


This is Exhibit N referred to in the 466
affidavit of Andrew J. Eckert Page 1
sworn before me, this 20th
day of February, 2015

A commissioner for taking affidavits

Indexed as:

**McCrimmon Holdings Ltd. v. Canada (Minister of National
Revenue - M.N.R.)**

**Between
McCrimmon Holdings Ltd. and 32155 Manitoba Ltd., a
partnership o/a Brandon Wheat Kings, Appellant, and
The Minister of National Revenue, Respondent, and
Daryl Stockham, Intervenor**

[2000] T.C.J. No. 823

[2000] A.C.I. no 823

Court File Nos. 2000-1538(EI), 2000-1540(CPP)

Tax Court of Canada
Winnipeg, Manitoba

Rowe D.T.C.J.

Heard: October 2, 2000.
Judgment: November 24, 2000.

(24 paras.)

Unemployment insurance -- Insurable employment -- What constitutes -- Employer-employee relationship.

This was an appeal by a major junior hockey club from the Minister's decision that players for the club were engaged in insurable and pensionable employment. The club argued that the relationship between the players and the club was more akin to a form of private education. It argued that the money the players received from the club was an allowance rather than a salary. Players who had graduated from high school were entitled to post-secondary tuition for every year of service to the club. The Minister argued that the evidence clearly established an employment relationship between the players and the club.

HELD: Appeal dismissed. The players were paid employees of the club. An amendment to subsection 5(2) of the Employment Insurance Act would be required to exclude junior hockey players from the category of insurable employment. While there was an educational component to the con-

tract between the hockey club and the players, the players were paid to play hockey. The requirement to play hockey was not inextricably bound to a condition of scholarship.

Statutes, Regulations and Rules Cited:

Canada Pension Plan.

Employment Insurance Act, s. 5(1)(a), 5(2).

Employment Standards Act, chapter E110, s. 9(2).

Income Tax Act.

Insurable Earnings and Collection of Premiums Regulations, s. 3(1).

Unemployment Insurance Act, s. 3(1)(a).

Unemployment Insurance Regulations, s. 3.

Pat Fraser and David Swayze, for the Appellant.

Tracy Harwood-Jones, for the Respondent.

No one appeared, for the Intervenor.

JUDGMENT:-- The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

1 ROWE D.T.C.J.:-- The style of cause utilized in the Notice of Appeal and subsequent pleadings or notices named Kelly McCrimmon and Robert Cornell o/a The Brandon Wheat Kings as the appellant. Counsel for the appellant advised the proper style of cause should reflect the corporate members of the partnership, McCrimmon Holdings Ltd. and 32155 Manitoba Ltd. used by McCrimmon and Cornell to carry on the business of operating - in Brandon, Manitoba - the hockey team known as the Brandon Wheat Kings and I ordered the style of cause to be amended accordingly. Counsel for the appellant waived the effect of any irregularities arising from the manner in which the assessment was issued and noted the proper account number had been used so there was no doubt concerning the matter at issue. The position of the appellant is that the junior hockey players on the Wheat Kings team were participants in an established training program having a sophisticated infrastructure and the overriding component was educational in nature.

2 The appellant partnership, referred to herein as the "Wheat Kings" appealed from decisions of the Minister of National Revenue (the "Minister"), dated January 17, 2000 wherein it was decided to confirm certain assessments issued pursuant to the Employment Insurance Act, Unemployment Insurance Act and the Canada Pension Plan on the basis named persons listed on Schedule A attached to the said decision letter were employed under contracts of service with the Wheat Kings and were therefore engaged in both insurable and pensionable employment. The appellant appeals from these decisions and both counsel agreed that appeal 2000-1540(CPP) would follow the result in the within appeal.

