Docket: 2002-1545(EI)

BETWEEN:

SASKATCHEWAN EXPRESS SOCIETY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeal of
Saskatchewan Express Society Inc. (2002-1546(CPP))
on August 14, 2003, at Regina, Saskatchewan

Before: The Honourable Justice D.W. Beaubier

Appearances:

Counsel for the Appellant:	Yens Pedersen
Counsel for the Respondent:	Robert Gosman
Student-at-Law:	Derwin Petri

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

The Appellant is awarded such costs as are allowed under the *Employment Insurance Act.*

Signed at Saskatoon, Saskatchewan, this 2nd day of September 2003.

"D.W. Beaubier"

Beaubier, J.

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Signed at Saskatoon, Saskatchewan, this 2nd day of September 2003.

"D.W. Beaubier"

Beaubier, J.

Citation: 2003TCC600
Date: 20030902
Docket: 2002-1545(EI)
2002-1546(CPP)

BETWEEN:

SASKATCHEWAN EXPRESS SOCIETY INC.,

Appellant,

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Respondent.

REASONS FOR JUDGMENT

Beaubier, J.

[1] These appeals were heard together on common evidence at Regina, Saskatchewan, on August 14, 2003. The Appellant called the following witnesses:

1. Carol Gay Bell, a founder and the Artistic Director of the Appellant, of Regina;

2. Kirsten Brough, now a homemaker, formerly a secretary employed by the Appellant in Regina and the person who typed the contract in question and prepared the Appellant's cheques for issuing;

3. Laurien Gibson, a self-employed music instructor who was under contract with the Appellant at Saskatoon and who knew Landon Peters during the Period;

4. Lorie Rebalkin, the Appellant's Studio Director in Saskatoon at all material times who negotiated the contract with Landon Peters, who worked at the Saskatoon studio.

[2] Paragraphs 12 to 16 of the Reply to the Notice of Appeal 2002-1545(EI) outline the matters in dispute. They read:

> 12. By letter dated August 15, 2001, the Regina Tax Services Office issued a ruling that the Worker was in insurable employment with the Appellant for the period February 5, 2001 to June 24, 2001.
>
> 13. By a letter received November 31, 2001, the Appellant appealed to the Minister for a reconsideration of the ruling.
>
> 14. In response to the appeal, the Minister decided that the employment was insurable as the Worker was employed by the Appellant under a contract of service for the period February 5, 2001 to June 24, 2001.
>
> 15. In so deciding as he did the Minister relied on the following assumptions of fact:
>
> (a) the Appellant operates a musical theatre;
>
> (b) the Worker was hired as a dance instructor;
>
> (c) the Appellant and the Worker entered into a written letter of agreement which included the following:
>
> (i) the Worker is hired as an instructor for the 2000/2001 season,
>
> (ii) the Worker is under the direction of the Appellant to follow the outlines of class content and goals to be achieved,
>
> (iii) the Worker is to prepare and teach all classes assigned,
>
> (iv) the Worker is to act as a substitute instructor when necessary,

(v) the Worker is to attend monthly instructor meetings,

(vi) the Worker is to assist with content, costumes, props, staging and presentation of the annual recital,

(vii) the Worker is to participate in promotional activities and workshops on behalf of the Appellant,

(viii) the Worker may work for others as long as there is no conflict of interest,

(ix) the Worker is expected to be present at least 15 minutes prior to class time,

(x) the Worker will have access to a photocopier,

(xi) the Worker will be paid $20.00 per hour, $75.00 for the recital, and $200.00 for the workshop,

(xii) the Appellant will cover the travel costs for the workshop,

(d) the Worker performed his services at the Appellant's premises;

(e) the Worker earned a set wage of $20.00 per hour;

(f) the Worker was also paid $75.00 for the recital and $200.00 for the workshop;

(g) the Appellant set the wage rates;

(h) the Worker was paid bi-weekly by cheque;

(i) the Appellant controlled the Worker's hours and days;

(j) the Worker was required to keep track of his hours and submit a timesheet;

(k) deadlines and priorities were set by the Appellant;

(l) the Worker's work was monitored by the Appellant;

(m) the Worker was required to attend regular meetings;

(n) the Worker's personal services were required;

(o) the Worker had to obtain the Appellant's approval for any leave;

(p) the Worker did not incur any expenses in the performance of his duties;

(q) the Appellant provided all of the tools and equipment required including a fully furnished work location;

(r) the Worker did not have a risk of loss;

(s) the Worker did not charge the Appellant G.S.T.;

B. ISSUES TO BE DECIDED

16. The issue to be decided is whether the worker was employed under a contract of service with the Appellant during the period of February 5, 2001 to June 24, 2001.

[3] The following assumptions were not refuted by the evidence, 15(a); (c)(x), (xi), (xii); (d); (e); (f); (h); (k); and (s).

[4] With respect to the remaining assumptions:

15(b): Landon Peters (the "Worker") was hired as an acting instructor. He considered himself to be an artist and he also proposed to teach his students how to draw Bart Simpson, to which the Appellant did not object. It is not known if he did this or not.

15(c)(i): The Worker was only on contract for less than half the year, from February to June.

