When an Independent Contractor is not an Independent Contractor

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DIFFERENCES BETWEEN "INDEPENDENT CONTRACTOR" AND "EMPLOYEE"

Hiring an "*independent contractor*", as opposed to an "*employee*", may be an attractive option for employers. Typically, an employer has fewer legal obligations when dealing with an independent contractor as opposed to hiring an employee; for example, the hiring of an independent contractor will not trigger the employer's obligations to remit to the government all statutory payroll taxes and deductions. An employer may also hire "*independent contractors*" to save on workers' compensation premiums, or employment standards benefits.

However, in recent months, a significant body of law has developed regarding when a worker will be considered an "*employee*", as opposed to, an "*independent contractor*". Courts have crafted various "common law" tests to differentiate between the two (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61. Traditionally, the factors that are reviewed to determine whether an individual is an "*employee*" or an "*independent contractor*" included: who controls the work; who owns the tools used; and who bears the chance of profit and the risk of loss.

Recent caselaw has added an important additional element to this analysis. As outlined in the decisions below, Courts and arbitrators will now also consider the "purpose of the legislation" governing the issue between the employer and the individual. Where that purpose is "*remedial*" (i.e. legislation which corrects a defect in existing law or provides a remedy where one may not already exist), individuals who otherwise would be considered "*independent contractors*" at law, are being considered "*employees*" for the purpose of applying that particular statute.

HUMAN RIGHTS

In *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)*, 2011 BCSC 713 a partner in a law firm ("McCormick"), complained that his forced retirement at age 65 which was based on a retirement clause in his partnership agreement, constituted discrimination. The Human Rights Tribunal refused the law firm's application to dismiss the complaint without a hearing because it held that the relationship between McCormick and the law firm was one of "employment". On judicial review, the British Columbia Supreme Court considered that human rights legislation is quasi-constitutional in nature and therefore must be given a "*broad, liberal and purposive interpretation to ensure the attainment of its purposes*". The Court went on to state that because of its special character, legal principles developed in other legal contexts (i.e. the common law) are not determinative of the rights and liabilities created by human rights legislation. As a result, a human rights tribunal must consider the question of "employment" in light of the statute's remedial nature, "*not from the narrow perspective of partnership law or the law of contract*". Factors considered by the Court included: that the law firm partnership

was of the limited liability variety (which it held was more reflective of a traditional corporate entity than a true partnership), the law firm utilized the service of equity partners for their mutual benefit, McCormick earned income from services he provided to firm clients and that work product belonged to the firm, and McCormick's compensation was determined by a compensation committee. These factors contributed to the dismissal of the law firm's application for review because the Court found that "employment" is not based on the label the parties agreed to but rather, what the relationship is in fact and substance. As a result, the human rights had jurisdiction to determine the discrimination complaint.

OCCUPATIONAL HEALTH AND SAFETY

The case of *Ontario (Labour) v. United Independent Operators Limited*, 2011 ONCA 33 required the Ontario Court of Appeal to determine whether independent contractors were to be counted when determining whether an employer was required to establish and maintain a joint health and safety committee pursuant to the *Occupational Health and Safety Act*, RSO 1990, c O-1 (the "*OHSA*"). Subsection 9(2)(a) of the *OHSA* requires that employers establish such a committee "*at a workplace at which twenty or more workers are regularly employed*". The *OHSA*, defines "*worker*" as "*a person who performs work or supplies services for monetary compensation ...*".

United Independent Contractors Limited ("UIOL") was a transportation company with 11 office employees. In addition, UIOL had contracts with 30-140 truck drivers, depending on the season. On previous occasions, these truck drivers had been found to be "independent contractors" by the Workplace Safety and Insurance Board ("WSIB"), Revenue Canada and the Employment Standards Branch of the Ministry of Labour. There were no written employment contracts between UIOL and the drivers; no statutory deductions were made by UIOL on behalf of the drivers; the drivers owned their own trucks and paid all associated expenses; UIOL did not pay WSIB coverage for the drivers; and it did not give the drivers Records of Employment ("ROE") when the working relationship was terminated. However, when a truck driver was crushed in an accident with another UIOL truck driver, the Ministry of Labour laid charges against UIOL under the *OHSA* for failure to establish a joint health and safety committee. In overturning the lower Court's acquittal of UIOL, the Ontario Court of Appeal reasoned that the *OHSA* was a "*remedial public welfare statute whose purpose is to guarantee a minimum level of health and safety protection for workers in Ontario*". Therefore, according to the Court, interpreting "*regularly employed*" to include these truck drivers made sense contextually and supports the purpose of the legislation. The Court concluded that while the truck drivers were "independent contractors", they must be counted as "regularly employed" for the purpose of establishing a joint health and safety committee.

LABOUR CODE

In *Teamsters, Local 987 v. 1093507 Alberta Ltd.*, [2011] A.W.L.D. 1526, 2011 CarswellAlta 170, the Alberta Labour Relations Board addressed a certification application under the *Labour Relations Code*, R.S.A. 2000, c. L-1 (the "*Code*") whereby the union applied to be the bargaining agent for "*all drivers of Access Taxi in the City of Fort McMurray, Alberta*". A Board officer initially found that the drivers were not employees of Access Taxi ("Access"). Access operated a

fleet of approximately 100 cars, of which, all but one was owned by an "owner-operator" (i.e. the driver owns the car). However, the Board noted that Access had significant control over the manner in which the drivers carried out their work, more particularly: Access enforced a "Driver's Rules Agreement" on the drivers; it had substantial influence over the work that was available to the drivers; and, the drivers enter into an exclusive commercial relationship with Access and are fully integrated into the Access enterprise. While the ownership of the vehicles made owner-operators more consistent with independent contractors, their relationship with Access as drivers was more like that of an employee. The Board reasoned that when it decides that an individual is an "independent contractor" rather than an "employee", it is denying that individual the statutory protection of the right to organize; which is not a decision that is to be taken lightly. Therefore, the Board found that common law tests are helpful as guidance, but only to the extent that they are consistent with the objectives of the Code. A Labour Board's primary mandate is to apply a fair and liberal construction to the definition of "employee", so that the objectives of the legislation are attained. As a result, the Board determined that Access was the employer of the drivers and the driver "employees" could form a bargaining unit.

WHAT THIS MEANS FOR EMPLOYERS

The implications of these decisions are significant for employers who utilize independent contractors in the operation of their business. Such employers must now consider their relationships with "*independent contractors*" in light of remedial employment legislation, such as human rights, occupational health and safety, and labour relations statutes, and the potential that these individuals now may be considered "*employees*" when issues under these statutes arise.

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