3 Kelly McCrimmon testified he resides in Brandon, Manitoba and for the past 12 years has been the General Manager of the Brandon Wheat Kings hockey club. Through his corporation, McCrimmon Holdings Ltd., he owns 1/3 of the team and Robert Cornell - through the numbered company - owns the balance and they operate as a partnership. McCrimmon explained the Canadian Hockey League (CHL) is composed of the Ontario Hockey League (OHL), Western Hockey League (WHL) and Quebec Major Hockey League (QMHL). There are 18 teams - including the Wheat Kings - in the WHL and 55 teams within the CHL. The teams are made up of players who have been developed in the minor hockey systems. McCrimmon stated that if a young (aged 16-20) player wishes to play in the WHL, it will probably be necessary for him to move away from home to the municipality where the team is situated. The Canadian Hockey Association (CHA) is an umbrella organization which oversees Canadian amateur hockey. The CHL has some teams operating in the United States and they have a similar arrangement with the U.S. counterpart organization. The WHL - an 18-member league - includes 7 community-owned teams that are managed by an Executive Committee and the other 11 franchises are privately owned. The WHL has a 72-game schedule with training camp beginning in August. The regular season is finished at the end of March while the playoff series - including the final - are concluded on Victoria Day in May. The WHL is run by a Commissioner and Board of Governors composed of one member from each team in the league. Approximately 8 meetings are held each year, on average, and a 5-man Executive Committee is responsible throughout the year for developing policy, rules, by-laws and otherwise dealing with matters pursuant to the league constitution. An excerpt of the Rules and Regulations governing the WHL was filed as Exhibit A-1 and contains details concerning the mandatory pay schedule of players while playing for any team in the WHL. McCrimmon stated the modest amounts paid to the players have not changed substantially since he played in the WHL 20 years ago except that a second-year player now earns \$20.00 more per month than he would have two decades ago. McCrimmon stated the following monthly payments of \$160.00 to a first-year player, \$180.00 to a second-year player, \$200.00 to a third-year player, \$240.00 to a fourth-year player and a maximum of \$600.00 to a returning 20-year old player are little more than an allowance to cover their day-to-day needs for transportation and other small expenses one would normally associate with "pocket money" if they were living at home. The players are billeted at local families in Brandon and the host billets are paid the sum of \$270.00 per month together with tickets to Wheat Kings home games as compensation for a player's room and board. Since most billets are avid hockey fans, the players are treated like a member of the billet's family. During the many years the Wheat Kings have been in the WHL, there has never been more than two players on the team from Brandon and some years there are none. In the event the players are local, they merely reside in their own family homes. McCrimmon referred to the standard players contract - Exhibit A-2 - which, in his opinion, did not legally bind a player but served to formalize the arrangement and sets forth the obligations of the player and the hockey team. A player can move up to a team playing in a higher league or to a team in a lower rung in the hockey hierarchy but cannot voluntarily decide to move to another team within the WHL. McCrimmon explained the cities having teams in the WHL range in size from Seattle and Portland to Swift Current and Prince George so it is vital for the existence of the league to stabilize the player pool. Pursuant to clause 13 of the contract - Exhibit A-2 - a player can play for a chosen professional team as an under-age 19-year old player provided the team in the professional league compensates his former WHL team by paying the sum of \$100,000. The rules of the WHL permit three 20-year olds on the roster of each team and they are referred to as "over-age" players. As a result, most players remain in the WHL for only four years. The National Hockey League (NHL) rules permit an 18-year old to play in that elite league but not in any minor

