Docket: 2013-1349(CPP)

BETWEEN:

LIPPERT MUSIC CENTRE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Lippert Music Centre Inc. 2013-1350(EI)
on December 6, 2013, April 22 and 23, 2014, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	David W. Chodikoff Simon Robertson (Student-at-law)
Counsel for the Respondent:	Alisa Apostle Lindsay Beelen

JUDGMENT

The Appeal of the ruling dated April 4, 2012 and the assessment dated May 30, 2012 under the *Canada Pension Plan* is dismissed. Zoë Henderson and Paula Wickberg were engaged in pensionable employment with the Appellant in the period from January 1, 2008 to March 30, 2012.

Signed at Calgary, Alberta, this 27th day of May 2014.

"David E. Graham"

Graham J.

Docket: 2013-1350(EI)

BETWEEN:

LIPPERT MUSIC CENTRE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Lippert Music Centre Inc. 2013-1349(CPP)
on December 6, 2013, April 22 and 23, 2014, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	David W. Chodikoff Simon Robertson (Student-at-law)
Counsel for the Respondent:	Alisa Apostle Lindsay Beelen

JUDGMENT

The Appeal of the ruling dated April 4, 2012 and the assessment dated May 30, 2012 under the *Employment Insurance Act* is dismissed. Zoë Henderson and Paula Wickberg were engaged in insurable employment with the Appellant in the period from January 1, 2008 to March 30, 2012.

Signed at Calgary, Alberta, this 27th day of May 2014.

"David E. Graham"

Graham J.

Citation: 2014 TCC 170
Date: 20140527
Dockets: 2013-1349(CPP)
2013-1350(EI)

BETWEEN:

LIPPERT MUSIC CENTRE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Lippert Music Centre Inc. operates a music school located in Toronto. The school has been operating for over 50 years. It has approximately 400 students. Approximately 30 teachers work at the school. Two of those teachers were Zoë Henderson and Paula Wickberg. Lippert viewed Ms. Henderson and Ms. Wickberg (together, the "Workers") as independent contractors. The Minister of National Revenue reviewed the terms and conditions of the Workers' work and concluded that they were employees. As a result of that review, the Minister issued a ruling that the Workers were engaged in insurable employment under the *Employment Insurance Act* and pensionable employment under the *Canada Pension Plan* in the period from January 1, 2008 to March 30, 2012. The Minister also assessed Lippert for the relevant EI and CPP for the period from January 1, 2008 to December 31, 2010. Lippert has appealed both the ruling and the assessment.

Witnesses

[2] Lippert called its director, Charleen Beard, as a witness. I found Ms. Beard to be a credible witness although she did have a tendency to colour her testimony to favour her position. The Respondent called the Workers as witnesses. I found them to be credible. Despite their animosity towards Ms. Beard relating to the termination of their contracts, they gave forthright testimony even when it may

have hurt the Respondent's position. There were some situations where the evidence of Ms. Beard and the Workers conflicted but the conflicts were not material. Lippert called two other teachers as witnesses. I found their testimony to be credible. Their testimony did not add much in terms of new evidence but it did match the testimony of the Workers in most key respects which gave me increased confidence that the Workers were not slanting their evidence.

Law

[3] In its relatively recent decision in *1392644 Ontario Inc. v. Minister of National Revenue*, 2013 FCA 85 ("*Connor Homes*"), the Federal Court of Appeal clarified the test that is to be applied in determining whether a worker is an employee or an independent contractor. At paragraphs 39 to 42 of *Connor Homes*, the Court stated that the correct test to be applied is a two-step test:

> [39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties [sic] intent as well as the terms of the contract may also be taken into account since they colors [sic] the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, *i.e.* whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.
>
> [41] The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

> *The application of the test*
>
> [42] … The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor.
>
> …

[4] Remarkably, both Lippert and the Respondent urged me to move away from the test set out by the Federal Court of Appeal in *Connor Homes*. Lippert submitted that if I found that the parties intended to be independent contractors, then that intention should govern. In essence, Lippert asked me to disregard the second step of the *Connor Homes* test. By contrast, the Respondent purported to accept the *Connor Homes* test but nonetheless attempted to indirectly reverse it by asking me to consider the total nature of the relationship among the Workers and Lippert as part of my determination of the parties' intention. For example, the Respondent would have had me look at the nature of the control exercised by Lippert over the Workers in determining whether the parties could truly have intended to have an independent contractor relationship. I am not prepared to follow either party's approach. In my view, this issue has been clearly settled by *Connor Homes* and I am bound to follow that decision.

