

Docket: 2017-1715(CPP)
2017-1717(EI)

BETWEEN:

CANADA SUN EDUCATION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence
on January 31, 2019, at Toronto, Ontario
Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Kai Hong Xu
Counsel for the Respondent: Derek Edwards

JUDGMENT

The appeals with respect to Minister of National Revenue's decision dated January 23, 2017 made under the *Canada Pension Plan* and the *Employment Insurance Act* are dismissed in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 15th day of May 2019.

“Rommel G. Masse”

Masse D.J.

Citation: 2019 TCC 117
Date: 20190515
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2017-1717(EI)

BETWEEN:

CANADA SUN EDUCATION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] These two appeals were heard together on common evidence.

[2] The Appellant, Canada Sun Education Inc., or Canada International College (hereafter referred to as the “Appellant” or the “School”), is a corporation based in Markham Ontario. The Appellant operates a private school providing language training and high school education credits for international students from grades 9 through 12. The School’s base of operations is located at 2347 Kennedy Road, Unit #505, Toronto, Ontario.

[3] The Canada Revenue Agency (the “CRA”) received a referral from the Employer Compliance Audit Section to determine the employment status of five teachers working at the School. These teachers are: Alysha Jagmohan for the period of January 1, 2013, to May 31, 2014; Ying Geng for the period January 1, 2013, to December 31, 2014; Andrew Kwa for the period January 1, 2013, to December 31, 2014; Christine Muhlberger for the period September 1, 2013, to April 30, 2014; and Graham Lee for the period September 1, 2013, to July 31, 2014. The teachers were interviewed by the CRA on May 30th, June 1st and June 2nd, 2016. Mr. Kai Hong Xu, who represents the School, was interviewed on July 11th, 2016. As a result of these interviews, The CPP/EI Rulings Division of the CRA issued Rulings holding that the five teachers were not independent

contractors but rather were employees of the School and were thus engaged in pensionable and insurable employment within the meaning of paragraph 6(1)(a) of the *Canada Pension Plan* (“*CPP*”) and paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996 c. 23 (the “*EIA*”), respectively. The CPP/EI Rulings Division of the CRA so notified the School and the teachers by way of letters dated July 14, 2016.

[4] The School disagreed with the Rulings and appealed the Rulings to the Minister of National Revenue (the “Minister”). On January 23, 2017, the Minister confirmed the Rulings. Hence, the appeal to this Court.

Factual Context

[5] Mr. Kai Hong Xu is the director of the School and has been for about 14 years. He is also the sole shareholder and owner of the School. He was the only witness who testified at this hearing. The Court was told that the School adheres to the Ministry of Education Ontario Curriculum for high schools and is thus subject to inspections by the Ministry of Education. He testified that about 60% of the student body are local students and 40% are international students – mostly from China. It is a small school with a student enrollment of 30 to 50 students. The Court was not told how much the tuition was to attend the School.

[6] The School must of course engage teachers. In order to qualify to teach at the School, the teachers need at least a university degree but it is not necessary that they be certified as teachers. Prospective teachers need to be familiar with the Ontario curriculum and are expected to adhere to it.

[7] When a teacher is hired, that teacher must sign an Individual Contract for Services Agreement (the “Agreement”). A template of such a contract is contained in the materials filed as Exhibit A-1. This document specifies that the teacher is being taken on as an independent contractor, principally as a teacher. Either party can terminate the contract upon 30 days advance notice in writing. The place of services is principally 2347 Kennedy Road, #505, Toronto. The contract provides for an hourly rate that, according to Mr. Xu, is negotiated with the candidate teacher. The duties of the teacher are described in paragraph 4 of the Agreement:

CIC [Canada International College] is committed to delivering the highest standard of the education to all students, and it is expected that all teachers will be involved in many aspects of school life. Although contract teachers work independently, it is expected that they respect the values and integrity of the “Canada International College” brand.

As a contract teacher, you will have complete autonomy over the courses and material being taught, as long as you meet or exceed the requirements of CIC.

As a contract teacher, you will plan, develop and execute all class related duties. Any materials needed for you to successfully complete your job will be your sole responsibility to locate and purchase at your sole discretion.

Any and all financial risk and rewards related to providing services at the school, will be the sole responsibility of the contractor.

The contractor has the opportunity to create, advertise and promote any new courses at the school, and to financially benefit from enrollment. However, low class enrollment may result in termination of this contract.