league or farm system owned by or associated with that NHL team. McCrimmon stated the WHL has a policy regarding education of the players. The league will pay the cost of one year's tuition and books at any Canadian university for each year a player has performed for a team and every education agreement is registered with the league Head Office. In any player-trade agreement, there is a provision relating to an allocation of the education entitlement as agreed upon by both teams and this arrangement must be approved by the Governor of the WHL. The minimum age at which a player can be a member of a WHL team is 16. The league has a system whereby promising 15-year olds are contacted and counselled in order to prepare them for leaving home the next year in order to play with a WHL team in another city. While playing for the Wheat Kings, all players attend the same high school and meet with the same counsellor. All players are subject to a curfew and are closely monitored both in and out of school, especially as it concerns their attendance, and the club will mete out discipline. There is a great deal of travel involved during the course of a hockey season and the players are required to be at school in Brandon at 9:00 a.m. even if they had just returned - at 5:00 a.m. - from a road trip. Brandon University and Assiniboine Community College are both located in Brandon. Those players who finished high school but have not chosen to attend college or university must come to training sessions 6 days a week from 12:30 p.m. to 5:30 p.m. each day. On a day on which a game is played, the players report to the arena between 12:30 p.m. and 2:00 p.m. and then return to the rink at 5:30 p.m. and remain there until the game is finished which is usually after 11:00 p.m. Even during a week when there is no game played, a Wheat Kings player would be at the arena 24 hours a week. When travelling to play games in other cities, the bus is the only form of transportation used by the team and it takes 27 hours to travel from Brandon to Portland, Oregon and 22 hours to Prince George, British Columbia. The arduous bus trips are an integral part of the process by which a player - against long odds - ultimately is afforded an opportunity to become a professional in the NHL and to participate in an industry which can permit a young man to earn up to several million dollars US per year or to play in other hockey leagues in North America or in Europe where salaries - for a short season - range up to \$100,000 CND. McCrimmon stated that following his hockey career in the WHL as a Brandon Wheat King, which he acknowledged was a disciplined environment requiring many sacrifices, he attended Brandon University. He is aware of other former players who have become executives, scouts or therapists and thereby able to remain involved in the game of hockey as a business. The Wheat Kings players are permitted one 2:00 a.m. weekend curfew each month. They are required to work with children at elementary schools and in programs concerning minor hockey, handicapped children, and drug awareness as well as interacting with the Brandon business community. Behaviour is monitored by the team management and the families acting as billets. The city of Brandon - with a population of 50,000 - is very proud of the Wheat Kings hockey team and players have a high profile within the community. At the annual awards banquet, there is an award for scholastic achievement and an award for the top graduating player which includes many facets of the individual as a member of the team and as a resident of the community of Brandon. The actual team roster has 22 or 23 players but an additional four persons can be on a protected list recognized by the WHL and could be playing somewhere else at a lower level such as Tier II or Midget Triple A.

4 In cross-examination, Kelly McCrimmon stated in the event a player chooses not to pursue post-secondary education, the room and board allowance is still paid on his behalf. Pursuant to clause 12 of the standard player's contract - Exhibit A-2 - there is provision for the suspension of payment of salary during a suspension issued by the league to a player but in 12 years with the Wheat Kings as General Manager, he had never seen this clause utilized. The fines that can be imposed pursuant to clause 6 of the contract are deducted from the monthly allowance but are later

refunded in the sense the amounts collected are contributed towards a team function for the benefit of all the players.

5 Lyn Shannon testified she lives in Brandon and for the past 10 years has worked as the Executive Assistant to the General Manager of the Wheat Kings. Her function originally was to reduce the workload of the General Manager but it developed into other areas so that she is now responsible for certain accounting, marketing and administrative functions as well as acting as a counsellor to the players. She is responsible for issuing them their monthly cheques. In September, 1992 she enquired of the previous operator of the hockey club and of Revenue Canada about the method of payment to the players and was advised that cash could be paid in a pay envelope - without any deductions - but a T4 slip would have to be issued to each player at the end of the year. She advised that since January, 1999, the appellant takes the appropriate deductions from the cheques issued to the players. While the billets are compensated at the rate of \$260.00 per month, in Shannon's opinion that does not cover the cost of having a young hockey player living in the home and eating as a member of the family. The billets enter into an agreement - Exhibit A-4 - with the Wheat Kings which sets out various terms and conditions including certain rules and expectations of the club together with some advice as to how players should be treated in an attempt to include them into a family atmosphere. When the players are on the road for 36 games per season, all costs are paid for by the Wheat Kings. At least 50% of the team - aged 16-18 - will be in highschool and the older ones can attend university or the community college and will be reimbursed for the cost of their books and tuition provided they achieve a passing grade. At the arena - Keystone Centre - in Brandon there is space available for the players who are students to study and, on occasion, the Wheat Kings organization will retain and pay for a tutor to instruct one or more players.

