

Date: 19981026

Docket: 97-1348-UI

BETWEEN:

THUNDER BAY SYMPHONY ORCHESTRA ASSOCIATION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Reasons for Judgment

Mogan, J.T.C.C.

[1] The Appellant is a charitable and non-profit corporation organized under the laws of Ontario with its head office in Thunder Bay. Its only object is the operation of a symphony orchestra known as the Thunder Bay Symphony Orchestra (referred to herein as the "TBSO"). The TBSO has a basic core of about 30 musicians who are engaged to rehearse and perform a series of concerts each season from October to May. The Appellant has always regarded its core musicians as independent contractors and not as employees. As a consequence, the Appellant has never withheld and remitted from the compensation of its core musicians any source deductions for unemployment insurance premiums, and the Appellant has never volunteered any employer premiums.

[2] During 1994 and 1995, the Appellant engaged Jean Christophe Guelpa as a cellist to play with the TBSO. In January 1996, Mr. Guelpa left the TBSO to join the Quebec City Symphony Orchestra. In May 1996, when the performing season ended, Mr. Guelpa applied for unemployment insurance ("UI") benefits assuming that his work with the TBSO had been insurable employment. When his benefits were denied, he requested a ruling from Revenue Canada regarding the insurability of his employment from October 10, 1994 to April 28, 1995. By letter dated July 9, 1996, Revenue Canada decided that Mr. Guelpa's employment by the TBSO was insurable for UI purposes.

[3] The Appellant then requested a determination on the questions of whether UI premiums were payable on the earnings paid to Mr. Guelpa in the period from October 10, 1994 to April 28, 1995. By letter dated April 16, 1997, Revenue Canada decided that Mr. Guelpa was engaged by the Appellant under a contract of service; that he was an employee of the Appellant; and that premiums were payable. The Appellant has appealed to the Court from that decision by Revenue Canada. The basic issue in this appeal is

whether the engagement of Mr. Guelpa by the Appellant was one of independent contractor or of employee for the period October 10, 1994 to April 28, 1995.

[4] The issue in this case is of great concern to the Appellant because the TBSO operates on a very tight budget and the obligation to pay the employer's portion of UI (now EI) premiums with respect to all core musicians would place a significant financial burden on the Appellant. The Appellant called the following eight witnesses who represented different points of view concerning the operation of the TBSO and the role of a core musician:

Clinton Kuschak, General Manager of the TBSO and the Community Auditorium

Norman Slongo, Secretary Treasurer of the Thunder Bay

Branch (Local 591) of the American Federation of Musicians

Michael Comuzzi, President of the Appellant and Chairman of its Board of Directors

Brenda Gilham, Executive Assistant to the TBSO

Dominique Corbeil, Member of orchestra, violin

Marc Palmquist, Member of orchestra, cello

Jeffrey Gibson, Member of orchestra, french horn

Jean Christophe Guelpa, Former member of orchestra, cello, now in Quebec City

[5] Mr. Kuschak holds a part-time position for which he receives no remuneration. He has been general manager for more than 10 years and he reports to the board of directors of the Appellant. He stated that the board's primary function was to raise money for the operation of the orchestra. As such, the Appellant operates year round whereas the TBSO has an eight-month season which usually runs from October to May. The 30 core musicians are engaged for a specific term, usually a full season but, in special circumstances, a half season. Each musician is paid a fixed fee per week payable every second week. The fee is earned by performing at rehearsals and concerts. If a musician is required to be absent for illness or some personal reason (i.e. appearing for an audition with some other orchestra), that musician is obliged to provide a replacement.

[6] Thunder Bay has a certain pool of qualified musicians who, from time to time, may play for the TBSO. If a replacement for an absent core musician cannot be found in the local pool of talent, the replacement may have to be brought in from another city. Like any orchestra, the TBSO depends upon the collective effect of the instruments to be played more than on the identity of a particular musician, but a high standard of skill is required of each musician.

[7] Exhibit A-3 is a copy of the Master Agreement between the Appellant and the Thunder Bay Musicians' Association Local 591 of the American Federation of Musicians signed on September 18, 1995 but operating from September 1, 1994 to August 31, 1997. The Master Agreement covers the relevant period in this appeal. Mr. Slongo explained that the American Federation of Musicians ("AFM") was an association of professional musicians to promote live music and to protect its members. He said that the AFM was not a union in Canada and that the title "Local 591" was only a territorial designation. He thinks that Exhibit A-3 was not a collective agreement even though it looks like one. According to Mr. Slongo, Exhibit A-3 is not a standard agreement but was drafted from scratch.

