

Docket: 2010-2539(EI)

BETWEEN:

LA SCALA CONSERVATORY OF MUSIC II,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeal of
La Scala Conservatory of Music II, 2010-2540(CPP)
on January 19, 2011, October 3, 4, 5, 6 and 7, 2011
and on March 18, 19 and 20, 2013, at Toronto, Ontario.

The Honourable Justice David E. Graham

Appearances:

Agents for the Appellant: Maria Piperni and Mauro Piperni
Counsel for the Respondent: Alisa Apostle and Christopher Bartlett

JUDGMENT

The Appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- (a) Ashley Hilmarson was not engaged in insurable employment in 2008 and 2009;
- (b) Candice Hilmarson was not engaged in insurable employment in 2009;
- (c) Robert Paul Jacobs was not engaged in insurable employment in 2008 and 2009;

(d) Michael Watson was not engaged in insurable employment in 2008 and 2009; and

(e) Robert Simpson was not engaged in insurable employment in 2008.

Signed at Ottawa, Canada, this 6th day of May 2013.

“David E. Graham”

Graham J.

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Appearances:

Agents for the Appellant: Maria Piperni and Mauro Piperni
Counsel for the Respondent: Alisa Apostle and Christopher Bartlett

JUDGMENT

The Appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- (a) Robert Paul Jacobs was not engaged in pensionable employment in 2008 and 2009;
- (b) Michael Watson was not engaged in pensionable employment in 2008 and 2009; and
- (c) Robert Simpson was not engaged in pensionable employment in 2008.

Signed at Ottawa, Canada, this 6th day of May 2013.

“David E. Graham”

Graham J.

Citation: 2013 TCC 122
Date: 20130506
Dockets: 2010-2539(EI)
2010-2540(CPP)

BETWEEN:

LA SCALA CONSERVATORY OF MUSIC II,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] The Appellant is a partnership of a husband and wife named Mauro and Maria Piperni. The Appellant operates a music store known as L.A. Music. Throughout the Appeal, the Appellant was simply referred to as L.A. Music.

[2] L.A. Music sells musical instruments to the general public and, at various times in the period in question, also offered music lessons. L.A. Music engaged in various other activities during the period but those activities are not relevant to the Appeal.

[3] The Minister of National Revenue assessed L.A. Music for Employment Insurance premiums and Canada Pension Plan contributions for the period from January 1, 2007 to April 30, 2009 in respect of 19 workers that the Minister concluded were engaged in insurable and pensionable employment under the *Employment Insurance Act* (“Act”) and the *Canada Pension Plan* (“Plan”) and a further 4 workers (the sons and daughters of Mauro and Maria) that the Minister concluded were engaged in pensionable employment under the *Plan*. A list of the 23

workers and the years during the period in question in which they worked is attached as Schedule “A”.

[4] L.A. Music contends that the 23 workers were independent contractors and thus no premiums or contributions were payable and has appealed the assessments on that basis. The sole issue before me is whether the workers were engaged in insurable and pensionable employment in the periods in question.

PROCEDURAL HISTORY

[5] This Appeal was heard over 9 days. The first 6 days of the Appeal were heard by Justice Wyman Webb before his elevation to the Federal Court of Appeal. Following Justice Webb’s elevation, L.A. Music was given the choice of starting the trial over with a new judge or continuing the trial with a new judge who had read the transcripts of the first 6 days of hearing. L.A. Music elected to continue the trial with a new judge who had read the transcripts. Accordingly, I reviewed the transcripts of the first 6 days of hearing in detail and presided over the remaining 3 days of trial.

LAW

[6] In its very recent decision in *1392644 Ontario Inc. v. M.N.R.*, 2013 FCA 85, [2013] F.C.J. No. 327, (“*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. Prior to this decision, there had been some confusion in the jurisprudence whether the intention of the parties was to be considered before or after applying what is commonly referred to as the *Wiebe Door* analysis¹. 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.

¹ Argument in this Appeal was heard prior to the decision in *Connor Homes*. I invited and received additional submissions from both parties after the decision in *Connor Homes* was rendered.

[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. ...

[7] Based on the foregoing, I will first examine the parties’ intention and then consider whether the reality of their relationship was consistent with that intention using the *Wiebe Door* factors as set out in paragraph 41 of *Connor Homes*.

WITNESSES

[8] A total of 11 witnesses testified.

[9] Michael Watson testified for L.A. Music. He is a retired CRA employee who worked for L.A. Music during the relevant period and continues to work there. He is clearly knowledgeable about the differences between employees and independent contractors. As an ongoing worker at L.A. Music, he had a reason to support L.A.

Music. In my view, his knowledge of the law and his desire to support L.A. Music caused him to embellish his testimony where he felt it would benefit L.A. Music. For that reason, where his testimony conflicts with the testimony of other, more reliable witnesses, I have preferred the evidence of those witnesses over his.

[10] Kevin Pooler testified for L.A. Music. I found him to be the most reliable of all of the witnesses. He appeared to answer questions honestly with no attempt to tailor his evidence to a specific outcome.

[11] Mark Rudyj testified for L.A. Music. He was terminated by L.A. Music during the period in question and clearly still bears a grudge against L.A. Music. In my view, his grudge caused him to slant his testimony in favour of the Respondent. For that reason, where his testimony conflicts with the testimony of other, more reliable witnesses, I have preferred the evidence of those witnesses over his.

[12] Robert Paul Jacobs (known as Paul Jacobs and referred to as such herein) testified for L.A. Music. I found him to be a reliable witness.

[13] Dragan Petrovic testified for L.A. Music. I found him to be a reliable witness. While he clearly had a strong view about his status as an independent contractor, I do not feel he made any attempt to slant his testimony to support that outcome.

[14] Victor Miolla testified for L.A. Music. I did not find him to be a reliable witness. Despite repeated objections from counsel for the Respondent and repeated warnings from Justice Webb, Maria Piperni asked leading questions on direct examination to many of L.A. Music's witnesses. I found those leading questions to be particularly prevalent during her direct examination of Victor Miolla. Victor continues to work with L.A. Music today and thus had an evident willingness to be lead by Maria. Except where noted, I have essentially disregarded Victor's testimony.

[15] Maria Piperni testified on her own behalf. I found that Maria frequently exaggerated evidence where she felt that doing so would benefit her case and was on occasion evasive. For this reason, where Maria's evidence is contradicted by evidence of other workers I have generally preferred the evidence of the other workers and, in some circumstances, I have simply not accepted Maria's evidence.

[16] Mauro Piperni testified on his own behalf. There were numerous occasions where he was lead by Maria Piperni in direct examination. I have given less weight to his evidence in those circumstances. Like Maria, Mauro tended to exaggerate evidence and thus there are a number of circumstances where I have preferred the

evidence of other witnesses over that of Mauro or have simply not accepted Mauro's evidence.

[17] Antonio Moreira testified for the Respondent. I found him to be a reliable witness. Despite the fact that he was terminated by L.A. Music sometime after the period in question and clearly dislikes the Piperni's, I found that he answered questions posed to him in a straightforward manner with little attempt to slant his evidence against L.A. Music. While his recollection of dates was weak, I found it to be as a result of the passage of time rather than any desire to mislead the Court. My confidence in his testimony is strengthened by the fact that his evidence was generally consistent with that of Kevin Pooler who I found to be a very reliable witness.

[18] Robert Simpson testified for the Respondent. He chose to stop working for L.A. Music during the period in question but, at the time of his testimony, was actively seeking to start working for them again. As a result, he had a clear motivation to please Maria and Mauro. This desire to please was evident in his answers when he was being cross-examined by Maria. Despite that, I found his testimony to be generally reliable.

[19] Riley O'Connor testified for the Respondent. I found him to be a reliable witness. Despite the fact that he views himself as having been terminated by L.A. Music sometime after the period in question and clearly holds a grudge against L.A. Music, he did not appear to slant his testimony as a result.

[20] Despite numerous objections from counsel for the Respondent and repeated warnings from Justice Webb, both Maria and Mauro continued to attempt to put facts in evidence through the questions that they were asking witnesses. I have not considered any such "facts" to be evidence.

ANALYSIS

[21] For simplicity, I will break my analysis of the 23 workers down into two groups: workers who were members of the extended Piperni family (i.e. the Piperni's and the Hilmarson's) and workers who were not.

Non-Family Workers

Intention

[22] The first step in *Connor Homes* is to examine the parties' intentions.

[23] There is no question that L.A. Music's intention was that each of its workers be independent contractors. The question is whether that intention was shared by the workers. Michael Watson, Paul Jacobs, Dragan Petrovic and Robert Simpson all intended to be independent contractors from the time that their work with L.A. Music began. The intentions of the other workers are less clear.

[24] L.A. Music entered into written contracts with its non-family workers². A sample contract between L.A. Music and Michael Watson is duplicated in Schedule "B". The written contracts were essentially identical. The only significant exceptions were the name of the worker and the description of the skills that the worker possessed that were set out in subsections 1(2) and 1(4) of the written contract.

[25] Maria prepared the written contracts using some samples that she found on the internet. The contracts were prepared in 2008 after the CRA began auditing L.A. Music. They were clearly an attempt by L.A. Music to provide the CRA with written proof of the parties' intentions and to document those intentions going forward.

