

Docket: 2010-2389(EI)

BETWEEN:

ÉCOLE DE LANGUES ABCE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KAMEL BOURENANE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of
École de langues ABCE Inc. (2010-3877(EI) and (2010-3878(CPP))
on May 15, 2012, and July 9, 2012, at Ottawa, Ontario.

Before: The Honourable Chief Justice Gerald J. Rip

Appearances:

Agent for the appellant:	Mohammed Chaouni
Counsel for the respondent:	Honk Ky (Éric) Luu
For the intervener:	The intervener himself

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (Act) is dismissed and the decision of the Minister of National Revenue under section 91 of the Act is confirmed on the basis that Kamel Bourenane held insurable employment during the period from March 9 to October 2, 2009, under paragraph 5(1)(a) of the Act.

Signed at Ottawa, Canada, this 22nd day of November 2012.

“Gerald J. Rip”

Rip C.J.

Translation certified true
on this 10th day of January 2013.
Daniela Guglietta, Translator

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Appearances:

Agent for the appellant: Mohammed Chaoui
Counsel for the respondent: Honk Ky (Éric) Luu

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (Act) is dismissed and the decision of the Minister of National Revenue under section 91 of the Act is confirmed on the basis that Denis Fugère held insurable employment during the period from June 22, 2009, to January 28, 2010, under paragraph 5(1)(a) of the Act.

Signed at Ottawa, Canada, this 22nd day of November 2012.

“Gerald J. Rip”

Rip C.J.

Translation certified true
on this 10th day of January 2013.
Daniela Guglietta, Translator

Docket: 2010-3878(CPP)

BETWEEN:

ÉCOLE DE LANGUES ABCE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of
École de langues ABCE Inc. (2010-2389(EI) and (2010-3877(EI))
on May 15, 2012, and July 9, 2012, at Ottawa, Ontario.

Before: The Honourable Chief Justice Gerald J. Rip

Appearances:

Agent for the appellant: Mohammed Chaouni
Counsel for the respondent: Honk Ky (Éric) Luu

JUDGMENT

The appeal under subsection 28(1) of the *Canada Pension Plan* (CPP) is dismissed and the decision of the Minister of National Revenue under section 6 of the Plan is confirmed on the basis that Denis Fugère was employed in pensionable employment during the period from June 22, 2009, to January 28, 2010, under paragraph 6(1)(a) of the CPP.

Signed at Ottawa, Canada, this 22nd day of November 2012.

“Gerald J. Rip”

Rip C.J.

Translation certified true
on this 10th day of January 2013.
Daniela Guglietta, Translator

Citation: 2012 TCC 410

Date: 20121122

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THE MINISTER OF NATIONAL REVENUE,

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KAMEL BOURENANE,

Intervener,

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BETWEEN:

ÉCOLE DE LANGUES ABCE INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent,

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Docket: 2010-3878(CPP)

BETWEEN:

ÉCOLE DE LANGUES ABCE INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Rip C.J.

[1] The Société École de langues ABCE Inc. (ABCE) appealed the decisions of the Minister of National Revenue (Minister) according to which Kamel Bourenane and Denis Fugère, who worked for appellant ABCE, held “insurable employment” under paragraph 5(1)(a) of the *Employment Insurance Act* (Act). The appellant also appealed a decision of the Minister according to which Mr. Fugère was employed in pensionable employment under section 6 of the *Canada Pension Plan* (CPP). Mr. Bourenane is an intervener in the appeal that concerns him.

[2] The relevant period involving Mr. Bourenane is from March 9 to October 2, 2009, and the relevant period in both appeals involving Mr. Fugère is from June 22, 2009, to January 28, 2010. All three appeals were heard on common evidence.

ABCE

[3] ABCE is a private language school that teaches English and French, primarily to federal public servants, and whose main client is the Canada School of Public Service (CSPS). The sole shareholder and directing mind of ABCE is Mohammed Chaouni. ABCE was incorporated in 1997, but Mr. Chaouni operated ABCE as sole proprietor until 2008.

