The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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Coverage Under the WSIA

Coverage for "Independent Operators"

Achieving full coverage and full independence

A Policy Solution: Full WSI protection while preserving a key method of business organization

Persons excluded but who can apply for coverage: Independent Operators and Executive Officers

In its January 21, 2002 consultation paper, "*Coverage Under the Ontario Workplace Safety and Insurance Act*", the WSIB raises the longstanding issue of workplace safety and insurance (WSI) coverage for independent operators. The Board suggests the following: ***Independent Operators*:** With respect to determining worker/independent operator status, the process is a complex and inexact process. ***Executive Officers*:** There is a lack of a clear definition in the Act; it "[r]emains possible that some organizations will attempt to assign executive officer status to some of their workers for purposes of avoiding WSIB premiums".

Background: Independent Operators

The experience in other Canadian jurisdictions:

Independent operators are treated differently across Canadian jurisdictions. Northwest Territories, Nunavut, Ontario and Quebec[1] are the only jurisdictions that explicitly define an independent operator in their Acts. Alberta does not refer to independent operators but refers to "proprietors".[2] In Saskatchewan, Northwest Territories, Alberta, and Newfoundland, independent operators are considered workers of the principal and thus covered.

Other jurisdictions (Ontario, Nova Scotia and Prince Edward Island[3]) provide the option that allows independent operators to apply for coverage under the Act by being deemed a worker. Nunavut and Manitoba only deem those independent operators who are not registered with the Board or Commission to be workers, thus ensuring that all independent operators are covered under the Act. In British Columbia, independent operators may be considered either an independent firm or a labour contractor, both of which are covered under the Act. The New Brunswick Act provides that contractors with less than three workers are not required to register and thus, they become the responsibility of the principal. The Saskatchewan Act (s.9) deems independent operators who supply equipment to be workers for purposes of the Act but allows the principal to charge back the coverage they are assessed to the owner-operator. This approach ensures both coverage and independence for the owner-operator.

Most jurisdictions undertake a typical common law analysis to determine employment status. Factors that are commonly considered include: i) method of remuneration, ii) whether employed on a regular basis, iii) whether source deductions are submitted, iv) if the individual works for more than one principal, v) if materials and services are supplied, vi) if there is a substantial investment and possibility of profit and loss, vii) and who has control over when and how the work is completed.

An examination of the common law principles of employment relationships:

A brief history: Employment relations have been regulated almost since time in memorial. Social and economic pragmatism have always dictated court and legislative intervention.

The contract of employment, in its most simple interpretation, represents an agreement of the worker to serve the employer, for remuneration, in exchange for those services,[4] "it must be susceptible of definition,"[5] and must be both inclusive and exclusive, and distinguishable from an independent work contract.[6]

The establishment of an employment relationship fashions obligations and rights

The establishment of an employment relationship results in the imposition of obligations and the attainment of a significant array of employee rights. The legal status of

[1] *NWT Act*, section 1(1); *Nunavut Act*, section 1(1); *Ontario Act*, section 2(1); *Quebec Act*, section 2.
[2] *Alberta Act*, section 1(1)(v).
[3] *Ontario Act*, section 12(1); *Nova Scotia Act*, section 4(2); *P.E.I. Act*, section 4.
[4] Arthurs, Carter & Fudge, *Labour Law and Industrial Relations in Canada*, 4th Edition, (Markham: Butterworths, 1993) ["Arthurs, Carter & Fudge"] at 69.
[5] J. Fudge, "New Wine into Old Bottles?: Updating Legal Forms to Reflect Changing Employment Norms" (1999) 33 U.B.C.L. Rev. 129 ["Fudge"] at para. 31.
[6] A. Brooks, "Myth and Muddle – An Examination of Contract for the Performance of Work" (1988) U.M.S.W.L.J. 48 at 50.

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"employee" is the gateway to most employment-related protections at common law and under legislation[7] [see the recent Supreme Court of Canada decision *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015].

