Docket: 2008-1601(EI)

BETWEEN:

MARK SHEPPARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Mark Sheppard (2008-1602(CPP))
on December 18, 2008 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Whitney Dunn

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated April 28, 2008 is varied to find that:

> Mark Sheppard was engaged in insurable employment with Positive Dyslexia Ltd. from September 1, 2006 to January 17, 2007.

Signed at Sidney, British Columbia, this 19th day of February, 2009.

"D. W. Rowe"

Rowe D.J.

Docket: 2008-1602(CPP)

BETWEEN:

MARK SHEPPARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Mark Sheppard (2008-1601(EI))
on December 18, 2008 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Whitney Dunn

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated April 28, 2008 is varied to find that:

> Mark Sheppard was engaged in pensionable employment with Positive Dyslexia Ltd. from September 1, 2006 to January 17, 2007.

Signed at Sidney, British Columbia, this 19th day of February, 2009.

"D. W. Rowe"

Rowe D.J.

Citation: 2009TCC97
Date: 20090219
Dockets: 2008-1601(EI)
2008-1602(CPP)

BETWEEN:

MARK SHEPPARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant Mark Sheppard ("Sheppard") appealed from two decisions issued by the Minister of National Revenue (the "Minister") on April 28, 2008 pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided the employment of Sheppard with Positive Dyslexia Ltd. ("PDL") from September 1, 2006 to January 17, 2007 was not insurable or pensionable because he was not employed under a contract of service.

[2] The Appellant and counsel for the Respondent agreed both appeals could be heard together.

[3] The position taken by the Minister as stated in the Reply to the Notice of Appeal ("Reply") is that Sheppard and Susan Hall ("Hall") and Tyler Norton ("Norton") were equal partners in carrying on a business known as Trident Learning Centre ("Trident") and that he was not an employee of PDL.

[4] Mark Sheppard testified he is a resident of Vancouver and has been teaching for 20 years. He has a Master of Education degree and is certified by the British Columbia College of Teachers ("BCCT") to teach in British Columbia.

Sheppard stated he defined Trident as a school because a learning centre operates outside of usual school hours and that the correct name for Trident was Trident Learning Community ("TLC"). The full-time instructors at TLC were himself and Hall at the teaching facility located in the premises known as Klee Wyck House on Keith Road in West Vancouver and Norton worked part-time as an outdoor activities instructor. PDL was a corporation wholly owned by Hall and most of the pay cheques issued to Sheppard were signed by Hall and drawn on a PDL account at Coast Capital Savings but Sheppard received one or more payments from another account belonging to The Whole Dyslexic Society ("TWDS" or "Society"). Only four children attended TLC and Sheppard was the only teacher certified by BCCT. Sheppard stated Hall provided him with direction through e-mail messages – often daily - and that her office was close to the classroom and she was able to hear the content of his instruction to the children, all of whom were assigned a rank equivalent to Grade 4. Sheppard stated TLC had a Principal – Peter Tongue ("Tongue") who attended the school and observed Sheppard teaching a class on two separate occasions and later reported he was satisfied with Sheppard's methods. Sheppard was injured in a motorcycle accident on October 1, 2006 but went to work the following day and although he needed to take pain relievers for some time thereafter, did not miss a day of teaching during the relevant period. Initially, TLC was supported by an individual who had made a substantial financial contribution but that support was withdrawn in January, 2007. Sheppard stated he was informed by Hall that other supporters of TLC were in a position to fund the school on an ongoing basis. Sheppard stated he did not question this information because earlier in his career he had charged out his services to a wealthy businessman at the rate of $4,000 per month for teaching his child daily based on one-half day teaching time. Sheppard referred to a letter – Exhibit A-1 - from Hall dated January 5, 2007 covering a variety of subjects pertaining to his teaching methods and other related matters affecting the operation of the school. Sheppard stated he had known Hall for many years and was aware that although she was not registered with BCCT, she was certified as a Davis Dyslexia Correction Method Facilitator by an institution based in California. Over the course of several years, he had discussed with Hall his vision of a school and she was interested in amalgamating a teaching philosophy known as the Waldorf Method with the Davis Method. Sheppard obtained his Bachelor of Education degree at Mount Allison University and moved to Vancouver in 1998 where he began teaching a Grade 2 class and remained with that group until they went through Grade 7. Sheppard stated the Waldorf Schools are world-wide with over 1000 independent schools and 1400 kindergartens in 60 countries. The founder was Rudolf Steiner and the educational philosophy is based on a concept of interdisciplinary learning that integrates practical, artistic and conceptual elements which include creative as well as analytical components. A school – Aspengrove - in Nanaimo, British Columbia,

