the Respondent or counsel for the Appellant.

III. **Issues**

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[124] See Robert Yalden et al., Business Organizations: Practice, Theory and Emerging Challenges, 2nd ed. (Toronto: Emond, 2018) at 30: In general, a joint venture ("JV") describes a relationship between people who agree to combine skills, property, funds, time, resources, knowledge and/or experience to pursue some common objective. Generally, each member of the JV has some control over the management of the joint activity and agrees to share in the profits and losses of the activity.

See also Barry J. Reiter and Melanie A Shishler, Joint Ventures, Legal and Business Perspectives (Toronto: Irwin Law, 1999) at 9, 81: The authors consider that there are three available vehicles for enabling separate entities to utilize their assets and expertise in a JV: (i) a joint venture corporation ("JVC") where a separate company is set up for the JV, (ii) a joint venture partnership ("JVP") which is a partnership among JV participants and (iii) a contractual joint venture ("CJV"), where parties proceed with a JV that is based upon agreement. The authors also observe that, because of the extensive statutory obligations and tax issues associated with traditional partnerships and corporations, potential venturers often opt to customize their own legal vehicle in the form of a contractual joint venture. The CJV is consequently a more flexible, unincorporated association that, unlike the JVP or the JVC, does not create a distinct separate legal entity. While the Appellant did not provide the Court with a copy of the owner-operators' shareholder agreement, I surmise that the agreement spells out the terms of the contractual joint venture.

[46] The issues in these appeals are as follows:

(1) Was the Appellant-Intervenor employed by the Appellant within the common law meaning of "employment"?

(2) Was the Appellant-Intervenor engaged in insurable employment for the purposes of the *EI Act* under the extended test in paragraph 6(e) of the *EI Regulations*?

IV. **The Law**

[47] The first issue will turn on the following definitions of "employment":

(a) Paragraph 5(1)(a) of the *EI Act* defines employment as:

> 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.[125]

(b) Subsection 2(1) of the *CPP* provides as follows:

> "employment" means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of office.[126]

[48] The second issue will turn on paragraph 6(e) of the *EI Regulations*. Section 6 of the *EI Regulations* includes in insurable employment certain types of "employment". Paragraph 6(e) provides for the following specific inclusion for persons who drive taxicabs:

> **6** Employment in any of the following employments […] is included in insurable employment:
>
> […]
>
> **(e)** employment of a person as a driver of a taxi, commercial bus, school bus or any other vehicle that is used by a business or public authority for carrying passengers, where the person is not the owner of more than 50 per cent of the

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[125] *EI Act*, paragraph 5(1)(a).
[126] *CPP*, subsection 2(1).

> vehicle or the owner or operator of the business or the operator of the public authority.[127]

V. **Analysis**

[49] As noted, the issues in this appeal are 1) whether the Appellant-Intervenor was employed by the Appellant within the common law meaning of "employment" and 2) whether the Appellant-Intervenor held insurable employment for the purposes of the *EI Act*.

[50] While the answer to the first issue will be determinative of whether the Appellant-Intervenor was engaged in pensionable employment for the purposes of the *CPP*, it is not necessarily determinative of whether the Appellant-Intervenor was engaged in insurable employment for the purposes of the *EI Act*.

[51] Accordingly, I will first consider whether under common law principles the Appellant-Intervenor was employed by the Appellant and placed in pensionable and insurable employment for the purposes of the *CPP* and the *EI Act* respectively. I will then consider whether the Appellant-Intervenor was placed in insurable employment pursuant to paragraph 6(e) of the *EI Regulations*.

Was the Appellant-Intervenor employed by the Appellant within the meaning of the common law?

[52] The jurisprudence has firmly established that the central question in determining whether a person is an employee or an independent contractor is always whether the individual is performing services as a person in business on his or her own account. The leading case on this issue is *Wiebe Door Services Ltd. v. M.N.R.,*[128] a decision which was confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[129] In writing for the Supreme Court, Justice Major adopted the following test originally laid out in *Wiebe Door*:

> ... 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

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[127] *EI Regulations*, paragraph 6(e).
[128] [1986] 3 F.C. 553, [1986] F.C.J. No 1052; 1986 CarswellNat 366 (Wiebe Door).
[129] 2001 SCC 59, [2001] 2 S.C.R. 983 (Sagaz).