[8] Appendix A to the Master Agreement (Exhibit A-3) is the form of Performance Agreement which the Appellant enters into with each of its core musicians. The Performance Agreement is a one-page document containing the essential details with respect to a particular musician: his or her name and address and S.I.N.; the instrument; seated position; dates of engagement (usually October to May); weekly fee; seniority amount (if any); and total retainer. Exhibit A-2 comprises copies of approximately 30 signed Performance Agreements for the season 1997-98; 25 signed Performance Agreements for the season 1996-97; and five signed Performance Agreements for the season 1995-96. Each of the copies in Exhibit A-2 is consistent with the form of Appendix A to the Master Agreement. The Performance Agreement with each core musician is usually renewed annually. Exhibit A-1 consists of the first Performance Agreement between the Appellant and Mr. Guelpa for the period January 11, 1994 to April 30, 1994 and the last Performance Agreement with Mr. Guelpa for the period October 10, 1995 to April 28, 1996. Actually, Mr. Guelpa left the TBSO in January 1996 to go to Quebec City.

[9] Two of the witnesses, Mr. Slongo and Mr. Palmquist, signed the Master Agreement (Exhibit A-3) on behalf of the musicians. Before considering the terms of the Master Agreement, I will summarize the evidence of the other witnesses. The compensation paid by the Appellant to each of the core musicians was relatively modest. For example, Exhibit A-2 indicates that a core musician engaged for the full season from October 1996 to May 1997 would earn between \$14,500 and \$18,800. To augment their income, most of the core musicians obtained other work such as offering private lessons; teaching in an academic place like a high school, community college or university; playing in a smaller local orchestra; and making recordings. Mr. Palmquist stated that he taught at Lakehead University, played in a local trio, and gave private lessons to some pupils. He estimated that these non-TBSO activities represented about 30% to 40% of his time and income.

[10] The Appellant provides music stands for rehearsals and concerts and has a significant library but, for some works, it rents the sheet music. Each orchestra member is responsible for owning, maintaining and upgrading his or her instrument except for the piano. Also, each member would need a home studio with a music stand, metronome, library, audio equipment and tapes and discs. And finally, each member must provide his or her own formal dress for public concerts depending upon the character of the music to be performed. The dress code for men could be tails (white tie), tuxedo (black tie) or a

TBSO sweat shirt with running shoes for school concerts and promotional events. The women musicians have a similar dress code requiring black long-sleeve tops, and black skirts of floor-length or cocktail (mid-calf) length.

[11] Mr. Gibson, a member of the TBSO (french horn), stated that each member develops himself or herself as a musician outside the orchestra. There is mutual reliance between the Appellant and the core musicians because the Appellant relies on the musicians to provide a high quality of good music to Thunder Bay and each musician relies on the Appellant for basic income even though it may not be enough to live on. One of the ways to achieve high quality music is through the "tenure committee", formed from certain members of the TBSO. The principal purpose of the tenure committee is to evaluate the performance of each non-tenured musician. Twice in each season, a probationary musician will receive a written report on his or her performance. The tenure committee plays an important role in determining whether a probationary musician becomes tenured (i.e. offered a third consecutive full season contract).

[12] There is no question that the Appellant seeks to preserve the status quo in which each core musician is regarded as an independent contractor without the need to remit UI premiums from either the musicians or the Appellant. I inferred from some of the Appellant's musician witnesses that they too are content with the status quo but they were cross-examined so inadequately that I am left with only the inference. This is the kind of appeal I would like to allow because the core musicians are artistically independent. Their performance skills are transportable into different milieu. Each one could be an independent contractor. Also, I would like to encourage smaller cities like Thunder Bay to maintain the musical enrichment of a symphony orchestra without the financial burdens of an industrial society. Having regard to the fact that the unemployment insurance plan was first enacted at the end of World War II and in the shadow of the great depression, I cannot imagine that the lawmakers of the day were attempting to insure the employment of musicians in a community symphony orchestra. I assume that the new law was then aimed at an industrial society.