required a teacher certified in the Waldorf Method and hired Sheppard as a staff member for the 2005/2006 academic year but the contract was not renewed. Sheppard stated it was while travelling on the ferry between Horseshoe Bay and Nanaimo that he encountered Hall and began discussing the concept of the school later known as TLC. In August, they continued their discussion of the new venture and Sheppard stated he and Hall intended to be partners but no formal documentation was prepared subsequently in that regard. Sheppard stated that when discussing the matter of the new school with Hall, he informed her that he needed an annual salary of $65,000 and she countered by offering the sum of $60,000 which he accepted on the understanding his salary would increase to the original amount requested, either in the form of money or by receiving certain benefits once the operation of the new school was taken over by TWDS, a non-profit society. The concept envisaged by Sheppard and Hall was that students would return to classes within the regular system in accordance with the provincial curriculum. He was aware that different standards and rules apply once there are more than 10 students in an entity like TLC. Sheppard stated he had not contemplated any method of receiving remuneration other than in the form of a monthly salary. Sheppard stated that in his experience as a teacher, it is extremely important to be hired by Easter in a particular academic year as otherwise it is difficult to find a teaching position that commences in September. With respect to his monthly pay cheques in the sum of $5,000 Sheppard stated he was aware none of the usual source deductions had been made but did not inquire about that omission and merely cashed the cheques for 3 months. He considered the pay arrangement was an interim measure until TWDS – through its financially secure members - assumed responsibility for the ongoing operation of TLC. His December cheque was late but as of January 10, 2007, he still assumed TWDS would pay him in full. Sheppard received a letter – Exhibit A-4 – dated January 24, 2007, signed by a Director of TWDS on behalf of the Board of Directors (“Board”) of the Society in which he was informed that although TLC had opened in September, 2006, the Board at that time “made it clear that it did not want to operate TLC within the [T]WDS. Consequently, Positive Dyslexia Ltd. took on the operations of the TLC, not the [T]WDS. The Board that is currently in place was elected with a view to ultimately transferring the operations of the TLC to the [T]WDS. Unfortunately, funding for TLC was abruptly ended before the new Board could consider or vote on the assumption of the project.” The letter continued as follows, “As of today’s date, the Board has not approved any such transfer and, therefore, assumes no responsibility or obligation for the operations of the TLC, which remains under the operation of Positive Dyslexia Ltd. and we respectfully suggest that you contact Sue Hall.” Sheppard received a letter – Exhibit A-5 – from Hall on the letterhead of PDL - dated January 31, 2007 - in which she advised that two families had withdrawn their children from TLC and Norton had resigned from the faculty on January 15, 2007.

Hall stated therein that the last day of operation of TLC was January 17, 2007 and enclosed a cheque – in the sum of $1,250 – drawn on the PDL account and added that TWDS – probably - would send Sheppard a cheque in the sum of $2,500 to pay the balance of his outstanding salary. Hall also advised Sheppard that PDL would recommence its previous business operation by providing Davis Dyslexia Correction programs and expressed regret concerning the demise of TLC. Sheppard stated he later received payment in full for his services as a consequence of obtaining a favourable decision from the British Columbia Employment Standards Branch based on his status as an employee. Sheppard stated he had provided Hall with a letter of reference prior to starting his teaching position and that no steps were undertaken by himself, Hall and Norton to pursue the initial suggestion that they form a partnership for the purpose of operating TLC. As requested by Hall, Sheppard submitted invoices to PDL – through Hall - in the sum of $5,000 per month. Norton worked one day a week for three weeks and then one complete week during which the education was undertaken outdoors and included activities such as sailing. The schedules of instruction were prepared by Hall and are included in the bundle of documents filed by the Appellant as Exhibit A-6. Some of the students at TLC had never been enrolled in a school within the provincial educational system. Sheppard stated it was not practical for him to have worked elsewhere when he was teaching at TLC because he taught classes every day and did preparation at night. He also performed other duties such as renting a dinghy from a sailing academy for use by Norton and the students. Sheppard referred to an exchange of e-mails – Exhibit A-7 - between himself and Hall which he characterized as complaints by certain parents about his methods and alleged lack of communication skills. He pointed to a line on page 2 – towards the bottom – in which Hall stated her summary of the sentiment expressed by her at the meeting with parents where she stated “None of the mistakes were severe enough to warrant instant dismissal.”

[5] Sheppard was cross-examined by counsel for the Respondent. Counsel – with the consent of the Appellant – filed as Exhibit R-1, a binder containing documents at tabs 1 to 35, inclusive. Sheppard acknowledged he had written an e-mail – tab 1 – on May 19, 2006, to Hall in which he expressed his excitement about the possibilities of the forthcoming academic year in the context of the idea they had discussed for a new school. In another e-mail – tab 2 - dated May 28, 2006 – Sheppard made a reference to working “together into the future” with Hall. On October 7, 2006, Sheppard sent a lengthy e-mail – tab 5 – to Hall in which he discussed various matters including Hall’s lack of experience in dealing with more than one student at a time and issues pertaining to student behaviour, scheduling of meetings and curriculum requirements. Sheppard stated he was fulfilling the role of a teacher but Hall was the sole administrator. He admitted that at the outset he was not certain as to