Issues

[5] Lippert entered into a written contract with each of the Workers which stated that the parties' intention was that their relationship be that of an independent contractor. The Respondent disagrees with that characterization. Based on the test set out in *Connor Homes*, the first issue in this case is therefore whether the intention stated in the contracts was, in fact, the shared intention of the parties. If it was their shared intention, then the second issue is whether that shared intention was borne out by the total relationship among Lippert and the Workers or whether the Workers were, in fact, employees. If the parties did not have a shared intention that their relationship be that of independent contractors, then the second issue is whether they were independent contractors or employees.

Intention

[6] There is no debate that Lippert intended the Workers to be independent contractors. The only question is whether the Workers shared that intention.

[7] In September each year Lippert had its teachers sign contracts that covered the 10 month period from September to June. Section 6 of those contracts stated:

> It is hereby agreed by the School and the Teacher that the Teacher is employed as an independent contractor and as such the Teacher is responsible for the [*sic*] reporting all School income. It is agreed that the School is not responsible for the withholding or remitting of income tax to Revenue Canada or any other deductions including Canada Pension Plan or Employment Insurance.

[8] The Workers were presented with the Contracts following their initial interviews with Ms. Beard. They were required to sign and return the contracts prior to commencing teaching. Lippert required the Workers to sign a new contract each school year[1]. The contracts were presented to the Workers in blank. The days of the week to be worked, the types of classes to be taught and the Worker's hourly rate were not filled in. The Workers were told to sign the blank contracts and return them to Lippert. Lippert then filled in the missing details and informed the Workers what their hourly pay would be. There was some debate whether Lippert ever signed the Workers' contracts. The copies of the contracts filed as exhibits were not executed by Lippert. Ms. Beard testified that she signed the contracts. Ms. Wickberg testified that she never received a signed copy of the contract. I find it difficult to understand how, if the contracts were in fact signed, Lippert could have unsigned copies of the contracts but not signed ones. I find that the contracts were never executed by Lippert. Given the manner in which these purported contracts were handled each year, I do not consider them to be evidence of the Workers' intentions. That does not, however, mean that I cannot accept the Workers' oral testimony as to their intentions at the beginning of each school year.

[9] The Workers testified that when they signed their contracts each year, their intentions were that they would be independent contractors. They explained that Ms. Beard had told them that they were independent contractors and that they accepted that.

---

[1] Contracts were filed as exhibits for Ms. Wickberg covering the period from September 1, 2007 to June 30, 2011 and for Ms. Henderson covering the period from September 1, 2007 to June 30, 2012. Based on the oral evidence, I have no doubt that Ms. Wickberg also signed a contract covering the period from September 1, 2011 to June 30, 2012.

[10] There was no external evidence of the Workers' intentions. Lippert acknowledges that, despite its attempts to create an invoice system, there were no invoices issued by the Workers. Neither of the Workers was registered for GST purposes and neither of them charged Lippert GST for her services but I do not reach any conclusions from these facts as there was no evidence that either of the Workers was required to register for GST.

[11] The Respondent made a number of submissions that, in effect, asked me to look behind the Workers' intentions to be independent contractors. These submissions focused on a perceived inequality of bargaining power between the Workers and Lippert, the Workers' personal understanding of what it meant both legally and practically to be independent contractors and the Workers' intention to carry on businesses on their own account as opposed to simply intending to be independent contractors. These issues raise the underlying question of whether the Court should assume a paternalistic role of protecting workers from their own acceptance of a position as an independent contractor or a laissez-faire approach that allows payors certainty of contract. That question has not yet been well canvassed in the caselaw. I do not feel that this case is an appropriate opportunity to do so. As explained in detail below, I find that the objective reality of the Workers' relationship with Lippert does not support their intentions that they be independent contractors. Thus, there is no need to consider whether the issues raised by the Respondent would permit me to look behind the Workers' stated intentions. In reaching this conclusion I want to be very clear that I am not turning *Connor Homes* on its head and using intention as a tie breaker. I am simply stating that, even with the most favourable interpretation of the intention test, Lippert will still not succeed on its appeal so there is no need to examine a less favourable interpretation.

