Noteworthy Decision Summary

Decision: WCAT-2005-04895 **Panel:** Herb Morton **Date:** September 16, 2005

Assessment – Employer – Non-Profit Society – Worker, Meaning of – Worker vs. Volunteer – Contract of Service vs. Volunteerism – Honoraria – Policy Item #20:10:30 of the Assessment Policy Manual – Item #AP-1-1-5 of the Assessment Manual

The test for distinguishing between an honorarium and a wage, and between voluntary acts and employment, should be based on the actual nature of the activity and the resulting legal relationships, rather than on the motive or purpose of a non-profit society and its members. Honoraria tend to be for short term or occasional activities. The provision of a service on a daily basis, paid for on that basis, is more readily characterized as involving the payment of a wage under a contract of service.

The Workers' Compensation Board informed the appellant, a non-profit society (Society), that it was required to be registered as an employer under the *Workers Compensation Act* in relation to the provision of crossing guard services by its members. The Society contracted with a local school district to provide crossing guard services before and after school, as well as midday in some situations. The school district paid a daily rate for the services which changed over time, but amounted to slightly more than minimum wage when considered on an hourly basis. The Society was required to obtain insurance, supply and maintain uniforms, provide training, and be wholly responsible for the conduct of its members. The Society argued that its members were volunteers and not workers, and that any monies paid to its volunteers were honoraria, rather than payment for services. The Workers' Compensation Review Division rejected this argument.

When a society enters into a contract for the provision of services, under specified terms and conditions, there is very little to distinguish the agreement from one which might be entered into by some other firm. While the services provided by the Society are in a grey area involving aspects of both volunteerism and payment for services, on balance, the panel found that the members were workers rather than volunteers.

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Panel: Herb Morton, Vice Chair

Introduction

The appellant, which is registered as a Society, is the local branch of an organization founded in 1904. In 2002, the Society contracted with a local school board to provide crossing guard services. The Society appeals *Review Decision #20697* dated January 10, 2005, which confirmed the Board's decision that it was required to be registered as an employer under the *Workers Compensation Act* (Act), in relation to the provision of crossing guard services by its members. The position of the Society is that its members are volunteers and not workers. The Society submits that any monies paid to its volunteers are honoraria, rather than payment for services.

By notice of appeal dated February 5, 2005, the Society requested that its appeal be considered on a "fast track read and review" basis. I invited comments from the Board's Assessment Department, pursuant to item #8.82 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). This provides that WCAT may invite the Board to participate in an appeal under its general authority to request participation by "any person", under section 246(2)(i) of the Act. Written submissions were provided by the manager, Assessment Policy (the policy manager), on June 9, 2005. These submissions were disclosed to the appellant for reply. On July 7, 2005, the appellant requested an oral hearing, stating: "I would like to present the history, past voluntee[r] service in British Columbia, present activity and volunteer service, and information regarding our future status as a volunteer organization." On July 14, 2005, I noted that considerable information was available on the internet concerning the history of this organization. A copy of the information obtained from the internet was provided to the appellant. I further noted:

> Items #4.32 and #4.37 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provide as follows:
>
> > Item #4.32 – Similarly, where an assessment appeal concerns whether a putative employer is liable for assessments for its "workers", or whether the alleged workers are independent operators, WCAT may invite the workers/independent operators to participate. WCAT may determine the appropriate means to invite participation (such as by letter, posting of a notice in the workplace, or other public notice) and the extent of their participation (such as written submission only, or selection of one representative to speak on their behalf at an oral hearing).

> Item #4.37 – On an appeal or section 257 application which raises the question as to whether an organization's representatives are workers or independent operators, WCAT may invite participation by the putative employer and all the workers/independent operators as the decision could affect their status (see item 4.32).
>
> WCAT may determine the extent to which such persons may be permitted to participate in a proceeding.

> Given the nature of the society, I will assume that the persons presenting this appeal are in a position to represent all the members of the society who perform services as crossing guards. This is not a situation where the alleged employer is arguing that the "workers" are independent of the Society. However, in the event any individual member who performs crossing guard services wishes to participate, however, I would include their input in my consideration. Please disclose this memo to the appellant. It is open to the appellant to advise its members of this appeal, to allow them to participate individually, or to continue to act as the representative of the Society and its members. In the event any individual member wishes to participate, their comments should be provided by August 26, 2005.

On July 11, 2005, the appellant provided its written rebuttal to the submissions of the policy manager, Assessment Department. On August 4, 2005, the appellant requested that the panel consider the material obtained from the internet regarding its history and organization be considered as additional evidence in support of its appeal.

Given the procedural complexities which had arisen, I removed this appeal from the "fast track" stream. The appeal remains subject to the 180-day time frame for decision-making set out in section 253(4) of the Act. I find the appeal may be appropriately considered on the basis of the written evidence and submissions (including the materials printed from the internet), without an oral hearing.

Issue(s)

Is the Society required to be registered as an employer under the Act, in connection with the provision of crossing guard services by its members?

Jurisdiction

The Review Division decision has been appealed to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

Background

The appellant is a Society incorporated under the *Society Act*. Its Constitution includes the following objects:

> (a) The [name] is a non-profit, non-racial, non-sectarian, non-political, self-supporting association organized for the purpose of upholding and promoting loyalty to Her Majesty the Queen and to the Commonwealth.
>
> (b) To promote and foster good citizenship by undertaking projects in association with other National and Community organizations whose objects are similar to that of the [name].
>
> (c) To recruit, train and qualify and equip the [name] to serve if called upon by their community, Province and Country in times of emergency.
>
> (d) To maintain and uphold the traditions established by the [name] in London, England, in 1904.