[26] Workers who were already working at L.A. Music prior to the audit under oral contracts were asked to sign the written contracts. Workers who began work with L.A. Music after the audit commenced signed the written contracts at approximately the same time as they commenced work. In a number of cases the written contracts were backdated to give the impression that they had been signed when the worker started with L.A. Music.

[27] Despite L.A. Music's assertions to the contrary, I find that the written contracts do not represent the actual terms of L.A. Music's contractual agreement with any of the workers.

- (a) Subsection 1(6) of the written contract states that the workers "will be available to teach lessons, classes, and clinics on a need basis." The only workers who actually taught lessons were Michael Dorosz and

² My understanding was that all such contracts had been filed as Exhibits. However, a review of the Exhibits shows no contracts for Tim Guerin, Archy Hachey, Lorne MacMillan, Kyle Ray, Matthew Sprague and Graham Wallace. None of these workers testified. Given my conclusions set out below regarding the contracts and regarding workers who did not testify, nothing turns on the fact that these contracts, if they existed, were not filed as Exhibits.

Riley O'Connor. There was no evidence that any of the other workers ever taught lessons at L.A. Music. With the exception of Riley O'Connor, none of the workers who testified indicated that they believed teaching was part of what they had contracted to do. In fact Dragan Petrovic testified that he was asked to teach and refused to do so.

- (b) Section 3 of the written contract states that the workers “will carry liability insurance relative to any service that he or she performs” for L.A. Music. None of the workers who testified carried such insurance nor was L.A. Music able to provide an example of any worker who had carried such insurance.
- (c) Section 4 of the written contract purported to deal with compensation. The workers who testified made it clear that the daily or hourly rate that they were paid was something that was negotiated up front yet the written contract simply states that “L.A. MUSIC shall award the Independent Consultant the amount As [sic] agreed to by both parties, awarded at the end of each period of service.” The rate of pay is not specified nor is there any mention of L.A. Music’s bonus system. I accept that the rate of pay and timing of payment differed from worker to worker and thus that it may have been more convenient for L.A. Music to describe the compensation in general terms such as these. However, I do not accept that either party would have signed a contract on such vague terms if their true intention had been to accurately document the terms of their relationship as opposed to simply creating a piece of paper to show to the CRA.
- (d) Each worker who testified made it clear that the hours and days that they worked and their ability to choose not to work on a given day was something that was negotiated up front and that was very important to them. Yet the written contract is completely silent in this respect.

[28] Maria explained that the above inconsistencies were due to the fact that she was not legally trained and that she had pieced together the contract from the internet. While I accept that that is the case, I am not prepared to simply ignore the inconsistencies in the written contract but still accept that it accurately represents the parties’ intention that the workers are to be independent contractors. Either the written contract is a full and accurate representation of the parties’ agreement or it is

window dressing. Accordingly, I give no weight to the terms of the written contracts in assessing the parties' intentions.

[29] While I do not accept that the written contract reflects the terms of the agreement between L.A. Music and the workers who signed the contracts, I do accept that the fact that a given worker signed the written contract could be evidence of an ongoing intention on the part of the worker to be an independent contractor. In other words, I accept that a worker who wanted to be an independent contractor may have been prepared to sign a written contract that purported to support that intention regardless of the contents of the rest of the contract. In order to make this determination, I would need to look at the circumstances under which each worker signed the contract.

[30] There was conflicting testimony regarding the circumstances in which the written contracts were signed.

- (a) Kevin Pooler testified that the contract was presented to him by L.A. Music sometime after he started working and he was told that it was something that he needed to sign. He took it home and reviewed it before signing it. He did not feel that he had any choice but to sign it. While he was not explicitly told that he would lose his job if he did not sign the contract, he believed that he would.
- (b) Antonio Moreira testified that he signed the contract because he needed the work.
- (c) Mark Rudyj testified that Mauro's and Maria's son, Michael Piperni, told him that if he did not sign the contract he would not be paid for the work he had already done. While I accept that Mr. Rudyj felt pressured to sign the contract and that that pressure came from Michael Piperni, I do not accept that he was threatened in the manner described. No other worker testified that he had been threatened in this manner. In addition, cheating a worker out of pay for work that he had already done appears to be completely inconsistent with the type of environment which I accept that L.A. Music was trying to create for its workers. As explained above, where Mr. Rudyj's testimony conflicts with the testimony of other workers, I prefer the testimony of the other workers as he clearly bears a grudge against L.A. Music.

- (d) Riley O'Connor testified that he signed the contract because he was afraid that he would lose his job and because he was afraid of what the CRA might do if they audited him.
- (e) Paul Jacobs testified that he was given the contract and told to read it over. He took it to his accountant to review before he signed it. He did not make any changes to it.
- (f) Dragan Petrovic testified that he reviewed the contract with his lawyer before signing it because his understanding of contractual English is not strong. He stated that he did not feel pressured to sign the contract and felt that he could have had a term changed if he had wanted to.
- (g) Robert Simpson testified that he was told that the contract needed to be signed to support L.A. Music's dispute with the CRA. He stated that he did negotiate to have the word "liability" removed from the insurance provision. This is the only evidence that was presented of any worker actually negotiating a term of the contract.
- (h) Michael Watson testified that everything in his contract was negotiated and discussed before he signed it. He stated³:

... In the sense that this contract was the subject of negotiated discussions, everything in here was something that we discussed before the contract was drawn up. This simply formalizes a discussion or a negotiated process that we went through.

I do not accept Mr. Watson's evidence. I find it extremely unlikely that Mr. Watson would negotiate and discuss each clause only to end up signing a contract that was essentially identical to the contract signed by everyone else and which actually did not reflect the terms of his agreement. This is a key example of the way in which Mr. Watson embellished his testimony in an attempt to favour a finding that he was an independent contractor. That said, while I do not find him to have been a credible witness on this point, I still accept that the reason that he signed the contract was to evidence his ongoing intention to be an independent contractor.

³ Transcript of January 19, 2011, page 70, lines 3 to 8.

- (i) Maria testified that she gave each worker the choice of whether to sign the contract and continue as an independent contractor or to become an employee. While I accept that she gave that choice to some of the workers, I do not believe that she gave it to all of them as the workers' testimonies do not support that fact. Maria asserted that no workers were pressured to sign the contract. I do not accept her testimony on that point. Given the testimony of the other workers, I cannot believe that there was not some level of pressure exerted.

[31] In summary, it is clear to me from the above testimony that those workers who clearly wanted to be independent contractors (i.e. Michael Watson, Paul Jacobs, Dragan Petrovic and Robert Simpson) felt they were under no pressure to sign the contract and everyone else felt as if they had no choice. As I have not accepted Maria's testimony on this issue, I have no evidence on which to assess the circumstances in which the non-family workers who did not testify signed the contract. Given the conflicting evidence that I have heard from the witnesses who testified, I am not prepared to draw any conclusions as to the remaining non-family workers' intentions from the fact that they signed the written contract.

[32] The parties spent a great deal of time examining whether the workers fully understood what it meant to be an independent contractor. There was a lot of testimony about discussions that Maria may or may not have had with workers about the distinction between employees and independent contractors and the benefits of being one or the other before they signed the contracts⁴. In my view, nothing turns on this. To the extent that the workers' understanding of the distinction is relevant, it would be their understanding at the time they began working, not the time they signed the contracts. The evidence from the remaining workers who testified indicates that while they were all clearly hired as independent contractors they did not feel that that was the true nature of their relationship with L.A. Music⁵.

⁴ Maria's statement that she explained the distinction and benefits to each of the workers prior to their signing the contracts is not supported by the testimony of the workers. I accept that she did discuss the benefits of being an independent contractor with some of the workers and that some of those discussions may have taken place before the contracts were signed but I do not accept that she had the discussion with all of the workers, nor do I accept that all of the discussions that she had occurred before the contracts were signed nor do I accept that she explained the benefits of being an employee.

⁵ For the reasons set out above I have not given any weight to Victor Miolla's evidence on this point.

- (a) Kevin Pooler testified that he felt he was working for L.A. Music nine-to-five and running his own recording business on the side.
- (b) Antonio Moreira testified that he felt he was an employee.
- (c) Riley O'Connor testified that he felt he was an employee both when he started working at L.A. Music and when he signed the contract. He stated that he did contract work in other aspects of his life and that his 3 years with L.A. Music did not feel like contract work.
- (d) Mark Rudyj testified that he never felt he was an independent contractor. As set out above, I feel that Mr. Rudyj was slanting his testimony against L.A. Music. I do not therefore completely accept his statement but I am prepared to accept that he was at least unsure of his status.

[33] Given this testimony, I find that Kevin Pooler, Antonio Moreira, Riley O'Connor, Mark Rudyj and Victor Miolla did not intend to be independent contractors.

[34] The Respondent did not make an assumption of fact regarding the intentions of the workers. Maria and Mauro testified that the remaining workers intended to be independent contractors. However, they said the same thing about the above workers. In light of the above evidence which contradicts Maria's and Mauro's evidence, I am not prepared to accept that the workers about whom I have no other evidence intended to be independent contractors based simply on the fact that they accepted the job on that basis.

[35] In conclusion, I find that the only non-family workers who shared a common intention with L.A. Music as to the nature of their relationship are Michael Watson, Paul Jacobs, Dragan Petrovic and Robert Simpson. Thus, for those four workers following the test set out in *Connor Homes*, I must consider whether the objective reality supports their subjective intention. For the remaining non-family workers, I must simply consider whether the objective reality indicates that they were independent contractors or employees.