the nature of the relationship between Hall and her corporation – PDL - and himself, but considered it had developed into one of employer-employee as of the commencement of the academic year in September. Hall had operated PDL for years as an entity for the purpose of providing training for students affected by dyslexia. Sheppard stated that when he wrote an article – tab 3 – about TLC and the three-fold nature of the institution which incorporated the Davis Method, the Waldorf Method and an Outdoor Education Program, he was doing so in his role as a teacher and any reference to "we" – page 2, second paragraph – was not intended to denote any ownership on his part but to make the point that he and others involved in TLC had a particular purpose in providing a different type of education to its students. Sheppard stated Hall was the expert in the Davis Method and that he was willing to accept instruction from her in that respect even though he had 20 years teaching experience in other fields. He taught Hall's son at the Vancouver Waldorf School and considered Hall had hired him because he could adapt that educational philosophy to accommodate the Davis Method. Counsel referred Sheppard to his reply – at the top of the page – to an e-mail – tab 22 – sent to him on January 14, 2007 by Hall - and suggested his response was inconsistent with someone accepting direction. Sheppard pointed out that the handwriting appearing on the e-mail copy was his own and had been placed there when corresponding with the CRA Rulings Officer. Sheppard stated he did not consider Tongue - who had a background in traditional education - had followed proper observational techniques when visiting Sheppard's classroom compared with those utilized at the Vancouver Waldorf School where he had undergone independent evaluations. Sheppard stated he attempted to teach mainly in accordance with the Waldorf Method during his tenure at TLC. An exchange of a series of e-mails – tab 7 - between November 3 and November 5, 2006 (to be read in reverse order from the back of the tab) pertain to the need for Sheppard to write his own job description and include his comments about the inability to meet the provincial curriculum requirements as well as regarding other topics. In the course of another exchange of e-mails – tab 17 – with Hall on January 5, 2007, Sheppard – fourth paragraph of the e-mail on page 1 - referred therein to the financial problems encountered by TLC and to the reason for the agreement that he "would be the only actual, full-time TLC employee is that it was recognized that it would be nearly impossible for me to take on outside work unless we drastically reorganized our schedule somehow." Sheppard was referred to an e-mail – tab 12 – sent to Hall in which he discussed his remuneration when teaching at Aspengrove and the amount he could be paid working in the public educational system and his agreement to teach for less money at TLC. Sheppard stated he was aware Hall could earn as much as $3,000 per week – through PDL – from teaching and thought she might be in a position to forego withdrawing money from TLC until proper funding could be secured from a wealthy patron and other parents. Although there were 3 students in

September and 4 students in October, Sheppard had not been concerned about the viability of TLC because he understood the premises at Klee Wyck House had been leased – for at least one year - by the parent of a student and believed the school could occupy the main house on the grounds without paying any rent. From his perspective, Sheppard considered his role was that of a qualified teacher responsible for the educational core of the fledgling entity. He acknowledged that some parents expressed concern about his teaching methods and although he had less than complete recall of certain portions of the period following his motorcycle accident in October, 2006, he was aware one parent had a problem with some aspect of his behaviour. He stated that Tongue – TLC Principal - supported him by stating at a meeting of the parents of the 4 students that Sheppard was a qualified, experienced teacher. Sheppard stated he had not been aware of any discontent on the part of any parent until December 17, but had undergone a knee operation and was suffering ongoing discomfort attributable to his neck injury. He conceded that a combination of disabilities may have affected his classroom behaviour to some extent. In an e-mail to Hall – tab 13 – dated December 18, 2006 – Sheppard expressed his disagreement regarding her plan to meet with the parents of 3 of the 4 students and suggested she should consult Tongue before proceeding. Sheppard stated he was accustomed to the Waldorf procedures in which a teacher would not be excluded from attending a meeting with parents and school administration. Sheppard agreed he was well aware that he would not be receiving the usual employment benefits associated with a teaching position and accepted the requirement to submit an invoice to PDL prior to receiving his monthly payment. He prepared the invoices – tab 25 – and at some point early in 2007 received a cheque from an account in the name of TWDS which caused him to believe it had assumed responsibility for TLC operations. Sheppard stated he was upset about the loss of his teaching position at TLC and made representations to TWDS in which he stated that he had been employed under contract and should not be subject to dismissal. In furtherance of this position, Sheppard attended at the classroom in Klee Wyck House to demonstrate that he was ready, willing and able to provide his teaching services according to his contract. Sheppard stated he realized he had not had any dealings with TWDS and that all negotiations and arrangements had been entered into with Hall and PDL, her corporation. Sheppard stated his only entrepreneurial experience arose from providing private teaching or tutoring services in his birthplace – Bermuda - prior to moving to Vancouver. While teaching at Aspengrove, deductions were taken from Sheppard's pay but not from his first cheque and it was this delay in that process which led him to believe the payroll would be regularized once TWDS took over the operation of TLC. In the interim, he was satisfied with the method in place whereby he received payment from PDL. Sheppard admitted he was not a person versed in

business nor was he concerned with money matters and perceived himself as belonging to a world more attuned to cultural pursuits.

[6] The Appellant closed his case.

[7] Susan Hall was examined in direct by counsel for the Respondent. Hall testified she resides in North Vancouver and immigrated to Canada from England in 1999 after receiving certification from Davis Dyslexia Association International as a Davis Facilitator. She is self-employed and works with dyslexic children and adults. She met Sheppard when her son attended the Vancouver Waldorf School and understood he was taking training in the Davis Method and that two of his own children had received benefit of that program. On the ferry to Nanaimo, she met Sheppard and his son and began talking with Sheppard about starting a new school in order to meet the needs of a parent who had approached her to discuss an educational concern. This parent disagreed with some advice that she should home-school her child and discussed the matter with her husband who was prepared to provide funding to obtain alternate instruction for their child. Hall stated she wanted to combine the Waldorf and Davis programs and to add an outdoor education component that would be taught by Norton. On August 6, 2006, she met with Sheppard, Norton and Tongue to discuss the concept of the new school. Tongue declined to participate in the venture as a founding member so Hall and Sheppard and Norton opened TLC in September. Hall was confident in Sheppard's ability to apply methods of Waldorf instruction and it was clear to her they would be operating the school as equal partners since she was a single mother and not in a financial position to be an employer. The main house on the Klee Wyck property was available because she had rented it earlier from the municipality of West Vancouver in the course of carrying on her business through PDL. The rental was month-to-month and West Vancouver invoiced TWDS at an hourly rate of $15 for use of the premises on the basis the school was in session 4 days a week during 3 weeks a month with the last week being reserved for outdoor training. Hall stated she was aware Sheppard required the sum of $60,000 per year and she needed an equivalent amount to meet her own financial demands. She was able to earn money during the fourth week of each month when the TLC students were participating in the outdoor component of their education. Hall stated she discussed with Sheppard the ramifications of being self-employed because she understood he had been an employee throughout his career as a teacher. Norton billed his services at $200 per day and directed his invoices to PDL of which she was the sole shareholder and Director. In turn, PDL submitted invoices – tab 27 - to TLC even though Hall knew it was not a legal entity and inserted a note at the bottom of each invoice requesting that payment – by cheque – should be payable to Sue Hall. Hall stated she envisaged Sheppard's role as

