

CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH
Barristers Solicitors

December 30, 1998

Reference No: 981113

Mr. David Jandrisch
Vice President from Canada
American Federation of Musicians
of The United States and Canada
75 The Donway West
Suite 1010
DON MILLS Ontario
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Dear Mr. Jandrisch

Re: Opinion re Thunder Bay Symphony Appeal

You were interested in our opinion with respect to the possibility of appealing the decision of the Tax Court of Canada in *Thunder Bay Symphony Orchestra Association Inc. v. The Minister of National Revenue*, a decision dated October 26, 1998.

This decision was an appeal by The Thunder Bay Symphony with respect to a decision by Revenue Canada. The decision by Revenue Canada was actually a confirmation of its earlier decision dated July 9, 1996 in which it was determined that a musician's employment by the Thunder Bay Symphony was insurable for the purposes of what was then unemployment insurance (now "employment" insurance). The Thunder Bay Symphony then requested a determination on the question of whether unemployment insurance premiums were payable on the earnings of the musician, and in a letter dated April 16, 1997 Revenue Canada decided that the musician was an employee of the Thunder Bay Symphony and that premiums were payable. It was from this decision that the Thunder Bay Symphony appealed. The basis of the appeal was that the musicians were and are independent contractors. The Tax Court denied the appeal and upheld the decision of Revenue Canada that the musician was engaged in insurable employment and that there was an employment relationship between the Thunder Bay Symphony and the musician.

The basis of the Tax Court's decision is two fold. First, the Tax Court finds that the Master Agreement between the Thunder Bay Symphony and the Thunder Bay Musicians' Association is a collective agreement and therefore each core musician is an employee of the Thunder Bay Symphony and not an independent contractor. Second, the Tax Court holds that on the basis of the four tests of control, ownership of tools, opportunity for profit or risk of loss, and integration, the musician is on balance an employee.

You requested our opinion with respect to the ability of the AFM or its Thunder Bay Local to appeal the Tax Court's decision and you were also interested in the relevance of a collective agreement to the decision.

I. The Ability of the AFM to Appeal

Section 27(1.1) of the *Federal Court Act* provides that an appeal lies to the Federal Court of Appeal from a decision of the Tax Court of Canada. If the Thunder Bay Symphony decided to appeal then the AFM and/or its Thunder Bay Local could bring a motion to intervene in the appeal as a party which has a strong interest in the outcome of the appeal and as a party which can offer a relevant and unique perspective on the issues under appeal. However, we were advised that the Thunder Bay Symphony has decided not to appeal the decision. In our opinion, given that neither the AFM nor the Thunder Bay Local were parties to the appeal before the Tax Court they do not have standing to appeal its decision. In the circumstances the

Federal Court of Appeal would not be prepared to permit a non-party to a decision to appeal the decision where the participating parties have chosen not to pursue such an avenue.

II. The Significance of a Collective Agreement to Revenue Canada Determinations

At page 10 of its decision the Tax Court states as follows with respect to the Thunder Bay Master Agreement:

There is no doubt in my mind that the Master Agreement not only looks like a collective agreement but is in fact a collective agreement. Having decided as an issue of fact that the Master Agreement is a collective agreement because all significant terms of engagement of each core musician are governed by the Master Agreement, I could conclude that each core musician is an employee of the Appellant and not an independent contractor.

In effect what the Tax Court holds is that simply because there is a collective agreement in operation each core musician is therefore an employee. In our opinion, this bald assertion fails to appreciate two important points.

First, individuals in Ontario regulated by a collective agreement include not only employees but also dependent contractors (this is also the case in several other jurisdictions). Even where they do not provide for dependent contractors, labour statutes in other provinces tend to have expanded notions of how to define "employees" which take into account the dependent contractor in determining whether an individual can participate in collective bargaining. Accordingly, contrary to what the Tax Court in the instant case concludes, individuals covered by collective agreements are not necessarily employees even under labour statutes.

Second, the purposes of labour law and tax law are distinct. Even where individuals are determined to be employees for the purposes of collective bargaining, this is not determinative of an individual's status for the purposes of tax law. Due to the fact that the two areas of law have different aims and objectives, courts must be attentive to the context in which terms such as "employee" are used in particular statutes. See: *Yellow Cab Ltd. v. Board of Industrial Relations* (1980) 2 S.C.R. 761. This is the case even though the tests used in labour law and tax law are similar. For this reason it is our opinion that a determination that the core musicians of the Thunder Bay Symphony are covered by a collective agreement does not answer the question of their status for the purposes of tax law. The conclusion by the Tax Court in the instant case that a collective agreement is determinative of tax status is in our opinion an erroneous approach to the issue and inconsistent with the careful assessment of the relevant factors and criteria which such a court should undertake before making a status determination. In our opinion it would be misguided for the symphonic community to conclude that a collective agreement automatically means that a musician is an employee for tax purposes.

We trust that this has been of assistance. If you have any questions or concerns please do not hesitate to contact us.

Yours very truly,

CavaIuzzo Hayes Shilton McIntyre & Cornish

Michael D. Wright
MDW:na