

Employment Contracts:

Tune Up Your Employment Offers and Consulting Agreements

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Employment Law Update

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Tune Up Your Employment Offers and Consulting Agreements

As the economy in Alberta continues to expand, businesses are increasingly looking to enhance their workforce. Understanding recent developments in the law relating to the distinction between independent contractors and employees, restrictive covenants, termination clauses, and stock option plans allows employers to develop well drafted employment offers and consulting agreements, which can give employers a significant edge. This paper will canvass developments in these areas of law with a view to assisting employers in drafting contracts that clearly capture the intention of the parties and reduce the chance of litigation.

I. INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHAT YOU NEED TO KNOW

A. Introduction

The determination of whether a worker is an employee or independent contractor remains an important consideration for employers in Alberta. Depending on the classification of a worker as either an employee or an independent contractor, specific employer obligations arise under any one or more of the following pieces of legislation:

- *Employment Standards Code* (obligations related to overtime, vacations, holiday pay)
- *Worker's Compensation Act*
- *Labour Relations Code*
- *Income Tax Act*
- Employment Insurance
- Canada Pension Plan (obligations may include mandatory deductions and remittances)

Additionally, an employee is entitled to the protection of the common law, absent any valid contract stating otherwise, with respect to the entitlement to receive reasonable notice, or pay in lieu thereof, in the event that an employment contract is terminated without cause. From an employer's perspective, the determination of a worker as an employee or independent contractor also has consequences with respect to other avenues of liability. For example, an employer may be vicariously liable for acts of both an employee and an independent contractor performed within the scope of their employment or retainer.

This portion of our paper will address how to identify whether a worker is an employee or independent contractor, highlight the consequences an employer may face if they fail to characterize a worker properly, and provide guidance on how to properly draft contracts for each.

B. Employee versus Independent Contractor: The Test

The classic four-part test to establish whether a worker is an employee or independent contract or was framed by Lord Wright in *Montreal v Montreal Locomotive*.¹ The overarching theme of the test is whether the worker is employed as part of a business and whether the work is done as an integral part of that business. By contrast, an independent contractor's work is done for the business but is not integral to that business.

Other significant Canadian decisions have affirmed and expanded on the test set out above. For instance, in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*,² the Supreme Court of Canada considered a factual scenario to determine if an independent contractor exposed the business to vicarious liability.

Design Dynamic Limited had been the principal supplier of car seat covers to Canadian Tire. Sagaz Industries Canada Inc. took over as the principal supplier via a "kickback scheme" which involved Sagaz retaining American Independent Marketing Inc. ("AIM") to assist in marketing the seat covers to Canadian Tire. During this, a Canadian Tire representative, through another corporation, accepted a bribe from AIM. After the bribe, the contract between Sagaz and Canadian Tire continued. The original principal supplier, Design, sued Canadian Tire, Sagaz and AIM for the bribery scheme. The Supreme Court of Canada was charged with determining whether Sagaz was vicariously liable for AIM and another individual involved in the scheme.

The Court expanded on the test for determining whether a worker is an independent contractor or an employee as set out in earlier decisions by referring to additional factors that could be considered. In particular, the Court stated:

Although there is no universal test to determine whether a person is an employee or independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cook J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor, However, other factors to consider include whether the worker

¹ [1974] 1 *dlr* 161 ((*pc*))

² 2001 SCC 59