a teacher who would be willing to assist Norton in carrying out the outdoor activity portion of the program. Meetings between herself, Sheppard and Norton were held on Monday afternoons and according to her understanding of their agreement, all three were partners and Tongue – who had declined to participate on that basis – provided his services – as Principal – as an independent consultant. There was no documentation prepared to formalize any agreements. The monthly tuition for each student was $900 and Hall anticipated any shortfall would be covered by donations received from a wealthy patron and two other supporters and that additional students would come "flooding in" once the existence of TLC became known to parents of children with specific learning disabilities. There was no advertising or marketing program undertaken and even though she and Sheppard and Norton had discussed the possibility of opening other similar schools, they were content to rely on word-of-mouth advertising to attract other students. Hall understood she was to be responsible for the portion of the education program composed of instruction in the Davis Method. She thought Sheppard would draw upon the TLC experiment in the course of writing his doctoral thesis. Hall identified the letter – tab 3 – prepared by Sheppard for insertion in the Vancouver Waldorf School bulletin and since she was not qualified to teach in British Columbia, accepted that he had complete control over teaching methods. When referred by counsel to her e-mail – tab 22 – to Sheppard, Hall characterized it as a suggestion concerning certain teaching methods rather than as constituting direction. Hall stated her initial understanding was that she and Norton and Sheppard would be partners in the new enterprise but her corporation – PDL – had an existing bank account and she utilized it to pay for the establishment of TLC and its subsequent operations. Tongue had a long, distinguished career as a Principal of a division within St. Michael's University School in Victoria and agreed to attend at TLC once a month to carry out his function as Principal, although it was not intended that he have any authority over Sheppard. Tongue sent an invoice – tab 27 – dated September 19, 2006 - to PDL in the sum of $550 including travelling expenses of $150. The school operated from 9:15 a.m. to 3:00 p.m. but Hall and Sheppard worked longer hours and Sheppard did not agree to start earlier because he had to take his children to their own school. Hall described the method used at TLC which was for Sheppard to structure his own curriculum while she used her own methods to instruct students during the afternoon class. Hall stated she hoped TWDS would take over operation of the school since it was a non-profit society - with status as a charity - that she had formed and continued to be a member of the Board during the TLC experiment. In her view, TLC was part of the four-fold objective of the Society which had about $10,000 in an account. Hall stated she expected to receive a further sum of $15,000 from a parent and anticipated the funds required to operate on an ongoing basis would be forthcoming from other parents or sources including charitable donations. Unfortunately, the majority of the Board voted against TWDS

taking on the TLC school as a project and left TLC in the position where – with only 4 students – it had monthly revenue of $3,600 and the monthly rent for the premises was $1,600. Hall had estimated that TLC could attract 16 students which – at $900 tuition each – would have produced sufficient revenue to cover all operational costs including remuneration for her, Norton and Sheppard. Supplies for teaching his own class were provided by Sheppard whose style had been characterized as "larger-than-life", "dramatic", "engaging" by parents whose children had been taught by him at the Vancouver Waldorf School. Hall met with 3 sets of parents on December 18, 2006 and Sheppard met with them on an individual basis the following day after which it was time for the Christmas break. On December 31, Hall and Norton and Sheppard met and decided to hold another meeting on January 5, 2007. Another meeting with the parents was held on January 3, 2007 and the minutes – tab 18 – were prepared by one of them and Sheppard and Hall's son also attended. It became apparent Norton did not want to work with Sheppard and suggested his behaviour and style were not compatible with the outdoor training segment and wanted Hall to fire him. Hall stated her response was to advise Norton that she was not his employer but agreed she had written the comment – tab 23 - second page of the e-mail – that although Sheppard had made some mistakes they were not sufficiently severe to "warrant instant dismissal." Hall stated she left before the meeting ended and it had been made clear to her that no more money would be forthcoming from one of the parents – Kelly Taylor – and her husband, whom Hall had expected to be major providers of ongoing operational funding. The money disbursed from the PDL account had been derived from tuition fees and donations. Hall stated she did not withdraw the sum of $9,500 required to reimburse her for her services and Tongue was owed some money for his services but Norton had been paid in full. She was aware Sheppard needed to be paid the sum of $5,000 per month and was aware he was paid in full – later - even though it was necessary for TWDS to issue cheques on its account to herself, Norton and Sheppard. Hall stated she understood TWDS intended to issue one cheque to PDL and it would have issued separate cheques to herself, Norton and Sheppard. Hall acknowledged Sheppard was not involved with any financial matters arising from the operation of TLC and was concerned with receiving his monthly payment of $5,000.