The contractor, at his or her own discretion and at his or her own expense, hires an assistant, classroom helper or substitute teacher.

[8] The duties of the School are set out in paragraph 5 of the Agreement:

Canada International College agrees, through this contract, to provide the contractor a clean, safe and appropriate teaching space (classroom), help in recruiting students, secretarial services, and all administrative services required for the granting of credit courses for the contractor.

[9] The contract provides for an hourly rate but other forms of remuneration, such as a salary, can be negotiated according to Mr. Xu. The quantum and form of remuneration would depend on the qualifications of the teacher candidate and other considerations such as the needs of the School. When the teachers got paid, the School did not make any at source deductions for income tax, CPP, EI or anything else. The teachers did not have any employer paid benefits such as health, dental, vision, pension, etc. The teachers were not entitled to any paid vacations or vacation pay in lieu of vacations. There was no collective bargaining agreement. Even though the teachers were considered to be independent contractors, they did not charge the school any GST/HST. They were expected to take care of their own tax related issues.

[10] Some of the teaching contracts were for the teaching of part-time courses in the evening. Hours of operation at the school were 8am to 8pm, Monday through Friday, and some weekends from 9:30am to 5:30pm, depending on the availability of teachers and students. Courses are taught at the School's premises located at Kennedy Rd. which is the main base of operations as required by the Ministry of Education. Sometimes teachers bring their students elsewhere, like to a library or a coffee shop, or other less formal settings for their lessons. Credit courses, however,

were expected to be taught on the School's premises. Students paid tuition to the School. They may have paid the teachers for individual tutoring but Mr. Xu did not take part in that; that was out of his control.

[11] Mr. Xu indicated that he did not control enrollment. He testified that he depended on the teachers to recruit students and increase enrollment. This is a proposition that I do not accept. This was his school. Increasing enrollment was undoubtedly one of the most important aspects of his duties while only of secondary importance to the teachers. Without maintaining a sustainable enrollment, the School would fail. I am not surprised that he would encourage teachers to promote the School but it is not credible that he would abdicate such an important function to teachers whom he engaged principally to teach credit courses.

[12] Mr. Xu would advise teachers not to accept money directly from students but he really does not know if they did – that was a matter between the teacher and the student. The students were clients of the School, not of the teachers and they paid tuition to the School from which the School's operating costs, including teacher remuneration, would be paid. He partially supervised the teachers to make sure they were adhering to the provincial curriculum. However, he states that he did not check the content of the courses which begs the question; how does he know that the teachers adhered to the provincial curriculum unless he checked course content? He states that he relied on provincial inspectors from the Ministry of Education as well as feed-back from the students. In other words, he was abdicating the School's responsibilities to the teachers, the provincial inspectors and to the students themselves. He says that he let the teachers teach what they wanted but if they did not adhere to the Ontario curriculum for their assigned subjects then the teacher would be let go. It was the responsibility of the teachers to pass Ministry of Education inspections. If any courses did not meet Ministry of Education standards then any aggrieved students would have to seek redress from the individual teachers rather than from the School. This is also a proposition that I do not accept. Students paid their tuition to the School and if the School does not provide educational services according to the Ontario Secondary School Curriculum, then the students could only contractually seek a remedy against the School and not the individual teachers.

[13] It was Mr. Xu's evidence that the teachers provided their own textbooks, their own reference books and their own laptop. However, they did use the School's photocopier. Sometimes, the School would lend textbooks to students. Mr. Xu testified that if a teacher were sick, the teacher would have to find a

substitute teacher at their own expense. The School would not be involved in having a substitute teacher attend to take over the class – this in spite of the fact that the School was responsible for providing an education to the students.

[14] Pay periods varied for different teachers. Teachers would generally be paid every two weeks but sometimes the pay would be spread to every 3 months. Teachers were required to submit invoices itemizing the hours worked in order to get paid. Teachers could subcontract their work but Mr. Xu does not seem to know much about this.

[15] Basically, Mr. Xu is of the view that every aspect of the relationship between the teacher and the school was negotiated between two independent parties. There was very little supervision or control of the teachers by the School, so he says. Mr. Xu also places just about all responsibility upon the teachers and none on the School – the School was only there to provide classroom space, so it seems.