The internet materials set out the history of the organization, of which the appellant is a local branch. These materials state in part:

> Canada of the early 21st century has a political and social reality that differs significantly from the British Imperial era that defined much of Canada in the late Victorian/early Edwardian era. The fortunes of the [name] have been closely tied to the influence of "empire" and the two World Wars of the 20th century. The [name] was most active immediately preceding the first Great War and revitalized during the 1930s prior to WW2. Following WW2, veterans provided a base for a continuance of the [name]. The roles focused on aid to civil powers and auxiliary police or security activities. As the war veterans faded into history, the [name] became less dynamic. Social and political realities have made the initial scheme of providing military scouts, guides, pioneers, and mounted rifles for service an unlikely task. Currently, [name] in Canada carry on as a living monument to Canada's patriotic history.

The recent history of the organization is summarized as follows:

> 1939 - WW2 is declared and able-bodied [members] enlist individually in the army, navy, and airforce of Canada. The remaining [members] become involved in patriotic duties on the home front. A noteworthy contribution involves the raising [of] funds for the donation of a 'Spitfire' fighter aircraft to the war effort.
>
> Post WW2 - veterans and some younger citizens enrol[l] in the [name] and work hard to contribute to their individual communities in a meaningful way. Quickly old traditions are fading and new values are coming to the forefront.
>
> 1950s – '60s & '70s still see the [name] active in many communities, but in diminishing numbers through the decades.
>
> 1980s & '90s in Canada finds the [name] in a difficult situation. Few new members are attracted and a constant state of fracturing commands and splinter groups interfere with useful [name] training and duty.
>
> TODAY - the [name] are reassessing their role and relevance in the 21st century. International contacts are strengthening through rapid travel and communications. Canadian [name] need to review the founder's early vision of the [name], assess and adapt it to new realities.

In a written contract dated November 22, 2002, with the Board of School Trustees of a local school district, the Society agreed to provide crossing guard services for the school year (September to June). Service was to be provided for one hour before the start of the school day, and one hour after the end of the school day, as well as mid-day in some situations. Provisions of the contract included the following:

> 7. **Billing Rate**: Service will be billed by the [name] to the Board at the daily rate of $19.00 per crossing. Where midday service is also provided the total daily rate will be $27.50 per crossing.
>
> 13. **Training & Equipment**: The [name] agrees to supply and maintain, in good and proper condition, uniforms, rainwear and provide appropriate training, for the execution of this MOA. The Board agrees to supply paddles and crossing guard reflective vests.
>
> 17. **Care and Qualifications**: . . . The [name] shall control, direct and supervise its crossing guards to observe all safety rules and

regulations. The [name] crossing guards shall remain at all times under the exclusive control, direction and supervision of the [name] and shall not be deemed employees, agents or servants of the Board for any purpose whatsoever. The [name] shall be solely responsible for any payment to their members including, without limitation, salary, employment taxes (WCB, withholding and similar taxes) and any benefits (hospitalization, medical, long-term disability). The [name] shall be solely and entirely responsible for the acts of its members.

18. **Workers' Compensation Board (W.C.B.) Requirements**: Any WCB requirements related to the [name] members who provide service to the [name] for the benefit of the Board shall be the sole responsibility of the [name]. Where applicable, the [name] will comply with all conditions of the Workers' Compensation Board of British Columbia.

The Society also agreed to maintain comprehensive general liability insurance of at least two million dollars. A purchase order dated August 29, 2003 in the amount of $110,660.28 relating to the provision of crossing guard services contained the following clause:

> Vendors will comply with the *Workers Compensation Act* and in particular will obtain and maintain the necessary coverage for the Vendor's employees, and will, upon request by the School District [number/location], provide particulars of such coverage.

In 2004, the Society entered into a new *Memorandum of Agreement for Crossing Guard Service* with the school district. The terms of this agreement were modified in several respects. Key changes included the following:

7. **Code of Conduct**: The [name] will establish a code of conduct and utilize it in directing the activities of their members as crossing guards. . . . The [name] shall direct its crossing guards to observe all safety rules and regulations. The [name] are responsible for the scheduling, and supervision of the crossing guards.

10. **Board's Right to do Work**: If the [name] neglect or fail to perform any provision of this MOA, the Board may, after three (3) days written notice to the [name], arrange relief or remedy. The donated expense payment to the [name] would be reduced proportionately to reflect the period of time relieved by the Board, i.e. by the daily amount normally donated to the [name] for such service under this MOA.

13. **Expense payment to [name**]: The Board recognizes that the [name] volunteer their services. However, there are costs for uniforms, rain gear, training, travel and administration, etc. A payment to cover expenses will be made to the [name] once a month. The payment will be based on a daily rate of $20.00 per crossing. Where a midday service is also provided, the total daily rate will be $30.00 per crossing. The [name] will submit a monthly statement to the Board indicating the sites of service provided for authorization of the expense payment. The [name] reserve the right to determine how the expense payment is distributed to their individual members.

