

## **EMPLOYEE vs. INDEPENDENT CONTRACTOR CONSIDERATIONS**

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on the rules relating to the tax treatment of independent contractors. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

### **A. EMPLOYEE vs. INDEPENDENT CONTRACTOR**

The issue of whether an individual is an employee of a business or whether the individual is an independent contractor performing services for the business is an important distinction for tax purposes for both parties.

The Income Tax Act permits independent contractors to deduct business expenses from their taxable income whereas there are strict limitations on the deductions that are available to employees.

On the other hand, an employer may be required to make contributions for its employees under the Canada Pension Plan. The employer may also be required to remit premiums under the Employment Insurance Act. Neither of these requirements would apply to a relationship between an independent contractor and its client.

These are some of the reasons that many businesses and the individuals working for them strive to characterize their relationship as that of client and independent contractor.

### **B. RECENT CASELAW**

#### **1. *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025**

This decision of the Federal Court of Appeal is the leading tax case for characterizing the relationship between a business and workers. Although the ultimate determination is based on the total relationship between the parties this decision confirmed that the following four factors should be considered: (i) control test; (ii) ownership of tools; (iii) chance of profit; and (iv) risk of loss.

2. **671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] S.C.J. No. 61**

This Supreme Court of Canada case dealt with vicarious liability where the key issue was the determination of whether an individual is an employee or an independent contractor. The Court stated that a worker is an independent contractor when they are engaged to perform services as a person in business on their own account. The Supreme Court adopted the test from *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025 confirming that each of the four factors listed in *Wiebe Door* should be considered although they may not all have the same weight in all cases.

The Supreme Court considered additional factors such as whether the workers provided their own equipment, whether they hired their own helpers, the degree of financial risk taken by the workers, the degree of responsibility for investment and management held by the workers, and the workers' opportunity for profit.

In this case, the Supreme Court found the workers were independent contractors. The Court noted that the worker was free to contract with other parties, controlled its own allocation of resources, and had an opportunity for profit or loss based on its commission.

3. **The Royal Winnipeg Ballet v. The Minister of National Revenue, 2006 DTC 6323**

In this case, the Federal Court of Appeal held that the dancers engaged by the taxpayer were independent contractors rather than employees, overturning a decision of the Tax Court of Canada. The dancers were engaged for limited periods within a season. The taxpayer exercised a significant amount of control over the dancers, since the dancers were not free to dance their assigned roles in a manner that departed from the choreography or the vision of the artistic director. The Tax Court had found that the dancers were employees based on these and other factors from *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61.

The Federal Court of Appeal held that the Tax Court erred in not considering the parties' common understanding that the dancers were independent contractors. In this case, this understanding was present in the contractual agreements between the parties and all the factors considered in their entirety were consistent with this mutual understanding. As well, the dancers charged GST for their services and the taxpayer did not withhold any tax from their remuneration except at a dancer's request.

Therefore, the Court found that the dancers were not employees of the Royal Winnipeg Ballet.

**4. 10Tation Event Catering Inc v. The Minister of National Revenue, 2008 TCC 562**

A large catering business, which was represented by Alpert Law Firm, engaged 91 workers as freelance servers, chefs and bartenders. The Minister decided that the workers were employees and assessed the taxpayer for arrears of contributions under the Canada Pension Plan and premiums under the Employment Insurance Act. The catering business appealed to the Tax Court of Canada on the grounds that all of the workers were independent contractors.

The Tax Court of Canada allowed the catering business' appeal on the basis that all of the workers were independent contractors. The Tax Court examined the four factors listed in *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025: control, ownership of tools, chance of profit and risk of loss.

In examining the control factor, the Tax Court noted that all of the workers were experienced individuals who were not trained by the business. These workers were not supervised in the performance of their duties. They were assigned their duties by one of the workers designated as a "supervisor," but they were not told how to do the work. The workers were understood to provide their own tools, such as clothing, lighters, pins, corkscrews, and bar kits, even though some large tools, such as ovens were provided by the taxpayer. The workers had a chance of profit and a risk of loss since they were free to turn down any given assignment and negotiate their hourly rates. As well, the intention of the parties as evidenced by the agreement was that the parties were independent contractors. The Tax Court found that all the four factors indicated that the workers were independent contractors.