6 Counsel for the respondent did not cross-examine.

7 Counsel for the appellant submitted the case did not involve the usual analysis employed pursuant to the decision of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 2 C.T.C. 200 as it was clear on the evidence the players were not independent contractors but would be regarded as employees, without more. However, counsel put forth the proposition that the true characterization of the status of the players in relation to the Wheat Kings hockey club was not that of apprentices but was more consistent with a form of private education in that the students were participating in a hockey program offering scholarships containing certain pre-conditions, one of which was to possess the ability to play hockey at a level permitting one to be a member of a team in the WHL. The players - like any students - had to abide by a code of conduct and to meet certain defined standards similar to any student on a scholarship. Counsel pointed out that in the long history of the WHL no assessments for unemployment - or employment - insurance premiums or contributions for Canada Pension had ever been issued and it did not seem reasonable within the overall context of the WHL to regard the small payment to the players as anything more than an allowance they could spend at their unfettered discretion that - although it constituted income under the Income Tax Act - was not insurable income for purposes of the Employment Insurance Act. In counsel's view of the legislation, it was intended to protect against involuntary idleness and is not - from any practical standpoint - relevant to the situation in the within appeal.

8 Counsel for the respondent submitted the evidence clearly established the relationship of the players to the appellant was that of employees to an employer as they were engaged in employment pursuant to a contract of service pursuant to the Employment Insurance Act and the Regulations thereunder made it clear the remuneration paid to the players was to be regarded as insurable earn-

ings. Further, counsel submitted it would require a specific regulation in order to exempt the players from the category of insurable employees as otherwise defined by the Employment Insurance Act.

9 Insurable employment is defined in paragraph 5(1)(a) of the Employment Insurance Act as follows:

"Subject to subsection (2), insurable employment is

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

10 Subsection 5(2) of the Employment Insurance Act reads as follows:

"(2) Insurable employment does not include:

- (a) employment of a casual nature other than for the purpose of the employer's trade or business;
- (b) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
- (c) employment in Canada by Her Majesty in right of a province;
- (d) employment in Canada by the government of a country other than Canada or of any political subdivision of the other country;
- (e) employment in Canada by an international organization;
- (f) employment in Canada under an exchange program if the employment is not remunerated by an employer that is resident in Canada;
- (g) employment that constitutes an exchange of work or services;
- (h) employment excluded by regulations made under sub-section (6); and
- (i) employment if the employer and employee are not dealing with each other at arm's length."

11 Since the Employment Insurance Act did not come into force until June 30, 1996 - and the assessments included the entire year 1996 - it is worth noting the definition of insurable employment contained in paragraph 3(1)(a) of the Unemployment Insurance Act is exactly the same as the one above quoted.

12 The definition of insurable earnings contained in subsection 3(1) of the Insurable Earnings and Collection of Premiums Regulations reads as follows:

"For the purposes of subsections (1) and (2), "earnings" does not include

- (a) the value of board, lodging and all other benefits received or enjoyed by a person in a pay period in respect of the employment if no cash remuneration is paid to the person by the person's employer in respect of the pay period;
- (a.1) any amount excluded as income under paragraph 6(1)(a) or (b) or subsection 6(6) or (16) of the Income Tax Act;

- (b) a retiring allowance;
- (c) a supplement paid to a person by the person's employer to increase worker's compensation paid to the person by a provincial authority;
- (d) a supplement paid to a person by the person's employer to increase a wage loss indemnity payment made to the person by a party other than the employer under a wage loss indemnity plan;
- (e) a supplemental unemployment benefit payment made under a supplemental unemployment benefit plan as described in subsection 37(2) of the Employment Insurance Regulations; and
- (f) a payment made to a person by the person's employer to cover the waiting period referred to in section 13 of the Act or to increase the pregnancy or parental benefit payable to the person under section 22 or 23 of the Act if the payment meets the criteria set out in section 38 of the Employment Insurance Regulations."

13 The relevant provision in the former Unemployment Insurance (Collection of Premiums) Regulations is section 3:

"3(1) For the purposes of this Part, a person's earnings from insurable employment means any remuneration, whether wholly or partly pecuniary, received or enjoyed by him, paid to him by his employer in respect of insurable employment..."

14 Pursuant to both sets of regulations, the value of board, lodging and other benefits received in respect of the employment are not considered as insurable earnings provided no cash remuneration is paid by the employer to the employee. The Minister recognized this aspect of the matter when undertaking a variation of earlier assessments and deleted certain amounts by virtue of certain players falling into the exempt category.

15 As noted by counsel for the appellant, IT 168R3 applies only to professional athletes employed by football, hockey and similar clubs and players in the WHL are not included in that definition.