[4] Mr. Chaouni testified that the school adapts to each client’s requirements. The number of students at ABCE varies. Mr. Chaouni stated that, in order to meet the needs of each client, ABCE determines the class schedule, the place at which courses are taught and the content of the courses based on the requirements of the client. The instructors are required to prepare the programs. The CSPS imposes numerous conditions on the students’ instruction. One of the conditions of the CSPS is the use of a curriculum it developed. The CSPS also has other requirements which involve verification and quality control. For the CSPS, the mandate of ABCE is to prepare students for an exam administered by the Public Service Commission of Canada. ABCE does not write those exams.

[5] Mr. Chaouni stated that some instructors are employees of ABCE. They have a fixed schedule and teach at the school. However, the school cannot ensure that there is always work for these employees, since the work depends on the contracts it receives.

[6] Mr. Chaouni explained that because the needs of each student are different, ABCE must be able to offer its clients instructors that are flexible in terms of schedule, location and course content. In addition to the instructors who are employees of the ABCE, he stated that the ABCE also hires instructors who are self-employed. He stated that the self-employed instructors sometimes work during the day, sometimes at night, and sometimes on weekends. They use their own manuals and tools. While the self-employed workers can avail themselves of the school's classrooms, they could also be required to teach elsewhere, for example in the students' offices. The school does not reimburse the expenses of self-employed workers. Mr. Chaouni testified that a flexible instructor enjoys more employment opportunities.

[7] In the case of self-employed instructors, ABCE assesses students to determine their current level and their objective. Once the initial evaluation is completed, the school submits the information to the instructor, who must prepare a structured curriculum adapted to the client's needs.

[8] Messrs. Bourenane and Fugère were seasoned instructors. Mr. Chaouni stated that he informed them, during the interview, of the different types of teaching positions. According to Mr. Chaouni, the two men chose to be self-employed workers.

[9] Even if the employment contracts were signed by Mr. Chaouni on the one hand, and by Messrs. Bourenane and Fugère on the other, the intention, said Mr. Chaouni, had always been that ABCE be the employer, and not Mr. Chaouni.

[10] Mr. Chaouni testified that the hourly rate of employed instructors is different from that of self-employed workers. The rate for employees is \$20 per hour, whereas the rate for self-employed workers is higher. ABCE has 10 to 15 employees and 15 to 20 self-employed workers. The number of instructors varies depending on the number of contracts signed by ABCE. The number of self-employed workers hired by the school varies depending on the work and the instructors' flexibility. Some instructors come in with no experience and require training. Such instructors are hired as employees.

[11] Mr. Chaouni challenges some of the Minister's assumptions of fact in finding that Messrs. Bourenane and Fugère were engaged in insurable employment:

- (a) He denies that the appellant's hours of work were from 6:30 a.m. to 9 p.m. or 10 p.m., seven days a week. Mr. Chaouni

submits that in principle, working hours ended at 5 p.m. and that the appellant was not open on weekends. However, self-employed instructors could always come on weekends to use the classrooms to teach.

- (b) He denies that the workers had to be accredited by the CSPS to teach public servants. Mr. Chaouni submits that no accreditation was required, but that the instructors had to undergo training to comply with the requirements of the CSPS.
- (c) He denies that the workers were supervised by the appellant and that the academic director verified the conduct of the courses in the classes. Mr. Chaouni submits that it was the CSPS itself that sent inspectors to verify instruction.
- (d) He denies that the workers had to meet objectives for each student. Mr. Chaouni notes that everything in life operates on objectives.
- (e) He denies that the workers had to comply with the CSPS's teaching methods. He states that the instructors could choose some work methods, whereas others were set by the CSPS. The instructors could choose the material they wished to use to meet the set objectives.
- (f) He denies that the appellant provided the teaching materials, VCRs and computers for the students and the classroom. Mr. Chaouni notes that the reference material was available to students.