**5. Salcross Industries Ltd. v. Canada, [1996] T.C.J. No. 1077**

In this Tax Court of Canada decision, the taxpayer was a commercial janitorial cleaning company which sometimes used its salaried cleaners to do the work and sometimes subcontracted the work to other cleaners. The issue under appeal was whether the subcontracted cleaners were employees or independent contractors. The Tax Court allowed the appeal holding that the workers were independent contractors.

Whenever work was contracted out the taxpayer required the subcontractor to sign a standard form of contract which stated that the relationship between the taxpayer company and the subcontractor was that of independent contractors, and that the subcontractor was solely responsible for compliance with legal obligations such as payment of taxes. The taxpayer also required the subcontractors to register under the Business Names Act. The Tax Court confirmed that this clause and the registration were good indication of the wishes of the parties, although not conclusive.

The workers were not subject to the company's control as to the manner in which they did the work. The workers were free to determine their own time of work though the clients occasionally dictated the time at which the work was to be done for security reasons. Only infrequent inspections were carried out by the company's staff. The taxpayer did not provide any training to the contractors. It did not provide any employee benefits to the contract cleaners while it had a benefit plan for its employed workers. The workers could hire other people to do the work. They were also free to work elsewhere in addition to these cleaning contracts and often did so. For these reasons, the Tax Court held that the subcontracting cleaners were independent contractors.

6. **TBT Personnel Services Inc. v. The Minister of National Revenue, 2010 TCC 360**

In this Tax Court of Canada decision, the taxpayer was a Canadian corporation in the trucking service business. The taxpayer explained that in a typical trucking business arrangement, a trucking business would contract with the taxpayer to provide a trucking service. In turn, the taxpayer would enter into a subcontract with a driver for the provision of the trucking service. The taxpayer had entered into written contracts with 96 truck drivers or their corporations (the "Workers"), 43 of which were incorporated. The taxpayer appealed from a determination by the Minister that 96 of the Workers were employees of the taxpayer in the period from 2002 to 2004 for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*.

The Tax Court of Canada followed the test specified in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025. In terms of the first factor of the test (i.e. control), the incorporated Workers were paid on a per-kilometer basis, and they thought themselves to be independent and self-employed. As well, the incorporated Workers had signed contracts with the taxpayer under which they agreed to engage in the business as independent contractors, and that the relationship was not one of employer and employee. Thus, the Tax Court held that the incorporated Workers were not caught by the control test.

As to the other factors of the test, the incorporated Workers (i) each had their own tools, (ii) carried the risk of loss if something occurred during their engagement with the trucking company, and (iii) had the intent to be hired as independent contractors. Thus, the Tax Court concluded that the 43 incorporated Workers were independent contractors. However, the Tax Court was not prepared to recognize that the remaining 53 Workers were independent contractors.

## C. PLANNING

In order to assess the true relationship between worker and payer, the courts place emphasis on the intention of the parties which is determined from the terms of the contract and the performance of the contract. In *A Worker's Status as Employee or Independent Contractor: Recent Case Law, Trends and Planning*, Kurt G. Wintermute explains that the common intention of the parties is often a determinative factor in assessing a worker's status as an employee or an independent contractor (page 34:20).

In order to reinforce a worker's status as an independent contractor the following factors should be given consideration:

### (1) Control

In a contract of service (i.e. employment relationship), the employer has the right to direct not only what must be done but also how the work is to be done or the worker's performance. Control over the result and the quality of work does not necessarily constitute control over performance. Specifically, a payer may monitor an independent contractor which is not to be confused with an employer who controls an employee's performance. For example, a payer may control an independent contractor over such matters as the premises and specific places of work, materials that are required, and time and work schedules.

### (2) Chance of Profit/Risk of Loss

The chance of profit and risk of loss are always considered from the worker's perspective. A worker who is an independent contractor should demonstrate a greater potential to profit from the engagement but should also bear an increased risk. For instance, if the worker is able to negotiate the terms of a contract or to accept or decline a job, it is an indication of an increased chance of profit and risk of loss for the worker.

**(3) Ownership of tools**

If the workers provide their own tools that are reasonably required for the performance of their tasks it is indicative that workers are independent contractors even if special tools are provided by the payer.

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