> 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.
>
> 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.[130]

[53] In addition to the *Wiebe Door* factors, a jurisprudential trend has emerged where the subjective intentions of the parties must also be considered. Recently, in *1392644 Ontario Inc. v. Minister of National Revenue*[131] (*Connor Homes)*, the Federal Court of Appeal clarified the role of the parties' subjective intention for the purpose of the above-noted analysis. Justice Mainville confirmed that the above-noted analysis is a two-step process whereby, first, the subjective intentions of each party must be ascertained and, second, the facts are analyzed to determine whether this subjective intent is in accordance with the objective reality.[132] This objective reality is measured by the application of the *Wiebe Door* factors, namely: i) control; ii) ownership of tools; iii) chance of profit and risk of loss. It is also important to note that the intention of the parties is only relevant to the extent that it is reflected in the facts of the case. It is not determinative on its own. As stated by Justice Mainville:

> . . . the legal status of independent contractor or of employee[s] is not determined solely on the basis of the parties' declaration as to their intent. That determination must also be grounded in a verifiable objective reality.[133]

A. **Subjective Intention**

[54] In light of the Appellant-Intervenor's testimony and keeping in mind the fact that the Appellant remitted EI premiums from 2012 to 2015, I conclude on a balance of probabilities that the common intention of the parties was that the Appellant-Intervenor would be treated as an employee.

[55] The Appellant-Intervenor's intentions are categorically clear; he was an employee of the Appellant. While the intentions of the Appellant are less clear, the Appellant did not provide any credible evidence that demonstrated an intention

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[130] *Ibid.*, at paras. 47-48.
[131] 2013 FCA 85 (Connor Homes).
[132] *Ibid.*, at paras. 39-40.
[133] *Ibid.*, at para. 37.

contrary to that of the Appellant-Intervenor. There was no written contract between the Appellant and the Appellant-Intervenor to support a contrary intention. Furthermore, the remittance of EI premiums suggests that initially the Appellant-Intervenor was considered by the Appellant as an employee. As noted above, Mrs. Singh surmised that the remittance of EI premiums had been a mistake. I do not believe it to have been a mistake. Rather, I surmise that the Appellant learned that other taxi corporations were dealing with their drivers as independent contractors and this caused the Appellant to unilaterally begin treating the Appellant-Intervenor as an independent contractor.

B. ***Wiebe Door*** **Factors**

(i) Control

[56] In the present instance, the Appellant-Intervenor clearly has a certain level of control over the manner in which he performs his taxi-driving services. All parties agreed on this point there was testimony establishing such control. However, in reality, this type of control is subordinate to the ultimate control of the Appellant. Given the facts in the case, I place considerable weight on the control factor which, in my view, weighs in favour of employment.

[57] The Appellant argues that lease-drivers have the ability to determine their own schedule and availability. The Appellant and owner-operators cannot force a lease-driver to work a specific shift or lease a car Lease-drivers can work for other cab companies (except Uber) they can negotiate the lease payments in lease agreements they determine their own breaks and they can choose to offset their expenses against their cash revenues.

[58] Additionally, while counsel for the Appellant acknowledges that there is a certain amount of control that the Appellant has over the drivers, the Appellant submits that this is mostly, if not entirely, because of the legal requirements set out in the various regulations, statutes, safety codes, et cetera.

[59] While these facts may indicate that the Appellant-Intervenor had a certain level of control, as previously stated, I find that the Appellant has the ultimate control. The Appellant is the gatekeeper to the dispatch system and it has the ability to reprimand drivers and enforce rules and impose sanctions as it pleases. In fact, in the present instance, the evidence demonstrates not only that the Appellant has the ability to completely cut off a driver from the taxi operations, but that it will actively do this in cases where a driver seeks to have his status determined

under the law. As the Appellant-Intervenor stated in his testimony, even though he had acquired a vehicle to drive from a shareholder, when he tried to get switched on to the dispatch system the Appellant would not give him any fares. The Appellant was able to stifle the Appellant-Intervenor's ability to earn revenue, notwithstanding that he had access to a taxi cab. If this is not control, I am not sure what is.

[60] Additionally, I note that lease-drivers cannot sublease a vehicle without the permission of the Appellant. In argument, the Appellant-Intervenor submitted that the Appellant would never actually give this permission. Rather, he argued that the taxicabs are effectively given to lease-drivers on trust, and as soon as the driver cannot "cover" the taxicab, it reverts to the Appellant. This suggests that the Appellant's control extends beyond simply controlling the lease-driver's ability to earn income from providing driving services. It extends to control over the lease-driver's ability to earn any income from the taxicab.