[12] The "contracts" concluded with Messrs. Bourenane and Fugère are virtually identical. The individuals that Mr. Chaouni considers as employees are subject to a different contract. The contract signed by Messrs. Bourenane and Fugère is as follows:¹

¹ The sole differences between the two contracts are the names (Bourenane and Fugère), the dates, the hourly rates (\$23 per hour for Mr. Bourenane and \$22.50 for Mr. Fugère) and the amount the school can retain if the instructor does not give at least months' notice prior to the cessation of services (three weeks' pay for Mr. Bourenane and two weeks' pay for Mr. Fugère).

[TRANSLATION]

~~École de langues ABCE Inc.~~

130 Slater Street, Suite 500, Ottawa, Ontario, K1P 6E2

Tel.: (613) 560-0555 Fax: (613) 560-0444 E-mail: abce@language-training.org

CONTRACT:

EMPLOYMENT OF INSTRUCTORS AS CONSULTANTS

New contract

Amendment of former contract

Ottawa, _____, 200__

I, Moe Chaouni, director of the École de langues ABCE inc. employ Instructor _____ as a consultant to offer pedagogical and language training services to federal public servants and private sector employees. The term "consultant" does not designate the status of employee or self-employed worker.

The consultant, while offering language training services to the École de langues ABCE inc., has the right to offer the same services to other language schools. However, the consultant undertakes neither to found his or her own language school nor to engage in activities serving the same objective for the duration of his or her employment with the École de langues ABCE inc. as well as within one year of the date he or she ceases his or her duties. The consultant shall not attempt to solicit clients, students and instructors.

The consultant makes a commitment to the École de langues ABCE inc. to comply with the rights of the institution and all clients of the school, and not to attempt to solicit them for the purpose of obtaining a direct contract with them for an indeterminate period even after ceasing to work for the École de langues ABCE inc.

The service times and locations are to be determined by the instructor (consultant) and not by the school.

Expenses related to the purchase and use of materials, photocopies, parking, travel (short- and long-distance travel), or any other expenses, are the sole responsibility of said consultant.

The consultant is responsible for submitting to the École de langues ABCE inc. attendance and progress reports on or before the last day of each month.

The hourly rate of instruction is \$____/hour. Payment shall be made on the 15th day of the month following the month of training.

The consultant shall not, under any circumstances or for any reason, discuss compensation or the number of hours of work with other consultants of the school. Any administrative issues should be discussed directly with management.

The instructor (consultant) has an obligation to inform the École de langues ABCE inc. in writing at least three weeks prior to the termination of the offer of services. Failure to do shall result in the withholding by the École de langues ABCE inc. of the equivalent of two weeks' full-time pay (the equivalent of 70 hours) or the consultant shall pay the École de langues ABCE inc. the equivalent of two weeks' full-time pay plus all other amounts in damages and interest.

This Contract shall take effect on the date of signature of this document.

This Contract completely cancels and replaces all previous contracts signed.

Signed _____
Moe Chaouni

I have read and understood this Contract.

Signed _____

[13] Mr. Chaouni stated that he addressed the issue of status during the initial individual interview with Messrs. Bourenane and Fugère. He testified that he explained the advantages and disadvantages of being an employee or self-employed worker.

[14] The document filed (as a self-employed workers' contract) indicates that the instructor is a "consultant" and that a consultant is neither an employee nor a self-employed worker. Self-employed workers are hired for an indeterminate period. However, Mr. Chaouni points out that he made an error when drafting the contract and that for him, a consultant was a self-employed worker.

[15] As for the clause in the "contract" which prevents self-employed workers from working for another language school and discussing compensation and the number of hours of work with the other consultants of the school, Mr. Chaouni explained that, in the past, the school had been the victim of professional espionage and the instructor in question became a competitor of ABCE. Mr. Chaouni noted that the non-competition and non-solicitation clauses are used to protect the interests of the school.

[16] The Public Service represents approximately 90% of the school's business. A small percentage of the total business derives from private-sector clients and foreign students.