[12] Based on all of the foregoing, I conclude that at the time the Workers began working each September they intended to be independent contractors. Having reached that conclusion, I must now consider whether the objective reality of their relationship supports that intent.

Control

[13] The Workers enjoyed a significant level of flexibility with respect to their teaching hours. Although they had to ask permission to miss work, it appears that with sufficient notice permission was granted if the reason for missing work involved pursuing an outside musical interest such as a performance. Ms. Wickberg in particular was given a great deal of flexibility. She was a member

of the Canadian Opera Company (the "COC"). The COC had very strict rules regarding attending rehearsals and performances. As a result, Ms. Wickberg missed approximately 2.5 months of work every Spring. The Respondent argued that this level of flexibility is not unusual for part-time employees. I do not accept that argument. In my view, this flexibility goes beyond what one would normally expect of an employer. I do acknowledge, however, that the strength of this argument in Lippert's favour is weakened somewhat by the fact that permission had to be obtained first and that it was Lippert, rather than the teachers, who was responsible for arranging for substitute Workers.

[14] The Workers were allowed to operate their own teaching businesses outside of Lippert and were allowed to teach for competitors. These facts favour a finding of an independent contractor relationship. The sole restriction on the Workers competing was that they could not solicit students or former students. There were a number of rules established by Lippert in support of this non-solicitation clause (e.g. the Workers were not permitted to give students their personal phone numbers or email addresses). The Respondent submitted that the non-solicitation clause and these related rules showed a high degree of control. In my view, in a situation where a payor is allowing a worker to compete it is not unreasonable that the payor would protect itself by limiting the worker's ability to steal customers. This would be true regardless whether the worker was an employee or an independent contractor. The Respondent also submitted that the fact that the Workers had to teach at the school (as opposed to a location of their choice) indicated a level of control. I do not accept this argument either. There are any number of reasons why Lippert would want its students to be taught in its schools, not the least of which would be that Lippert would run a significant risk of teachers stealing students if teachers met with students in locations of their own choosing.

[15] Lippert established many rules for the Workers. Some of these rules were set out in the contracts signed by the Workers. Other rules were set out in Lippert's detailed Teacher Manual. Still other rules were communicated to the Workers by email or in staff meetings. While it is not unreasonable for a payor to establish rules for independent contractors to ensure that the services it receives are of the quality it wants or to ensure the efficient operation of its business, Lippert's rules went far beyond that. The Workers were not permitted to tell students if they would be away during the summer. The Workers were required to keep records of each class in a book maintained by Lippert and to do so using a pen rather than a pencil. The Workers were required to follow a written script when calling parents to advise them that a student was late for class. At the end of each night, the Workers were required to lock the windows in each classroom and bathroom,

ensure that all electrical equipment was turned off and turn off the lights. The Workers were not permitted to give a grade lower than a "B" on a student's report card without Ms. Beard's permission. The Workers were required to respond to emails from Lippert to indicate that they had received and read them. The Workers could not discuss the quality of a student's instrument, the amount that the student was practicing or the student's choice of instrument with him or her without Ms. Beard's permission. While I can picture many valid and reasonable business reasons for Lippert exercising these types of control, at some point, if one's business requires one to have such a high level of control over one's workers in order for the business to be successful, then what one needs is to have employees.

[16] Lippert had staff meetings at least twice a year. The meetings were scheduled to fall into the half hour teaching break that the school took at dinnertime. The meetings would be held over 4 consecutive nights to ensure that, regardless of their teaching schedule, all teachers could attend. While the Workers agreed that the meetings were not mandatory, there was clearly pressure to attend. Whether they were mandatory or not, the mere fact that they were held is far more consistent with an employment relationship than an independent contractor relationship. Furthermore, an even greater level of control was demonstrated by the fact that Lippert dictated that the Workers must attend the first meeting of the week for which they were at the school rather than leaving the Workers to choose which meeting to attend.