[8] Hall was cross-examined by the Appellant. Hall stated Norton submitted invoices under the name of TN Research – example found in tab 27 – for providing his services at the rate of $200 per day. In the invoice, the customer was identified as Trinity Learning Center and a request was contained at the foot thereof that payment be made in the form of a cheque payable to TN Research. Hall stated she was content with the merger of the Waldorf curriculum with the Davis Method. Hall considered that she and Sheppard and Hall had commenced the venture as business partners but

assuming TWDS would have assumed responsibility for the ongoing operation of TLC, Sheppard could have provided his services either as an employee or as an independent contractor. Hall stated the role of Tongue – as Principal – was to act as an intermediary so parents could communicate their concerns. Hall recalled Sheppard complained to her that he did not want Tongue to attend his class to observe teaching methods unless the procedure was in accordance with the Waldorf Method. The first complaint from a parent was received in October, 2006 and Tongue attended at Sheppard's class thereafter and informed the parents subsequently that Sheppard had a Master's degree in Education and was well-qualified to teach. Hall was referred to a bundle of three documents – Exhibit A-6 – titled in sequence, Daily Timetable, Timetable 2006-2007 and TLC Daily Schedule. Hall identified them as schedules and timetables prepared by her following consultation with Sheppard and Norton.

[9] Counsel for the Respondent did re-examine Hall and did not adduce any additional evidence.

[10] The Appellant submitted that he was first and foremost an educator without any experience in business and had agreed to participate in a venture with Hall and Norton for the purpose of creating a new school that would be more than a school in the traditional sense. In his view, there were no acts taken to formalize the relationship into any structure other than as administered by Hall through her wholly-owned corporation – PDL - and that he was treated throughout the relevant period as an employee even though no source deductions were taken from his monthly salary.

[11] Counsel for the Respondent submitted there was evidence of intent that Sheppard, Hall and Norton were to proceed as business partners with the intent the school would prosper and other similar centres could be opened to accommodate demand as parents with children affected by dyslexia or those seeking alternate education in accordance with the Waldorf philosophy became aware of their service. In counsel's view of the evidence, it was apparent Sheppard had a substantial risk of loss by choosing to provide his services to a fledgling, experimental school rather than seeking employment within the public system or at an established private school. The content of e-mails sent by Hall to Sheppard concerning his teaching methods were characterized as advice to a business colleague rather than direction from an employer to an employee. Counsel submitted that in the event the Court was reluctant to conclude Sheppard was a member of a business partnership, the evidence disclosed he was not an employee of PDL but had provided his services as an independent contractor. Counsel pointed out that Sheppard sent a monthly invoice to PDL and submitted it was merely because PDL had an existing bank account that it

was convenient for Hall to utilize it for purposes of administering the finances of TLC.

[12] The first issue that must be dealt with is the matter of the alleged partnership because if Sheppard was providing his services within that business structure, he cannot have been an employee engaged in insurable or pensionable employment with PDL even if PDL was technically a member of the partnership instead of Hall in her personal capacity.

[13] Sections 2 and 4 of the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348, provide:

> 2 Partnership is the relation which subsists between persons carrying on business in common with a view of profit.
>
> …
>
> 4 In determining whether a partnership does or does not exist, regard must be had to the following rules:
>
> > (a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to any property that is so held or owned, whether the tenants or owners do or do not share any profits made by the use of the property;
> >
> > (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing the returns have or have not a joint or common right or interest in property from which or from the use of which the returns are derived;
> >
> > (c) the receipt by a person of a share of the profits of a business is proof in the absence of evidence to the contrary that he or she is a partner in the business, but the receipt of a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular
> >
> > > (i) the receipt by a person of a debt or other liquidated amount by installments or otherwise out of the accruing profits of a business does not of itself make him or her a partner in the business or liable as a partner,
> > >
> > > (ii) a contract for the remuneration of an employee or agent of a person engaged in a business by a share of the profits of the business

> does not of itself make the employee or agent a partner in the business or liable as a partner,
>
> (iii) the spouse or child of a deceased partner who receives by way of annuity a portion of the profits made in the business in which the deceased person was a partner is not merely because of the receipt a partner in the business or liable as a partner,
>
> (iv) the advance of money by way of loan to a person engaged or about to engage in a business, on a contract between that person and the lender under which the lender is to receive a rate of interest varying with the profits or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person carrying on the business or liable as a partner, as long as the contract is in writing and signed by or on behalf of all the parties to it, and
>
> (v) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him or her of the goodwill of the business is not, merely because of the receipt, a partner in the business or liable as a partner.

[14] In the decisions *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, *Backman v. Canada*, [2001] 1 S.C.R. 367 and *Spire Freezers Ltd. v. Canada*, [2001] 1 S.C.R. 391, the Supreme Court of Canada outlined the proper approach for determining the existence of a partnership in the context of income tax appeals. In *Backman, supra,* at paragraph 17, Iacobucci and Bastarache JJ. determined that a partnership exists if it satisfies the essential elements of a partnership provided under the relevant provincial law.

[15] Section 2 of the British Columbia *Partnership Act, supra,* defines partnership as "the relation which subsists between persons carrying on business in common with a view of profit". Accordingly, the Supreme Court's decisions in *Continental Bank, supra,* at paragraph 22, *Backman, supra,* and *Spire Freezers, supra,* confirmed that the three essential elements of a partnership are: (1) a business, (2) carried on in common, (3) with a view to profit.