[36] I will apply the *Connor Homes* test to each worker individually. However, because much of the evidence relating to the objective relationship is common to all of the workers, I will first review that evidence, I will then use that evidence when

examining the particular circumstances of each worker in light of their intentions or lack thereof.

Control

[37] During the period in question, L.A. Music initially operated two stores. Sometime in 2008, they closed the second store. The store that was closed had previously conducted some sales and was home to L.A. Music's rental business. The rental business is not relevant to the issues before me as none of the workers were involved in it. I heard almost no testimony about the physical layout of the store that was closed down. Substantially, all of the evidence was focused on the remaining store.

[38] The remaining store consisted of approximately 12,000 square feet spread out over 3 floors and a basement area. Sales occurred on the first and third floors. The store was a converted office space and, despite renovations, it kept the feel of a number of separate spaces with a central lobby on each floor. Thus the drums department, for example, was not part of a large open store but rather occupied a self-contained space off the central lobby on the third floor. The first floor contained an acoustic guitar room and the electric guitar department. The second floor was used for music lessons and also held some office space that was rented out to third parties. The lessons were run by L.A. Music during part of the period in question and by a third party during the remainder of the period. The third floor contained the keyboards, drum and pro audio⁶ departments. The basement was used for storage and inventory.

[39] L.A. Music operated its store in what appears to be a relatively unique manner in the local industry. L.A. Music hired salespeople who were highly skilled at playing one or more instruments or, in the case of the pro audio area, highly skilled in the programming and operation of the relevant equipment. All of the salespeople came to L.A. Music with a pre-existing intimate knowledge of the instruments, equipment and/or software in their given area of expertise. The salespeople were passionate about their area of expertise outside of work and they brought that passion with them to work. Sales to customers were made, not by pressuring the customer to purchase a given instrument, but rather by having these highly proficient salespeople demonstrate their skills on various instruments or equipment in order to inspire a

⁶ "Pro audio" is short for "professional audio". The term was not clearly defined in the testimony but it appeared to cover sound and possibly lighting systems designed for large audiences (e.g. a concert) as well as professional recording and mixing equipment.

customer to buy that instrument or equipment. If one walked into L.A. Music's store on a given day, it would not be unusual to come across one or more of its salespeople giving impromptu performances in order to inspire the customers.

[40] L.A. Music's strategy was to find workers with the skills necessary to inspire customers and then to set those workers loose in the relevant department to see how they performed as salespeople. The workers did not receive training. They came to the job with the necessary musical skills. They were not trained in either sales techniques or, in the case of the workers who also taught music lessons, teaching techniques. This argues in favour of an independent contractor relationship.

[41] There was a great deal of testimony concerning the flexibility that the workers enjoyed in their working hours and days. It was clear that the flexibility that the workers enjoyed was one of the primary reasons that the workers chose to work at L.A. Music and one of the primary reasons that L.A. Music was able to attract and retain workers.

[42] When a potential worker first met with L.A. Music, he or she would negotiate the days and hours that he or she would work. Most workers agreed to work from store opening until store closing on whatever day they worked but some negotiated a later start or an earlier end to their day due to other commitments. Mauro characterized this flexibility in setting the initial days and hours to be worked as being indicative of an independent contractor relationship. I do not agree. This level of flexibility would equally be present when an employee applied to work part-time for an employer who had a variety of available shifts.

[43] However, what was unusual about L.A. Music's relationship with its workers was that its workers could, and frequently did, simply advise L.A. Music that they would not be coming to work for some or all of a given day or days. The workers were not required to ask permission to be absent⁷. It was essential that L.A. Music offer this level of flexibility to its workers in order to attract the type of talent that they wanted. For the vast majority of the workers, this flexibility was the primary reason that they were at L.A. Music rather than another music store. The workers were musicians or technicians first and salespeople second or even third. All of the

⁷ While Mauro and Maria would like me to have believed that it was not necessary for workers to even advise them that they would not be there, I do not accept that to be the case. Whether it was stated or not, it was clearly understood by the workers that they needed to advise Mauro, Maria, Michael Piperni or Rob Piperni if they were going to be absent. However, nothing turns on this, I would expect workers to advise their payor of an intended absence whether they were independent contractors or employees.

workers had outside musical interests which could unexpectedly require their attention and which were a higher priority for them than their L.A. Music work. For example, many of the workers played in bands. If the opportunity for a gig arose unexpectedly, it was understood that the workers would simply advise L.A. Music that they would not be available to work. The same was true for vacations. If workers wanted to take a vacation, they simply advised L.A. Music of the days that they would be absent. While there was an expectation that workers who were going to be absent would try to arrange to have another worker from their department cover their shift, the workers were not required to do so. This unusual level of flexibility strongly supports independent contractor status.

[44] Mauro and Maria both testified that workers could simply show up at the store when they wanted to work more days or hours and they would be allowed to work. I do not accept their testimony on that point. Not only does it make no commercial sense, it was also not supported by any of the workers who testified and was, in fact, contradicted by a number of them. I find that if workers wanted to increase, decrease or change their working days and hours, they had to negotiate that with L.A. Music. However, this ability to negotiate is not indicative of an independent contractor relationship. This same level of flexibility to negotiate changes would equally be present for a part-time employee.

[45] Subject to workers advising L.A. Music that they would be absent for part of a day, the workers' hours of work were fixed. However, I do not think that these fixed hours suggest an employment relationship. The fixed hours were generally the hours that the store was open. L.A. Music needed workers to sell equipment during its store hours. It was not interested in having workers work at midnight.

[46] Generally speaking, the work was done at L.A. Music's store⁸. The fact that the location of the work was determined by L.A. Music does not argue for either independent contractor or employee status. L.A. Music was a retail business operating out of a fixed location. It needed its workers to sell equipment at its store.

[47] All of the salespeople were required to demonstrate and sell instruments, equipment and related accessories and to help customers with any questions or

⁸ The evidence disclosed that there were a few occasions where pro audio workers were asked to work offsite at a location where L.A. Music was supplying pro audio equipment but it was clear that this was done at L.A. Music's request.

problems that they had. However, some of the salespeople had additional duties⁹. In my view, there were 2 categories of salespeople. The first category of salespeople was those whose job was purely to sell instruments and equipment and to help customers with questions or problems. I will describe this category as the “pure salespeople”. The second category of salespeople was those who, in addition to sales, were required to perform a range of other duties more closely related to the general operations of the store such as unloading deliveries, moving inventory, setting up displays, pricing products, updating pricing on the L.A. Music website and cleaning. I will describe this category as the “sales workers”. The narrow duties of the pure salespeople indicate neither employee nor independent contractor status. However, the more general duties of the sales workers are more consistent with an employment relationship.

[48] There was conflicting evidence regarding whether the workers were supervised or not. For the reasons set out in more detail under my analysis of the relationship of Michael Piperni and Maria’s and Mauro’s other son, Rob Piperni, with L.A. Music, I find that Michael Piperni and Rob Piperni were supervisors at L.A. Music. I also find that Mauro and Maria acted in a supervisory capacity.

[49] There does not appear to have been much in the way of supervision of the actual sales activities. In fact, this appears to have been intentional on L.A. Music’s part as it was L.A. Music’s belief that creative personalities do not thrive in controlling environments. No one was looking over the workers’ shoulders telling them how to sell. However, L.A. Music had sales policies which the workers had to follow. Those policies governed such things as customer relations, refund policies, exchange policies, returns policies and discounts. As it would be normal for a company hiring workers to set parameters within which the work was to be performed, I find these policies do not point towards either independent contractor or employee status.

[50] The only supervision in the sales process occurred when a customer asked a worker if they could have a discount. In this case the worker was required to seek approval from a supervisor¹⁰. I do not view the simple need to seek approval in that circumstance as being indicative of an employment relationship.

⁹ Maria objected to the use of the word “duties”. In her view, the workers always had a choice whether to do the additional tasks assigned to them or not. It is clear from the evidence of most of the workers that they did not feel this way. I accept those workers’ viewpoint on this issue.

¹⁰ In his testimony Michael Watson testified that he had authority to give discounts. This testimony was contradicted by many other witnesses including Mauro. L.A. Music had a general policy of offering discounts for cash payments during certain times of the year. It appears to me that

[51] Based on the foregoing, I conclude that the pure salespeople had little supervision. By contrast, the presence of supervision was more noticeable for the types of duties performed by the sales workers. Workers who I would classify as sales workers described themselves as being told by a supervisor to perform various activities and as feeling that they had no choice but to do so. This is indicative of an employment relationship.

[52] Salespeople who were also teachers were not supervised in their teaching duties. They were told when and where to teach but not how. That said, one does not expect a high level of supervision of a teacher regardless whether he or she is an employee or an independent contractor.

[53] Workers did not receive sick days or vacation pay. This is consistent with an independent contractor relationship.

[54] Workers were not prohibited from working for competitors in the retail music business although there was no evidence that any of the salespeople actually did so. There was evidence that a number of the workers were involved in bands or other music related businesses on their own time. I do not consider these activities to be in competition to L.A. Music's business. Some workers competed with L.A. Music's music lessons by offering their own lessons. Paul Jacobs was in the process of opening his own music store (albeit far enough away from L.A. Music that it would not compete directly with them) while he was working at L.A. Music. Overall, the fact that the workers could compete and, in the case of lessons, did compete argues in favour of independent contractor status.