[17] A further example of Lippert's control can be seen in Lippert's requirement that the Workers follow what it characterized as an invoice system[2]. Lippert prepared a document titled "Invoice For Music Lessons". The document consisted of a single page of paper. Each Worker had her own document. Each year the Workers were instructed to fill in their name, address and contact information at the top of the form as if to indicate that the purported invoice had been issued by the teacher. There was a statement that the invoice was being "Billed to" Lippert. Then there was a chart. There was a row on the chart for each month of the year. Beside each month were blank cells for the "Amount (Total of Cheque)", "Date Received" and "Signature". When Workers were paid at the end of each month they would receive an envelope from Lippert in their teacher cubby hole at Lippert's office. The envelope would contain a cheque for the month's pay, the purported invoice and a separate document listing the hours that the teacher had worked during the month. The Workers were instructed to copy the amount from

---

[2] As noted above, counsel for Lippert conceded in argument that the documents in question could not actually be characterized as invoices.

the cheque into the "Amount (Total of Cheque)" cell, fill in the date they had received the cheque and sign their name. They then left the purported invoice in the envelope to be filled in each month. Using this purported invoice system was a prerequisite to being paid.

[18] Lippert's and the Workers' expectations with respect to the foregoing rules were telling. While there was some debate whether certain rules were mandatory or merely suggestions, it was clear that everyone involved believed that at some point Lippert had the authority to enforce the rules. The fact that Lippert may not have chosen to do so very often does not take away from the fact that it retained that right (*Gagnon v. Minister of National Revenue*, 2007 FCA 33).

[19] Lippert also controlled the scheduling of the lessons. At the beginning of the school year, the Workers would tell Lippert what days and hours they were available to work. If those times were acceptable to Lippert, then Lippert would schedule the Workers at those times. Once the times were established, Lippert filled them with students. The Workers did not have control over which student was scheduled at which time or, except in unusual circumstances, which students they were given.

[20] Lippert held recitals for its students each Spring. The recitals were a big event for the school. A number of different shows ran over a number of days. The Workers were strongly encouraged to attend. Ms. Wickberg felt that her attendance was required whereas Ms. Henderson felt it was optional. However, both of them attended the recitals. Lippert set out a guideline for the Workers indicating the number of shows that they should attend based on the number of days that they taught each week. The number of shows was equal to the number of days taught plus one. The Workers did not simply appear on stage to accompany students. They were expected to perform such tasks as organizing students backstage or taking tickets. The Workers were not paid for attending the recitals. Regardless whether it was mandatory that the Workers attend the recitals or only strongly encouraged, the simple fact is that Lippert and the Workers both believed that Lippert was in a position to have at least some level of influence over the Workers' activities outside of their regular working hours without compensation being paid. This is not indicative of an independent contractor relationship.

[21] Counsel for the Respondent stated that it was difficult to picture how Lippert could have exercised more control over the Workers than it did. She conceded that any given element of control that Lippert exercised could have been explained as not being inconsistent with an independent contractor relationship but submitted

that collectively they were too much. Counsel was not too far off the mark. It is clear based on all of the foregoing that the objective reality of the control that Lippert exercised over the Workers does not support their subjective intention to be independent contractors.

[22] I note that in reaching the above conclusion I am not giving any weight to what actually occurred in the classrooms during the lessons. There is no debate that the Workers determined how they taught their classes and that they did so without interference from Lippert. However, it is not unusual for a payor to find it difficult to manage a professional who has very specific talents. Similarly, it is clear that Lippert dictated at least some of the content of what was to be taught in the classrooms. In particular, Lippert dictated that music theory was to be taught to all students. I do not find this to be indicative of Lippert controlling the Workers. Lippert is in the business of selling music lessons. Part of what Lippert sells is the fact that all of its students will be trained in music theory. Therefore, dictating that theory is to be taught in the classroom amounts to nothing more than telling the Workers that Lippert is selling a product and they need to provide that product.