15(c)(ii): He only had to prepare his students for a recital which was agreed by the teachers to be based on GREASE.

15(c)(iv) and (v) are wrong. They are in the written contract but it was not adhered to by these parties or other teachers.

15(c)(vi): The Worker was only involved in the staging and presentation.

15(c)(vii): The Worker did not do this. Rather he promoted himself with flyers and arranged with the Appellant to be able to rent its studio to teach any students he might be able to contract with privately. He may have taught outside the Appellant's contract, as other teachers under contract did on their own or for competing studios. He did substitute teach in the Public School System in Saskatoon. He was highly qualified as an actor and had a Bachelor of Education Associated Arts/Theatre, Film. (Exhibit A-3).

15(c)(viii): See above.

15(c)(ix): The Worker was always just in time or late for his classes.

15(g): The wage rates were negotiable. The Worker accepted the Appellant's first offer of $20.00 per hour.

15(i): Is wrong. At the beginning of each year the teachers say when they will be available. They all teach by the hour after regular school hours. Class times are set according to the teachers' own schedules. Landon Peters replaced a teacher and assumed those vacant class hours.

15(j): Is correct. Much was made of the lack of an "invoice". But the time check sheet was filled out and signed by the Worker, unlike an employee, whose time is recorded by an employer without employee input.

15(l): The Appellant did not monitor or supervise the Worker except to see that he arrived for class. His class content and output was up to him.

However his class had to be ready to perform whatever he specified they were to perform in the annual recital.

15(m): This was in the contract, but there were only two meetings per year and only one when the Worker was at the Studio.

15(n): This is wrong. The Worker could send a substitute of his own choosing. The substitute would be paid directly by the Appellant.

15(o): The Worker had to notify the Appellant of his absence and of a substitute or the need for a substitute.

15(p): The Worker had to supply any props for his class; for example, any thing they might require to draw Bart Simpson or to act out a character.

15(q): The only things that the Appellant supplied were studio space, the use of a photocopier and the space for the annual recital.

15(r): A conscientious Worker might lose, depending on the props supplied and the hours of teaching worked. All preparation was unpaid and on the Worker's own time.

15(s): The Worker did not charge G.S.T., nor is there any evidence that he complained about the lack of deductions of income tax, Employment Insurance, Canada Pension Plan or Workers' Compensation premiums. Ms. Bell testified that the Worker would not have made enough to warrant registering for G.S.T.

[5] Using the primary tests set out in *Wiebe Door Services Ltd. v. The Minister of National Revenue*, [1986] 3 F.C. 553 (C.A.) on the facts in evidence:

1. Control

The Appellant did not tell the Worker how to do anything. Nor did it inspect his conduct in class. He merely had to appear or send a substitute to conduct a class for the set time in the Appellant's studio and prepare the class for its performance as proposed and arranged by the Worker in the GREASE recital. In other words, the Worker was to produce a product or production

by his class. "How" he did it was up to him. Because he arrived late in the year, "when" was already determined as was "where".

2. Ownership of Tools

Any props were the Worker's. The studio and photocopier were the Appellant's.

3. Chance of Profit and Risk of Loss

Poor management of preparation time or costly props could cause the Worker to lose. His hourly rate of teaching time was fixed at $20.00 per hour.

4. Integration

Except for the actual recital, there was no time integration into a combined operation by the Appellant. What and how the Worker taught was very much up to him. Other teachers and substitutes were readily available to the Appellant. There was no curriculum that had to be followed or continued upon by a teacher or a substitute. The "Bart Simpson" drawing had nothing to do with acting. Ms. Rebalkin thought it would build a students' confidence; but so would acting, which is what the students were there for. Bart Simpson drawings were far removed from the Studio's purpose, but much in tune with what the Worker wanted to do.

[6] Ultimately the question is, was the Worker in business for himself. On the evidence he controlled his work and course and merely turned out a product – his portion of the GREASE recital. He supplied his own tools except for space and a photocopier. He did have a risk of loss. He need not appear but could send his own substitute. He was merely an accessory to produce a small, severable, part of GREASE. He could work for direct competitors of the Appellant or compete with the Appellant and rent its studio space.

[7] The Worker was in business for himself. He and the Appellant could and did supply business services to each other, each for a fixed fee - time by the Worker, and the provision of and offer of space by the Appellant. Each could do his or its business without the other, or each could do business with the other, as they chose.

[8] The Worker was not employed under a contract of service with the Appellant during the period February 5, 2001 to June 24, 2001.

[9] The Appellant is awarded such costs and disbursements as are granted under the *Employment Insurance Act.*

Signed at Saskatoon, Saskatchewan, this 2nd day of September 2003.

"D.W. Beaubier"

Beaubier, J.

CITATION:	2003TCC600
COURT FILE NO.:	2002-1545(EI) 2002-1546(CPP)
STYLE OF CAUSE:	Saskatchewan Express Society Inc. v. The Minister of National Revenue
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	August 14, 2003
REASONS FOR JUDGMENT BY:	The Honourable Justice D.W. Beaubier
DATE OF JUDGMENT:	September 2, 2003

APPEARANCES:

Counsel for the Appellant:	Yens Pedersen
Counsel for the Respondent:	Robert Gosman

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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