[55] The workers were permitted to give their names and contact information to customers who might be interested in hiring them outside of L.A. Music to provide certain services. For example, Kevin Pooler testified that he would give his contact information to customers who might be interested in his recording services. Riley O'Connor also testified that he gave customers his contact information for his personal music instruction business. This factor argues in favour of independent contractor status.

Mr. Watson was trying to make it seem as if this cash payment policy amounted to his giving a customer a discount. This is another example of why I concluded that Mr. Watson was embellishing his testimony to favour L.A. Music.

[56] The frequency with which workers were paid varied from worker to worker and was set at the discretion of the worker. Most workers were paid weekly. Some were paid every two weeks and others monthly. Regardless of the frequency of payment, the workers were paid on the last day of the pay period for all work performed up to and including that day. The variation in the frequency of payment argues slightly in favour of independent contractor status but the fact that payment was made immediately at the end of the period for all work up to the end of the period is more typical of an employment relationship. Therefore, overall, I consider this factor neutral.

[57] Prior to the CRA audit, the workers did not issue invoices. Sometime after the audit commenced, L.A. Music informed the workers that they would not be paid if they did not issue written invoices. The decision to require invoices was clearly motivated by a desire to create documents that supported an independent contractor relationship. Thus I attach no weight to the actual physical invoices. Prior to the audit, workers simply kept track of the number of days they had worked and the number of bonuses that they had earned and advised L.A. Music orally how much money was owed to them. There was no formal method employed by L.A. Music to track workers' days or sales. Maria testified that the operation was small enough that they just knew who had worked when, what they had sold and what they were owed. Overall, I do not find the presence or lack of invoices useful in determining the workers' status.

[58] Some of the above factors indicate that the workers were independent contractors. Others indicate that they were employees. In my view the most significant factors are the flexibility that the workers enjoyed in scheduling their work, the duties they performed and the corresponding level of supervision that they were subject to. The remaining factors taken as a whole are effectively neutral. Therefore, when applying the *Connor Homes* test to each worker below I will focus primarily on the issues of flexibility, duties and supervision.

Tools

[59] The Respondent submitted that the store itself, the inventory, the floor models and all of the furniture, fixtures and equipment were tools provided by L.A. Music. While I accept that those items were supplied by L.A. Music, I do not accept the Respondent's position that they were all tools. The Respondent's position presupposes that the issue in this appeal is whether the workers were in the business of selling musical instruments. That is not the issue. The business of selling musical

instruments is L.A. Music's business. The issue is whether the workers were in the business of providing salesperson services. There were a limited number of tools actually required for the salespeople to do their jobs. L.A. Music's sales strategy was to sell instruments by using the workers' performances. Thus the key tool required was demonstration instruments and equipment. Those instruments and equipment were owned by L.A. Music¹¹. Without them, the salespeople could not inspire the customers and thus, under L.A. Music's business model, would have a harder time making sales.

[60] For the teachers, the instrument that the student was learning on was also a tool that was required. With the exception of an old pair of cymbals provided by Riley O'Connor, the instruments the students learned on were provided by either L.A. Music or the students themselves. Maria indicated that Michael Dorosz brought in his own guitar for his own use while teaching.

[61] Maria testified at length about workers providing laptops and SCSI drives¹². I found her evidence on this point to be unreliable and have not given it any weight except where it was supported by other witnesses. In general, Maria's testimony on this point was more of a recitation of things that workers had brought with them to the store at one point or another rather than a description of specific tools that the workers actually used in their work. For example, she described Kevin Pooler and Antonio Moreira as using their laptops at work. Mr. Pooler, who I have found to be a very reliable witness, made no mention of a laptop when he was asked what tools he provided. Mr. Moreira testified that he brought his personal laptop to work but never used it for anything to do with work.

[62] For the sales workers who were required to update L.A. Music's website, a computer was clearly a tool required but the computers for that task were provided by L.A. Music.

[63] L.A. Music appeared to believe that the tools that its workers owned for use in their business ventures outside of L.A. Music were tools that should be taken into account when considering the tools test for their relationship with L.A. Music. I do not accept this position. Take, for example, Kevin Pooler, who has thousands of

¹¹ While there was some evidence that workers occasionally brought in their own instruments, the vast majority of demonstrations were conducted on instruments and equipment provided by L.A. Music since the goal was to sell L.A. Music's instruments, not the workers' instruments.

¹² My understanding is that a SCSI drive is a device for storing electronic data that can be connected to instruments or equipment.

dollars of recording equipment that he uses in his recording business. While work on that equipment may make Mr. Pooler more knowledgeable about and skilled at operating the equipment that he demonstrates and sells at L.A. Music, that does not mean that his recording equipment is a tool that he uses in his activities as a salesperson.

Chance of Profit

[64] The workers were paid a flat daily rate. The rate was negotiated when they were hired.

[65] L.A. Music paid bonuses to workers who achieved certain daily sales targets. The exact mechanics of the bonus system were unclear from the testimony. Either the system differed among the workers or the workers' recollection of the system differed. Nothing turns on these differences. The system described by Paul Jacobs appears to be fairly typical. He testified that he would receive a \$25 bonus for generating \$3,500 in sales and a \$50 bonus for generating \$5,000. While there was evidence of some workers earning bonuses during specific busy times of the year like Christmas, in general it appeared that bonuses were not common among the workers and it was clear that some workers earned almost no bonuses.

[66] L.A. Music argued that the bonus system provided the workers with an opportunity for profit. The Respondent argued that the opportunity to earn more by being good at selling instruments and equipment was not an opportunity for profit. The Respondent relied on the Federal Court of Appeal decision in *City Water International Inc. v. The Queen*, 2006 FCA 350, [2006] F.C.J. No. 1653. In *City Water* the Court considered whether service technicians were employees or independent contractors. The technicians were paid by the hour and were given a \$200 monthly incentive bonus if they avoided recall work. That bonus was reduced by \$50 for each recall until the \$200 was exhausted. The Court concluded, at paragraph 24, that “[w]hile [the technicians] may have had an incentive to work harder and get paid an extra \$200, this is not the same as the commercial risk of running a business ...”. Based on *City Water*, I agree with the Respondent that L.A. Music's bonus system did not, in itself, create a chance of profit.

[67] The workers did not subcontract their shifts nor do I accept that they were free to do so. Thus, they could not profit by subcontracting. When a worker was absent and they arranged for another worker to take their place, the other worker was paid his own daily rate not the rate of the absent worker and was paid directly by L.A.

Music not by the absent worker. All of these factors argue in favour of an employment relationship.

[68] For salespeople who were also teachers, Riley O'Connor testified that the rate that students paid was set by the store and that his remuneration for teaching was simply part of his daily rate of pay. Maria testified that the rate that the students paid was set by negotiations between the teacher and the student. I prefer Mr. O'Connor's evidence over Maria's as it is more logical. I cannot imagine why L.A. Music would leave it in the teacher's hands to negotiate the rate when the teacher had no financial incentive to negotiate a higher rate.

[69] Although this point was not specifically argued by L.A. Music in its submissions, based on certain questions asked of witnesses it appeared that L.A. Music may have believed that the sales work that a given worker was doing was part of a larger music business carried on by the worker. I do not accept this position. Take, for example, Michael Watson. While he plays drums in a band and sells drums at L.A. Music, I do not consider him to have an overall drum business encompassing both activities. His band may be a business in which he uses drums as a tool to make music. That business does not have any connection to his work at L.A. Music. In his band he sells a performance, at L.A. Music he sells drums. The fact that the band may be a business activity carried on by Mr. Watson does not affect my decision as to whether his sales activities are a separate business activity or not.

Risk of Loss

[70] The workers were paid a guaranteed daily rate regardless of the amount of instruments and equipment they sold. They had few, if any, expenses. Mauro testified that he never sent a worker home if he had too many workers. Thus, workers were not only guaranteed their daily rate but were also guaranteed not to have their number of scheduled days reduced unexpectedly.

Conclusion

[71] Having reviewed the evidence which is common to all of the non-family workers, I will now apply the *Connor Homes* test to each of them.

- (a) Paul Jacobs: As set out above, Mr. Jacobs intended to be an independent contractor. The objective reality of his relationship with L.A. Music supports that intention.

Control: Like all of the other workers, the flexibility Mr. Jacobs had in determining when he worked argues strongly in favour of independent contractor status. Mr. Jacobs was a pure salesperson. He testified that he did not clean up the store or perform any similar types of labour. While at one point he helped the store to create some signage using his fine arts skills, I do not consider that activity to put him into the category of sales worker. As a pure salesperson, Mr. Jacobs had limited supervision over his activities. In addition to his regular sales activities, Mr. Jacobs had a unique arrangement with L.A. Music. He felt that he could draw more customers into the store and sell more products by offering them online through Kijiji. He approached Mauro and negotiated a deal whereby L.A. Music would pay him \$10 for each item of inventory that he sold through Kijiji. The sales did not actually take place online. Mr. Jacobs used Kijiji to draw potential customers to the store where he would then complete the sale. The indicia of control as they relate to these Kijiji sales were different than the indicia for other sales. New products were listed on Kijiji at their normal retail price but older products were set at a price agreed on between Mr. Jacobs and Mauro. Thus Mr. Jacobs had some level of control over pricing. Because the customers were attracted online, Mr. Jacobs did not need to be physically present at L.A. Music's store to post the ads on Kijiji or to respond to emails from potential customers. He testified that he did much of this work from his home and that his wife assisted him with it. While there was no evidence whether he paid his wife to do so, the fact remains that he was able to delegate his work to an assistant. Overall, the control test provides strong objective support for his intention to be an independent contractor.