[16] In paragraphs 25 and 26 of *Backman, supra,* Iacobucci and Bastarache JJ. outlined the inquiry that must be made by the courts when determining the existence of a partnership:

> 25 As adopted in Continental Bank, supra, at para. 23, and stated in Lindley & Banks on Partnership, supra, at p. 73: "in determining the existence of a partnership

> … regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case". In other words, to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.
>
> 26 Courts must be pragmatic in their approach to the three essential ingredients of partnership. Whether a partnership has been established in a particular case will depend on an analysis and weighing of the relevant factors in the context of all the surrounding circumstances. That the alleged partnership must be considered in the totality of the circumstances prevents the mechanical application of a checklist or a test with more precisely defined parameters.

[17] The British Columbia *Partnership Act*, *supra*, at section 6, defines "business" as including every trade, occupation and profession.

[18] In *Backman*, *supra*, the Supreme Court of Canada explained what is required to fulfill the "business" requirement in paragraph 20:

> 20 The existence of a valid partnership does not depend on the creation of a new business because it is sufficient that an existing business was continued. Partnerships may be formed where two parties agree to carry on the existing business of one of them. It is not necessary to show that the partners carried on a business for a long period of time. A partnership may be formed for a single transaction. As was noted by this Court in Continental Bank, supra, at para. 48, "[a]s long as the parties do not create what amounts to an empty shell that does not in fact carry on business, the fact that the partnership was created for a single transaction is of no consequence." Furthermore, to establish the carrying on of a business, it is not necessary to show that the parties held meetings, entered into new transactions, or made decisions: Continental Bank, supra, at paras. 31-33. A business may be established even in circumstances where the sole business activity is the passive receipt of rent, … [Emphasis added.]

[19] With respect to the requirement that the business be carried on "in common", the Court in *Backman*, *supra*, explained as follows:

> 21 In determining whether a business is carried on "in common", it should be kept in mind that partnerships arise out of contract. The common purpose required for establishing a partnership will usually exist where the parties entered into a valid partnership agreement setting out their respective rights and obligations as partners. As was noted in Continental Bank, supra, at paras. 34-35, a recognition of the authority of any partner to bind the partnership is relevant, but the fact that the management of a partnership rests with a single partner does not mandate the

> conclusion that the business was not carried on in common. This is confirmed in Lindley & Banks on Partnership (17th ed. 1995), at p. 9, where it is pointed out that one or more parties may in fact run the business on behalf of themselves and the others without jeopardizing the legal status of the arrangement. It may be relevant if the parties held themselves out to third parties as partners, but it is also relevant if the parties did not hold themselves out to third parties as being partners. Other evidence consistent with an intention to carry on business in common includes: the contribution of skill, knowledge or assets to a common undertaking, a joint property interest in the subject matter of the adventure, the sharing of profits and losses, the filing of income tax returns as a partnership, financial statements and joint bank accounts, as well as correspondence with third parties: see Continental Bank, supra, at paras. 24 and 36.

[20] With respect to the "view to profit" requirement, the Court in *Backman*, *supra*, held it is necessary to inquire into the intentions of the parties involved:

> 22 A determination of whether there exists a "view to profit" requires an inquiry into the intentions of the parties entering into an alleged partnership. At the outset, it is important to distinguish between motivation and intention. Motivation is that which stimulates a person to act, while intention is a person's objective or purpose in acting. This court has repeatedly held that a tax motivation does not derogate from the validity of transactions for tax purposes […]. Similarly, a tax motivation will not derogate from the validity of a partnership where the essential ingredients of a partnership are otherwise present […]. The question at this stage is whether the taxpayer can establish an intention to make a profit, whether or not he was motivated by tax considerations. [Emphasis added.]

[21] In addition, the Court held that it is sufficient for a taxpayer to demonstrate that there was an "ancillary profit-making purpose":

> 24 An ancillary purpose is by definition a lesser or subordinate purpose. In determining whether there is a view to profit courts should not adopt or employ a purely quantitative analysis. The amount of the expected profit is only one of several factors to consider. The law of partnership does not require a net gain over a determined period in order to establish that an activity is with a view to profit. For example, a partnership may incur initial losses during the start up phase of its enterprise. That does not mean that the relationship is not one of partnership, so long as the enterprise is carried on with a view to profit in the future. Therefore, where a partnership is formed with the predominant motive of acquiring a tax loss, it is not necessary to show an intention to profit by the amount necessary to recoup the acquired losses or produce a net gain. [Emphasis added.]

[22] There was no reliable independent evidence that revealed any intention on the part of Hall, Sheppard and Norton to act as partners during the relevant period.