On May 3, 2004, as a result of an inquiry regarding the status of the Society, a Board officer telephoned the Society, and recorded the following:

> Major [X] stated that all the people under this non profit society are volunteers. Major [X] stated that he has 80 volunteers, 50 steady and 30 casual. They are crossing guards for the [name] School Board. That they are paid an "allowance", they work 2 hours per day, 1 hour in the morning and 1 hour in the afternoon. They are paid $20, for their uniforms and their gas. Major [X] states he deducts 10% to put towards the uniforms. Major [X] does not consider this income and does not report to CCRA. I have advised Major [X] that the [Society] is deemed an employer under The Act and that registration is mandatory. I advised Major [X] that I have backdated the account to January 1-03.

By letter dated May 4, 2004, the Employer Service Centre, Assessment Department, welcomed the employer as a new account, effective January 1, 2003. By letter dated May 28, 2004, the Society wrote to the Board stating: "TAKE NOTICE THAT THIS LETTER IS A REQUEST for a review of the deemed decision…" The Society submitted:

> Our "Society was incorporated . . . on June 20, 1961 under the BC Societies Act. We have been engaged in numerous volunteer activities that have been a form of "work" by our volunteers members over the years. . . .
>
> Our present activity as "crossing guards' for the [school board] is done on a voluntary basis. While we receive a recompense from them, our Society gives out these monies as gifts towards the costs of the volunteers' efforts and expenses. Uniform, automobile, traveling, telephone, and other expenses of our [name] are substantial.

In a letter dated August 13, 2004, the manager, Employer Service Centre, Assessment Department, reconsidered and upheld the May 3 [*sic*], 2004 decision on the basis there was no new information to consider.

The Society requested review of the August 13, 2004 decision. By letter dated December 20, 2004, the appellant explained:

> . . . we are all volunteers and members in a military fashion of the [name]. We as individuals, have the option to help out in various events such as sport occasions, funerals, parades, celebrations and other activities including Armistice Day commemorations.
>
> Our activities as "crossing guards" appear to be structured; and when viewed with the aid of the Memorandum of Agreement of November 22, 2002, the structure appears as an employers' agreement. However, that said agreement is not in force now. I enclose a copy of our latest arrangement with the [board of school trustees].

By decision dated January 10, 2005, the review officer confirmed the Board's decision of August 13, 2004. (The reference in the conclusion to a decision of August 4, 2004 appears to have been a typographical error). The review officer reasoned in part:

> The applicant has entered into an ongoing contractual relationship with the school district to provide crossing guard services. The applicant has been providing the service since 2002 and is committed to providing the service through at least June 2005.
>
> The applicant is paid for providing the service. While the amended Memorandum of Agreement calls a payment a "donation", I find it is a payment for a service. If the service ceases to be provided, the payment likewise will cease. The use of the term "donation" in the Memorandum of Agreement is not determinative of whether coverage is required under the *Act.*
>
> The *Act* is social legislation, it is meant to be read expansively. The definition of "worker" is inclusive.
>
> Policy item #1-1-5 sets out volunteers or other persons not receiving payment for their services are generally not workers. In this case, the members are paid for their services. Although the applicant submits the payment is a gift or an allowance for expenses, from the information on file, it appears the payment is directly related to the hours of "work" provided. There is no evidence it is tied to the actual "expenses" of the members providing the service. The terminology of "gift" or honourarium

> [*sic*] used by the applicant to describe these payments is not determinative of whether coverage is required under the *Act.*

The review officer concluded that the appellant's members fit within the definition of "worker" for the purposes of providing crossing guard services for the school district.

Law and Policy

The definition of the term "worker" in section 1 of the Act includes:

> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

Section 1 defines "employer" as follows:

> **"employer"** includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

Section 1 defines "industry" as follows:

> **"industry"** includes establishment, undertaking, work, trade and business;

Section 2(1) of the Act provides:

> This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board.

Policy at item #6.20 of the *Rehabilitation Services and Claims Manual*, Vol. I (RSCM I) currently provides:

> **6.20 Voluntary and Other Workers Who Receive No Pay**
>
> Usually a "worker" is paid. Therefore, it is not surprising that voluntary or other workers receiving no payment for their work are not generally considered workers under the *Act*. On the other hand, some workers of this type are expressly included within the scope of the *Act*, and the Board is given express power to admit others at its discretion. Furthermore, the receipt of some sort of payment by such workers may lead to their being workers under the *Act*. Further information about volunteers can be found at 20:10:30 and 20:10:40 of the Assessment Policy Manual.

Policy at item 20:10:30 of the former *Assessment Policy Manual* provided:

> Volunteers or other workers not receiving payment for their services are not normally considered workers under the Act. However, some workers of this type are expressly included within the scope of the Act (volunteer firefighters or ambulance drivers and attendants employed by a municipality or other form of local government) and the Board is given power to admit others at its discretion. The admission of workers under Section 3(5) – 3(7) of the Act is covered in Section 20:10:40.

Policy at item 20:10:40 of the former *Assessment Policy Manual* concerned the Board's authority to extend coverage to workers and employers who would not normally fall within the scope of the Act. That policy has no relevance to this case, as the Board found that the Society was subject to mandatory coverage under the Act.