[16] The teachers did not testify. However, the Respondent presented a Book of Documents that was filed as Exhibit R-1 in these proceedings. This exhibit contains the CPP/EI Rulings as well as the results of the interviews that were held with all five teachers who are the subject of these proceedings as well as the interview of Mr. Xu. It is on the basis of these interviews that the CPP/EI Rulings were made.

[17] Tab 1 of Exhibit R-1 deals with Christine Muhlberger who taught English as a second language and business as a credit course. She was interviewed on June 2, 2016. Tab 3 deals with Ying Geng who taught English as a second language and also English and Mandarin as credit courses. She was interviewed on June 1st, 2016. Tab 6 deals with Andrew Kwa who taught English as a second language and Mathematics and Sciences as credit courses. He was interviewed on May 30th 2016. Tab 8 deals with Graham Lee who taught English as both a second language course and as a credit course. He was interviewed on June 1st, 2016. Tab 9 deals with Alysha Jagmohan who taught English as a second language and English and business as credit courses. She was interviewed on June 1st, 2016.

[18] In these interviews, the information provided by the teachers was all the same except for very minor variations. All of the teachers entered into a verbal or written agreement, and they all understood that they would be working as independent contractors. The School assigned job duties. These included preparing the subject to be taught for presentation to high school students according to an

approved curriculum. The courses would be taught using a systematic plan of lectures, discussions and audio-visual presentations. Duties also included assigning and correcting homework; preparing, administering and correcting tests; evaluating progress; determining individual needs of students and discussing results with parents and School officials; conducting discussions with students to supplement lectures if necessary; participating in staff meetings, educational conferences and teacher training workshops.

[19] All teachers stated in the interviews that the School provided the audio-visual material, documents, workbooks, speaking and presentation notes required for the performance of their duties. This is contrary to what Mr. Xu stated in his evidence. The teachers stated that they were supervised by Mr. Xu and the principal of the School. However, they worked independently when teaching in class. The teachers adhered to a fixed work schedule for the entire school year. They regularly worked Monday to Friday from 8am to 4pm. The teachers stated that the enrollment process was made directly with the School. They were instructed by the School to consider themselves as self-employed and to file their taxes accordingly. The teachers were paid an hourly rate ranging from \$20 to \$33; most of them found themselves at the lower end of this range. The rate of pay was set by the School based on workload and performance – this was not negotiated and was not negotiable, according to the teachers. The School requested that teachers submit invoices itemizing the hours worked. The teachers did not receive any protections or benefits from the School. They were not compensated for either statutory holidays or days off. Teachers performed their work personally and did not hire any replacement or substitute teachers if they were unavailable to take over a class. Teachers did not have any capital invested in this business. Teachers indicated that they were not responsible for any operating costs and were not financially liable.

[20] Mr. Xu, representing the School, was interviewed on July 11th, 2016. Mr. Xu indicated during this interview that the mutual intent of the School and the teachers was that the teachers were independent contractors, not employees. The School assigned the job duties to the teachers. These included preparing subject material for presentation to high school students according to an approved curriculum. Teaching of the courses was to be according to a systematic plan of lectures, discussions and audio-presentations. Duties of the teachers also included assigning and correcting homework, preparing, administering and correcting tests, evaluating progress, determining individual needs of students and discussing results with parents and school officials. Duties also included conducting discussions with students to supplement lectures if necessary. Teachers were also

to participate in staff meetings, educational conferences and teacher training workshops.

[21] Mr. Xu indicated in his interview that there was no guarantee of ongoing work and the Agreement could be terminated as a result of low class enrollment. The teacher could either accept the Agreement or refuse it. I find that this was basically a “take it or leave it” attitude on the part of the School and this did not permit any real negotiations between the parties. Mr. Xu stated in the interview that the teachers controlled the hours of work and the place of work. This is not correct since the written agreement provided that services were to be performed at the Kennedy Road address. The teachers were required to call or email to report their absence from work and the School was responsible for finding and paying for a substitute teacher. However, Mr. Xu in his testimony denies that he said this in the interview. I find that he did. Mr. Xu stated in the interview that the teachers were paid a fixed rate of pay that was not negotiable. This is consistent with what the teachers stated in their interviews and inconsistent with what he said in his testimony given a long time after his interview that all things were negotiable. I find that it is more probable that he did say in the interview that the rate of pay was not negotiable and I find this to be a fact. Teachers did not have any protection and the school provided no benefits. Thirty days advance notice was required to terminate the Agreement. The teachers did not have their own business cards but they were provided with the School’s business cards and encouraged to promote the School wherever they could.