[61] Also, the city of New Westminster is a small community with only one other taxi company, which is significantly smaller than the Appellant. Clearly, lease-drivers are limited in terms of the taxi companies they can drive for and associate themselves with. The facts demonstrate, in the instant case, that the Appellant had the ability to largely curtail the Appellant-Intervenor's ability to drive a taxicab in the area under licence to the Appellant. The fact that the Appellant-Intervenor along with the other Lease-Drivers were warned not to drive for Uber is evidence of this point.

(ii) Ownership of Tools

[62] With respect to who owns the tools of the trade, I also find that this factor suggests that the Appellant-Intervenor was an employee of the Appellant.

[63] All of the essential equipment for the business operations was provided to the Appellant-Intervenor. The shareholders provided insured taxi vehicles which were compliant with the regulations and bylaws. The Appellant provided credit card machines, trip sheets, and the on-board computer system giving access to the dispatch system operated by the Appellant. Moreover, even though the shareholders are the ones who own the vehicles, the most valuable assets in the taxi industry are the actual licences to operate taxicabs, which are owned by the Appellant. Given the structure and governmental regulations of the taxi industry, licences are central to the business operations and without licence, the taxicab market is impenetrable.

[64] Also, while it could be suggested that the tools of the taxi trade include the driver's time and effort, I am not convinced that these are sufficient to point to the Appellant-Intervenor being an independent contractor. Is it not the case that employees always put their time and effort into work performed for their employer?

[65] Similarly, even though the Appellant-Intervenor had to obtain the proper driver's licence, a TaxiHost certificate and a chauffeur's permit, these are "tools" that must be acquired by a driver irrespective of whether the driver's status is that of employee or independent contractor.

(iii) Chance of Profit and Risk of Loss

[66] Regarding chance of profit and risk of loss, I find that these factors indicate that lease-drivers are slightly more akin to employees than to independent contractors.

[67] While a lease-driver is able to increase his or her profit by increasing his or her hours and, perhaps, by negotiating a lower lease payment with a shareholder, there are a number of factors that are out of a lease-driver's control and that have a greater impact on the ability to make a profit. For example, the Appellant-Intervenor testified that the particular day or night worked, whether the computer gives you good trips, and luck, all have an impact on how much money can be earned. Moreover, as the Appellant-Intervenor testified, whether or not you receive a shift and the quality of the shift both depend on whether or not the spare board order is respected.

[68] Additionally, as noted above, lease-drivers are not entitled to sublease the taxicabs and they arguably may never receive permission from the Appellant to do so. As a result, lease-drivers are not entitled to profit from the work of replacement drivers and are limited to the revenues that they themselves earn from driving. In terms of investment, the Appellant-Intervenor had no share in the ownership of the Appellant or the vehicles.

[69] Conversely, the taxi business is structured such that shareholders have a greater ability to arrange their affairs so as to maximize profit. Shareholders can

drive the taxis themselves and they are not at the mercy of the spare board. Also, they can either lease their vehicle directly or use the spare board system. A combination of these options allows shareholders to continuously profit from the taxicab operations. They can also benefit from the sale of their shares, which appear, according to the evidence, to appreciate by 4% per year.

[70] With respect to risk of loss, lease-drivers incur little to no risk of loss and their expenses are limited to the lease payment, fuel, tickets, fines and insurance deductibles.

C. **Conclusion regarding of *Wiebe Door* Factors**

[71] On the whole, I find that both the subjective intention and the sum total of the *Wiebe Door* factors demonstrate that the Appellant-Intervenor was an employee of the Appellant. Accordingly, I find that the Appellant-Intervenor was engaged in insurable and pensionable employment for the purposes of the *CPP* and *EI Act*.

[72] This conclusion is sufficient to dispose of all of the appeals. However, if I am wrong on this point and the Appellant-Intervenor was not an employee under the common law test, I nonetheless conclude for the reasons that follow, that the Appellant-Intervenor is deemed to have held insurable employment under paragraph 6(e) of the *EI Regulations*.

Did the Appellant-Intervenor hold insurable employment under paragraph 6(e) of the EI Regulations?

[73] Pursuant to paragraph 6(e) of the *EI Regulations*, a person employed as a driver of a taxicab is excluded from insurable employment if:

> (a) The person is owner of more than 50 percent of the vehicle;
>
> (b) The person is the owner or operator of the business; or
>
> (c) The person is the operator of the public authority.

[74] In the present instance, this question will turn entirely on the second exception. The parties agree that the Appellant-Intervenor is neither an owner of more than 50 percent of a vehicle nor an operator of a public authority.