Policy at AP-1-1-5 of the *Assessment Manual* currently provides:

> **(a) General**
>
> Workers include individuals not employing other individuals and who fall into the following categories:
>
> - individuals paid on an hourly, salaried or commission basis;
> - individuals paid on commission or piecework where the work is performed in the employer's shop, plant or premises;
> - individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;
> - individuals operating under circumstances where the "lease" or "rental" of equipment or "purchase" of material from their employer is merely a device to arrive at a wage or commission amount; and
> - labour contractors who elect not to be registered as independent operators.
>
> A worker cannot be an "independent firm".

(b) Volunteers

Volunteers or other persons not receiving payment for their services are generally not workers.

Union delegates attending conferences, seminars, conventions or similar events are considered workers of the union if they receive a recorded payment for attending such functions, whether it be in the form of a wage or a per diem allowance.

A social service agency may operate a sheltered workshop to provide mentally or physically handicapped individuals with training or life enrichment opportunities in a workshop environment. Coverage applies only to the paid workers of the organization and paid instructors in the workshop, and not to the participants in the program, whether or not they receive a living allowance, incentive allowance, or nominal payment from the Provincial Government.

Volunteer firefighters or ambulance drivers and attendants employed by a municipality or other form of local government are given coverage by the definition of "worker" in section 1. This includes an individual at the scene of a fire who is requested by the Fire Chief or authorized delegate to assist and whose name is recorded. Only those individuals under the direction and control of the Fire Chief or authorized delegate are covered.

Preliminary

The Review Division confirmed the August 13, 2004 decision by the Board, to deny reconsideration of the May 3, 2004 decision. In substance, however, the Review Division decision addressed the merits of the decision that the Society was obliged to register with the Board as an employer in relation to the provision of crossing guard services by its members.

The August 13, 2004 decision appears to have been made in contravention of section 96 of the Act, both because it followed a request for review and because it was issued more than 75 days following the May 4, 2004 decision. Subsections 96(4) and (5) of the Act provide:

> (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
>
> (5) Despite subsection (4), the Board may not reconsider a decision or order if

(a) more than 75 days have elapsed since that decision or order was made,
(b) a review has been requested in respect of that decision or order under section 96.2, or
(c) an appeal has been filed in respect of that decision or order under section 240.

Policy at AP1-06-1 of the *Assessment Manual* specifies that a determination as to whether an individual is a worker or employer is a decision on an individual matter. Accordingly, the Board's authority to reconsider such a decision is subject to the limitations in section 96(5) of the Act.

However, the Society had submitted a timely request for review of the May 3, 2004 decision. Inasmuch as the Review Division decision addressed the merits of the May 3, 2004 decision (albeit in connection with the subsequent request for review of the August 13, 2004 decision), no significance attaches to the fact the second decision by the Assessment Department was made without jurisdiction. I consider it appropriate to simply proceed to address the Society's appeal on the merits.

Reasons and Findings

Submissions have been provided by the policy manager, and the Society, regarding the criteria which are used in determining whether an individual is a worker or an independent operator. The policy manager cites the reasoning of the New Brunswick Court of Appeal in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2001) 201 D.L.R. (4th) 450, application for leave to appeal to the Supreme Court of Canada dismissed, [2001] S.C.C.A. 4250. These submissions do not pertain directly to the question as to whether the members are volunteers. They are relevant, however, to consideration as to whether the members have entered into or work "under a contract of service…, written or oral, express or implied" (i.e. as included in the definition of the term "worker" in section 1 of the Act). I do not consider it necessary to address these criteria at length. The services provided by the members are essentially services of labour. The Society contracted with the school district for the provision of such services on a regular and ongoing annual basis. The provision of such services by the Society clearly requires a considerable degree of organization, in order to ensure "coverage" of the various schools as required. The members have no chance of profit or loss. To the limited extent that any tools or equipment are required, these are provided to the members by the school district or the Society. I find no basis to support the conclusion that the members are independent contractors. Subject to consideration as to whether the members are volunteers, I consider that there is sufficient basis for finding a contract of service. I do not consider these criteria particularly helpful to addressing the central issue as to whether the members are workers or volunteers. For example, if the members perform some

service at a Remembrance Day or other function, they may do so as part of the Society rather than on an independent contractor basis, but nevertheless be volunteers.

The Society submits that it is self-evident that the honorarium for expenses is not a minimum wage. The Society submits that its members are not hired but are totally volunteers. As well, they perform a socially beneficial function, "not basic work". The members view their crossing guard services as "parental" guidance rather than work. The Society also submits that its members have replaced volunteer parents to escort children at crossings, which raises the question of parents being workers.

It is clear from the past and current policies that volunteers are normally not considered workers under the Act. Accordingly, the real issue in this appeal is whether the members' services as crossing guards were those of volunteers.

A similar issue was addressed in *WCAT Decision #2003-01780* dated July 31, 2003. That decision concerned the status of a 71 year old elder and counsellor of a native Band, who was injured in a motor vehicle accident. She initially received workers' compensation benefits on the basis she was a worker. However, it was subsequently argued that she was not a worker, as she had only received honoraria for participating as an elder in certain school activities. The evidence indicated the plaintiff would receive approximately $50 for attending the school for about 3.5 hours in the morning. The WCAT panel reasoned:

> On the other hand, it is also apparent that the plaintiff's association with the school was not a typical employment situation. She stated, early in her communications with the Board, that she does not read or write. In an affidavit sworn on August 30, 2001 she described her involvement with the school as follows:
>
> 5) I would go there for a couple of hours in the morning, I would sit there as an elder, they had someone there from Headstart who was actually looking after them. The woman was helping the children, getting them to colour, just looking after them. I was just sitting there, I don't know why, in case the other girl had to leave. More just as a presence, there is a lot of respect for the elders, the kids listen more when there is an elder there. Not really teaching them the language, except if it was me alone, I would talk in Kaska, they were too small to understand, they would just listen. I would tell them stories. They do that quite a bit in our band, have the elders there, visiting kids, but not working.
>
> 6) They would give me an honorarium, each time I went in I think I would get an honorarium, about $50 each time. They would send me a cheque every so often, I never kept track. I got honoraria for various things like going to meetings, I'm not really sure.