[17] Mr. Chaouni stated that Messrs. Bourenane and Fugère taught the majority of their courses on the school's premises. He noted that all the materials found in the classrooms, the chairs, tables, boards, computers and dictionaries, were available to the clients. Despite that, the instructors were not limited to the materials that were in the classroom and the self-employed workers could use their own resources. Self-employed workers prepared their courses themselves. According to Mr. Chaouni, self-employed workers have more flexibility to increase their income; they can choose where and when they wish to work.

[18] The ABCE's Web site uses words and expressions that suggest the instructors are employees of the ABCE. For instance, the site indicates that "their" instructors are trained by the school and that certain manuals are produced by the school. Mr. Chaouni's response is that the site merely indicates that the instructors work at

the school and that they undergo training offered by the school. Said training allowed the employees to learn the administrative workings of the school and was not necessarily language training. The manuals developed prepared by the ABCE are designed exclusively for the instruction of foreign students. However, Messrs. Bourenane and Fugère did not teach the foreign students. Furthermore, business from foreign students is limited to 10% of the total.

[19] Mr. Chaouni testified that the CSPA requires the preparation of a course plan. The instructor prepares the plan at home and sends it via e-mail to the school. The school's pedagogical advisor verifies the plan, which is used to ensure the quality of instruction. There is also a document that is used to organize the classrooms. The schedule of instructors who are employees as well as that of the self-employed workers who teach in the school's classrooms are outlined in this document.

[20] Mr. Chaouni stated that the school imposes a dress code on instructors. If a student gives less than 24 hours' notice that he or she will be absent, the instructor is paid for the cancelled course. If the student gives more than 24 hours' notice, the instructor is not paid. Instructors who need to be absent from work must inform management. They can opt to be replaced, but, often, the school itself takes responsibility for the student. The instructors have weekly meetings with the pedagogical advisor. Mr. Chaouni stated that the purpose of the weekly meetings is to ensure the school is aware of what goes on in class and that it knows whether the students are having difficulty, so as to report possible problems to quality assurance officers.

[21] Karmina Bendaqqi is a pedagogical advisor for the students and the instructors. She testified for the appellant. She stated that the CSPA requires that the school follow the program established by the CSPA. However, the instructors themselves prepare their programs for other clients. For those other clients, the instructors can use their own materials. Messrs. Bourenane and Fugère brought their own materials with them to class.

[22] Ms. Bendaqqi stated that the CSPA requires that the instructors prepare a program. The instructors send the programs to Ms. Bendaqqi via e-mail. According to the contract with the CSPA, Ms. Bendaqqi must conduct checks during classes. However, she does not conduct checks for the other clients.

[23] Ms. Bendaqqi explained that while the school provides instructors with some resources, in general, they bring their own materials. For the students of the CSPA,

the program and books are prescribed. However, for the other clients, the instructor prepares the course for the client.

[24] Where necessary, Ms. Bendaqqi informs instructors of the clients' objectives and problems, but it is up to the instructors to find their own materials and solutions to teaching problems.

[25] Ms. Bendaqqi performs the same tasks for employee instructors. Her role is to advise and coordinate instructors, not to know whether an instructor is an employee or a self-employed worker. Ms. Bendaqqi herself is an employee.

Testimony of Kamel Bourenane

[26] Prior to his employment with ABCE, Mr. Bourenane worked at another language school, the École de Jonquière, which offered the same services as ABCE, namely, second language courses to public servants. The École de Jonquière was unable to obtain new contracts and, therefore, Mr. Bourenane only worked part-time. He considered himself to be an employee of the École de Jonquière.

[27] At that point, Mr. Bourenane began to look for employment at other language schools. ABCE organized a meeting between a pedagogical director and Mr. Bourenane to ask him questions related to pedagogy. A second meeting with Mr. Chaouni followed and he was offered a teaching contract with a pay of \$23 per hour. Mr. Bourenane submits that during that second meeting, the issue of his employment status was not raised. Mr. Bourenane accepted the contract. He acknowledged that they did not discuss the terms and conditions of the contract other than salary.

[28] At the École de Jonquière, Mr. Bourenane was an employee and he earned \$22 per hour. During the initial meeting between Mr. Bourenane and Mr. Chaouni to discuss his new position at ABCE, Mr. Bourenane did not inquire about leave and vacation. He did not read the contract prior to signing it. He did not receive any explanations as to the two types of instructors.