Some suggest that Canadian employers are substituting self-employed labour for employees, escaping the burden of compliance with protective employment legislation and with common law severance pay requirements.[8] Corporate restructuring, beginning in the late 1970s and continuing throughout the 1980s, resulted in an erosion of the standard employment relationship and a large expansion of the gap between the social norms of work and a legal form of employment, resulting in growth in the small business sector.[9] While contract work is growing in every sector of the economy,[10] the use of non-standard employment to enhance competitiveness is not inherently objectionable.[11]

How to distinguish employment relationships

There are many employment relationships that bear a close resemblance to contracts of employment, in that they deal with the provision of services in exchange for a fee, but which are distinguishable from the classic employer/employee relationship. Independent operator is one. The independent operator typically agrees to perform tasks to produce a particular result and is left with a considerable discretion and freedom in order to determine how to bring about that result.[12] Employees are considered to be persons who work under a contract of service, whereas independent contractors work under a contract for services.[13]

The courts have responded to the new mode of organization and enterprises, and have developed complementary tests which examine a broader range of criteria than a control test, but even still, such a formation does not provide precise guidelines. One such test has been termed the "organizational test" which attempts to determine whether or not a person plays an integral part of the organization.[14] But it has been recognized that this test is still imprecise and offers no real means of differentiating people who are employees versus those who are independent contractors.[15]

Statutory definitions usually fail to provide definitive criteria distinguishing employees from other people, yet, it has been held by the Supreme Court of Canada that the terms 'employer' and 'employee' in the legislation have to be construed in accordance with the statutory definitions and not on the basis of common law notions.[16]

Different statutes approach definitions in different ways:

Under the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, as amended ("*OLRA*"), employee includes "dependent contractor." Under the Ontario *Employment Standards Act*, R.S.O. 1990, c. E-14, as amended, ("*OESA*"), "employee" includes a person who, performs any work for or supplies any services to an employer for wages, and "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment (*OESA*, s.1.). Similarly, under the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. O-1, as amended, ("*OHSA*"), "worker" is given a far broader definition than in the *WSIA*. Under the *OHSA*, "worker" means a person who performs work or supplies services for monetary compensation (*OHSA*, s.1(1)). Under the *Canada Labour Code*, R.S.C. 1985, c. L-2 as amended, "dependent contractor" is even more broadly defined that under the comparable Ontario legislation and means, "the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract" (*Canada Labour Code*, s.3(1)(a)). As with the *OLRA*, dependant contractor is included in the definition of employee. Under the *Employment Insurance Act*, S.C. 1996, c. 23, ("*ESA*") insurable employment is narrowly defined in a manner similar to the *WSIA*, as "insurable employment is . . . employment . . . under any express or implied contract of service . . . " (*ESA*, s.5(1)(a)).

Employment relationships are changing:

The test for "employee" must fix the boundary between "the economic zone in which business entrepreneurs are expected to compete" and the "economic zone in which workers will be afforded the relatively substantial protection of the labour standards… and of the common law".[17]

The characterization of an individual as an employee is a question of fact and is based on the substance and nature of the relationship. There are no "magic" tests that can be substituted for an examination of the "the total relationship" of the parties to determine "whose business is it?"[18]

The traditional common-law approach focused on employer control:

The traditional common-law criterion of the employment relationship has been based on the degree of control the employer has exercised over the employee and control

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[7] *Fudge*, *supra* note 5 at para. 6.
[8] Geoffrey England, "Individual Employment Law", (QuickLaw 2000), chap. 1 ["England"], Chapter 2.
[9] *Fudge, supra* note 5 at para. 21.
[10] J. E. Magee, "Whose Business Is It? Employees Versus Independent Contractors*"* (1997) 45 No. 3 *Canadian Tax Journal* 584 ["Magee"] at 590.
[11] *Fudge, supra* note 5 at para. 29.
[12] *Arthurs, Carter & Fudge*, *supra* note 4 at 71.
[13] See *Cassidy v. Ministry of Health* (1951), 1 All E.R. 574 (C.A.) as referenced in *Arthurs, Carter & Fudge.*
[14] *Bank voor Handel en Scheepvaart N.V. v. Slatford* (1952), 2 All E.R. 956, 971 (C.A.).
[15] *Arthurs, Carter & Fudge, supra* note 4 at 73.
[16] M. Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law" (1982), 32 University of Toronto Law Journal 374 ["Bendel"] at 390 referencing *Yellow Cab Ltd. v. Board of Industrial Relations* (1980), 114 D.L.R. (3d) 427 (S.C.C.).
[17] *Fudge, supra* note 5 at para. 18 referencing Geoffrey England, Employment Law in Canada, 3rd Edition (Toronto: Butterworths, 1998) at section 1.1.
[18] *Magee, supra* note 10 at 587.

remains the most fundamental determinant [*Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*, [1978] 1 S.C.R. 605].