[13] Statute law, however, is a growth industry. New statutes are enacted while older ones are amended and expanded. Few are repealed. The unemployment insurance plan, so recently given a new and misleading name, has certainly expanded. Considering the terms of the Master Agreement and the circumstances in which the core musicians perform with the TBSO, I have reluctantly concluded for the reasons set out below that Mr. Guelpa was engaged in insurable employment during the relevant period. In other words, I conclude that there was an employer/employee relationship between the Appellant and Mr. Guelpa.

[14] In my opinion, the principal purpose of the Master Agreement is to define the relationship between the Appellant and the core musicians and to protect the musicians in their character as employees. The Master Agreement extends beyond 40 pages and, in order to reflect the tone of the agreement, I will set out a significant number of its terms as follows:

1. The purpose of this Master Agreement is to promote and maintain harmonious relations between the Board of Directors of the Thunder Bay Symphony Orchestra Association and the musicians of the Thunder Bay Symphony Orchestra. The objectives of the Association are best met through a co-operative undertaking to provide a community-based musical resource for the region, providing employment for both professional and community players residing in the regions.

2. Selected definitions

Association The Thunder Bay Symphony Orchestra Association Incorporated.

Core Musician A musician who plays as his/her vocation and is contracted by the Association on a weekly fee basis as either a tenured or a probationary musician.

Local The Thunder Bay Musicians' Association, Local 591, American Federation of Musicians of the United States and Canada.

Performance Agreement A contract conforming to Appendix A between a musician and the Association which does not contravene the terms of this Master Agreement.

Probationary Musician A core musician who is in his/her first or second consecutive season under contract with the Association.

Season The weeks for which a core musician is under contract to the Association.

Steward A musician appointed by the Local to act as its agent with respect to the administration of this Master Agreement.

Tenured Musician A core musician who has been under contract with the Association for two complete and consecutive seasons and has been offered and has accepted his/her third contract.

3.1 The Association recognizes the Local as the exclusive bargaining agent for all musicians contracted by the Association except the Music Director for the purpose of bargaining with respect to minimum remuneration, hours, and other terms and conditions of performance, except that the Concertmaster shall have the right to negotiate his/her own fee.

3.2 The Local recognizes the right of the Association to manage its affairs and to direct the services of its contracted musicians in all matters pertaining to the operation of the Association, provided that the Association shall not act in a manner inconsistent with the terms of this Master Agreement.

4.4 International and Local Work Dues totalling 2% of each musicians weekly fee shall be deducted by the Association from each pay cheque and forwarded to the Local monthly.

6.1 Every provision of this Master Agreement shall be considered to be incorporated into each Performance Agreement, provided that, (a) the Performance Agreement does not establish a rate of compensation for service less than this Master Agreement, and (b) conditions of employment of a non-monetary nature which are different from those in this Master Agreement are not less favourable to the musician.

7.1 The Music Director or Conductor appointed by the Association shall be in charge of all rehearsals and performances, consistent with the terms of this Master Agreement, and shall have the authority to regulate all musical matters. Seating order of the string section shall be determined by the Musical Director in consultation with the Principal players of the respective string sections. String section seating shall not change after the commencement of the service. The Assistant Concertmaster shall sit front desk inside.

7.4 There shall be a Thunder Bay Symphony Orchestra Players' Committee consisting of five musicians in the orchestra. The Committee shall represent the collective interests of the musicians to the management of the Association. The Committee shall have its own officers.

7.10 The Local shall appoint a Steward from among the orchestra musicians to act as its agent with respect to the administration of this Master Agreement.

9.1 The Association shall offer each musician one of the following types of contracts.

9.1.1 Tenured

A contract with automatic renewal offered, subject to renewal procedures pursuant to 11.3, to a Core musician for his/her third and subsequent consecutive full years with the Association.

9.1.2 Probationary

A one-year contract leading to a tenure contact offered to a Core musician in the first year of his/her work with the Association and, subject to renewal procedures pursuant to 11.3, in the second consecutive year with the Association.

13.1 The Association shall establish in its budget a sum equal to the product of the average annual retainer paid to the full contract musicians multiplied by the number of full contracted musicians in the Master Agreement, this sum to be allotted to musicians' fees.

13.2.1 Each core musician shall be paid a minimum weekly fee according to the following schedule:

Section rate

Principal Rate

1994-95	\$532.95	\$666.20
1995-96	\$543.61	\$679.52
1996-97	\$559.92	\$699.91

A core replacement shall be paid at the same rate as a core musician except that payment for periods of less than seven days may be pro-rated.