Tools: Mr. Jacobs used guitars provided by L.A. Music to inspire customers. He testified that he would bring his guitar tuning tools to L.A. Music so that he could make sure that a guitar that he was demonstrating for a customer would sound good. It appeared that some of the tools he brought would also have been available at

L.A. Music but that some types of allen wrenches that he brought were not available. However, overall, the amount of tools he provided for his pure sales activities were outweighed by those provided by L.A. Music. By contrast, Mr. Jacobs provided the majority of the tools needed for the Kijiji sales. He had a digital camera that he used to photograph L.A. Music's inventory. While he did not indicate how he made the Kijiji postings from home, he presumably used a laptop or other computer. Mr. Jacobs also maintained ownership of the Kijiji postings. When he left L.A. Music, that intellectual property was not transferred to the store. Given Mr. Jacobs' heavy emphasis on Kijiji sales, I find that overall, the tools test provides strong objective support for his intention to be an independent contractor.

Chance of Profit: Mr. Jacobs' chance of profit was significantly different from the other workers because of his Kijiji sales. With Kijiji he was able to earn money during times when he was not at work. He was also able to earn money from the work of others (i.e. his wife). He earned \$10 per sale regardless of the price of the item. If Mr. Jacobs sold 4 items in a day through Kijiji and another salesperson sold the same 4 items in the store, Mr. Jacobs would earn \$40 whereas the other worker would only earn a bonus if their total daily sales exceeded the relevant target. Mr. Jacobs' evidence was that the Kijiji sales were so successful that he actually agreed to reduce his daily rate as he wanted to focus more of his time at the store on generating Kijiji sales. Thus, he traded guaranteed daily income at the store for the potential to earn substantially more income through his own efforts on Kijiji. In addition, the terms that he negotiated with Mauro allowed him to count the Kijiji sales towards his daily sales targets so he had the potential of earning not just the \$10 per sale for the Kijiji sales but also the sales bonuses. The creation and maintenance of the Kijiji sales system placed Mr. Jacobs in a position that was significantly different than that of the other workers. While the presence of a flat commission and bonus system may not necessarily mean that a worker has a chance of profit, when viewed through the prism of Mr. Jacobs' intention to be an independent contractor, his ability to profit through a system that he created on his own initiative is objective support of his intention to be an independent contractor.

Risk of Loss: Like all of the other workers, Mr. Jacobs had no risk of loss. Thus this factor does not support his subjective intention to be an independent contractor.

- (b) Dragan Petrovic: As set out above, Mr. Petrovic intended to be an independent contractor. However, the objective reality of his relationship with L.A. Music does not support that intention.

Control: Like all of the other workers, the flexibility Mr. Petrovic had in determining when he worked argues strongly in favour of independent contractor status. Mr. Petrovic appeared to actually have even more flexibility than the other workers. Mr. Petrovic would fall into the category of pure salesperson although it is not clear how much he actually focused on selling. I put him into that category as the two activities that he clearly focused on (i.e. demonstrations on the keyboards and answering customers' questions) are part of the pure salesperson category and because he clearly would not have done any of the more menial tasks performed by sales workers as he felt they were beneath him. As a pure salesperson, Mr. Petrovic had limited supervision over his activities. Overall, the control factor provides strong objective support for Mr. Petrovic's subjective intention to be an independent contractor.

Tools: Mr. Petrovic needed two things to sell keyboards. First he needed demonstration keyboards on which to play and then he needed SCSI drives to connect to those keyboards to demonstrate the keyboards' full potential. L.A. Music provided the demonstration keyboards. Mr. Petrovic provided the SCSI drives. The SCSI drives contained music that he had prepared at home. Mr. Petrovic used the SCSI drive to demonstrate the capabilities of the keyboards at L.A. Music. He had more than one SCSI drive as they were particular to different keyboards. The SCSI drives cost approximately \$100 to \$150 each. My impression was that Mr. Petrovic would have owned the SCSI drives regardless of his work at L.A. Music. The value of the SCSI drives relative to the demonstration keyboards is also small. Therefore, while Mr. Petrovic's provision of the SCSI drives is not inconsistent

with his subjective intention to be an independent contractor, I do not attach much weight to this factor.

Chance of Profit: Mr. Petrovic testified that he specifically opted out of the bonus system. My overall impression was that Mr. Petrovic felt that selling was an activity unbecoming a true musician. He appeared to be quite satisfied with his daily rate and was more interested in simply performing at the store, establishing industry contacts and having the opportunity to purchase keyboards from L.A. Music at a discount than he was in earning a profit. In my view, his attitude towards profit and his actions do not provide objective support for his subjective intention to be an independent contractor.

Risk of Loss: Like all of the other workers, Mr. Petrovic had no risk of loss. Thus this factor does not support his subjective intention to be an independent contractor.

- (c) Michael Watson: As set out above, Mr. Watson intended to be an independent contractor. Although his case is not as strong as that of Mr. Jacobs, the objective reality of Mr. Watson's relationship with L.A. Music supports his intention to be an independent contractor.

Control: Like all of the other workers, the flexibility Mr. Watson had in determining when he worked argues strongly in favour of independent contractor status. As a pure salesperson, Mr. Watson had limited supervision over his activities. Overall, the control factor provides strong objective support for Mr. Watson's subjective intention to be an independent contractor.

Tools: Mr. Watson used drum sets provided by L.A. Music to inspire customers and make sales. There is no evidence that he provided any of his own tools. Given the significant number of demonstration drums that would have been provided by L.A. Music, I conclude that the tools factor does not provide objective support for Mr. Watson's subjective intention to be an independent contractor.

Chance of Profit: The evidence indicates that Mr. Watson was more successful at earning bonuses than many of the other

workers. While the ability to earn a bonus in these circumstances does not indicate an independent contractor relationship, when viewed through the prism of Mr. Watson's intention to be an independent contractor it is not objectively inconsistent with that intention.

Risk of Loss: Mr. Watson claimed that he incurred expenses attending drum trade shows and subscribing to drum industry magazines. While I accept that doing these things would have helped him in his sales activities, I suspect that he was once again embellishing his evidence. I suspect that these are expenses that he would have incurred irrespective of his work with L.A. Music. I therefore conclude that, like all of the other workers, Mr. Watson had no risk of loss. Thus this factor does not support his subjective intention to be an independent contractor.

- (d) Robert Simpson: As set out above, Mr. Simpson intended to be an independent contractor. Although his case is not as strong as that of Mr. Jacobs, the objective reality of his relationship with L.A. Music supports his intention to be an independent contractor.

Control: Like all of the other workers, the flexibility Mr. Simpson had in determining when he worked argues strongly in favour of independent contractor status. There was no evidence which suggested that he was anything other than a pure salesperson. As a pure salesperson, Mr. Simpson had limited supervision over his activities. Overall, the control factor provides strong objective support for Mr. Simpson's subjective intention to be an independent contractor.

Tools: Mr. Simpson used pro audio equipment provided by L.A. Music to inspire customers and make sales. He generally did not bring any of his own tools to L.A. Music. On one occasion he brought in some tools to fix the dust cover on a set of speakers. He built a unit that would allow customers to test headphones but he sold the unit to L.A. Music so this was not a tool that he provided. The tools factor does not support his subjective intention to be an independent contractor.

Chance of Profit: Although, Mr. Simpson never earned a bonus, the bonus system did provide him with an opportunity to do so. Because there was evidence that others, such as Michael Watson, earned bonuses under the bonus system, I accept that Mr. Simpson's opportunity to earn a bonus was not merely wishful thinking. While the potential to earn bonuses in these circumstances does not indicate an independent contractor relationship, when viewed through the prism of Mr. Simpson's intention to be an independent contractor it is not objectively inconsistent with that intention.

Risk of Loss: Like all of the other workers, Mr. Simpson had no risk of loss. Thus this factor does not support his subjective intention to be an independent contractor.

- (e) Kevin Pooler: As set out above, I was unable to find that Mr. Pooler intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. I find that those factors indicate he was an employee.

Control: Like all of the other workers, the flexibility Mr. Pooler had in determining when he worked argues strongly in favour of independent contractor status. Mr. Pooler was a sales worker. In addition to sales, his duties included receiving inventory and either putting it away or putting it on display as well as putting prices on floor items and updating the website with pricing information. As a sales worker, Mr. Pooler was supervised in his activities although he was responsible for fewer of the more menial sales worker activities than some of the other sales workers and was thus subject to less supervision. Overall, the control factor suggests that Mr. Pooler was an independent contractor.

Tools: Mr. Pooler used pro audio equipment provided by L.A. Music to inspire customers and make sales. There is no evidence that he supplied any of his own tools. Therefore the tool factor indicates that Mr. Pooler was an employee.

Chance of Profit: The ability to earn a bonus in these circumstances does not indicate an independent contractor relationship.

Risk of Loss: Like all of the other workers, Mr. Pooler had no risk of loss. Therefore this factor indicates an employment relationship.