Tools

[23] The test for tools is not whether the Workers supplied the tools necessary to operate a music school business but rather whether they supplied the tools necessary to operate a business of supplying music teaching services to a school. There are very few tools required to operate that business. Ms. Wickberg's voice lessons did not require her to bring an instrument. It would have been both impractical and unnecessary for the Workers to bring their own pianos to Lippert's premises for their piano lessons so I take nothing from the fact that they did not do so. Ms. Henderson taught a small number of ukulele lessons and was required to provide her own ukulele for those lessons. The Workers were required to provide their own copies of the Royal Conservatory of Music's syllabus. The basic tools required for reporting on the students' progress and scheduling students were supplied by Lippert. If the Workers wanted to have their own copies of the music that their students were working on they had to supply those copies themselves.

[24] Overall, I find that the objective reality of the tools factor is not inconsistent with the Workers' intention to be independent contractors. That said, given the small number of tools required, I give very little weight to this factor.

Chance of Profit

[25] The Workers had no ability to earn more money by subcontracting their teaching duties. Their only ability to increase their earnings was by working more hours. The Federal Court of Appeal has made it clear that ability to earn more money by working more hours does not amount to a chance of profit (*City Water International Inc. v. Minister of National Revenue*, 2006 FCA 350).

[26] Lippert argued that Ms. Wickberg's ability to attract more students by establishing contacts with a wide range of students and parents through her work at the front desk was an ability to profit. Ms. Wickberg certainly had an entrepreneurial spirit and there is no doubt that she was trying to increase her earnings by selling herself, but this does not amount to a chance of profit.

[27] In summary, I find that the Workers' lack of a chance of profit does not support their subjective intention to be independent contractors.

Risk of Loss

[28] The Workers did not have any real risk of financial loss. There was no evidence of the Workers making any capital expenditures. The only current expense mentioned was the cost of purchasing sheet music.

[29] There were a number of instances such as recitals and staff meetings where the Workers were expected to provide their services in circumstances where they were not being paid. However, this type of unpaid work is neither indicative of an employment nor an independent contractor relationship. It is unusual under either relationship for a worker who is paid by the hour to work for free.

[30] Ms. Wickberg testified that she had to use personal time to prepare report cards as she was unwilling to interrupt her class time to do so. This unpaid work appears to have been more of a personal choice than a necessity. I believe that it is more indicative of Ms. Wickberg's professionalism than it is of an independent contractor relationship.

[31] In summary, I find that the Workers' lack of a risk of loss does not support their subjective intention to be independent contractors.

Other Work

[32] The Workers did some extra work at Lippert outside of their teaching. Ms. Henderson cleaned Lippert's facilities for a few months. She was paid a lower

hourly wage for that work. Ms. Wickberg worked at the front desk during a portion of the periods in question. She too was paid a lower hourly wage for that work. Neither party suggested that I should consider these jobs separately from the Workers' teaching. In light of that fact and given that there is very little evidence of how the *Wiebe Door* factors applied to either of these jobs, I have ignored them for the purposes of my analysis.

Summary

[33] In summary, the control, chance of profit and risk of loss factors all fail to support the Workers' subjective intention to be independent contractors. The tool factor supports the Workers' subjective intention but is not worthy of significant weight in the circumstances. Of all the factors, I consider the control factor to be the most important factor in this case. Therefore, overall I must conclude that the Workers were employees.

[34] Accordingly, the appeals are dismissed. The Workers were engaged in insurable and pensionable employment during the period from January 1, 2008 to March 30, 2012.

Signed at Calgary, Alberta, this 27th day of May 2014.

"David E. Graham"

Graham J.

CITATION:	2014 TCC 170
COURT FILE NOS.:	2013-1349(CPP), 2013-1350(EI)
STYLE OF CAUSE:	LIPPERT MUSIC CENTRE INC. AND M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	December 6, 2013, April 22 and 23, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF JUDGMENT:	May 27, 2014

APPEARANCES:

Counsel for the Appellant:	David W. Chodikoff Simon Robertson (Student-at-law)
Counsel for the Respondent:	Alisa Apostle Lindsay Beelen

COUNSEL OF RECORD:

For the Appellant:

Name:	David W. Chodikoff Simon Robertson (Student-at-law)
Firm:	Miller Thomson LLP

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada