The Queen (*Plaintiff*) *v.* **Scheer Ltd** (*Defendant*)

Walsh J.—Montreal, January 12; Ottawa, February 3, 1971.

Unemployment Insurance—Orders and Regulations—Regulations declaring self-employed taxi-drivers to be in insurable employment—Whether authorized by statute Unemployment Insurance Act, 1955, c. 50, s. 26(1)(d)—Unemployment Insurance Regulations, P.C. 1960-610 of April 4, 1966; am. P.C. 1968-1181 of June 19, 1968, Reg. 64B.

Section 26(1)(*d*) of the *Unemployment Insurance Act*, 1955, c. 50 does not authorize a regulation by the Commission declaring self-employed taxi-drivers to be in insurable employment.

QUESTION of law set down pursuant to s. 18 of *Exchequer Court Act.*

Paul M. Ollivier, Q.C. for plaintiff.

J. A. Robb and *J. Martineau* for defendant.

R. W. McKimm for Blue Line Taxi Co.

H. Lanctot for Attorney General of Quebec.

WALSH J.—This matter came before me for adjudication on a question of law by virtue of an agreement entered into on October 9, 1970 between Her Majesty the Queen in right of Canada, represented by the Deputy Attorney General of Canada, and Scheer Limited, under the provisions of s. 18(1)(*g*) of the *Exchequer Court Act* which reads as follows:

18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

* * *

(*g*) the amount to be paid where the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court, or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

By virtue of this agreement the question of law which I am called on to decide is as follows:

> Is Regulation 64B of the Unemployment Insurance Regulations, approved by Order-in-council P.C. 1960-610 dated April 4, 1966, as amended by Order-in-council P.C. 1968-1181 dated June 19, 1968, invalid in whole or in part and if the latter, which part?

It will be helpful to review briefly the history of the dispute which has given rise to this question of law. On December 29, 1969, the Unemployment Insurance Commission caused to be filed in the Exchequer Court a certificate under s. 104 of the *Unemployment Insurance Act*[1] claiming from Scheer Limited the sum of $9,173.08 as contributions due under s. 37 of the said Act (which said section sets out the sums which "every employer shall for every week during which an insured person is employed by him in insurable employment pay, in respect of that person", the said payment consisting of a contribution on behalf of the insured person and an equal contribution on behalf of the employer). By virtue of s. 104 of the *Unemployment Insurance Act* all amounts other than benefits payable under the Act are debts due to Her Majesty and recoverable on certification by the Commission of the amount that has not been paid. Section 104(3) reads as follows:

> 104. (3) On production to the Exchequer Court of Canada a certificate made under this section shall be registered in the Court and when registered has the same force and effect and all proceedings may be taken thereon as if the certificate were a judgment obtained in the Court for a debt of the amount specified in the certificate plus interest to the day of payment.

In claiming the said amount from Scheer Limited, the Commission relied *inter alia* on s. 64B of the Unemployment Insurance Regulations, the first two subsections of which, by virtue of the June 19, 1968, amendment, read as follows:

> 64B. (1) Except for employment that is excepted employment, the employment of every person who
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> (*a*) is employed in driving any taxi, commercial bus, school bus or other vehicle that is used by a business or public authority for carrying passengers, and
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> (*b*) is not the owner of the vehicle or the proprietor or operator of the business or public authority that uses the vehicle for carrying passengers,
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> shall be included in insurable employment notwithstanding that such employment may be self-employment or employment not under a contract of service.
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> (2) The operator or proprietor of a business or a public authority that uses a vehicle described in subsection (1) for carrying passengers shall, for all

[1] 1955 (Can.), c. 50.

> the purposes of the Act and these Regulations, be deemed to be the employer of every person whose employment is included in insurable employment pursuant to subsection (1).

Subsection (3) provides that where the operator or proprietor of a business or a public authority is unable to determine the earnings that are to be taken into account for the purpose of determining the contributions payable, they shall be deemed to be $100 per week, or $20 a day when the operator or proprietor of the business or public authority maintains a record showing the number of days the person worked each week. The presumption is subject to rebuttal if the person in question can prove to the satisfaction of the inspector that his weekly earnings are less than $100 or that his employment is excepted by s. 27(*q*) of the Act (earnings of over $7,800 per annum).

The original regulation which took effect on April 4, 1966, and was the regulation in effect when the assessment on which this claim is based was made, was substantially similar, except for the fact that the 1968 amendment replaced the word "operating" by the word "driving" in para. (*a*) of subsec. (1), added, following the words "owner of the vehicle" in para. (*b*) of subsec. (1), the words "or the proprietor or operator of the business or public authority that uses the vehicle for carrying passengers", added the words "operator or" before the word "proprietor" in subsec. (2) and established the deemed weekly earnings as $69 instead of $100 or $20 a day, always subject to the right of the person in question to make proof to the contrary, in subsec. (3).

This certification by the Commission on December 29, 1969, of the sum due in the amount of $9,173.08 followed the decision of the Umpire under the *Unemployment Insurance Act* on an appeal to him from the initial decision of the Unemployment Insurance Commission under its No. 1206 dated February 9, 1968, assessing Scheer Limited and others for the said contributions. The decision of my brother Mr. Justice Kerr, acting in his quality as Umpire under the *Unemployment Insurance Act,* dated June 16, 1969, upheld the decision of the Commission that the employment of the taxi drivers in question was insurable employment within the scope of the said s. 64B of the Regulations, and in view of this finding he found it unnecessary to express a final conclusion on the question of whether there was an implied contract of service or not, although he did state:

> I lean towards the view that the substance and true character of the relationship between the appellants and the drivers is that of employer-employee under an implied contract of service...

By virtue of s. 34 of the *Unemployment Insurance Act* the decision of the Umpire on this appeal "is final and is not subject to appeal to or review by any court".

Scheer Limited takes the position that s. 64B of the Regulations is invalid as being ultra vires the Commission to the extent that it purports to include

in insurable employment "self-employment" or "employment not under a contract of service" and that in the alternative it is invalid on the ground that s. 26(1)(*d*) of the *Unemployment Insurance Act* under which it was made is ultra vires the Parliament of Canada to the extent that it purports to authorize the Commission to include by regulation "self-employment" or "employment not under a contract of service". The said s. 26(1)(*d*) reads as follows:

> 26. (1) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment,
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> * * *
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> (*d*) any employment if it appears to the Commission that the nature of the work performed by persons employed in that employment is similar to the nature of the work performed by persons employed in insurable employment.

Scheer Limited attempted to bring the matter before the Superior Court of Quebec pursuant to art. 453 of the Code of Civil Procedure seeking a declaratory judgment but this motion was dismissed on the grounds that this was not a problem of law but one of fact as well. The matter then came before this court by way of a petition in revocation of judgment, and by judgment dated April 30, 1970, my brother Mr. Justice Cattanach held that this was not the proper procedure since the certificate filed under s. 104 of the *Unemployment Insurance Act* is not a judgment. In so finding, however, he indicated that, since in order to determine whether the certificate filed under s. 104 had any validity it would be necessary to consider whether s. 64B of the Regulations was ultra vires the Commission and the Parliament of Canada and this question had not been argued before him, it should be determined at trial following the filing of proper pleadings. As a result of this judgment the parties agreed to submit the question of law with which I am now called upon to deal in accordance with the provisions of s. 18(1)(*g*) of the *Exchequer Court Act.*

The history of the present *Unemployment Insurance Act* commenced when Parliament enacted the *Employment and Social Insurance Act*[2]. This statute was tested as to its constitutionality in the Supreme Court and by a three to two decision it was held that the subject matters of the Act fell within the legislative authority of the provinces, that it attached statutory terms to contracts of employment, and that its immediate result was to create civil rights as between employers and employees[3]. This decision was upheld by the Privy Council[4]. As a result of this, the *British North America Act* was amended in 1940 so as to add to s. 91, dealing with the legislative authority of the Parliament of Canada, a further heading: "2A. Unemployment insurance". This was followed by a re-enactment of substantially similar legislation which led eventually to the present *Unemployment Insurance Act*[5]. Neither the words "unemployment insurance" nor the word

[2] 1935 (Can.), 38.
[3] [1936] S.C.R. 427.
[4] [1937] A.C. 355.
[5] S. of C. 1955, c. 50.

"employment" are defined in the Act nor in the *Interpretation Act* so we must look elsewhere to determine their meaning in the present context.

The words "insurable employment" are defined in s. 2(*h*) of the Act, however, as being "employment specified in s. 25". Section 25 reads as follows:

> 25. Insurable employment is employment that is not included in excepted employment and is
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> (*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 reckoned by time or by the piece, or partly by time and partly by the piece, or otherwise;
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> (*b*) employment in Canada as described in paragraph (a) under Her Majesty in right of Canada; or
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> (*c*) employment included in insurable employment under section 26.

It is important to note that this specifically refers to an "express or implied contract of service or apprenticeship, written or oral". Section 27 of the Act defines what constitutes excepted employment and s. 26 permits the making by the Commission of regulations which really constitute exceptions to these exceptions and thereby bring employment covered by such regulations back within the definition of "insurable employment" of s. 25. In addition to s. 26(1)(*d*) with which we are concerned, s. 26(1)(*a*) permits the Commission by regulation to include in "insurable employment" "any excepted employment".

Furthermore, s. 29(1) of the Act gives extensive powers to the Commission with respect to the regulations that it may make. It reads as follows:

> 29. (1) A regulation made under section 26 or 28 may be conditional or unconditional, qualified or unqualified, and may be general or restricted to a specified area, a person or a group or class of persons, and the authority conferred by those sections to make regulations includes authority to make such other regulations and with the approval of the Governor in Council such modifications and adaptations of the provisions of this Act as are necessary to give effect to the regulations made under those sections.

The authority given to make "such modifications and adaptations of the provisions of this Act" appears to go very far. Despite this, however, Parliament apparently considered it necessary, when coverage was to be extended to self-employed fishermen otherwise excepted under s. 27(*b*), to add s. 29(2) to the Act[6], which reads as follows:

> 29. (2) Notwithstanding anything in this Act, the regulations made with the approval of the Governor in Council under section 26 for including employment in fishing in insurable employment may, for all purposes of this Act, provide for
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> (*a*) including as an insured person any person who is engaged in fishing (hereinafter called a "fisherman"), notwithstanding that such person is not an employee of any other person;
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> (*b*) including as an employer of a fisherman any person with whom the fisherman enters into contractual or other commercial relationship in respect of his occupation as a fisherman; and
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> (*c*) all such other matters as are necessary to provide unemployment insurance for fishermen.

[6] 1956 (Can.), c. 50 s. 1.

No satisfactory explanation was given as to why the same procedure was not deemed necessary when coverage was extended by s. 64B of the Regulations, with which we are here concerned, to taxi drivers whether self-employed or not, or to barbers or hairdressers whether self-employed or not, as was done by s. 64A of the Regulations. In both cases the Commission apparently acted under the authority of s. 26(1)(*d*) in extending the coverage on the basis that the nature of the work performed by such persons was "similar to the nature of the work performed by persons employed in insurable employment". Perhaps the difference in procedure arises from the fact that whereas employment in fishing was specifically included in "excepted employment" under s. 27(*b*) of the Act, there was no such specific exception for barbers, hairdressers or taxi drivers, but against this it must be pointed out that s. 26(1)(*a*) permits the Commission to make regulations for including excepted employment in insurable employment, and it is difficult to understand why it was necessary to amend the Act so as to bring in fishermen if this could have been done by a regulation made by virtue of s. 26(1)(*a*) whereas no amendment was deemed necessary to bring in barbers, hairdressers or taxi drivers by regulations made by virtue c 26(1)(*d*). It can perhaps be argued that legislation was resorted to in the one instance *ex majore cautela* and that while this created a precedent, it does not necessarily follow that similar legislation was necessary subsequently to bring in self-employed barbers, hairdressers and, the case with which we are concerned, taxi drivers, but this is not a very satisfactory answer for it implies that the amendment made by 1965 (Can.), c. 50, s. 1, [the enactment of s. 29(2) of the Act] was unnecessary. In Odgers Construction of Deeds and Statutes, 5th Ed. at page 387 under the heading "The legislature does not make mistakes" he states:

> If it clearly does so, nevertheless it is not for the court to legislate in order to correct the mistakes.
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> As Lord Halsbury said in *Commissioners of Income Tax v. Pemsel* ([1891] A.C. 531 at p. 549):
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> > "But I do not think it competent for any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes."

It may be that the amendment to the statute was deemed necessary because this introduced into the present statute for the first time the concept that it might be applied to a person "notwithstanding that such person is not an employee of any other person" (i.e. self-employment). By a 1946 amendment to the 1940 *Unemployment Insurance Act* (discussed in detail *infra*) s. 14A was added which referred to persons "not employed under a contract of service," but these words are not included in s. 26(1)(*d*) of the present Act which therefore seems to derive rather from s. 14 of the 1940 Act than from the said s. 14A.

Counsel for Scheer Limited contended that the words must be given their ordinary and common meaning and that the word "employment" implies the existence of a contract of service and the relationship of employer and employee so that it cannot be extended to include self-employed persons. He argued that the Commission by its regulations was attempting to create a system of "occupation protection" instead of "unemployment insurance", and that however desirable this may be, it was ultra vires the powers of the Commission and, indeed, ultra vires the powers of the federal legislative authority given to it under the heading "Unemployment insurance" in the amendment to the *British North America Act*. He contended further that insurance is defined in the Quebec Civil Code as follows:

> 2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

and that a similar definition would also apply in common law jurisdictions. The Civil Code further states in art. 2476, which reads as follows:

> 2476. Insurance may be made against all losses by inevitable accident, or irresistible force, or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.

and that a self-employed person cannot be said to have no control over his loss of work and hence be subject to protection by insurance against this.

In considering the question of whether it was ever intended that insurable employment should include self-employment, it is of some interest to look further into the history of the Act. The original Act[7] referred in s. 13 to persons who were employed in any of the employments specified in a Schedule to the Act (other than excepted employment which appeared in another Schedule) as being insured against unemployment. Subsections (2), (3) and (4) of s. 13 read as follows:

> 13. (2) The employment in which any such person is employed shall in this Act be referred to as "insurable employment".
>
> (3) Any person employed in insurable employment shall in this Act be referred to as an "employed person".
>
> (4) Any such person who is insured under this Act shall be referred to as an "insured person".

The Schedule referred to defines employment as:

> (*a*) Employment in Canada under any contract of service or apprenticeship, written or oral, whether expressed or implied, or whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise.

* * *

[7] 1940 (Can.), c. 44.

Section 14(1) of the Act read as follows:

> 14. (1) Where it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, any class of persons employed in an excepted employment are so similar to the terms and conditions of service of, and the nature of the work performed by, a class of persons employed in an insurable employment as to result in anomalies in the operation of this Act, the Commission may, by regulation, conditionally or unconditionally provide for including,—
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> (*a*) the class of persons employed in insurable employment among the classes of persons employed in excepted employment; or
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> (*b*) the class of persons employed in excepted employment among the classes of persons employed in insurable employment.

This Act was amended[8] by the insertion of s. 14A reading as follows:

> 14A. The Commission may, by special order, declare that the terms and conditions of service of, and the nature of the work performed by a person or group or class of persons who are not employed under a contract of service are so similar to the terms and conditions of service of, and the nature of the work performed by, a person or group or class of persons who are employed under a contract of service as to result in anomalies or injustices in the operation of the Act, and thereupon the person or group or class of persons in respect of whom the declaration is made shall be deemed to be employed under a contract of service for the purposes of this Act.

It is evident that this section was intended to extend coverage to persons who were not employed under a contract of service in order to deal with the situation where an employer might enter into a contract with an employee in such form as to purport to make him an independent contractor, whereas he might be in practically every respect in the same position as an employee, and thereby to avoid contributions due under the *Unemployment Insurance Act.*

Some significance must be given to the failure to include in the present Act some such section giving the Commission authority in such situations to extend coverage specifically to persons "not employed under a contract of service".

It must be noted that the enabling s. 26(1)(*d*), by virtue of which s. 64B of the Regulations was made, makes no reference to self-employment and, in fact, refers to "persons employed in that employment" so it does not settle the question of whether self-employed persons can be considered as employed within the meaning of the Act. In fact the definition in s. 25 would seem to exclude self-employment and this is borne out by some of the categories of excepted employment enumerated in s. 27 which, for example, exclude the husband or wife of the employer, employment by a corporation of which the person owns more than half of the voting shares, or of which he is a director or officer and actually performs such function. Section 154(1) of the Regulations excludes from entitlement to benefit self-employed claimants or those employed in employment in which they can control their working hours.

[8] 1946 (Can.), c. 68.