- (f) Mark Rudyj: As set out above, I was unable to find that Mr. Rudyj intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. I find that those factors indicate he was an employee.

Control: Like all of the other workers, the flexibility Mr. Rudyj had in determining when he worked argues strongly in favour of independent contractor status. Mr. Rudyj was a sales worker. In addition to sales, his duties included stacking merchandise, occasionally scanning inventory into the computer system, shipping products from one L.A. Music store to the other, tidying up his department, taking out garbage and breaking down boxes. He also testified that he helped clean out the basement area of the store when L.A. Music was renovating the basement. I believe that in his testimony Mr. Rudyj over emphasized the amount of time that he spent tidying up, taking out garbage and breaking down boxes but I accept that these were things that he was told to do from time to time. As Mr. Rudyj had to carry out more menial duties than some of the other sales workers, I conclude that he was also subject to more supervision than they were. Overall, the types of duties that Mr. Rudyj was required to perform and the level of supervision outweighs the flexibility that he had in the job. I find the control factor favours a finding of employment status.

Tools: Mr. Rudyj used pro audio equipment provided by L.A. Music to inspire customers and make sales. There is no evidence that he supplied any of his own tools. Therefore the tool factor indicates that Mr. Rudyj was an employee.

Chance of Profit: The ability to earn a bonus in these circumstances does not indicate an independent contractor relationship.

Risk of Loss: Like all of the other workers, Mr. Rudyj had no risk of loss. Therefore this factor indicates an employment relationship.

- (g) Victor Miolla: As set out above, I was unable to find that Mr. Miolla intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. I find that those factors indicate he was an employee. Also as discussed above, due to the extent to which Maria lead Mr. Miolla in his testimony, I have essentially disregarded most of his testimony.

Control: Like all of the other workers, the flexibility Mr. Miolla had in determining when he worked argues strongly in favour of independent contractor status. I do not accept Mr. Miolla's description of his duties. I find him to have been a sales worker and to have therefore been subject to supervision. In addition, Mr. Miolla testified on cross-examination that Riley O'Connor was his assistant and that he would direct Mr. O'Connor to perform tasks for him. This testimony was confirmed by Mr. O'Connor. Overall, I find that the supervision of Mr. Miolla and, in turn, his supervision of Mr. O'Connor, was enough to overcome the flexibility of his work schedule and indicates that he was an employee.

Tools: Mr. Miolla used drum sets provided by L.A. Music to inspire customers and make sales. He gave no reliable evidence of his providing any of his own tools. Therefore the tool factor indicates that Mr. Miolla was an employee.

Chance of Profit: The ability to earn a bonus in these circumstances does not indicate an independent contractor relationship.

Risk of Loss: Like all of the other workers, Mr. Miolla had no risk of loss. Therefore this factor indicates an employment relationship.

- (h) Antonio Moreira: As set out above, I was unable to find that Mr. Moreira intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. I find that those factors indicate he was an employee.

Control: Like all of the other workers, the flexibility Mr. Moreira had in determining when he worked argues strongly in favour of independent contractor status. Mr. Moreira was a sales worker. In addition to sales, his duties included maintaining the floor, stocking inventory in his department, updating L.A. Music's website with prices and product images, unloading new inventory from trucks and then sorting it and distributing it to the department where it belonged. In addition, Mr. Moreira was asked to do work that fell completely outside of that expected of a normal sales worker. On one occasion he spent 2 days at L.A. Music's old store tearing down drywall and soundproofing. On another occasion he was told to go to a rental property owned by Mauro and help a painter move some furniture. Finally, on his last day at work he was told to go to Mauro's rental property and clean dust out from under a stairwell. He did not want to do any of these additional jobs but felt that he had no choice but to do so. All of these additional duties indicate a very high level of supervision. Overall, the types of duties that Mr. Moreira was required to perform and the level of supervision outweighs the flexibility that he had in the job. I find the control factor strongly favours a finding of employment status.

Tools: Mr. Moreira used pro audio equipment provided by L.A. Music to inspire customers and make sales. He did not provide any of his own tools. He used his personal laptop once to create a MySpace account for L.A. Music at Michael Piperni's request. He was not paid for his time. Therefore the tool factor indicates that Mr. Moreira was an employee.

Chance of Profit: Mr. Moreira testified that he was paid an hourly rate rather than a daily rate. While his evidence contradicts that of all of the other witnesses, I accept that he believed he was being paid by the hour. I do not think that anything turns on this in any event. Mr. Moreira testified he only earned a bonus twice as his

sales were otherwise not high enough¹³. The ability to earn a bonus in these circumstances does not indicate an independent contractor relationship.

Risk of Loss: Like all of the other workers, Mr. Moreira had no risk of loss. Therefore this factor indicates an employment relationship.

- (i) Riley O'Connor: As set out above, I was unable to find that Mr. O'Connor intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. I find that those factors indicate he was an employee.

Control: Like all of the other workers, the flexibility Mr. O'Connor had in determining when he worked argues strongly in favour of independent contractor status. Mr. O'Connor was a sales worker. He also taught music lessons at L.A. Music. When he was not teaching he was expected to be selling. In addition to sales and teaching, his duties included stocking inventory in his department, building sales displays, updating L.A. Music's website with prices and product images and unloading new inventory from trucks. These duties indicate that Mr. O'Connor was subject to supervision. In addition, Victor Miolla testified that Mr. O'Connor was his assistant and Mr. O'Connor confirmed this. In terms of his teaching, Mr. O'Connor testified that a person he described as the "lesson coordinator" would schedule his lessons for him. However, he also testified that he had his own students outside of L.A. Music and freely recruited new students from non-student customers at L.A. Music. Overall, the types of duties that Mr. O'Connor was required to perform and his level of supervision outweighs the flexibility that he had in the job and the fact that he was competing with L.A. Music. I find the control factor favours a finding of employee status.

¹³ On direct examination he testified that he only earned one bonus. He was presented with an invoice showing a second bonus on cross-examination and admitted that he must have earned that one too. I do not consider this to have undermined his credibility. I attribute the inconsistency to the passage of time not an intention to mislead.

Tools: Mr. O'Connor used drum sets provided by L.A. Music to inspire customers and make sales. He did not use his own tools for his sales work. Regarding his teaching, he stated that he sometimes provided his own sheet music, that he brought in one of his old sets of cymbals for lessons and that he was responsible for preparing his own lesson plans. The rest of the drum set for the lessons was provided by L.A. Music. Overall, the tools factor favours a finding of employee status.

Chance of Profit: The fact that Mr. O'Connor was a teacher did not increase his chance of profit. His ability to earn a bonus does not indicate an independent contractor relationship.

Risk of Loss: Like all of the other workers, Mr. O'Connor had no risk of loss. Therefore this factor indicates an employment relationship.

- (j) Tim Guerin: Mr. Guerin did not testify. As set out above, I do not have sufficient evidence to find that Mr. Guerin intended to be an independent contractor. Therefore, the determination of his status rests purely on the *Wiebe Door* factors. Mauro testified that Mr. Guerin was exactly the same as Kevin Pooler. As I have found Mr. Pooler to be an employee, I therefore find Mr. Guerin to be an employee.
- (k) Remaining Non-Family Workers: The following non-family workers did not testify. The limited evidence that Mauro and Maria provided about these workers did not provide me with any basis upon which I could distinguish them from one another:

- Frank Bartoletti
- Michael Dorosz
- Archy Hachey
- Lorne MacMillan
- Matthew Sprague
- Kyle Ray
- Graham Wallace

As set out above, I do not have sufficient evidence to find that these workers intended to be independent contractors. Therefore, the

determination of their status rests purely on the *Wiebe Door* factors. I find that those factors indicate they were employees.

Control: Like all of the other workers, the flexibility that these workers had in determining when they worked argues strongly in favour of independent contractor status. As I do not have any evidence of the duties that they performed, I am not able to determine whether they should be classified as pure salespeople or sales workers and thus am unable to determine their likely level of supervision. The Respondent made an assumption of fact that, in addition to selling, all salespeople performed some or all of the following: cleaning and organizing the store, updating L.A. Music's website, unloading inventory from delivery trucks, answering phones and building displays. In the case of these remaining workers, I find that this assumption has not been demolished. Based on the assumption, I will therefore categorize these workers as sales workers and find that they had a higher level of supervision. Overall, the types of duties that these workers were required to perform and their level of supervision outweighs the flexibility that they had in the job. I therefore find the control factor indicates that they were employees.

Tools: There is no reliable evidence to suggest that these workers provided any of their own tools other than Michael Dorosz who used his own guitar while teaching guitar lessons. Given that when selling, these workers were using L.A. Music's instruments and equipment for demonstration purposes, I am left to conclude that the tools factor indicates that they were employees¹⁴.

Chance of Profit: The ability to earn a bonus in these circumstances does not indicate an independent contractor relationship.

¹⁴ Mauro testified that Michael Dorosz would bring his own guitar in and would use it for demonstration purposes but other witnesses made it clear that Mr. Dorosz brought his guitar to work with him because he took it everywhere with him not because he was using it as a tool. In any event, Mr. Dorosz must have used L.A. Music's guitars for demonstration purposes because he was trying to sell their guitars not his.

Risk of Loss: I have no evidence that these workers had any risk of loss. Therefore this factor indicates an employment relationship.

Family Workers

[72] The family workers are the four Piperni children (Michael, Rob, Jacqueline and Valerie) and the Hilmanson sisters (Ashley and Candice). During the years in question, Ashley was living with and later engaged to Michael. Thus, for the purposes of my analysis I have considered Ashley and Candice to be part of the extended Piperni family.

[73] None of the family workers testified. Maria testified that all of them resided locally so they would presumably have been available to testify. While I have not drawn an adverse inference from their failure to testify, this does not change the fact that L.A. Music's case has been hurt by the absence of the evidence that they could have offered.

[74] I will now apply the *Connor Homes* test to each of the family workers.

- (a) Michael Piperni and Rob Piperni: Although I have limited evidence on the point, I am prepared to accept that Michael and Rob always intended to be independent contractors. However, the objective reality of their relationship with L.A. Music does not support that intention.

Control: There was conflicting evidence regarding Michael Piperni's and Rob Piperni's roles at L.A. Music.

- (i) Mr. Watson testified that there was no supervisor or manager in the drum department. He stated that he would refer significant issues to Maria or Mauro. He denied that Michael or Rob were supervisors. He said that they were working along side him. He stated that Maria and Mauro would leave the store in Michael's and Rob's hands if they were away on vacation.
- (ii) Kevin Pooler described Michael and Rob as "floor managers" although they were never formally introduced to him as such. He stated that Rob was on

his floor almost every day. He testified that when he wanted to reduce his work schedule on a permanent basis he spoke to Michael. He also testified that he would advise Michael and Rob when he knew he would be absent from work.

- (iii) Mark Rudyj testified that he viewed Michael and Rob as supervisors. As his evidence is consistent with Kevin Pooler's evidence on this point, I accept it. He also testified that Michael introduced himself to him as a manager. As other witnesses have all said that Michael did not do this, I do not accept Mr. Rudyj's evidence on this point.
- (iv) Mark Rudyj, Robert Simpson and Riley O'Connor all testified that they were hired by Michael.
- (v) Paul Jacobs testified that Michael and Rob were in charge of the store if Mauro and Maria were away.
- (vi) Antonio Moreira testified that he considered Michael and Rob to be managers although they were never introduced to him that way. He testified that he was hired by Rob, that it was Michael or Rob who would tell him to unload the inventory truck, that he would advise Michael or Rob if he was going to be absent from work and that it was Michael who told him to do the physical labour at the old store and at Mauro's rental property. He stated that he would speak to Rob if a customer wanted to negotiate a price.
- (vii) Robert Simpson testified Rob was his supervisor and that he would talk to Rob if a customer wanted a discount.
- (viii) Riley O'Connor testified that both Michael and Rob were managers although they were never formally introduced to him as such. He testified that he negotiated his hours and rate of pay with Michael. He also testified that Rob was the manager of the third

floor and that he had to go to Rob if a customer wanted to negotiate a price.

- (ix) Mauro testified that Michael and Rob did not have the power to hire and fire workers but rather had to run those decisions through him or Maria. While I accept that this may have been the case, the fact remains that they presented themselves as having this power and that they clearly played an important role in the hiring process as a number of workers testified that they were hired without ever having spoken to Mauro or Maria.
- (x) Maria testified that Michael and Rob were not supervisors. She stated that Michael worked along side the other salespeople and that those salespeople sometimes asked him questions because of his broad base of knowledge. When asked what department Michael worked in, Maria was evasive. I believe this is because Michael actually covered all departments. This belief is supported by the testimony of the other workers who described Michael and Rob as working on a particular floor, not in a particular department.

These conflicting views of Michael's and Rob's roles could potentially have been reconciled if either of them had testified. Since Michael and Rob did not testify I am left to choose among the various views. Mauro's and Maria's explanations are simply not logical. They would have me believe that the sons of the owners of the business have a job where they move throughout various departments on a given floor giving advice and being asked about discounted pricing but that they are not acting in a supervisory capacity over those departments. This is simply not believable. I therefore prefer the testimony of the workers over that of Mauro and Maria. The only worker who testified that Michael and Rob were not supervisors or managers was Mr. Watson. As explained above, I felt that Mr. Watson slanted his testimony in favour of the Respondent whenever possible. In light of the overwhelming evidence from the other workers (three of whom were L.A. Music's own witnesses), I therefore find that Michael and Rob were supervisors. As supervisors, they were

supervising Mr. Jacobs, Mr. Watson and Mr. Simpson. This means that there was a situation where two people (Michael and Rob) who were supposedly independent contractors were supervising other people (Mr. Jacobs, Mr. Watson and Mr. Simpson) who I have already concluded were independent contractors without there being any contractual relationship between Michael and Rob on the one hand and Mr. Jacobs, Mr. Watson and Mr. Simpson on the other. The Federal Court of Appeal made it clear in *Pluri Vox Media Corp. v. The Queen*, 2012 FCA 295, 2013 DTC 5012, that in a situation where a worker is supervising an independent contractor and there is no contractual relationship between the two workers, the better view is that the worker who is acting as supervisor is, in fact, an employee. There is virtually no evidence of what Michael and Rob did other than making sales and supervising, no evidence of whether they enjoyed the same flexibility as the other workers and no evidence of their general working conditions other than the fact that they were supervised by Maria and Mauro. Therefore, since the only evidence available indicates that they were employees, I have no choice but to find that the control factor does not provide objective support for their subjective intentions to be independent contractors.

Tools: There is no credible evidence that Michael or Rob supplied any tools that were relevant to their sales or supervisory duties. Maria testified that Michael brought in some of his own lighting and commercial pro audio equipment to show customers. This was equipment that Michael had from work that he did outside of L.A. Music. Given Maria's propensity to exaggerate, I am not confident that Michael brought the equipment to the store in order to sell similar equipment as opposed to just bringing it in to show it off or for some other reason. Overall, this factor does not provide objective support for Michael's and Rob's subjective intentions to be independent contractors.

Chance of Profit: It appears that Michael and Rob both participated in the bonus system although there is no evidence of how often they earned bonuses and it is unclear whether they were primarily supervisors or primarily salespeople. While the ability to earn a bonus in these circumstances does not indicate an

independent contractor relationship, when viewed through the prism of Michael's and Rob's intentions to be independent contractors, it is not objectively inconsistent with those intentions.

Risk of Loss: There is no evidence that Michael or Rob had any expenses or faced any risk of loss. Thus this factor does not support their subjective intentions to be independent contractors.

- (b) Valerie Piperni: There is insufficient evidence to allow me to conclude that Valerie intended to be an independent contractor. Therefore, the determination of her status rests purely on the *Wiebe Door* factors. Those factors indicate she was an employee.

Control: In the years in question, Valerie was in college or had just had a baby. She had no pre-assigned duties. Generally she would work as a cashier or on product displays. She did not work in sales or teach. I find that the duties that Valerie did are consistent with those of an employee not an independent contractor. Valerie had no set schedule and simply worked when she wanted to. However, it was clear that Valerie's flexibility in working whenever she wanted to and on whatever duties she wanted to arose from the fact that she was Mauro's and Maria's daughter, not from any contractual relationship. Therefore I have not given this flexibility any weight. Her work was clearly supervised by her parents. Overall, the control factor indicates Valerie was an employee.

Tools: There was some suggestion that one of Valerie, Candice or Ashley may have used her personal laptop to help design some price tags. The cash register that Valerie used was supplied by L.A. Music. At best this factor is neutral.

Chance of Profit: Valerie did not have any potential to earn bonuses. She was simply paid for when she worked. This favours a finding that she was an employee.

Risk of Loss: Valerie had no risk of loss. Therefore this factor indicates an employment relationship.

- (c) Jacqueline Piperni: There is insufficient evidence to allow me to conclude that Jacqueline intended to be an independent contractor. Therefore, the determination of her status rests purely on the *Wiebe Door* factors. Those factors indicate she was an employee.

Control: Like Valerie, Jacqueline worked when she wanted to and had no pre-assigned duties. She would generally work as a cashier or answer the phone. She was also a lesson coordinator. She did not work in sales or teach lessons. I find that the duties that Jacqueline did are consistent with those of an employee not an independent contractor.

Tools: Maria testified that Jacqueline brought her laptop to work but it is unclear to what use the laptop could have been put since L.A. Music supplied the computers that were used by cashiers. This factor indicates an employment relationship.

Chance of Profit: Jacqueline was paid a flat daily rate without bonuses. There is no evidence which would indicate that she had any ability to profit. This indicates she was an employee.

Risk of Loss: Jacqueline had no risk of loss. This indicates she was an employee.

- (d) Ashley Hilmanson: There is insufficient evidence to allow me to conclude that Ashley intended to be an independent contractor. Therefore, the determination of her status rests purely on the *Wiebe Door* factors. Those factors indicate she was an employee.

Control: Ashley worked when she wanted to. I find that this was because she was a member of the Piperni family so I do not give it any weight. She would generally work as a cashier, answer the phone and work on product displays. She was also the lesson coordinator. She did not work in sales or teach lessons. I find that the duties that Ashley did are consistent with those of an employee not an independent contractor.

Tools: There was some suggestion that one of Valerie, Candice or Ashley may have used her personal laptop to help design some

price tags. The computer that Ashley used as a cashier was supplied by L.A. Music. At best this factor is neutral.

Chance of Profit: Ashley was paid a flat daily rate without bonuses. There is no evidence which would indicate that she had any ability to profit. This indicates she was an employee.

Risk of Loss: Ashley had no risk of loss. This indicates she was an employee.

- (e) Candice Hilmanson: There is insufficient evidence to allow me to conclude that Candice intended to be an independent contractor. Therefore, the determination of her status rests purely on the *Wiebe Door* factors. Those factors indicate she was an employee.

Control: Candice worked when she wanted to. I find that this flexibility was because she was a member of the Piperni family so I do not give it any weight. There is conflicting evidence as to Candice's duties. She did not work in sales or teach lessons. In his direct testimony Mauro stated that Candice set up window displays for L.A. Music. On cross-examination he admitted that she also worked as a cashier. In her direct testimony Maria made it appear as if Candice had window display design expertise and had offered to do L.A. Music's display windows in exchange for a daily rate of pay plus materials. On cross-examination Maria admitted that Candice also worked as a cashier on rare occasions. By contrast, Antonio Moreira described Candice as the 3rd floor cashier who occasionally reorganized product displays and on one occasion had set up a Christmas display in the store's window. Since Candice herself did not testify I am left to choose between Mauro's and Maria's version and Mr. Moreira's version. I accept that Mr. Moreira may not have been aware of other display work that Candice did but I also think that Mauro and Maria were exaggerating Candice's display work in order to make her appear to be an outside contractor. I find that Candice was a cashier who also did display work in various areas of the store and that she was paid the same daily rate for both types of work. These duties and this method of payment are consistent with those of an employee not an independent contractor.

Tools: There was some suggestion that one of Valerie, Candice or Ashley may have used her personal laptop to help design some price tags. The computer that Candice used as a cashier was supplied by L.A. Music. At best this factor is neutral.

Chance of Profit: Candice was paid a flat daily rate without bonuses. There is no evidence which would indicate that she had any ability to profit. This indicates she was an employee.

Risk of Loss: Candice was reimbursed for any design expenses that she incurred. She had no risk of loss. This indicates she was an employee.

Insurable Employment:

[75] Paragraph 5(2)(i) of the *Act* excludes employment from the definition of “insurable employment” if the employer and employee are not dealing with each other at arm’s length. Related people are deemed not to be dealing at arm’s length. However, under paragraph 5(3)(b) if it is reasonable to conclude that the employer and employee would have entered into substantially similar contracts if they had been dealing at arm’s length then the parties are deemed to deal with each other at arm’s length. As a result, the employment is considered insurable employment and EI applies.

[76] The Minister did not assess L.A. Music for EI in respect of Valerie and Jacqueline as the Minister concluded that they were engaged in excluded employment. Since Valerie and Jacqueline are related to Mauro and Maria, the Minister must have come to the conclusion that Valerie and Jacqueline would not have entered into substantially similar contracts with L.A. Music if they had been dealing with L.A. Music at arm’s length.

[77] I find that the contracts under which Ashley and Candice were employed were essentially identical to those under which Valerie and Jacqueline were employed. The Minister has already concluded that those contracts were non-arm’s length contracts. I accept this conclusion and therefore find that Ashley and Candice were not engaged in insurable employment as they were not dealing with L.A. Music at arm’s length.

SUMMARY

[78] In summary, I find that the only workers, both family and non-family, who were independent contractors were Paul Jacobs, Michael Watson and Robert Simpson. However, I also find that the employment of Ashley Hilmarson and Candice Hilmarson was not insurable employment.

[79] The Appeal is therefore allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- (a) Ashley Hilmarson was not engaged in insurable employment in 2008 and 2009;
- (b) Candice Hilmarson was not engaged in insurable employment in 2009;
- (c) Paul Jacobs was not engaged in insurable employment or pensionable employment in 2008 and 2009;
- (d) Michael Watson was not engaged in insurable employment or pensionable employment in 2008 and 2009; and
- (e) Robert Simpson was not engaged in insurable employment or pensionable employment in 2008.

Signed at Ottawa, Canada, this 6th day of May 2013.

“David E. Graham”

Graham J.

Schedule "A"

Workers in Respect of Which Both EI and CPP Were Assessed

Worker	Years Worked in the Period in Question
1. Frank Bartoletti	2008 and 2009
2. Michael Dorosz	2007
3. Tim Guerin	2008
4. Archy Hachey	2008
5. Ashley Hilmarson	2008 and 2009
6. Candice Hilmarson	2009
7. Robert Paul Jacobs (known as Paul Jacobs)	2008 and 2009
8. Lorne MacMillan	2008
9. Victor Miolla	2008 and 2009
10. Antonio Da Silva Moreira	2008 and 2009
11. Riley O'Connor	2007, 2008 and 2009
12. Dragan Petrovic	2008
13. Kevin Pooler	2008 and 2009
14. Kyle Ray	2008 and 2009
15. Mark Rudyj	2008
16. Robert Simpson	2008
17. Matthew Sprague	2009
18. Graham Wallace	2008 and 2009
19. Michael Watson	2008 and 2009

Workers in Respect of Which Only CPP Was Assessed

Worker	Years Worked in the Period in Question
1. Michael Piperni	2007, 2008 and 2009
2. Jacqueline Piperni	2007
3. Robert Piperni	2007 and 2008
4. Valerie Piperni	2007

Schedule "B"
Sample Contract Between L.A. Music and Michael Watson

L.A. MUSIC

CONTRACT FOR SERVICES

This Contract for Service Agreement is between **L.A. MUSIC** ("Company")

And **Michael Watson**

("Independent Consultant")

in consideration of the mutual agreement and covenants herein contained, the parties hereto agree as follow [sic]:

1. **COMPANY:** The Company appoints the consultant as its non-exclusive Independent Consultant for the following purpose:
 1. Consulting with clients interested in making an acquisition of musical product.
 2. Michael Watson will use his expert sales knowledge and skills pertain [sic] to Drums Digital and Electronic Drums, Percussion, and Percussive related items.
 3. You will need to bring tools to perform and exhibit your skills to prospective clients. As necessary you will need to perform on and assess the merchandise available for sale.
 4. The Consultant will keep abreast of all the latest updates and trends in the drum market.
 5. As part of Consulting, you will make recommendations on products and relay feedback to L.A. MUSIC representative on an "as need" basis.
 6. The Consultant will be available to teach lessons, classes, and clinics on a need basis.

The Independent Consultant shall lack authority to bind Company to any agreement of contract until Independent Consultant obtains written consent from owner(s) of the Company L.A. Music.

2. INDEPENDENT CONSULTANT: This Agreement shall not render the Independent Consultant an employee, partner, or joint vendor with the Company for any purpose. The Independent Consultant is and will remain an Independent Consultant in his or her relationship to the Company. The Company shall not be responsible for withholding taxes with respect to the Independent Consultant compensation hereunder. The Consultant shall have no claim against the Company hereunder or otherwise for vacation pay, sick leave, retirement benefits, social security, worker's compensation, health or disability benefits, unemployment insurance benefits or employee benefits of any kind.

3. INSURANCE: The Independent Consultant will carry liability insurance relative to any service that he or she performs for the Company L.A. MUSIC.

4. COMPENSATION: Time of Payment

For services to be performed, L.A. MUSIC shall award the Independent Consultant the amount As [sic] agreed to by both parties, awarded at the end of each period of service.

260 LAKESHORE RD. MISSISSAUGA ON L5G1J9
905-271-0303

- 1 -

L.A. MUSIC

5. EXPENSES: Expenses are not applicable. L.A. MUSIC shall not be obligated to reimburse the Independent Consultant for any additional expenses incurred in the performance of services pursuant to the Agreement unless agreed in writing by the Company in advance.

6. TERM: Unless renewed, this Agreement expires at midnight _____

7. RENEWAL: This Agreement shall automatically renew for increments of seven days, unless either party gives written or [sic] verbal notice to the other party of his or her intent not to renew.

8. ENTIRE AGREEMENT: This Agreement sets forth the entire agreement and understanding between the parties relating to the subject matter herein and supersedes all prior discussions between the parties. No modification or amendments to this Agreement, nor any waiver of any rights under this Agreement will be effective unless in writing.

9. ADDITIONAL ACKNOWLEDGMENTS: Both parties acknowledge and agree that: (a) the parties are executing this Agreement voluntarily without duress or undue influence, (b) the parties have carefully read this Agreement and have asked any question [sic] needed to understand the terms, consequences, and binding effect of this Agreement and fully understand them: and (c) the parties have sought the advice of an attorney of their respective choice if so desired prior to signing this Agreement.

This Agreement consisting of two pages, including this page is entered into

This 7th day of February, 2008.

**Company: L.A. MUSIC
Maria Piperni**

“signed by Maria Piperni” Signature of Company Representative

**Independent Contractor
Michael Watson**

“signed by Michael Watson” Signature of Independent Consultant

**260 LAKESHORE RD. MISSISSAUGA ON L5G1J9
905-271-0303**

CITATION: 2013 TCC 122

COURT FILE NOS.: 2010-2539(EI)
2010-2540(CPP)

STYLE OF CAUSE: LA SCALA CONSERVATORY OF MUSIC
II AND M.N.R.

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: January 19, 2011,
October 3, 4, 5, 6, 7, 2011,
and March 18, 19 and 20, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham

DATE OF JUDGMENT: May 6, 2013

APPEARANCES:

Agent for the Appellant: Maria Piperni and Mauro Piperni
Counsel for the Respondent: Alisa Apostle and Christopher Bartlett

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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