Modern and evolving employment relationships drive an evolving judicial assessment:

The seminal decision assessing changing employment relationships in a modern society is clearly *Montreal v. Montreal Locomotive Works Ltd. et al*,[19] which set out the now often repeated test, requiring an examination of (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. The crucial question is "whose business is it"? The analysis shifts from control to an economic analysis based on the question of economic risk. If an employee does not supply any funds, assume any economic risks, or undertake any liability, it is obvious that a contract of service is operating.[20]

The organizational test:

A similar general test, called the "organizational test" or the "integration test" is predominately featured in WSIB policy [see *Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans*, [1952] 1 T.L.R. 101 (C.A.)]. In *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pages 737-738, the analysis is succinctly described as, ""[i]s the person who has engaged himself to perform these services performing them as a person in business on his own account?"

The organizational test can lead to absurd results:

However, the organizational test if applied improperly can lead to absurd results.[21] In the very widely applied decision of the Federal Court of Appeal, *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 F.C. (Fed. C.A.), a cavalier application of the organizational test was severely condemned. *Wiebe Door* established the principle that there was no series of individual "magic" tests that could be substituted for an examination of the "the total relationship" of the parties to determine "whose business is it?" Instead of the four distinct tests, *Wiebe Door* stands for the proposition that there was only one test, "a four-in-one test, with emphasis always retained on … the combined force of the whole scheme of operation".[22]

Legal tests do not ensure simple or consistent application:

The formulation of a legal test in itself, no matter how comprehensive the individual test, does not ensure consistent legal application. The tests used all require a factual analysis which leaves much discretion to the adjudicator. This question is often tackled not from the viewpoint of the true nature of the relationship, but rather, from the context of what result is desired, which has been described as "social benefit formulation."[23]

The real issue is one of coverage – not definition – WSIB policy should not erode legitimate means of business organization:

In the WSI context, the absence of coverage for uninsured independent operators has clearly been the determinative worry in both policy development and individual adjudication. The source of this difficulty flows less from any definitional contest between "worker" and "independent operator" but more from the reality that under the present law, independent operators are left with the choice not to be covered under WSI. It is the absence of compulsory coverage that drives the issue – not the utilization of a legitimate form of business organization. If independent operators were required to cover themselves, the controversy of worker definition, for the most part, disappears.

Executive Officers

Executive officers also are not treated in a consistent manner across jurisdictions. Some jurisdictions (Northwest Territories, Saskatchewan, Yukon, New Brunswick, Newfoundland, Nova Scotia, and British Columbia)[24] explicitly include an executive officer in the definition of worker, ensuring mandatory coverage. However, New Brunswick, Nova Scotia, and Saskatchewan require that the executive officer be carried on the payroll in order to be included in the definition of worker. Ontario, Alberta, Manitoba, Prince Edward Island, and Quebec[25] explicitly exclude executive officers from the definition of worker, although the executive officer may be voluntarily deemed a worker upon application.

Possible Positions on Independent Operators and Executive Officers:

Independent Operators

Independent Operator Option 1: *Status Quo*:

The status quo is inconsistent with a policy objective of full coverage. The present problem has less to deal with the difficulties in legally determining whether or not an individual is a worker or an independent operator, but with whether or not an individual engaged in economic activity is fully insured against the risk of personal injury while injured in the course of employment.

At present, while principals have contractual control over whether or not an independent-operator secures WSIB

[19] [1947] 1 D.L.R. 161, affirming [1945] 4 D.L.R. 225, reversing in part [1945] 2 D.L.R. 373, affirming [1944] 1 D.L.R. 173 (P.C.) ["Montreal Locomotive"].

[20] B. Hsu, "The Politics in the Canadian Judicial Decision Making Process: Economic Analysis of Tax Litigation" (1994) 32 Alta. L. Rev. (No. 4) 741.

[21] A.N. Khan, "Who is a Servant?" (1979), 53 Austr. L.J. 832, at 834

[22] *Magee*, *supra* note 10 at 588.

[23] *Ibid.* at 76.

[24] *NWT Act*, section 66(2); *Saskatchewan Act*, section 2(t); *Yukon Act,* section 101(1); *New Brunswick Act*, section 1; *Newfoundland Act*, section 2(1)(z); *Nova Scotia Act*, section 2(ae); B.C. *Assessment Policy No. 20:10:30*, November 1994, Subject: Definition of "Worker" and "Employer", p. 5.

[25] *Ontario Act*, section 11(2); *Alberta Act*, section 10(1); *Manitoba Act*, section 1(3); *P.E.I. Act*, section 1(1)(z); *Quebec Act*, section 18.

coverage, the Board retains no legal ability to compel coverage. Each individual independent-operator has the discretion to secure coverage or not.

Should a principal not contractually insist on coverage and should an independent-operator not independently secure coverage, policy expectations are frustrated. The independent-operator is not insured.