16 The appellant's position is that the players were involved in a scholarship program. The following definition of scholarship is contained in *The Dictionary of Canadian Law*, 2nd Edition, Carswell, 1995, Dukelow & Nuse:

"1. A sum of money awarded with special regard to the quality of the academic work of the person to whom it is awarded. 2. An award of distinction, prize or incentive. 3. Pecuniary assistance granted gratuitously to a student."

17 The *Concise Oxford Dictionary of Current English*, Eighth Edition, Clarendon Press, Oxford defines scholarship as:

"payment from the funds of a school, university, local government, etc., to maintain a student in full-time education, awarded on the basis of scholarly achievement."

18 Counsel for the appellant agreed the sums received by the players in the form of their monthly allowance would be taxable but that one cannot assume this renders the employment in-

surable - or pensionable - for purposes of the relevant legislation. The WHL rules and regulations - Exhibit A-1 - referred to the Standard Players Contract which states the amount of payment which is referred to as "player's allowance". The players had full discretion over this amount and they were not required to use it to pay for any expenses while travelling on the road for away games or otherwise in connection with performing their services as hockey players for the Wheat Kings. The player's contract - Exhibit A-2 - in clause 12 referred to: Loss of salary during a suspension by the club or the league. However, under Clauses 2.1 and 2.2 there is reference to the payment as "the allowance fixed by the rules of the WHL".

19 While there is an educational component attached to the contract between the Wheat Kings and the players - and that is commendable - the players are paid to play hockey for the team in the WHL. They are entitled to one year's books and tuition at a post-secondary educational institution for each year they have played for a WHL team. It is the completion of the playing time that gives rise to the educational entitlement. The payment for playing hockey is modest but all their expenses are covered, including room and board. However, the requirement to play hockey is not inextricably bound to a condition of scholarship as may be the case with a university since attendance at a post-secondary educational institution was not mandatory for remaining on the roster. In the case of *Charron v. M.N.R.*, [1994] T.C.J. No. 47 - Archambault T.C.J. heard an appeal from a determination by the Minister that the appellant - a graduate student employed by Laval University on a research project - was not engaged in insurable employment because she was receiving university credit for the work. Judge Archambault held that the existence of an academic benefit did not prevent the existence of a contract of employment and at paragraph 14 of his judgment stated:

"...Further, the fact that s. 3(1)(a) refers to employment " 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" indicates that Parliament clearly intended the idea of insurable employment to be as wide as possible for the purposes of the Act."

20 Kelly McCrimmon - General Manager of the Wheat Kings - stated he did not regard the players contract as being legally binding upon them but as a document formalizing - for league purposes mainly - the arrangement between players and their respective hockey clubs. The relevant provision of The Employment Standards Act, chapter E110, Province of Manitoba, in force during the period covered by the within appeal defines an adolescent, as follows:

"adolescent" means a person who has reached his 16th birthday but has not reached his 18th birthday;"

21 Subsection 9(2) of the said Standards Act under the heading Agreements by Adolescent states:

"An adolescent who enters into employment is liable thereon and has the benefit thereof as if the adolescent were an adult."

22 It is extremely doubtful that Parliament was concerned about massive unemployment among the ranks of 16 to 20-year old hockey players. It is also difficult to imagine how unemployment would result other than in the circumstance where a player was released outright or was unable to play for any other team and was therefore in need of collecting the extremely modest benefits dur-

ing a transition period. The WHL has operated for many years and has put emphasis on the value of obtaining an education. Kelly McCrimmon serves as a model to other players who can continue to be involved - at some level - in the hockey industry after their playing days have come to an end. But, the business of the Wheat Kings is simply the business of hockey. It is a commercial organization - albeit beloved by the citizens of Brandon - carrying on business for profit. The players are employees who receive remuneration - defined as cash - pursuant to the appropriate regulations governing insurable earnings. It would require an amendment to subsection 5(2) of the Employment Insurance Act in order to exclude players in the WHL - and other junior hockey players within the CHL - from the category of insurable employment.

23 Taking into account the evidence, relevant legislation and jurisprudence, I find the assessments issued by the Minister to have been correct and the decision dated January 17, 2000 confirming those previous assessments is - itself - hereby confirmed.

24 The within appeal is dismissed together with the appeal 2000-1540(CPP) which the parties agree would follow the result.

cp/d/qlsrr/qlscl