[75] The seminal case on this matter is the Federal Court of Appeal's decision in *Yellow Cab Company Ltd. v. Minister of National Revenue*.[134] In the Yellow Cab case, I would note dissenting reasons were written by Justice Malone. The doctrine of *stare decisis* mandates that I am bound to give effect to the judgment of the higher court, regardless of whether there is a dissent. However, I also note that, since the *Yellow Cab* decision, there appears to be a divergence in this Court's jurisprudence when it comes to the question of insurable employment in the context of the taxi industry.

[76] On the one hand, Justice Woods in *1022239 Ontario Inc. v. Minister of National Revenue*[135] restricted the principles of *Yellow Cab* to similar fact cases. Accordingly, under Justice Woods's approach, the Appellant-Intervenor could fall within paragraph 6(e) of the *EI Regulations* even though he is not an employee under the common law test.

[77] In *1022239 Ontario Inc.*, Justice Woods distinguished that case from *Yellow Cab* on the basis that in *Yellow Cab* the company did not share in any of the revenues earned by the drivers.[136] While this difference was in and of itself sufficient to distinguish *1022239 Ontario Inc.* from *Yellow Cab*, Justice Woods also specified that the following facts demonstrated that the relationship was more than just that of a lessor and lessee: the corporation earned 70 percent of the fares, maintained the vehicles, paid for gas and had its own customers that represented 40 percent of the business.[137]

[78] As with *1022239 Ontario Inc.*, in this case, there are differences which could distinguish it from *Yellow Cab*. Specifically, unlike in *Yellow Cab*, under the lease agreements the lease-drivers do not have "rights in the taxicabs insofar as they are entitled to use the taxicabs [and profit from the taxi cabs] to the exclusion of others."[138] In the instant case, the Appellant also enjoyed significant control over the Appellant-Intervenor in the taxi market of the city of New Westminster. It took steps to limit the Appellant-Intervenor's ability to drive in that city as punishment for his actions in seeking to have his employment status properly determined under the law. It also barred him from driving for Uber. In my view, these differences are sufficient to distinguish the *Yellow Cab* case.

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[134] 2002 FCA 294 (Yellow Cab).
[135] 2004 TCC 615 (1022239 Ontario Inc.)
[136] *Ibid.*, at para. 16.
[137] *Ibid.*, at para. 17.
[138] *Yellow Cab* at para. 26.

[79] In a very recent case, Justice Bocock, in *Beach Place Ventures Ltd. v. The Queen*,[139] appears to have followed the *Yellow Cab* decision more strictly. In *Beach Place Ventures*, Justice Bocock appears to conclude on the basis of the analysis of Justice Sexton, that if a person fails the common law test, that person is an independent contractor and, by virtue of this, is operating a business and the person's employment must be excluded under the *EI Regulations*. Therefore, under Justice Bocock's approach to *Yellow Cab*, the Appellant-Intervenor would fall outside of paragraph 6(e) of the *EI Regulations* if he is an independent contractor under the common law test.

[80] Respectfully, on my view, this type of interpretation of *Yellow Cab* defeats the purpose of paragraph 6(e), especially given how the transportation industry and, in particular, how the taxi industry, is evolving and operating in British Columbia. Taxi companies do not appear to be operating under traditional employment structures but yet continue to maintain a large level of control over drivers. As a result, under a more rigid interpretation of *Yellow Cab*, the regulations may no longer achieve their intended objective, which is to provide some security to cab drivers. A strict interpretation of the rule renders it a dead letter. I think this is what Justice Malone cautioned against in his dissenting judgment, where he concluded that:

> . . . the application of the *Sagaz* factors is, in my analysis, improper. Such an application to the definition of "operator of a business" would sterilize paragraph 6(e), so as to deny benefits to taxi drivers who resemble independent contractors; the very situation that 6(e) was created to address.[140]

[81] Similarly, I think this is the quandary that Justice Woods was considering when she wrote her decision and stated that the effect of over extending *Yellow Cab* would be to deprive individuals of employment insurance benefits that they were intended by the legislation to receive.[141]

[82] In this instance, I agree with Justice Woods's approach. I conclude that the facts of this case are sufficiently distinguishable from those in *Yellow Cab*, and therefore I find that the Appellant-Intervenor falls within paragraph 6(e) of the *EI Regulations* and held insurable employment.

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[139] 2019 TCC 24 (Beach Place Ventures).
[140] *Yellow Cab*, dissent at para. 79.
[141] *1022239 Ontario Inc.* at para. 18.

[83] That said, however, I wish to make the following additional comments.