7) When I was leaving the school, they would sometimes tell me when to come back, sometimes they would not ask me. I never knew when I was going to be working except when they told me to come the next day.

8) No-one ever told me what I was supposed to do, I was just supposed to be there until lunch, then go home. I could go if I wanted to, or not, no-one ever told me I had to go, and if I had other things to do I would not go.

. . .

There is no role that is analogous to that of an elder, outside of the native community. Individuals who are paid to assist in classrooms or other types of programs are usually viewed as workers regardless of whether they are formally involved in teaching. The evidence in this case is that the plaintiff received money for attending at the school, but the role that she describes is not one which readily accords with the usual types of "services" that would form the subject of a contract of service. If it were clear from the evidence that the plaintiff was paid honoraria, as this term is usually understood, for her role at the school then there would be no contract of service. It is primarily the conflicting evidence regarding the nature of the payments made to the plaintiff which creates uncertainty as to her status.

I find that the evidence on the whole is more indicative of the plaintiff receiving honoraria in the usual sense of that term than receiving money for services rendered. She was not paid a salary or wages for performing certain activities; rather, she was given money in recognition of the contribution she made by virtue of her status as an elder. This is not to say that a Band elder would never be viewed as an employee of the Band. But, on the evidence before me I find that the plaintiff was not an employee of the Dease River Band Council.

WCAT Decision #2005-02049/02051 concerned the status of an Indian Band Chief and Band Councillor. In that case, the Assessment Department advised:

The Audit Section of the Assessment Department has written practice regarding elected band officials. In the Audit Section Procedure guide in the section entitled "*Specific Industry Audit Guidelines — Indian Band Operations*" it states:

. . . Bands currently rely heavily on subcontractors/consultants. These consultants are involved in administration functions, supervisory activities in specialty areas such as logging, treaty negotiations, construction, etc. Consultants can be Band/Non-

> *Band Members/Council or Chief. The consultants can be on payroll or be receiving honorariums for other work. The consulting remuneration may even be recorded as an honorarium, which is assessable.*
>
> *Many Bands have secondary activities such as logging, manufacturing and silviculture being operated under a separate legal entity. These legal entities will have the Band Council members acting as the Board of Directors. Supervisors or managers of these separate legal entities may be remunerated through the associated Indian Band. . .*
>
> *. . . Band Council members are paid an honorarium for functions relating to the Band Administration. These honorariums are similar in nature to amounts received by City Councilors and Mayors for Municipal Government activities. The honorariums relating to Band Council activity are not assessable. Assessment Officers should be cognizant of excessive honorariums being paid which may be for unrelated services by the Council. Often the elected Chief and Council may be T4'd during an assessment year. Verification of the nature of the remuneration is necessary. Remuneration for the individuals elected duties is not assessable. Remuneration for other duties is assessable i.e. councilor is the bands school teacher. Should the remuneration be for elected duties and other duties combined then an analysis is necessary to differentiate between the remunerated amounts.*

The audit procedure guide provides that honorariums are not assessable. The reason they are not assessable is that band council members are not considered workers under the *Act*, as per policy AP1-1-4.

[reproduced as written]

WCAT Decision #2005-02049/02051 reasoned:

> In the circumstances of the present case, the payments to the plaintiffs were more clearly labeled as honorariums. At the same time, however, the fact that they involved payments on a regular basis, at an annual rate, makes the payments appear more like a salary rather than an honorarium as that term is commonly used. At most, the use of the term "honorarium" may be viewed as signifying an intention of the Band and the plaintiffs not to enter into an employment relationship. However, the labels used by the parties, and their wishes or intentions, cannot be determinative. *Decision No. 32* reasoned, at pages 128-129:

> For full effect to be given to the principle of compulsory coverage contained in the Act, and reflected in that section, the prohibition of contractual avoidance must be applicable whether such a contract provides in express terms that no benefits under the Act are payable to a worker of the employer, or whether it seeks to achieve the same objective by more subtle means, such as by describing the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment. . . .
>
> . . .
>
> But accepting the contract as a genuine attempt to define the terms of the relationship does not require that we should also accept the labels used in the document as showing how the relationship should be classified. That is something on which we must make our own judgment having regard to the terms of the contract and the operational routines of the relationship.

In that case, it was found that the individuals in question were not workers. However, that decision was based on the parties' positions as Band Chief and Band Councillor. It was concluded that they came within the policy which excluded elected officials from coverage under the Act.

Having regard to the reasoning in these prior decisions, I consider that the submissions of the appellant have some merit. If the payments made to its members were truly honoraria, provided in relation to their volunteer services but not constituting money for services rendered, then the members are not workers under the Act. While the members of the Society receive money for providing crossing guard services, it must be considered whether the role that they perform is one which readily accords with the usual types of "services" that would form the subject of a contract of service.