Except for Hall's testimony, the evidence does not support a finding that Norton acted as though he was a member of a legal partnership as opposed to a willing participant in a venture. He provided his services on a part-time basis and – using the name TN Research - invoiced PDL at the rate of $200 per day and received payment from PDL. Having regard to the entire facts, it is apparent Sheppard intended his participation to be that of a colleague in a new education experiment that could combine his qualifications as a teacher versed in the Waldorf Method with those of Hall who held certification in the Davis techniques. The evidence is clear that he did not turn his mind towards the formation of a legal partnership as he was adamant that he receive an annual salary of $60,000 per year initially, with the understanding that - either in the form of cash or through receiving certain benefits - he would receive an additional $5,000 during the following year. Sheppard did not deal with any aspect of the finances but was aware there were only 4 students in the school as of October, 2006 and that the combined amount of their tuition was only $3,600 per month. Hall considered that Sheppard could be transformed into either an employee or an independent contractor once TWDS assumed operation of TLC but the only person playing any role in the administration of finances and payment of expenses – including rent for Klee Wyck House and the invoices of both Sheppard and Norton - was Hall through PDL, her wholly-owned corporation. There is no evidence that Hall, Sheppard and Norton held themselves out as partners in the legal sense and there was no documentation in the form of a valid partnership agreement nor was there any oral evidence consistent with their intention to function as a business partnership. In the meetings with parents, there is no indication Hall ever disclosed that Sheppard was a business partner. Instead, there was a discussion about acceding to the demands of the parents that he be discharged as a consequence of certain classroom behaviour. Hall did not agree the conduct complained of was sufficient to warrant "instant dismissal." The thrust of the e-mails exchanged between Hall and Sheppard and Hall and others during the relevant period is not consistent with the behaviour of partners in a business enterprise, although there were some attempts on the part of both Norton and Hall to do so *ex post facto* through letters or e-mails. There is no evidence of any intent expressed by either Sheppard or Norton nor of any actions consistent with any such intent that their services would be remunerated by receiving a share of the profits of TLC which existed in name only to describe the educational experiment and was not a legal entity.

[23] A review of the evidence discloses there was no opportunity for profit for the venture as structured nor was there any business plan in place that could lead to a profit in the future. The intent of Hall was to negotiate a takeover of TLC by TWDS, a non-profit society she had founded and continued as a member of its Board. Once absorbed into Society with its charitable status, the opportunity for profit would not

exist *per se* although TWDS could hire Hall, Sheppard and Norton to provide services, either as employees – in the case of Sheppard - or could pay Hall and Norton for their services through PDL and TN Research, respectively. There were no adequate funds on hand in the TWDS account to fund any ongoing operation of TLC and the wishes and hopes that the experiment would be saved by a white knight with bags of money was completely unrealistic as demonstrated by the withdrawal of interim funding by one or more of the parents of the only four students enrolled at the school.

[24] The discussions between Hall and Sheppard during the ferry voyage and subsequent meetings between themselves and with Norton demonstrates that – at best – there was a consensus they would work towards another arrangement that would enable them to pursue a common goal of providing parents with an educational alternative for their children. Their subsequent conduct between September 1, 2006 and January 17, 2007 did not manifest any intention to transform their relationship from the sharing of education philosophies into one having legal consequences that would flow from a valid business partnership. As of February 2, 2007 – Hall prepared a letter – tab 28 – which announced that as of January 31, 2007, PDL ceased trading. In a letter - dated January 31, 2007 – tab 24 – Hall wrote to Sheppard and stated in the second sentence of the first paragraph:

> … You and I and Tyler Norton (the Faculty) jumped into the unknown as partners in name (no money having been part of the agreement) and I agreed to run TLC under my existing business of Positive Dyslexia Ltd. until such time as The Whole Dyslexic Society was able to take over the operation of TLC.

[25] In my assessment of the evidence, that statement is an accurate depiction of the events that transpired because the unknown remained unknown and Hall continued to carry on the business of PDL which – as of September 1, 2006 –also included TLC.

[26] The testimony of Sheppard reveals his understanding of the arrangement with Hall and Norton to have been consistent with two of the definitions of partner, found in The Canadian Oxford Paperback Dictionary, Oxford University Press Canada 2000:

> **partner: 1a** a person, organization, country, etc. who shares or takes part with another or others in some activity (*Canada's trading partners*). **b** a person who is associated with another or others in the carrying on of a business with shared risks and profits. **2** a colleague or associate.

[27] It is clear Sheppard did not see himself as other than a qualified teacher providing his services in return for a monthly payment and did not intend to be involved as a partner in a business with shared risks and profits.

[28] I conclude there was no partnership in existence with respect to TLC during the relevant period and that the Appellant, Hall and Norton did not establish themselves as partners – equal or otherwise - in TLC, as assumed by the Minister and stated in the Reply.

[29] Notwithstanding this finding, that is not the end of the matter. In the case of *Canada v. Schnurer Estate* (C.A.), [1997] 2 F.C. 545 also at *Schnurer v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 121 Court file: A-315-96, the Federal Court of Appeal considered the duty of a Tax Court judge when hearing an appeal from a determination to section 70 of the *Unemployment Insurance Act*, the predecessor to section 103 of the *Act*. Chief Justice Isaac – writing for the Court – stated at paragraph 16:

> …
>
> In my respectful opinion, the Deputy Tax Court Judge erred in law in concluding that the applicant could not rely upon both paragraphs 3(1)(a) and 3(2)(c) in responding to the appeal from the Minister's determination. The authorities in this Court clearly establish that in a section 70 appeal, the Tax Court must focus on the validity of the Minister's determination, and not on the validity of the Minister's specific reasons, or the subsections of the Unemployment Insurance Act relied upon, for that determination. As stated by Desjardins J.A. in Barrette v. Canada (Minister of National Revenue--M.N.R.), "What is important is the conclusion arrived at by the Minister, not the sections of the Act on which he relied. Similarly, in Canada (Attorney General) v. Doucet, Marceau J.A. stated the following:
>
> > It is the Minister's determination which was at issue before the judge, and that determination was strictly that the employment was not insurable. The judge had the power and duty to consider any point of fact or law that had to be decided in order for him to rule on the validity of that determination. This is assumed by s. 70(2) of the Act . . . and s. 71(1) of the Act . . . so provides immediately afterwards, and this is also the effect of the rules of judicial review and appeal, which require that the gist of a judgment, which is all that is directly at issue, should not be confused with the reasons given in support of it.