[29] After the meeting, the parties set March 9 as the effective start date. At approximately 7:30 a.m., Mr. Bourenane arrived at school. Mr. Chaouni and Ms. Bendaqqi provided him with a code for the photocopier and showed him the library as well as the rest of the school. He was provided the objectives of the school and the school curriculum: a student shows up at the school, has certain characteristics and wants to study to achieve a certain level.

[30] The school sent Mr. Bourenane on training to be able to teach CSPA students. The training was held over four or five days. The school paid Mr. Bourenane \$644 while he was in training. At the end of the training, he received a familiarization certificate.

[31] Mr. Bourenane also underwent a second training course offered by ABCE on June 13 and 14. The program is for students who wish to acquire level C second language proficiency.

[32] Mr. Bourenane stated that he was provided with much assistance from the school. The director would sometimes come to observe his courses and would provide feedback on his teaching methods. Mr. Bourenane submitted that the school's assistance was invaluable to him. He also received help with his programs.

[33] At the end of each day of class, he would fill out a daily log which the school would review to be up to speed on what was happening in class and also to assist substitute teachers in the event that an instructor was absent had to be and replaced.

[34] Mr. Bourenane described a typical day at work. He would arrive in the morning. He would look at the day's schedule depending on the program. Sometimes, programs have to be modified if a student cannot attend class. He would enter the classroom with a student. In the room there is a board, a computer, a projector, tables and chairs, and a library full of the school's books. At around 10 a.m., there is a 15-minute break, which is regulated. After the break, he would get back to work until noon. At noon, there is a one-hour break. He would then resume his courses until about 4 p.m.

[35] Mr. Bourenane submits that he never taught anywhere else but the school. He usually gave private lessons. However, if instructors had to be absent for training purposes, Mr. Bourenane would also look after their students.

[36] Mr. Bourenane would prepare his weekly programs at the school. He had to send his programs to Ms. Bendaqqi for verification every Wednesday or Thursday. He could change the learning activity, but not the CSPA's learning objectives.

[37] If a student gave notice more than 24 hours in advance that he or she was going to be absent, the instructor was not paid, unless he still had to be present at the school to stand in as needed. If less than 24 hours notice was given, the instructor

was paid if he was present at school. If he had to be absent from work, he had to inform management, who had to find a replacement.

[38] There were meetings with the pedagogical advisor every Wednesday to discuss news or issues. All teaching material was provided by the school. Mr. Bourenane never purchased teaching books. He could not use pedagogical resources other than those provided by the school. According to Mr. Bourenane, management had the right to tell him how to teach.

[39] Mr. Bourenane was paid for an hour or half hour of preparation for every day he taught. Mr. Chaouni prepared a table indicating salary increases he offered the instructors. Mr. Bourenane never received a salary increase. He did not have any risk of loss. He did not have any expenses related to teaching. He did not have a business card.

[40] The attendance report is an invoice prepared for each student. The instructor indicates the student's name and, on occasion, the department the student works for. A coordinator explained to Mr. Bourenane that it was important to fill out the invoices at the end of each month.

[41] Mr. Bourenane only worked for the CSPS but stated that it was possible that he would have to replace other instructors. However, the pedagogical director always urged him to follow the program established by ABCE. He could not use any other program. He followed the instruction program specific to the level of each student. There were icebreakers in the morning to "break the ice." The icebreakers are on the program. Mr. Bourenane prepared the material to be taught, depending on the program. The school provided instructors and students with the password necessary to allow them access to a Web application called "Campus Direct."

Testimony of Denis Fugère

[42] Mr. Fugère was hired by ABCE on June 11, 2009. He was paid \$22.50 per hour. During the interview, there was never any discussion of his status as an instructor. After the interview, he was given a tour of the school.

[43] Mr. Fugère read the contract before signing it. He modified the penalty for failing to give notice of termination to two weeks' pay.

[44] He taught a student in the morning and another in the afternoon, and sometimes taught groups. The school provided instructors with materials: the

40 booklets required for training, the code to access Campus Direct, and a computer in the classroom. The school also provided dictionaries, photocopiers and Internet access. Every Friday, Mr. Fugère was required to hand in a program for the following week. He had to fill out a log every day, after each course.

[45] He worked about eight hours per day. The program had to be verified by Ms. Bendaqqi. The school informed him of each student's learning objectives. Therefore, any long-term planning was done by the school.

[46] If a student was absent without notice, the instructor had to wait just in case another instructor had to be replaced. If the student gave 24 hours notice, Mr. Fugère was not paid. If Mr. Fugère had to be absent from work or if he wanted to take time off, he had to consult with Mr. Chaouni or the pedagogical advisor.

[47] Each month the school prepared invoices for its clients which indicated the number of hours taught and the hourly rate of each instructor.

[48] Mr. Fugère worked at the school for six months, until January 2010, because he wanted to work at the Olympic Games in Vancouver. He took two weeks off in August to attend training for the Olympic Games.

[49] There is extensive case law on the issue of whether a person is an employee or independent contractor. The answer, obviously, depends on the facts of each case.

[50] In considering this appeal, it is appropriate to refer to three decisions published in the law reports: *Wiebe Door Services Ltd. v. Minister of National Revenue*² (*Wiebe Door*), *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*³ (*Sagaz*), and *The Royal Winnipeg Ballet v. Minister of National Revenue*⁴ (*Royal Winnipeg Ballet*).

[51] In *Wiebe Door*, Justice MacGuigan examined the four case law tests to be considered in determining whether a contract is one of service or for the provision of services. Based on a set of criteria, it is appropriate to consider the following:

- (a) The degree or absence of control, exercised by the alleged employer.
- (b) Ownership of tools.

² [1986] 3 F.C. 553 (F.C.A.).

³ [2001] 2 S.C.R. 983.

⁴ 2006 FCA 87, [2007] 1 F.C.R. 35.

- (c) Chance of profit and risks of loss.
- (d) Integration of the alleged employee's work into the alleged employer's business.

[52] Justice MacGuigan stated that “the traditional common-law criterion of the employment relationship has been the control test,”⁵ and “that this test is still fundamental is indicated by the adoption by the Supreme Court of Canada in *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*.”⁶ However, the application of the test depends on the various circumstances, namely, the wording of the contract and the employee’s skills.

[53] Justice MacGuigan referred to the decision of Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.* and concluded that determining the character of the relationship involves “examining the whole of the various elements which constitute the relationship between the parties.”⁷ The character of the relationship will depend on “the combined force of the whole scheme of operations.”⁸

[54] At the end of his analysis, the question the judge must answer, in respect of the worker, is the following: Whose business is it? The worker’s or his employer’s?

[55] In *Sagaz*,⁹ the Supreme Court agreed with Justice MacGuigan. The Court indicated that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. Although, in this appeal, the contract designated one

⁵ At page 558.

⁶ [1978] 1 S.C.R. 605, at page 613.

⁷ [1947] 1 D.L.R. 161 (J.C.P.C.).

⁸ Citing Lord Wright, at 560 in *Wiebe Door*.

⁹ At pages 998 to 1005.

of the parties as an “independent contractor,” this classification is not always determinative for the purposes of vicarious liability, which was the issue the Supreme Court had to decide.

[56] In *Royal Winnipeg Ballet*, while the degree of control exercised by the ballet company over the work of the dancers was extensive, it was no more than needed to stage a series of ballets over a well planned season of performances. The parties' common understanding was that the dancers should be independent contractors. The legal relationship between the Royal Winnipeg Ballet and its dancers was borne out by the Canadian Ballet Agreement in force at the time, an umbrella agreement between the ballet company and the Canadian Actors' Equity Association (the CAEA), which could be supplemented by an individual contract.

[57] The umbrella agreement provided, among other things, that the dancers could accept to work for other ballet companies. The dancers had to bear the cost of physical conditioning, orthopaedic devices, and so forth. A performance could not be filmed unless a separate agreement was negotiated between the Royal Winnipeg Ballet and the CAEA. The dancers were registered for GST purposes, and charged GST to the Royal Winnipeg Ballet.

ABCE Inc. and its instructors

[58] According to the contracts between Mr. Chaouni and Messrs. Bourenane and Fugère, ABCE had a right of control and strict supervision over the work performed by them. The school was directly operated by Mr. Chaouni. The contracts' terms and conditions are rather draconian, and some of them patently illegal. The contracts acknowledge that the “consultant” can offer training services to other schools but stipulate that he or she cannot engage in activities serving the same objective as ABCE. The consultant cannot seek to provide services to ABCE's clients “for an indeterminate period even after ceasing to work” for ABCE. The contracts also restrict the consultant's freedom of speech by prohibiting him or her from discussing compensation or hours of work with other ABCE instructors.

[59] Messrs. Bourenane and Fugère had to inform the school when they wished to take vacation, as the school had to know to prepare course schedules. ABCE also required Messrs. Bourenane and Fugère to keep a daily log, prepare weekly instruction programs and meet with Ms. Bendaqqi. The instructors were subject to the supervision and control of the school and taught by following the program approved by the school.

[60] The school provided the students with teaching materials. Mr. Chaouni stated that only the students, and not the instructors, could use said materials, although that is questionable. The instructors worked with the students and normally used the same materials. Indeed, when Messrs. Bourenane and Fugère taught CSPA students, who accounted for most of their students, they were required to use the prescribed materials and follow the prescribed programs. While it is possible that Messrs. Bourenane and Fugère used their own materials, it would have only been on rare occasions and was only incidental.

[61] The chance of profit and risks of loss were borne by ABCE. Messrs. Bourenane and Fugère were paid per hour of teaching; it is not a situation where they would earn more if they worked faster and got more work done. They taught during the school's office hours. ABCE set the hours of work, breaks and lunch hour; it assigned classrooms and decided on meetings.

[62] It is not at all clear whether the parties wanted Messrs. Bourenane and Fugère to be independent contractors. The contract each of them concluded with ABCE (or with Mr. Chaouni) stipulates that [TRANSLATION] "the term 'consultant' does not designate the status of employee or self-employed worker." Furthermore, although there is no evidence as to the annual income Messrs. Bourenane and Fugère earned from teaching, that is, whether their income exceeded \$30,000, there is nothing to suggest that they charged ABCE the GST or that ABCE paid the GST. I doubt that Mr. Chaouni asked himself whether the school may have been required to pay the GST to its instructors.

[63] The school decided who was going to replace an absent instructor. There is no evidence that Messrs. Bourenane and Fugère chose their replacements or that they took on the students of absent instructors, as stated by Mr. Chaouni.

[64] There is no doubt that the business was ABCE's business. The school was the centre of all activities, whether in its offices or elsewhere. The school needed instructors to operate its business, and that is the reason that it hired Messrs. Bourenane and Fugère.

[65] Messrs. Bourenane and Fugère were employees of ABCE during the relevant period. The appeals are dismissed.

Signed at Ottawa, Canada, this 22nd day of November 2012.

“Gerald J. Rip”

Rip C.J.

Translation certified true
on this 10th day of January 2013.
Daniela Guglietta, Translator

CITATION: 2012 TCC 410

COURT FILE NOS.: 2010-2389(EI), 2010-3877(EI) and
2010-3878(CPP)

STYLES OF CAUSE: ÉCOLE DE LANGUES ABCE INC. v.
M.N.R. and KAMEL BOURENANE AND
ÉCOLE DE LANGUES ABCE INC. v.
M.N.R.

PLACE OF HEARING: Ottawa, Ontario

DATES OF HEARING: May 15, 2012, and July 9, 2012

REASONS FOR JUDGMENT BY: The Honourable Chief Justice Gerald J. Rip

DATE OF JUDGMENT: November 22, 2012

APPEARANCES:

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For the intervener:	The intervener himself

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