The first time that the notion of self-employment seems to have been brought into the present Act was in the 1956 amendment relating to fishermen where subsec. (2)(*a*) of s. 29 uses the words "notwithstanding that such person is not an employee of any other person". (As previously indicated, the 1946 amendment to the 1940 Act adding s. 14A had foreseen the inclusion in the circumstances therein set out of persons "not employed under a contract of service".) This was then followed in 1965 by s. 64A of the Regulations relating to barbers and hairdressers and in 1966 by s. 64B of the Regulations which is before me and which uses the words in subsec. (1) "notwithstanding that such employment may be self-employment or employment not under a contract of service".

In arguing that the amendment to the *British North America Act* did not permit the federal authority to provide a system of "occupation protection" but that it must be strictly limited to legislation relating to "unemployment insurance" and that therefore self-employed persons cannot be covered, counsel for Scheer Limited did not go so far as to argue that s. 26(1)(*d*) of the Act is ultra vires but stated that he considers it to be in the nature of an enforcement section giving the Commission the right to claim that the work in question should be covered when it considers that the situation is a simulated one created to avoid contributions and coverage, but that it does not give the Commission the right to extend coverage to persons not employed under an express or implied contract of service. He admitted that, under his argument, s. 29(2) of the Act extending coverage to self-employed fishermen might well be unconstitutional but he did not raise this as it is not an issue in the present case which is confined to his contention that s. 64B of the Regulations is ultra vires in so extending the coverage.

I cannot give any weight to the contemporary commentaries quoted by him as to what the policy of Parliament in connection with extending unemployment insurance to self-employed persons is or should be. Questions of policy are for Parliament to decide but the question of whether certain sections of a statute are ultra vires the federal authority or certain regulations made by virtue of it are ultra vires the authority given the Commission in that statute are matters for determination by the courts.

In an attempt to define the meaning of "employment" I was referred to numerous dictionary definitions and considerable jurisprudence, most of which is not very helpful or in point since it dealt in most instances with workmen's compensation cases and the question of whether the person in question was employed by virtue of a contract of service or not, which is a question of fact, and the question of whether the taxi drivers in question were in fact self-employed or working for Scheer Limited by virtue of a contract of service is not an issue before me.

It is clear that the word "employment" has two meanings. For example, the Shorter Oxford English Dictionary defines it as:

1. The action of employing; the state of being employed; and
2. That on which (one) is employed; business; occupation;

Webster's Third New International Dictionary defines it as:

> activity in which one engages and employs his time and energies... the act of employing someone or something or the state of being employed.

This distinction is well expressed in a judgment of Allen C.J. in the case of *Ex parte Tucker*[9] in which he states at page 313:

> ...These terms, "occupation," and "employment," in the section may bear, we think, different meanings. The first means where a person does some business for himself; and "employment" means the doing some business for another, implying not only the doing of the business, but the employment to do it; one of the definitions of which is, to intrust with the management of it.

In the case of *Might v. M.N.R.*[10], an income tax case, the appellant was a barrister and his wife a physician who practised her profession in Calgary, and the Act provided at that time that the husband should not lose his right to exemption for his wife by reason of her "being employed and receiving any earned income". The Crown adopted in that case the converse of its present position arguing that the words "being employed" did not mean occupied or engaged at work but was limited to those in the relationship of master and servant. In rendering judgment, O'Connor J. made a careful examination of the dictionary definitions of the word "employed" and also of the jurisprudence in which this had been considered and concluded, at pages 387-88, that the cases:

> ...do show quite clearly, first that "employed" is used in both senses; one, occupied or engaged and the other, in the relationship of master and servant. They also show how essential it is that the meaning of the word be ascertained in the context in which it is used.
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> The fundamental rule of interpretation to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that make it". *Fordyce v. Bridges* ((1847) 1 H.L.C. 4).
>
> The intention of Parliament must be gathered from the language employed, having regard to the context in connection with which it is used. Per Lord Russell, C. J., in *Attorney-General v. Carlton Bank* ([1899] 2 Q.B. 164.)

In the context of the *Income Tax Act* and the purpose of the proviso to encourage married women to go to work to relieve the manpower shortage in existence at that time, O'Connor J. found in favour of the broader interpretation and decided that, as used in that statute, the word "employed" meant "occupied or engaged". He concluded, at page 390:

> In my opinion, the adoption of the sense of "being occupied, engaged or at work" of the word "employed" best harmonizes with the context and also promotes in the fullest manner the policy and object of Parliament.

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[9] (1883-84) 23 N.B.R. 311.
[10] [1948] Ex. C.R. 382.

A somewhat similar question was raised in the Supreme Court in the case of *Steinberg's Ltée v. Comité Paritaire*[11]. In this case, Martland J. whose judgment was concurred in by Fauteux, Abbott and Ritchie JJ. states at pages 974-976:

> ... the appellant contended that the decree in question here was invalid because, by reason of the definition of the word "employer" contained in it, and the use of that word in certain provisions of the decree, the decree purported to apply to establishments in which there were no employees and to sales of merchandise not made by employees. A decree having this scope was, it was submitted, beyond the powers of the Lieutenant-Governor in Council to enact under the provisions of the *Collective Agreement Decrees Act*, R.S.Q. 1964, c. 143. Section 2 of that statute provides:
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> 2. The Lieutenant-Governor in Council may order that a collective agreement respecting any trade, industry, commerce or occupation shall also bind all the employees and employers in the Province or in a stated region of the Province, within the scope determined in such decree.
>
> The definition in question is as follows:
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> Employer: The term "employer" designates any person, company or corporation owning or operating a commercial establishment subject to this decree.
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> "Commercial establishment" is defined thus:
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> Commercial establishment: The term "commercial establishment" designates any establishment located within the territorial jurisdiction of this decree where food products are sold on a retail basis, for outside consumption.
>
> The word "employer", standing by itself, would mean a person who employs the services of one or more other persons. That is the sense in which it is defined in the *Collective Agreement Decrees Act:*
>
> 1. (*f*) "employer" includes any individual, partnership, firm or corporation who or which has work done by an employee.
>
> In my opinion the definition of "employer" contained in the decree ought not to be construed as extending to someone who is not an employer within the definition contained in the Act. In *McKay v. The Queen* ([1965] S.C.R. 798, 53 D.L.R. (2*d*) 532) Cartwright J., as he then was, refers to a rule of construction which is properly applicable in this case:
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> The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly.
>
> The definition in the decree is capable of receiving the meaning that the word "employer" was intended to encompass those persons, companies or corporations, who have work done by employees, which own or operate commercial establishments subject to the decree. I agree with the view expressed on this point, in the Court of Appeal, by Choquette J.:
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> La définition du mot «employeur» dans le décret ne saurait modifier le sens donné à ce terme par la loi précitée (art. 1, *f*)); cette définition ne fait en somme que préciser le genre d'établissement commercial que cet employeur (personne, société ou corporation) doit posséder ou exploiter pour être assujetti au décret. Il n'en reste pas moins une personne «qui fait exécuter un travail par un salarié».

[11] [1968] S.C.R. 971.

In the present case Parliament has, by the enactment of s. 29(2) extended the provisions of the Act to include fishermen in insurable employment "notwithstanding that such person is not an employee of any other person". This is clearly an exception to the general scheme of the Act, and for the purpose of the present decision it is not necessary for me to consider whether this amendment is ultra vires or not. In adopting s. 64B of the Regulations the Commission, following the lead given by Parliament in this amendment relating to fishermen, and acting by virtue of s. 26(1)(*d*) which was specifically intended to plug any loop-holes which might otherwise exist in certain categories of employment, decided to include self-employed taxi drivers just as it had earlier by s. 64A included self-employed barbers and hairdressers. I do not consider that the Commission itself had the authority by virtue of the said section to so extend the coverage in these cases to persons in self-employment or employment not under a contract of service.

If Parliament had intended to give the Commission this authority it should have done so in express terms, whereas on the contrary, it omitted from the present Act the provisions of s. 14A of the 1940 Act as amended in 1946 which specifically referred to persons "not employed under a contract of service", and moreover made a specific amendment to the present Act when it wished to extend coverage to self-employed fishermen.

I therefore conclude that the question submitted must be answered affirmatively and that s. 64B of the Unemployment Insurance Regulations is invalid in part to the extent that it includes in subsec. (1) the words "notwithstanding that such employment may be self-employment or employment not under a contract of service". The balance of the said s. 64B is not objectionable since it merely refers to "insurable employment" which is defined in the Act.

Whether in any specific case a taxi driver driving a vehicle of which he is not the owner is employed under an express or implied contract of service and hence in insurable employment is a matter for the Umpire to determine in such case.

The costs of these proceedings shall be in favour of Scheer Limited.