18.1 The season shall span twenty-nine weeks and consist of twenty-four performing weeks and five unpaid weeks free of responsibility to the Association. A season shall begin in late September or early October and conclude in late April or early May.

18.3.4 If a musician performs more than two services in one day, the third and subsequent service(s) shall be paid at the scheduled service extension fee rate pursuant to 13.2.7.0.A.0.a.

18.4 Services shall not exceed 2.5 hours in length except for Choral, Oratorio, Ballet, Symphony Ball and Opera Performances, for one dress rehearsal for Choral, Oratorio, and Ballet, and for two dress rehearsals for Opera for each separate production. These excepted services shall not exceed 3.0 hours without payment of service extension.

18.5 A service extension is a period of time which begins when playing continues beyond the scheduled conclusion of a service. There shall be a grace period of three minutes. Service extension shall be paid in fifteen-minute segments calculated from the scheduled end of service when the actual playing time exceeds the three-minute grace period due to a late start or circumstances normally expected within a professional performance.

23.3 The Association may terminate the contract of an individual musician for cause, which term shall, without limiting the generality of the foregoing, be deemed to include: inattention to duty, tardiness, unexcused absences, failure to maintain acceptable standards of performance, refusal to comply with the terms of this Master Agreement or his/her individual Performance Agreement.

[15] Paragraph 1 ends with the phrase "providing employment for both professional and community players". Paragraph 3 identifies the Local as the exclusive bargaining agent for all musicians. Paragraph 4.4 permits a check-off or source deduction for dues payable to the AFM. In accordance with paragraph 6, the one-page Performance Agreement with each musician incorporates every provision of the Master Agreement. Paragraph 7.1 designates the Music Director as the person in charge of rehearsals and performances and paragraph 7.4 provides for a players' committee to represent "the collective interests of the musicians". Paragraph 12 dictates a dress code with the words "Concert dress shall be in accordance with the following ...". These paragraphs indicate that the individual musician has traded away what might have been his or her independent contractor status in exchange for the collective interests of all musicians within the TBSO. The indication

is even stronger in the following paragraphs which are concerned with remuneration and hours of work.

[16] Paragraph 13 established the minimum weekly fee to be paid to each core musician for the three performing seasons covered by the Master Agreement. There was no evidence that any individual musician negotiated a weekly fee higher than the minimum scale set out in paragraph 13 but it may have happened. Although the core musicians do not have identified working hours on any specific days of the week, their working time is measured by a period called a "service" which, according to paragraph 18.4, does not ordinarily exceed 2.5 hours. Under paragraph 18.3.4, if a musician performs more than two services in one day (e.g. one rehearsal plus one concert or two concerts), then the musician is paid a service extension fee which is like overtime. The determination of remuneration and hours of work and overtime in paragraphs 13 and 18 are like terms of employment; and they are not like terms which an independent contractor would negotiate.

[17] And finally, paragraph 23.3 describes termination for cause. On the signature page of the Master Agreement, the last unnumbered paragraph immediately above the signatures commences with the words: "This Collective Agreement between ... ". 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.

[18] 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. Because I could be wrong on that issue of fact, I will consider as an issue of law how the tests laid down by the Federal Court of Appeal in *Wiebe Door v. The Minister of National Revenue*, 87 DTC 5025 apply to the terms of engagement of each core musician. At page 5030, the Federal Court of Appeal quotes the *Market Investigations, Ltd. v. Minister of Social Security* case as "the best synthesis". The four tests are control, ownership of tools, opportunity for profit or risk of loss, and integration.

[19] Control. Although a core musician as a performing artist will bring a personal skill and interpretation to each musical composition, a core musician is not performing alone in his or her engagement with the Appellant. Each core musician must work in close co-operation (one may say in harmony) with about 30 other musicians to produce a totally integrated and pleasing result. This result is achieved only when all core musicians follow the guidance of and put themselves under the direction of the conductor who, in paragraph 7.1 of the Master Agreement is called the "Music Director". The Music Director is obviously an important person in the TBSO because the title appears frequently throughout the Master Agreement. The control test points toward employment because (i) the Appellant's purpose is to operate a symphony orchestra; (ii) the orchestra can produce good results only when all members accept the control and guidance of the conductor; and (iii) the Music Director as conductor is "in charge of all rehearsals and performances" (paragraph 7.1).

