

Are Your Contractors Really Employees? Federal Court of Appeal Revisits and Refines the Test

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The consequences that flow from an independent contractor being deemed an employee can be monumental for companies operating in Canada, both from a legal and financial standpoint.

Since independent contractors have no employment status, a determination of this nature by a court or tribunal can attract retroactive liability for employers as it relates to the withholding and payment of income taxes, the payment of vacation, holiday and overtime pay, the making of Canada Pension Plan and Employment Insurance contributions, as well as exposure to vicarious liability.

Moreover, it entitles the employee to reasonable notice or a "severance" payment in lieu of that notice in the event of a dismissal without cause.

In *1392644 Ontario Inc. v. Minister of National Revenue* (2013), 358 D.L.R. (4th) 363, 2013 C.L.L.C. 240-004 (F.C.A.) ("*Connor Homes*"), the Federal Court of Appeal, which hears appeals from the Tax Court of Canada, revisited and refined the test for determining an individual's status as an employee as it concerns the *Canada Pension Plan*, R.S.C. 1985, c. C-8 and *Employment Insurance Act*, S.C. 1996, e. 23. Of particular importance was the court's determination of how to properly account for the parties' subjective intentions at the time of contract.

Facts

Connor Homes (the "Appellant") appealed the Tax Court of Canada's decision confirming the Minister of National Revenue's determination that certain individuals were employed by the Appellant in pensionable and insurable employment.

The Appellant operated foster and group homes for children. This appeal dealt with three child and youth workers who were contracted by the Appellant.

The contracts at issue, while not entirely identical, specified that the individuals would be acting as independent contractors remunerated on the basis of an hourly rate paid upon the submission of invoices. Certain transportation payments were also provided under the contract. The contract was for an indeterminate period of time, but could be terminated by 14 days' notice given by the contractor and by Connor Homes at any time "for cause". It was also stipulated that, as an independent contractor, the individual [at para. 5]:

...shall not be entitled to any benefits and shall be responsible for payment of all necessary remittances, including Canada Pension Plan, Employment Insurance and Provincial and Federal Taxes" ...[and that] "nothing in this agreement shall be construed so as to restrict in any way the freedom of the Independent Contractor(s) to conduct any other business or activity for his/her individual profit."

The Test Refined

Prior to making its determination, the Federal Court of Appeal rearticulated the test for determining an individual's status as an employee in the following manner [at paras. 39-41]:

[Step 1] the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

[Step 2:] ascertain whether an objective reality sustains the subjective intent of the parties. The subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties [sic] intent as well as the terms of the contract may also be taken into account since they color the relationship...the relevant factors must be considered "in the light of" the parties' intent.

... in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in [Wiebe Door Services Ltd. v. Minister of National Revenue, [1986] 3 F.C. 553, 86 C.L.L.C. 14,062

(Fed. C.A.)] and [671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 204 D.L.R. (4th) 542, [2001] 2 S.C.R. 983 (S.C.C.), at para. 47] will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

Judgment

Ultimately, the Federal Court of Appeal upheld the Tax Court of Canada's judgment, determining that the respondents were in fact employees based on the substance of the relationships. The degree of control exercised by the Appellant over these individuals was far too significant to ignore.

The individuals' duties and responsibilities were dictated by manuals and mandatory meetings of the Appellant. They were carried out under the supervision of the Appellant. Their rates of pay were fixed and hours scheduled by the Appellant. Moreover, no significant financial risks or investments were required or the concerned workers.

Notably, the court found that while in theory the individuals retained the ability to adjust their pay through their hours of work, the degree of control effectively prevented them from actually realizing that benefit.

Further, while the individuals made extensive use of their own vehicles for work-related activities, that factor alone could not overcome the "combined force of the whole scheme of operation which must be considered".

Conclusion

The court's judgment, in part, responds to past judgments where varying and inconsistent degrees of weight may have been given to the parties' subjective intentions.

In its judgment, the Federal Court of Appeal reiterated that substance trumps form or subjective intention, even when both parties agree as to the individual's status in writing. In essence [at para. 36]:

...the legal effect of the contract, as creating an employer-employee or an independent contractor relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.

As a result of the legal and financial consequences that flow from a determination that one is an employee, the decision cannot be based solely on the basis of the parties' declaration as to their intent, particularly given the apparent self-interest that exists in contract drafting. The determination "must also be grounded in a verifiable objective reality".

While some may see this decision as stifling the freedom to contract, it does not depart from previous tests employed by Canadian courts. In reality, a contract cannot depart from the objective reality or it risks having minimal bearing on the determination of one's status as an employee or independent contractor. Simply put, if the individual is controlled like an employee, dependent like an employee and deals almost exclusively with the company like an employee, he or she is likely an employee.