The Society has a long history of volunteerism. I accept that the primary motivation of the Society and its members is to engage in activities which accord with its traditions and Constitution. On the other hand, however, the specific activity in question in this appeal, involving the provision of crossing guard services, is being performed in a manner which is largely indistinguishable from a work activity.

I appreciate that no fixed dollar amount can be used to distinguish a wage from an honorarium. The payment of $50 to a native elder for approximately 3.5 hours of attendance at a school is equivalent to more than $14 per hour. That amount, which exceeds the payments to the members of the Society for performing crossing guard services, was accepted as constituting an honorarium, and the elder was found not to be a worker.

The current minimum wage in British Columbia is $8 per hour. Section 34(1) of the *Employment Standards Act* provides:

> Subject to subsections (2) and (3), if as required by an employer an employee reports for work on any day, the employer must pay the employee for a minimum of 2 hours at the regular wage whether or not the employee starts work, unless the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act,* or a regulation under that Part.

However, section 33 of the *Employment Standards Act* further provides:

> An employer must ensure that an employee working a split shift completes the shift within 12 hours of starting work.

While other statutory requirements are not determinative, they are a factor to be considered. It would appear that the amount of the monies paid by the school district for the provision of crossing guard services would meet or exceed the minimum wage requirements of the *Employment Standards Act* (as involving a split two-hour shift), if the member performed the crossing guard duties in both the morning and afternoon.

The May 3, 2004 telephone memo indicated that of the 80 volunteers, 50 were steady and 30 were casual, and that they received an "allowance" for working two hours per day. The fact that over $100,000 was paid to the Society for the provision of crossing guard services is indicative of the scope of these activities. The evidence indicates these services have been provided on a regular, large scale basis, over the last few school years.

Where, as here, the Society has entered into a contract for the provision of services, under specified terms and conditions, there is very little to distinguish the agreement from one which might be entered into by some other firm. To this extent, therefore, the provision of crossing guard services appears distinguishable from other types of volunteer services which might be performed by the Society and its members.

The Society submits that its members:

> …are more military in their functions than normal ordinary workers and have a history of 100 years of voluntary service for her majesty the Queen of England (and prior sovereigns) including loss of life in wartime activities.

I am reminded, in this regard, of the historical doctrine of crown immunity. In *Lorac Transport Ltd. v. The Atra* [1987] 1 F.C. 108, (1986) 28 D.L.R. (4th) 309, the Federal Court of Appeal reasoned:

> . . . the doctrine of absolute sovereign immunity is now wholly discredited in England. Without tracing the full history of the process by which the courts of that country have brought themselves into step with most of the rest of the world, it is enough to note that, in succession, the Privy Council (Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd. et al., [1977] A.C. 373), the Court of Appeal (Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529), and the House of Lords itself (I Congreso del Partido, [1981] 2 All E.R. 1064) have now unreservedly adopted what is called the restrictive doctrine of sovereign immunity. That doctrine, briefly stated, limits immunity to those cases where the foreign State's involvement in the subject-matter of the suit is truly of a public law nature as an integral part of the exercise of its sovereign governmental functions.

The Federal Court of Appeal addressed the question as to the test to be applied in determining whether the governmental activity was of a commercial or trading nature (*jure gestionis*) or one of governmental function (*jure imperii*), as follows:

> One of the clearest statements of the test is in the decision of the Federal Constitutional Court of the German Federal Republic in the case of the Claim against The Empire of Iran (1963), 45 I.L.R. 57, quoted with approval in I Congreso del Partido, supra, as follows (at p. 80):
>
> > As a means for determining the distinction between acts jure imperil and jure gestionis one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.

The Federal Court of Appeal denied the appeal from the decision of the Federal Court, Trial Division. The lower decision similarly reasoned in part, with respect to the decision in *Playa Larga v. I Congreso del Partido*, [1981] 3 W.L.R. 328:

> In the Court of Appeal disposition of I Congreso, Lord Denning M.R., in his affirmative judgment, approved the statement of law made 100 years or so before by Sir Robert Phillimore in The "Charkieh" (1873), L.R. 4 A. & E. 59 at pp. 99-100:
>
> > No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an

> obligation to a private subject to throw off, so to speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character ...
>
> ...In my opinion, the broad general principle running through the modern-day cases is simply this -- the doctrine of absolute sovereign immunity no longer applies to the commercial transactions of foreign governments or their agencies or entities unless such transactions, from the nature of the motivating acts or the subject-matter thereof, are clearly of a governmental or sovereign character.

These court decisions concerning sovereign immunity have no direct relevance to this appeal. I consider, however, they provide a useful analogy. To the extent the Society enters into an agreement to provide services on defined terms and conditions, and the role being performed by its members is one which readily accords with the usual types of "services" that would form the subject of a contract of service or contract of hire, it may be concluded that there is an employment relationship which comes within the terms of Part 1 of the Act. The test for distinguishing between an honorarium and a wage, and between voluntary acts and employment, should be based on the actual nature of the activity and the resulting legal relationships, rather than on the motive or purpose of the Society or its members. While the intentions of the parties are a factor to be taken into account, it is also necessary to evaluate "the terms of the contract and the operational routines of the relationship" to determine the nature of the relationship (for the reasons set out in *Decision No. 32*).