[20] Ownership of Instruments. Each core musician owns his or her instrument except for the keyboard. Many instruments are highly sensitive and each musician will develop a refined touch with respect to tuning and playing his or her instrument. Also, for certain instruments played by mouth (flute, clarinet, trumpet, etc.), there is a hygienic reason for having the musician own the instrument. Each core musician is required to own two types of formal dress plus casual attire for the different kinds of concert performed by the TBSO. The ownership test points toward independent contractor.

[21] Opportunity for profit or risk of loss. Each core musician is paid a weekly fee in accordance with his or her individual performance agreement (Exhibit A-2). The minimum weekly fee plus the experience increment (i.e. seniority pay) is established under paragraph 13 of the Master Agreement. The fee is paid every second week through the performing season. The TBSO goes on tour as far east as Timmins and as far west as Dryden and Fort Frances. While on tour, each musician is reimbursed for travel expenses and provided a daily allowance for meals. Each instrument is a capital asset to the musician who owns it and so the cost of the instrument could not be deducted as an annual expense. Consistent with accounting and economic theory, the cost of an instrument could, in appropriate circumstances, be amortized over its useful life. While instrument repairs are the responsibility of the individual musician, there was no evidence that the cost of repairs would in any circumstance approach the total retainer or season remuneration of any core musician. The opportunity for profit or risk of loss test points toward employment.

[22] Integration. Considering the terms of engagement between each musician and the Appellant, I cannot conclude that any core musician is in business for himself or herself. Although the performing skills of each musician are intensely personal, they are all merged to produce a collective effect in the TBSO. A group of musicians as independent contractors could come together as an orchestra for a single performance or a few performances without creating any employment relationship but that is not the situation here. The Appellant has assembled about 30 musicians; placed them under contract for a full season (October to May); obligated itself to a fixed weekly remuneration; and appointed a Music Director in charge of all rehearsals and performances. This is not the business of the individual musician but the Appellant's business even if it is a non-profit corporation. The integration test points toward employment.

[23] In *Wiebe Door*, at page 5029, *McGuigan J.A.* referred to a four-in-one test:

... I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls "the combined force of the whole scheme of operations," even while the usefulness of the four subordinate criteria is acknowledged.

As I view the combined force of the Appellant's whole scheme of operations, I conclude that each core musician is an employee of the Appellant.

[24] In argument, two decision of the Pension Appeals Board were cited. In *Vancouver Symphony Society v. Minister of National Revenue et al*, (1974), the Board found that the individual musicians were employees of the Society. In *The Edmonton Symphony Society v. Minister of National Revenue*, (1981), the Board relied on a specific declaration in the agreement with each musician to the effect that the musician was an independent contractor; and the Board found no employer/employee relationship. In my view, such a declaration is helpful only when all other factors are evenly balanced. I find that the factors or tests in this appeal are not evenly balanced but point strongly toward employment.

[25] Also, in the *Edmonton Symphony* case, the Board distinguished the prior *Vancouver Symphony* case with these words:

This case is distinguishable from *Vancouver Symphony Society v. Minister of National Revenue*, (1974) C.C.H. (PAB) 6179, where a collective agreement as well as written agreements between the *Vancouver Symphony Society* and the individual players in its orchestra established the relationship between those parties in terms which this Board found to be clear and unambiguous.

In the circumstances of the *TBSO*, there is a collective agreement and there are individual *Performance Agreements* with all core musicians.

[26] Appellant's counsel also relied on the decision of this Court in *Pitaro v. Minister of National Revenue* (January 17, 1987), not reported. In *Pitaro*, Deputy Judge Trahan decided that a violinist was not engaged in insurable employment by *Symphony Nova Scotia Society* because the violinist (*Pitaro*) was a "per-service musician" paid \$50 per service. There were two categories of musicians: (a) contracted musician; and (b) per-service musician. Mr. *Pitaro* agreed to be a per-service musician because, otherwise, he would not have been engaged. The decision in *Pitaro* can be easily distinguished on its facts and is not helpful in this appeal by the *TBSO*. The appeal is dismissed.

Signed at Ottawa, Canada, this 26th day of October, 1998.

"M.A. Mogan"

J.T.C.C.

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