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Independent Contractor Status: A Different Perspective

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As most businesses are now aware, the choice between using independent contractors and employees to provide direct service is complicated and often done poorly. For years, our courts have defined and redefined the tests used to determine who is, in fact, an independent contractor and who is an employee. The two most recognized and influential decisions are *1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (SCC) and *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)* (FCA). These decisions and those which follow clearly confirm that, notwithstanding the parties' intentions, the essence of the question is whether the person is performing services "as a person in business on his/her own account." Our courts will typically review and consider:

(i) the level of control exercised by the businesses over the worker's activities;

(ii) whether the worker performs services exclusively or almost exclusively for one business and is "economically dependent";

(iii) whether the worker provides his/her own equipment, expertise and helpers;

(iv) the level of integration between the worker's services and the business;

(v) the degree of financial risk to the worker; and

(vii) the worker's opportunity for profit.

Essentially, our courts look at the day-to-day control, integration and supervision over the worker's activities and the differences or distinctions between the worker and the persons clearly identified as employees of the business.

One of the obvious reasons why our courts have not been prepared to give paramountcy to the parties' stated intention or subjective belief of the type of contractual relationship they have or want to have is because the classification, as contractor or employee, has other implications with respect to taxation and social policies such as those under the Canada Pension Plan, Workers' Compensation, Labour Relations and Employment Insurance legislation. In this context, an objective reality check makes sense and is an important part of our judicial system, protecting both individuals and our tax base.

That said, for years, employers have also been frustrated by employees who choose to consider themselves as independent contractors and take full advantage of that relationship until it no longer suits their purpose. This usually happens at the time of the termination of the independent contractor's relationship with the business. At that time, the individual has a sudden reversal of opinion that the relationship was never really a true independent contractor relationship but rather was throughout an employment relationship with the concomitant termination benefits afforded to employees.

Recently, however, the Federal Court, in a decision entitled *Rennie v. VIH Helicopters Ltd.* has, in certain circumstances, changed the question which must be asked and answered. Rather than asking if the person is in fact an employee, the proper question may be instead, is it fair or appropriate to allow a person to assert retroactively that he/she was an employee?

Mr. Rennie was a helicopter maintenance engineer and maintained helicopters owned by VIH Helicopters Ltd. Both Mr. Rennie and VIH Helicopters considered Mr. Rennie to be an independent contractor. Other similar individuals chose to be employees. Mr. Rennie took the position that it was to his advantage not to be an employee. For the purpose of filing his income tax returns Mr. Rennie reported business income and deducted the expenses associated with running his business. In matrimonial proceedings with his former spouse, affidavits were filed which expressly stated that Mr. Rennie was self-employed, which apparently suited his purposes during those proceedings too. Upon termination of his business relationship with VIH Helicopters, however, Mr. Rennie came to the opposite conclusion and stated that he was really an employee. Mr. Rennie sought certain legal remedies available only to employees under the *Canada Labour Code*.

In its decision, the Court clearly disapproved of Mr. Rennie's duplicity in referring to his relationship with VIH Helicopters as an independent contractor for some purposes, but as an employee for others. The court decided before answering the question of whether Mr. Rennie was or was not an employee at law first whether or not Mr. Rennie was "estopped" from asserting that he was an employee. That is: (1) did Mr. Rennie lead VIH Helicopters to understand that their relationship was not that of an employer and employee? (2) Could he change his position?; and, (3) Did VIH Helicopters alter its legal position to its own detriment as a result?

The court found that there was clear, unequivocal and consistent evidence that Mr. Rennie represented himself to VIH Helicopters and others that he was not an employee. Accordingly, VIH Helicopters was entitled to raise and establish the defence of estoppel and Mr. Rennie was not permitted to argue that he was now an employee.

This decision is important in that it brings back into play the argument that where an individual wants to be an independent contractor and represents him/herself as an independent contractor, the employee should not then be able to avoid the negative consequences of choosing that relationship. Individuals cannot necessarily pick and choose when they want to consider themselves to be independent contractors and when they want to consider themselves to be employees.

This case is not by any means a licence for businesses to arbitrarily elect to treat some people as independent contractors and others as employees. Canada Revenue Agency, the WSIB and the Ministry of Labour will still have very little regard to the stated intentions of the parties where the facts are contrary to that intention. However, where it is clear that an individual clearly desired to be an independent contractor for reasons of self-interest, and then subsequently attempts to change that position for self-interest, it appears as though our courts are prepared to provide some relief. ■