The policy manager cites the decision of the Tax Court of Canada in *Royal Winnipeg Ballet v. Minister of National Revenue*, (2004) 35 C.C.E.L. (3d) 101. The court reasoned:

> 31 Intent only becomes a factor in the event the relevant legal tests yield no definitive result, and where no sham or window dressing is suggested. I agree with this approach. In appropriate circumstances intention simply serves as a tie-breaker. This accords with Justice Major's approach; it does not elevate "intention" to a more primary role. If "intention" was given the prominence the Supreme Court of Canada appears to have reserved for the control factor, there would be a risk that payors, employers, employees and independent contractors might view it as some endorsement of a right to opt in or out of the employment insurance scheme. It should be borne in mind this is not a voluntary program.

Parties who are otherwise subject to the Act similarly cannot choose to opt out of the workers' compensation coverage provided under Part 1 of the Act.

Two court decisions dealing with disputes regarding the status of "volunteers" have found that such persons did not come within the terms of particular statutory schemes. In *St. John Ambulance-Ontario Council (Oshawa Branch) v. Canada (Minister of National Revenue)* [1988] T.C.J. No. 1035, the Tax Court of Canada considered the situation of a "volunteer" instructor for St. John Ambulance. Such instructors received an honorarium paid at the rate of $7.00 per hour. The court found the instructor was not employed by St. John Ambulance pursuant to a contract of service. Alternatively, this was found to be an "excepted employment" for the purposes of the *Unemployment Insurance Act*. With respect to the conclusion that no contract of service existed, the Court appears to have attached significance to the fact that the services of the instructor were provided on only 7 occasions during the time period in question (fifth paragraph from the last in the conclusion on page 40).

Similarly, in the case *Merritt (City) v. Canada (Minister of National Revenue* [1999] T.C.J. No. 319, the Tax Court of Canada found that a "volunteer" firefighter was not employed in "insurable employment". The Court found that no contract of service existed, as the person had no obligation to respond to the needs of the employer. The Court reasoned:

> When a person is employed under a contract of service, that person has some obligation to respond to the needs of the employer. This is part of the "control test" concerning whether the payor has some control over the worker. On the facts of this case, the Appellant had no control over the Intervenor as to whether the Intervenor would respond to a particular call. This is an important factor because the only purpose of the Merritt Fire/Rescue Department is to respond to emergencies as they arise: either putting out a fire or rescuing a person in distress or doing both at the same time. Notwithstanding the emergency nature of the Department's purpose, the Intervenor at his own convenience could elect either to respond to a call from the Department or to ignore such a call; and the excise of his election either way would have no effect on his continuing status as a volunteer firefighter.

The Court further concluded, in any event, that this was an excepted employment under the *Employment Insurance Act* and Regulation 7(e).

It seems to me, however, that there may well be employment situations in which the employer has a number of part-time workers available on an "on call" basis. The employee may have the option of declining a call, in which case the employer contacts the next person on the list. The fact that a person has the option of declining a request to work is not necessarily indicative of a lack of control.

The policy manager cites the reasoning of the New Brunswick Court of Appeal in *Joey's Delivery Service*, cited above. The Court of Appeal analyzed the factor of "control" as follows:

> 76 In classical terms, "control" is defined by reference to four aspects: (1) power to direct the thing to be done; (2) the means by which it will be done; (3) the way it will be done; and (4) directing the time and place it shall be done: see Ready Mixed Concrete (South East) Ltd. v. Min. of Pensions and National Insurance, supra. The modern law, however, eliminates the third aspect and instead emphasizes control in the sense of directing the residual "when and where" of the work, as opposed to the manner of its completion. The elimination of the third criterion is necessitated by the fact that today professional employees and other highly skilled workers exercise a great deal of discretion in deciding how tasks are to be performed. The employer is more concerned with assigning tasks and their date of completion than with the way in which results are achieved: see Wiebe Door Services Ltd. v. Minister of National Revenue, supra, at paras. 6 & 7.

In the 2002 agreement with the school district, the Society agreed that it "shall control, direct and supervise its crossing guards to observe all safety rules and regulations." In the 2004 agreement, the Society agreed that it would establish a code of conduct and utilize it in directing the activities of its members as crossing guards, and that it would be responsible for the scheduling, and supervision of the crossing guards. It is evident that the Society exercised control in directing the "when" and "where" of the crossing guard services to be performed.

The payments due to the Society from the school board are determined by contract. The payments by the Society to its members are ongoing and regular in nature and relate directly to the services performed. I note, with interest, the detailed guidelines provided by the University of California regarding "honoraria" (http://www.policies.uci.edu/quickviews/honoraria.html). While these guidelines have no direct applicability, they serve to illustrate how another body has attempted to distinguish between honoraria and payment for work, in its particular context:

> **OVERVIEW**
>
> An honorarium is a payment granted in recognition of a special service or distinguished achievement for which custom or propriety forbids any fixed business price to be set. The amount of the honorarium should be specified in an agreement or in correspondence with the individual who will receive the honorarium. A copy of the agreement or correspondence should accompany the request for payment.