[22] If I accept the evidence of Mr. Xu, then I would have to conclude that all the School did was provide an opportunity for the teachers and the students to get together for the purposes of education. The School’s only responsibility was to provide a meeting place for the teachers and the students. It would appear that the School took no responsibility at all for the education of the students. It was all up to the teachers. In my estimation, this does not reflect the reality of the situation.

Issue

[23] There is only one issue to be decided in this matter. Were the teachers employees of the School or were they engaged as independent contractors? If they were employees, then they were engaged in pensionable and insurable employment with the School within the meaning of paragraph 6(1)(a) of the *CPP* and paragraph 5(1)(a) of the *EIA* respectively. If they were not employees, then the *CPP* and the *EIA* are not applicable in the circumstances of this case.

Position of the Parties

[24] The School takes the position that all of the teachers were independent contractors during the tenure of their work at the School and they were not employees. This was the mutual intention of the parties as evidenced by the Agreement and the parties conducted themselves accordingly. The School submits therefore, that the appeals should be allowed.

[25] The Respondent submits that the teachers were employees of the School and as such were engaged in pensionable and insurable employment for the purposes of the *CPP* and the *EIA*. The Respondent alleges that the true relationship was that of employer-employee since the teachers were in a relationship of subordination to the School and the School exercised direction and control over the work performed by the teachers. The appeals should therefore be dismissed.

Analysis

[26] It is not necessary to set out the relevant provisions of the *CPP* or the *EIA* since it is clear that if the teachers were employees, then they were engaged in insurable and pensionable employment and if they were independent contractors, then they were not.

[27] Any analysis of whether a worker is an employee or an independent contractor under the common law must start with the landmark decision of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 (F.C.A.). Mr. Justice MacGuigan, speaking for the Court, adopted Lord Wright's four-in-one test as stated in *Montréal v. Montréal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161, describing it as "a general, indeed an overarching test, which involves 'examining the whole of the various elements which constitute the relationship between the parties.'" This four-in-one test involves a consideration of (1) degree or absence of control, exercised by the alleged employer; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. Neither one of these factors is determinative in and of itself under the common law. The determination requires a trial court to combine and integrate the four factors in order to seek out the meaning of the whole relationship. Justice MacGuigan also stated that the "organization test" or the "integration test", that is the extent to which the worker is integral to the employer's business, is also of assistance. The true question is whether or not the worker is carrying on business for himself or herself or on his or her own behalf rather than on behalf of the alleged employer.

[28] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (S.C.C.), Mr. Justice Major of the Supreme Court of Canada held that in the common law, the difference between an employee and an independent contractor was the element of control that the employer has over the worker. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. Justice Major was of the opinion that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. He stated as follows at paragraphs 47 and 48:

47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. 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.

48. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[29] The common intention of the parties, if it can be ascertained, is also an important factor in determining if the relationship is that of employer-employee or independent contractor but it also is not determinative. One has to look at the entirety of all of the circumstances surrounding the relationship in order to determine its true nature.

[30] In *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87 (F.C.A.), the Federal Court of Appeal was swayed by the common intention of the parties. The Court was of the view that dancers engaged by the Royal Winnipeg Ballet were independent contractors rather than employees. Justice Sharlow was of the view that the trial judge erred by not considering the intent of the parties. The parties did not intend an employment relationship to result from the contract. Justice Sharlow traced the jurisprudential history since *Wiebe Doors* at paragraphs 60, 61 and 64:

60. ... One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.

61. I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their shared intention will be disregarded.

...

64. In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[31] In the case of *1392644 Ontario Inc. (Connor Homes) v. M.N.R.*, 2013 FCA 85, Mr. Justice Mainville of the Federal Court of Appeal discussed the test to determine whether a worker is an employee or an independent contractor at paragraphs 23, 29, 33, 38, 39, 40 and 41:

23. The ultimate question to determine if a given individual is working as an employee or as an independent contractor is deceptively simple. It is whether or not the individual is performing the services as his own business or on his own account: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.) at para. 47 ("Sagaz Industries Inc.").

...

29. ... The factors to consider may thus vary with the circumstances and should not be closed. Nevertheless, certain factors will usually be relevant, such as the level of control held by the employer over the worker's activities, and 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.

...

33. As a result, *Royal Winnipeg Ballet* stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in *Wiebe Door Services Ltd.* is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant factors support and are consistent with the common intent. ...

