

Employee vs Independent Contractor - Order of Inquiry Reversed?

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Mallon v MNR, [2014 TCC 14](#)

The facts of this decision are not particularly interesting (other than the "refreshing" occurrence of witnesses telling "the same story", the description being "identical") , but the approach of Campbell J Miller J to answering the age-old question of whether a relationship is that of an employee or an independent contractor is interesting. Miller J properly expresses the trouble with the reliance on intention in the existing two-step process. He correctly highlighted, in order to provide guidance for future parties, that judges will look "foremost to the actions and behaviour that define the relationship and determine whose business it is" and that it is "action and behaviour will determine intention, not the other way round" (para 15).

The distinction between employees and independent contractors is an important one in the Canadian Income Tax system. The importance of the distinction is not discussed here.

Miller J highlighted the root of the recurrence of the employee-contractor issue as being the mistaken belief that persons can choose "with the stroke of a pen" the nature of their relationship, and the danger of placing too much emphasis on the intention of the parties. After referring to, and quoting from, *1392644 Ontario Inc. (c.o.b. Connor Homes) v Canada*, [2013 FCA 85](#), - *to identify the two-step process: (1) identify intention of the parties as to the relationship; and (2) see whether reality sustains that subjective intention* - and *Royal Winnipeg Ballet v Canada*, 2006 FCA 87, Miller J, at paragraph 14, posited that the two-step process introduced by *Royal Winnipeg Ballet*:

requiring the second step to be an analysis through the "prism" of intention appears to place too great an emphasis on the factor of intention, that can so readily be manipulated with no regard for the true status of the working relationship, but more to the effect of avoiding source deductions.

Miller J recognized that he was bound by the FCA decision, and paid detailed attention to the actions of the parties to state that the relationship does not support an "intention expressed by words only" that an independent contractor relationship was intended. There was, therefore, no need to go to the second step of the inquiry, and all that was needed was to ask "whose business is it?". Miller J also expressed trouble with the fact that "intention" was never mentioned by the SCC in the leading case on the issue - [1671122 Ontario Ltd. v Sagaz Industries Canada Inc.](#), 2001 SCC 59.

The interesting portion of this inquiry is that Miller J suggested that the two steps are in the

wrong order. He stated that the better approach is to first determine the true nature of the working relationship as between the parties and, only if this inquiry is not determinative, then look at the intention of the parties (para 15). This order of the approach is much better and more in line with reality of the determination. The reason for drawing the distinction in the ITA is based on a number of policy grounds (including administrative ease and tax base protection) rooted in the reality of Canadian income relations. It would, therefore, make sense to consider the objective reality of the income relation first, and only resort to what the parties intended to do where their actions leave one in doubt of the actual relationship.

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