[84] In my view, the Supreme Court of Canada has provided commentary and directions indicating that the *EI Regulations* are intended to have a broader reach than the common law test, such that a person may fail to meet the threshold of an employee under the common law test, but may still be an insurable employee under the *EI Regulations*. The rules on placement agencies play a similar role. A worker who is placed in the services of an employer by a placement agency is deemed to be an employee of the placement agency although control is exercised by the client of the placement agency.[142]

[85] In *Martin Service Station v. Minister of National Revenue*,[143] the Supreme Court of Canada recognized that, irrespective of whether individuals may be employees or independent contractors, they can in case can find themselves deprived of work because of conditions outside of their control. Justice Beetz even went so far as to say that "it is mainly to protect [the self-employed] against this risk of unavailability of work and involuntary idleness that the Acts are extended."[144] The risk of being deprived of work is a risk which, in the opinion of the Supreme Court, is an insurable one.[145]

[86] Also, looking at the text of paragraph 6(e) of the *EI Regulations*, the Federal Court of Appeal in *Canada v. Skyline Cabs (1982) Ltd.*[146] decided that while at first blush the text of paragraph 12(e) of the *Unemployment Insurance Regulations* (now paragraph 6(e) of the *EI Regulations*), particularly the word "employment", suggests that the individual must be an employee, this type of interpretation would be incorrect. The Federal Court of Appeal unanimously agreed that the word "employment" is not to be understood in the narrower sense of a contract of service, but in the broader sense of "activity" or "occupation".[147] This interpretation is consistent with the Supreme Court's position in *Martin Service Station* and demonstrates that the provision seeks to look beyond the mere existence of a relationship of employment.

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[142] See, for example: *European Staffing Inc. v. M.N.R.* 2019 TCC 59, subsections 34(1) and (2) of the *Canada Pension Plan Regulations* and paragraph 6(g) of the *Employment Insurance Regulations*.
[143] [1977] 2 S.C.R. 996 (Martin Service Station).
[144] *Ibid.*, at 1004.
[145] *Ibid.*
[146] (1986), 70 NR 210.
[147] *Ibid.*, at para. 5.

[87] Accordingly, if I were to read paragraph 6(e) of the *EI Regulations* in light of the above-noted decisions of the Supreme Court of Canada and the Federal Court of Appeal, I would conclude that the Appellant-Intervenor meets all of the conditions of paragraph 6(e) for the following reasons:

(i) "[E]mployment of a person as a driver of a taxi. . ." It is clear that the Appellant-Intervenor meets this condition since his activities consisting in driving a taxi;

(ii) ". . . vehicle that is used by a business. . ." While counsel for the Appellant submits that the Appellant is in the business of providing dispatch and administrative services for taxicabs, Mrs. Singh acknowledged in cross-examination that the Appellant is in the transportation business. As a result, the Appellant has admitted to a certain extent that the taxicabs form part of its business.

(iii) ". . . for carrying passengers. . ." Again, it is clear that the taxi is being used to carry passengers; and

(iv) ". . . where the person is not. . . the owner or operator of the business. . ." Here, I read "the business" as referring to the same business as before and not a different business. It is the business of the Appellant. The Appellant-Intervenor is not an owner or operator of the Appellant's business and therefore he falls within the exception.

[88] I am of the respectful view that it may be an appropriate time for a higher court to reconsider the issue of insurable employment under the *EI Regulations* and its interaction with the common law test for employment. As noted earlier, the *Yellow Cab* decision does not address the issue of whether the arrangement between the owner-operators and the corporation can be characterized as a joint venture. In this regard, because the corporation manages the joint venture business, it should be liable for remitting the EI and CPP premiums.

[89] While I think there may need to be clarification by the Federal Court of Appeal in light of the changes to the taxi and ride-share industry, I also note that the *Yellow Cab* decision predated the Federal Court of Appeal's decision in *Connor Homes*. Accordingly, there has also been a development in the common law test that may have an impact on the significance of *Yellow Cab*. Moreover, because the present case involves both the *CPP* and the *EI Act*, I think it would provide the Federal Court of Appeal with the opportunity to compare the applicable principles, considerations and tests under each of those Acts and, ultimately, provide future guidance for lower courts.

D. **Conclusion**

[90] For all of the above reasons, the Appellant's appeal is dismissed and the Appellant-Intervenor's appeal is allowed. Therefore, I find that the Appellant-Intervenor was engaged in pensionable and insurable employment under the *Canada Pension Plan* and the *Employment Insurance Act* throughout the relevant period at issue herein.

Signed at Ottawa, Canada, this 6th day of May, 2019.

"Robert J. Hogan"

Hogan J.

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