...

38. Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a twostep process of inquiry that is used to assist in addressing the central question, as established in *Sagaz Industries Canada Inc.* and *Wiebe Door Services Ltd.*, which is to determine whether the individual is performing or not the services as his own business on his own account.

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. Minister of National Revenue*, 2011 FCA 256, 422 N.R. 366 (F.C.A.) at para. 9, “it is also necessary to consider the *Wiebe Door Services Ltd.* 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’ intent as well as the terms of the contract may also be taken into account since they color 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 with the purpose of determining whether the test set out in *Wiebe Door Services Ltd.* and *Sagaz Industries Canada Inc.* has been in fact met, i.e. whether the legal effect of the relationship the parties have established is one of independent contractor or one 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.

[32] Having set out this brief jurisprudential review I now will go on to discuss the various factors.

FIRST STEP: the subjective intent of each party

[33] All of the teachers interviewed regarded themselves as independent contractors. So did the School. The Agreement the teachers entered into defined the relationship as one of independent contractors. There were no at source deductions for income taxes, CPP or EI. There were no benefits at all, such as medical, dental etc., and no pension plan. There were no paid vacations and the teachers were not paid for statutory holidays. The teachers filed their income tax returns reporting their income as business income and some of them deducted business expenses from this revenue. Invoices for services had to be submitted. I find that the teachers and the School mutually intended and understood that the Workers were engaged as independent contractors and not as employees of the School.

SECOND STEP: does the objective reality sustains the subjective intent of the parties

[34] The subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. The objective reality part of the test requires an examination of the *Wiebe Door* criteria, as well as other factors, to determine whether the facts are consistent with the parties' subjective intention.

(i) Level of control

[35] According to the interviews of the teachers, the interview of Mr. Xu and the evidence rendered at the hearing of this matter, the School hired the teachers to teach secondary school credit courses and other courses. The teachers stated that they were supervised by Mr. Xu and the principal of the School on what duties to perform. However, they worked independently when in the class-room. According to the teachers' interviews, the School assigned job duties. These would include: preparing the subject to be taught for presentation to the students according to an

approved curriculum using a systematic plan of lectures, discussions and audio-visual presentations; assigning and correcting homework; preparing, administering and correcting tests; evaluating progress; determining individual needs of students and discussing results with parents and school officials; conducting discussions with students to supplement lectures if necessary; participating in staff meetings, educational conferences and teacher training workshops. In my view, the teachers were assigned the kind of duties that all teachers right across Canada would be expected to perform. Credit courses had to be taught at the School's base of operations located at 2347 Kennedy Road, Unit #505, Toronto. The School controlled the hours of work; it was open Monday through Friday from 8am to 4pm, although weekend classes could be permitted. Teachers had to notify the School if they would miss a class. Although teachers were encouraged to recruit students, the enrollment process was made directly with the School and students paid their tuition directly to the School and not to the teachers. On balance, I find that a consideration of the "level of control" factor is more consistent with the teachers being employees than being independent contractors.

(ii) Tools and equipment

[36] A teacher's most important tools are his or her knowledge and the ability to convey this knowledge to students. These are not the tools and equipment contemplated in *Wiebe Door*. In the instant case, the teachers also used their own laptops but personal laptops are ubiquitous in today's society – everybody has one. However, all teachers stated in their interviews that the School provided audio-visual material, documents, workbooks, speaking and presentation notes required for the performance of their duties. This is contrary to what Mr. Xu stated in his evidence. The School provided secretarial services, administrative services and photocopy services. Mr. Xu stated that the teachers had to provide all of their instructional materials including text-books, although text-books could be loaned to the teachers by the School. It is not uncommon for teachers, even those who are employees, to provide their own instructional materials. On balance, I find that the "tools and equipment" factor is a neutral factor.

The Hiring of Helpers

[37] All the teachers performed their teaching duties personally – indeed, that is why they were engaged. They had been hired to render personal services of teaching because of their individual skills and knowledge. However, the Agreement indicates that the teacher may hire an assistant, classroom helper or substitute teacher. There is no evidence that any of the teachers in fact hired an

assistant or classroom helper. All the teachers stated in their interviews that they were required to notify the School to report if they would be absent from class for reason such as illness. The School would then be responsible for finding and paying for a substitute teacher. Mr. Xu, on behalf of the School, denies this in spite of the fact that he stated in his interview that the School was responsible for covering the costs of a substitute teacher. It is the School who contracted with the students to educate them so it is the School's responsibility to provide the teachers, substitute or otherwise. I find on the balance of probabilities that the School did hire and cover the costs of substitute teachers; just like any school in Ontario would do. On balance, the "hiring of helpers" factor in the instant case is more consistent with an employer-employee relationship than it is with an independent contractor relationship.

Financial Risk – profit and loss

[38] These teachers were paid an hourly wage for their personal services ranging from \$20 to \$33, with most of them paid at the lower end of the range. The rate of pay was set by the School based on workload and performance – this was not negotiated and was not negotiable according to the teachers' interviews. The only way the teachers could increase their earnings was to work longer hours – just like employees would do. There really was no way for the teachers to make their work more efficient by sub-contracting their duties to others at a lower cost. In my view, this simply was not practical and would only result in reduced earnings for the teacher. The teachers also were not exposed to any financial risk usually associated with persons who work on their own account. None of them were in a position to realize a business profit or loss normally associated with a self-employed person. On balance, I find that the factor of "financial risk – profit and loss" is more consistent with an employer-employee relationship.

Investment and Management

[39] None of the teachers were responsible for any of the school's operating costs. They did not make any capital investments in the business of teaching and they took no part in the management of any business. There is no evidence that they advertised or otherwise promoted themselves. They did not charge GST on the services rendered. Some of them did claim business expenses in filing their tax returns but these were minimal. There is no evidence that they carried any liability insurance. They did not have a business presence and they did not promote themselves as conducting any business enterprise on their own account. They did not have any business cards of their own. They were given business cards of the

School and were encouraged to promote the services offered by the School. A consideration of this factor is more consistent with an employer-employee relationship than it is with the relationship of an independent contractor.

Integration into the Appellant's operations

[40] The degree of integration of workers into a business has to be assessed from the standpoint of the workers, not that of the business: *671122 Ontario Ltd. v. Sagaz Industries*, [2001] 2 S.C.R. 983, at 1003. In the instant case, the teachers were an integral part of the School's business operations. That is the nature of an educational institution. Without teachers there can be no school. A school without teachers is just an empty building. This factor is more consistent with an employer-employee relationship than it is with that of an independent contractor.

Fixed location of work

[41] Credit courses had to be taught at the School's premises located on Kennedy Road. That is where the classrooms were located. This of course did not preclude field trips or instructional sessions in other locations. However, this is a factor that is more consistent with an employer-employee relationship than it is with that of an independent contractor.

Other Factors

[42] The teachers did not receive any part of the tuition paid by the students to the School; they were paid an hourly wage. It was the School who determined if enrollment was sufficient to justify offering a course, not the teacher. The teachers had to meet the requirements of the Ontario curriculum; if they did not then they were discharged. The School had to exercise a sufficient level of control and supervision of the teacher in order to determine if they met the standards of the curriculum. Mr. Xu indicated that if the teachers did not meet curriculum standards then they had to give the money back that they had been paid and they also would be financially liable to the students – this is an assertion that I do not accept. The students were clients of the School, not clients of the teachers. If anyone was financially liable to the students for failing to meet curriculum standards, then it was the School since it was the School who had a contractual relationship with the students, not the teachers. All of this is more consistent with the existence of an employer-employee relationship between the teachers and the School than it is with that of an independent contractor.

Conclusion

[43] It is trite law that in tax litigation, the initial burden of proof is on the taxpayer: *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336. In the instant case, the Appellant has failed to discharge its onus. On balance, a review of the entirety of the relationship in the light of the parties' subjective intention satisfies me that the true nature of the relationship that existed between the teachers and the School was that of employer-employee and not that of independent contractors during the periods under review. As a result, the teachers were engaged in insurable and pensionable employment within the meaning of the *EIA* and the *CPP*, respectively, during the periods.

[44] For all of the foregoing reasons, the appeals are dismissed, without costs.

Signed at Kingston, Canada, this 15th day of May 2019.

“Rommel G. Masse”

Masse D.J.

CITATION: 2019 TCC 117

COURT FILE NO.: 2017-1715(CPP)
2017-1717(EI)

STYLE OF CAUSE: CANADA SUN EDUCATION INC. AND
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 31, 2019

REASONS FOR JUDGMENT BY: The Honourable Rommel G. Masse, Deputy
Judge

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APPEARANCES:

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