Who Can Receive an Honorarium

Generally, honoraria are paid to persons of scholarly or professional standing in conjunction with an academic activity. Full-time academic appointees are not normally eligible to receive additional compensation for activities related to their recognized University duties, except that in certain cases members of the faculty may receive honoraria for lectures and similar services at campuses other than their own. State employees are prohibited from receiving honoraria for making a speech, publishing an article, or attending any public or private conference, convention, meeting, social event, meal or similar gathering. For officials and employees who file statements of economic interests under an agency's conflict of interest code, the prohibition is applicable only to individuals or entities that would have to be disclosed on the Form 700.

Examples: What is Considered an Honorarium

UC Faculty

- A payment for giving a special lecture or a short series of such lectures for a campus other than the faculty member's home campus.
- A payment for participating in a campus-sponsored program review for a campus other than the faculty member's home campus.
- A payment for a concert or other creative work on any UC campus.

Non-UC Faculty

- A payment for conducting a seminar or a workshop of no more than two-week's duration.
- A payment for a musical demonstration related to Music Department instruction.
- A payment for a guest speaker at a commencement exercise or other similar function.

- A payment for an appraisal of an article to be submitted to a professional publication.
- A payment to Continuation Education of the Bar (CEB) authors and lecturers.

Examples: What is NOT Considered an Honorarium

- Performance fee payments to individuals or groups for professional services not directly related to academic functions.
- Payments to independent consultants providing primarily professional or technical advice to the University in an independent contractor relationship.
- Payments to faculty consultants who hold a faculty appointment and who provide specialized professional or technical advice to a campus extramurally supported project or to an activity supported from University funds.
- Additional compensation for Summer Session Teaching, University Extension Teaching, University Extension Correspondence courses or Extramurally Funded Research.

It is difficult to arrive at a precise definition of the distinction between wages and honoraria. As these examples illustrate, however, honoraria tend to be for short term or occasional activities. The provision of crossing guard services on a regular daily basis throughout the year is more readily characterized as involving the payment of a wage under a contract of service. Of course, no particular member is obliged to provide their services. However, the extent of the services provided on an annual basis makes it evident that this is not an occasional or exceptional event.

The Society presents several additional arguments in its notice of appeal. With respect to the 2004 memorandum of agreement, the Society submits that it merely facilitates voluntary services. As no contractual damages flow from it, it is not a contract. I consider, however, that it does constitute an enforceable contract. If the school district failed to pay the Society for the services provided under the agreement, the Society could make a claim against the school district based on the contract. As well, the amounts payable to the Society are based on the actual services provided. If the Society fails to provide these services, the school district is entitled to make alternative arrangements (with a corresponding reduction in the amount payable to the Society).

The Society submits that the Review Division decision failed to address the exemption provided in policy for workers averaging less than 15 hours a week caring for children. The policy manager points out that this exemption is set out in *Assessment Manual*

Item: 1-2-1 and is subject to a condition precedent not present in this case: that the individual in question be "employed by the owner or occupier in or around a private residence." The policy states:

> The Board has made the following general exemptions from coverage:
>
> (1) **An individual employed by the owner or occupier in or around a private residence**, other than for the purpose of the owner's or occupier's trade or business, **or employed in serving the personal needs of the owner or occupier or the owner's or occupier's family** is exempt where:
>
> (i) the individual is regularly employed for a definite or indefinite period on a weekly, monthly or similar basis for an average of less than
> - working hours per week; or
> - 15 working hours per week, and the individual is employed caring for children in the period immediately preceding and following school; or
>
> (ii) the individual is employed to do a specific job or jobs involving a temporary period of less than 24 working hours.
>
> [emphasis added]

I agree with the policy manager that the Society does not fit within the terms of the existing general exemption. Policy at AP1-2-1 further states that "The Board will, as a matter of policy, decide whether general exemption orders will be made under section 2(1) of the Act." Thus, applications for exemption which do not come within the terms of the present policy are addressed by the board of directors as a matter of policy under section 82 of the Act. Accordingly, it is not within WCAT's jurisdiction to consider the Society's request for an exemption, outside of the criteria set in policy.

The policy further states:

> (iv) Exemption orders will only be made in respect of industrial or occupational groups. An exemption order will not be granted to an individual or to a business unless the individual or business constitutes the entire industrial or occupational group.

The practice note set out below the policy at item AP1-2-1 states:

> Where an association, union or other group which represents an entire industry or group of workers, wishes to apply for exemption from coverage, it must write to the Policy and Research Division requesting an exemption and providing reasons. The Policy and Research Division will research the request and present the request along with their findings to the Board of Directors for consideration.

As set out above, I have found that the Society does not meet the criteria set out in the established policy for being exempted from coverage under the Act. It is not open to me to otherwise consider the request for an exemption. I decline the request of the appellant that I make a recommendation on this issue.

My decision is limited to addressing the role of the Society and its members, under the terms of the 2002 and 2004 memoranda of agreement. While I find that the services provided by the Society are in a grey area, involving aspects of both volunteerism and payment for services, on balance, I am in agreement with the Review Division decision. I find that the provision of crossing guard services by the Society and its members comes within the scope of Part 1 of the Act, for which workers' compensation coverage is mandatory. Accordingly, the appeal of the Society is denied.

Conclusion

Review Decision #20697 is confirmed. The Society is required to be registered as an employer under the Act, in relation to its provision of crossing guard services to the school district. This decision is solely concerned with the provision of crossing guard services by the Society's members, and has no application to any other volunteer activities which may be performed by the Society and its members.

Herb Morton
Vice Chair

HM/cd

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