A demand for full coverage is consistent with an inherent paternalism in the design of the WSI scheme. In a briefing paper to the British Columbia Royal Commission,[26] the following was noted:

"If independent operators do not take out personal optional protection with the Board and do not otherwise adequately insure themselves for work related injuries or death, financial hardship can result. . . . there is an element of paternalism to social insurance coverage. The *Workers Compensation Act* had its origins in social action and concern for workers and their families left destitute by serious injuries, diseases and death resulting from employment". [page 29]

Yet, the B.C. Royal Commission did not go so far as to recommend compulsory coverage for independent operators, although the Commission was attracted to the Ontario "industry specific" approach. The Commission wrote:[27]

"While unwilling to recommend that this province's compensation board adopt Ontario's Organizational Test . . . the commission is of the view that Ontario's industry- specific questionnaires could be usefully adapted to BC's work environment". (p. 20). "The commission is not, at this time, convinced that universal compulsory coverage for independent operators is necessary . . . The commission believes that individuals who are genuinely independent operators should be responsible for the consequences of their own business decisions. This includes decisions on whether to obtain worker compensation coverage or private disability coverage and the sufficiency of that coverage". (p. 21)

The commission noted that there may be ". . . a serious and growing potential for under-insurance in highly-hazardous industries". If so, the Board should recommend "compulsory registration of independent operators for problematic industries." However, the recommendation would place the independent-operator responsible for the coverage. [Recommendation No. 168].

Independent Operator Option 2: *Declare all independent operators workers:*

A move towards the *de-facto* elimination of independent operator status through a sweeping policy or legislative declaration that the majority of independent operators fall within the statutory definition of "worker" is an unsatisfactory position. Such a move would needlessly violate a legitimate means of business organization. However, in cases where the individual is not truly an independent operator, the WSIB should ensure that the proper designation applies.

Independent Operator Option 3: *Full coverage while promoting independence:*

The ideal position would insist on coverage, require the independent-operator to ultimately pay, but drive the payment through the principal. This achieves full coverage while preserving business independence and ensuring payment. Such an arrangement exists in Saskatchewan. ***The Saskatchewan Model*:** A "principal" is the person who benefits from the use of an independent operator's equipment.[28] The owner who operates the equipment, and who is not otherwise covered, is the "deemed" worker of the principal,[29] but the principal is able to charge-back the coverage to the owner-operator,[30] thus achieving coverage, payment and independence.

Full coverage is the underlying theme. Independent-operators should be insured under Schedule 1:

Coverage should not be achieved through a policy declaration that independent operators are *de facto* workers. This needlessly undercuts a legitimate means of business organization. Adoption of the Saskatchewan model ensures coverage, payment and independence.

Executive Officers

The premise of the Board that employers may improperly report workers as executive officers is unsupported. However, if such cases do present themselves, the Board has legal remedies available without disturbing legitimate business organization decisions.

A corporation is a legal entity distinct from its shareholders [*Salomon v. Salomon & Co., Ltd.,* (H.L., 1897)]. However, the "separate entities" principle is not enforced when it would yield a result too flagrantly opposed to justice. [*Constitution Insurance Co. of Canada et al. v. Kosmopoulos et al.* (1987), 34 D.L.R. (4th) 208 (S.C.C.)]

A person who is classified as legitimate executive officer of a corporation was intended to be excluded by the definition of "worker" in the Act. The focus on the actual activity of an "executive officer" should stop at the point where one is satisfied that the designation or classification as an "executive officer" is legitimate. [*Decision No. 170/90* (1990), 14 W.C.A.T.R. 282]

For the corporate veil to be lifted, there must be: (1) control by the personal defendant; (2) the exercise of the control to commit fraud, wrong, or breach of duty; and (3) this misconduct must be the proximate cause of the plaintiff's injury or loss. [*W.D. Latimer Co. Ltd. v. Dijon Investments Ltd. et. al.* (1992), 12 O.R. (3d) 415 (Ont. General Division)].

When these circumstances present themselves, which seems to be the concern of the Board, the corporate veil can be lifted. There is no need to include all executive officers as workers. Many of our members do not require WSIB coverage to protect their interests. Some do. Presently they have choice and should be left to exercise that choice. The Board has ample legal remedies available to address "sham" corporations.

[26] Determining who is a worker under the Workers Compensation Act: A briefing paper [to BC RC]

[27] In Volume II, Chapter III: The Scope of Compensation Coverage in British Columbia: Who is Covered?

[28] *Saskatchewan Act* s. 9(1)(b)

[29] *Saskatchewan Act* s. 9(2)

[30] *Saskatchewan Act* s. 9(3)