[30] Although it was not contemplated by the Minister in issuing the decision nor is it addressed directly in the Reply, there are certain assumptions stated therein that are relevant to the issue of whether Sheppard provided his services to PDL as an employee or as an independent contractor. Those assumptions are as follows:

11. …

f) the Payor did not exercise control over the services provided by the Appellant;

g) the Appellant determined which hours he would work;

h) the Appellant negotiated his remuneration package with the Payor;

i) the Appellant invoiced the Payor for his services;

j) the Payor did not deduct withholdings from the Appellant's pay;

k) the Appellant was free to work elsewhere teaching during the Period;

l) the Appellant did not receive training from the Payor;

m) the Appellant was not supervised; and

n) the Appellant decided curriculum, content, hours and disciplinary methods used and had the final say on students.

[31] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323 ("*Royal Winnipeg Ballet*"), *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.*), [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was no issue in this regard due to the clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. That is not the case in the within appeals as Sheppard and Hall did not address this issue except that Hall contemplated the possibility Sheppard could provide his services as either an employee or as an independent contractor once TWDS had taken control of the operation of TLC.

[32] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – ("*Sagaz*") dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. Canada (Minister of*

National Revenue - M.N.R.), [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 and 48 of his judgment stated:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[33] I will examine the facts in the within appeals in relation to the indicia set forth in the judgment of Major, J. in *Sagaz*.

Level of control

[34] Sheppard was a qualified teacher with 20 years experience including his tenure at the Vancouver Waldorf School and Hall did not have the qualifications to be certified by the BCCT but was certified as a facilitator in the Davis Method by the relevant organization. It is apparent from all the evidence – including the e-mails – that Hall functioned as the Administrator of TLC and in that capacity was not reticent about stating her opinion pertaining to certain of Sheppard's teaching methods. She arranged for Tongue – the consultant providing his services as Principal of TLC – to observe Sheppard in the classroom. The statement by Hall that Tongue was to serve only as a go-between between the three-person Faculty and the four sets of parents does not strike me as reasonable. Hall's demeanour at the meeting with the parents on January 14, 2007 as disclosed by her e-mail – tab 23 – is not consistent with a partner discussing the conduct of another partner but smacks of a superior considering complaints about the conduct of a subordinate and then weighing them to determine whether that person should be dismissed. From the perspective of Sheppard, once he started teaching at TLC in September and thereafter, he believed

he was subject to the control of Hall who issued him pay cheques each month drawn on the PDL account.

Provision of equipment and/or helpers

[35] Sheppard used his own supplies in the classroom but neither the extent nor the cost was referred to in evidence. Since he had been a teacher for many years utilizing the Waldorf Method, it is reasonable to assume much of the material used by him had been in possession earlier. There was no need for Sheppard to hire any helpers or to provide any equipment.

Degree of financial risk and responsibility for investment and management

[36] Sheppard did not invest any money in the TLC venture. He was aware that he would be teaching at a new private school with an experimental component but did not pay a great deal of attention to the security of that position until he was not fully paid for his services during the month of December. By the end of January, 2007, Sheppard probably wished he had obtained employment with an established private school or a public school in the Greater Vancouver area but he had been assured by Hall that she was exploring various methods for the purpose of ensuring the future financial stability of TLC. Sheppard was not required to manage any staff but participated in meetings with Hall and Norton pertaining to scheduling, class activities, communication with parents and other matters related to the operation of TLC.

Opportunity for profit in the performance of tasks

[37] There was no opportunity for Sheppard to profit in the performance of his task as a teacher at TLC. He was insistent that he receive an annual remuneration - which he took pains to characterize as salary on several occasions – of at least $60,000 to be paid at the rate of $5,000 per month. There was no opportunity for him to profit had Society assumed responsibility for the ongoing operation of TLC except that if it could have had sufficient money on hand or the means to raise funds, it would have afforded him some security until the academic term ended. Unfortunately, Society did not possess sufficient funds and moreover declined to become involved in the TLC operation. Outside of that, there was nothing of consequence in place between Sheppard and Hall and Norton that would entitle him to reap any financial gain even if Hall had been successful in duplicating the TLC experiment elsewhere and obtaining a financial benefit through some franchise arrangement or royalty agreement.

[38] Hall chose to utilize PDL as the vehicle by which Sheppard's teaching services could be obtained - and retained - for purposes of the TLC venture. There was no intent at the outset that Sheppard provide his teaching services as an independent contractor and an analysis of the relevant indicia referred to in *Sagaz*, *supra*, results in a finding that there was an employer-employee relationship existing between PDL and Sheppard.

[39] I conclude Sheppard was employed by PDL during the relevant period and the within appeals are allowed. Both decisions of the Minister are varied to find that:

> Sheppard was engaged in insurable and pensionable employment with Positive Dyslexia Ltd. from September 1, 2006 to January 17, 2007.

Signed at Sidney, British Columbia, this 19th day of February, 2009.

"D. W. Rowe"

Rowe D.J.

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