

Federal Court of Appeal: Let parties decide on working relationship

A recent decision of the Federal Court of Appeal has raised the issue of the ability of parties to determine the nature of their relationship in the workplace. The decision, *Ambulance St. Jean v. Canada* (October 13, 2004), was rendered in an application for judicial review of a decision of the Tax Court of Canada that had held that, for employment insurance purposes, two first aid trainers were employees rather than independent contractors.

The Court granted the application, holding that the following factors supported the argument that the trainers were independent contractors and that their employment consequently was non-insurable:

- The trainers were given work on a free-lance basis according to their availability;
- They could refuse work without giving reasons for the refusal and could determine their own work schedule;
- They were not paid during work absences and were not eligible for sick or other leave days;
- One trainer had filed a tax return indicating that she was an independent contractor and claiming home office deductions.

This evidence, the Court held, indicated that the parties had intended to structure their relationship in such a way that the trainers were independent contractors. The Court then stated that, although it is not determinative, the stated intent of the parties should be given considerable weight when the nature of their relationship is evaluated:

"Where the parties have freely elected to come together in separate business arrangements rather than one side arbitrarily and artificially imposing that upon the other, so that it is in fact a sham, parties should be left to their choice and that choice should be respected by the authorities."

In Our View

Some commentators have noted that, short of "sham", the Court in this case characterized the intentions of the parties as the primary factor to determine whether a person is an employee or an independent contractor. However, it should be noted that the Court was careful to cite the evidence bearing out the nature of the relationship, apart from the parties' intentions. It remains to be seen to what extent courts and tribunals will depart from the approach of examining a range of factors in order to determine who is and who is not an employee. (For more on this issue, see ["Supreme Court reverses Ont. C.A. ruling on liability for actions of independent contractor"](#))

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