



The Distinction Between an Employee and an Independent Contractor

Determining whether or not someone is an employee or an independent contractor is a question of fact in each case and depends on the individual circumstances.

A true independent contracting relationship is one where the worker runs his or her own business and does not typically devote all of his or her working time to one entity exclusively, but rather freelances for a number of organizations, thereby assuming his or her own risk of profit and loss. Typically, the worker will also control his or her time, work schedule, and the manner in which work is completed.

Courts will not permit the label attached to a particular relationship, to govern the true substance of the relationship. As a guide, in determining whether a worker was an employee or independent contractor, the Federal Court of Appeal in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)* determined that accurately characterizing a worker relationship requires that we consider four tests or factors:

1. Degree or Absence of Control Exercised by the "Employer"

Employment relationships imply some supervision or control over the worker. The question is not whether the alleged employer exercises control over the worker, but whether they have the right to exercise control. The "degree" of control is a factor of whether the worker:

- a. Works mostly on their own
- b. Is free to accept or refuse other work
- c. Is required to work or attend the hirer's place of business

2. Ownership of Tools

A worker is considered an independent contractor if he/she owns his/her own tools. The same is true even if the hirer provides special tools when required.

3. Chance of Profit and Risk of Loss

If the worker has a financial investment in the business over and above providing labour, this is considered a strong indicator that an independent contractor arrangement exists. Unlike an employee, whose weekly salary is constant, an independent contractor's income fluctuates with the amount of work they complete.

4. Integration of the "Employee's" Work into the "Employer's" Business

Is the worker an intrinsic part of the organization, or merely ancillary to it? Under a contract of service, a worker is employed as part of the business and his/her work is done as an integral part of the business. By



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contrast, under a contract for services, an individual's work, although still done for the business, is ancillary to the business.

The Supreme Court of Canada considered the appropriate test for determining employee vs. independent contractor status in *671122 Ontario v. Sagaz Industries Canada Inc.*² Justice Major, writing for the majority, noted, "there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor." On the contrary, the decision maker must examine all aspects of the relationship between the parties.

Canadian courts have been clear: no one factor is determinative of the relationship of employer/employee or hirer/independent contractor. Rather, the four indicators, taken together, suggest which arrangement is likely to be present.